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# CASES

ARGUED AND ADJUDGED

IN

# The Supreme Court

OF

# THE UNITED STATES,

DECEMBER TERM, 1867.

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REPORTED BY

JOHN WILLIAM WALLACE.

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VOL. VI.

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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. SAMUEL NELSON,
HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. ROBERT COOPER GRIER,
HON. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. STEPHEN J. FIELD.

ATTORNEY-GENERAL.

HON. HENRY STANBERY.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

# ALLOTMENT, ETC., OF THE JUDGES

OF THE

# SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 8, 1867, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

| NAME OF THE JUDGE, AND STATE WHENCE COMING. | NUMBER AND TERRITORY OF THE CIRCUIT. | DATE AND AUTHOR OF THE JUDGE'S COMMISSION. |
|---|---|---|
| CHIEF JUSTICE. | FOURTH. | 1864. |
| HON. S. P. CHASE, Ohio. | MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA. | December 6th. PRESIDENT LINCOLN. |
| | FIFTH. | |
| Vacant. | GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS. | Commission Expired. |
| | SECOND. | 1845. |
| HON. SAML. NELSON, New York. | NEW YORK, VERMONT, AND CONNECTICUT. | February 14th. PRESIDENT TYLER. |
| | THIRD. | 1846. |
| HON. R. C. GRIER, Pennsylvania. | PENNSYLVANIA, NEW JERSEY, AND DELAWARE. | August 4th. PRESIDENT POLK. |
| | FIRST. | 1858. |
| HON. N. CLIFFORD, Maine. | MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND. | January 12th. PRESIDENT BUCHANAN. |
| | SIXTH. | 1862. |
| HON. N. H. SWAYNE, Ohio. | OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE. | January 24th. PRESIDENT LINCOLN. |
| | EIGHTH. | 1862. |
| HON. S. F. MILLER, Iowa. | MINNESOTA, IOWA, MISSOURI, KANSAS, AND ARKANSAS. | July 16th. PRESIDENT LINCOLN. |
| | SEVENTH. | 1862. |
| HON. DAVID DAVIS, Illinois. | INDIANA, ILLINOIS, AND WISCONSIN. | December 8th. PRESIDENT LINCOLN. |
| | NINTH. | 1863. |
| HON. S. J. FIELD, California. | CALIFORNIA, OREGON, AND NEVADA. | March 10th. PRESIDENT LINCOLN. |

# GENERAL RULES,

## MADE AT DECEMBER TERM, 1867.

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### RULE No. 31.

APPEARANCE—NOTICE OF MOTIONS.

ORDERED, That upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered, and no motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

### RULE No. 32.

SUPERSEDEAS.

Supersedeas bonds in the Circuit Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use or detention of the property, and the costs of the suit and "just damages for delay," and costs and interest on the appeal.

RULE No. 33.

WRITS OF ERROR.

In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day.

# MEMORANDA

THE Honorable JAMES MOORE WAYNE, Esq., Senior Associate Justice of this court, departed this life, at his residence in the city of Washington, on the 5th day of July, 1867. He was born in Savannah, Georgia, about the year 1789, and was the son of Richard Wayne, a respected citizen of that place. Having enjoyed, by the advantages of birth and connections, the opportunities for good early education, and profited by them, himself, he was found well prepared to enter Princeton College at an early age. He was graduated there in 1808, and having chosen the law as his profession, studied it at New Haven, Connecticut, under the care of the Honorable DAVID DAGGETT, well known as Chief Justice of that State, and as Professor of Law in Yale College. He was admitted to practice in the courts of Georgia about the year 1810, and in the Federal court at Savannah in 1813. In our war of 1812, with Great Britain, he entered the volunteer military service, and was an officer of the Georgia cavalry. His spirit and personal bravery were at all times universally conceded. In 1819 he was Mayor of Savannah, and in the same year was elected the first judge of the Court of Common Pleas—now the City Court—of Savannah, then recently established by the legislature; an office which he continued to hold until 1822, when he was elected to the Bench of the Superior Court. He presided continuously, and with dignity and independence, over the Superior Courts of the Eastern District of Georgia until the year 1828, when he was sent a representative from his State to the Congress of the United States. Soon after this time the State of South Carolina began to oppose herself to the execution of the laws of the United States, and the heresy of "Nullification" became prevalent in her immediate region. Mr. Wayne gave to it no countenance at any time. In 1832 President Jackson issued his Proclamation levelled against it. This was followed by the Act of Congress of March 2, 1833, known as the Force Bill. To both Mr. Wayne, who was again in Congress, gave his approbation, and was the only representative from Georgia who voted with the majority for the bill.

Although his support of the measures of that bill alienated many of his former friends, it gave to him the hearty support of the Union party of Georgia, then rising into power, and in 1834 he was again re-elected to Congress by a higher vote than that given to any other candidate. On the 9th January, 1835, during the session of the Twenty-third Congress, he was appointed an associate justice of this court in the place of Mr. Justice William Johnson, of South Carolina, then recently deceased.

In the late unhappy rebellion he sided, as it might have been anticipated, from his education and previous fidelity, that he would do, with the Government, and from the beginning to the end of the war, was faithful to the cause of the Union. He had not, however, been less truly the friend of his native State. From an early day he sought to promote learning there, and to develop all its natural advantages. For many years he was one of the Trustees of the University of Georgia, and for a considerable time presided over the Georgia Historical Society. In 1836 he represented Chatham County in the Knoxville Convention, the object of which was to unite the Atlantic seaboard of Georgia with the productive regions of the West; and was at all times ready to serve and be useful to the people to whom he more especially belonged.

Mr. Justice Wayne possessed the advantages of a fine person and engaging countenance, and was distinguished by manners singularly elegant and attractive. Animated as these and all his conversation and conduct were, by real goodness of heart, it is not surprising that he should have been, as he was, extensively beloved. He was a member of the Protestant Episcopal Church, and communicant in the same. For several years before his death he resided principally in Washington City, where his house was the centre of hospitality to very numerous friends. His illness was not long, and its fatal termination was obviously hastened by a general declining strength, perceptible for some time before. During his long service upon the bench he sat with twenty-one or twenty-two different judges, and at the time of his death was the sole survivor of the court as constituted in the presidency of MARSHALL.

Previous to the assembling of the court upon the bench at the opening-day of this term, a meeting of the bar and officers of the court was held, and a committee appointed to prepare resolutions expressive of the affection and veneration enter-

tained by them for the late departed Justice. These resolutions the meeting requested the Attorney-General, Mr. Stanbery, to be good enough on its behalf to present to the court.

On the subsequent assembling of the court, the Attorney-General, having introduced the subject in some appropriate and feeling remarks, read the preamble and resolution as follows:

The members of the bar and officers of the court here assembled unite in the sincere expression of their respect for the memory of the late Mr. Justice Wayne, and their sorrow that they shall see him no more in the place which for nearly a third of a century he filled with uniform dignity and usefulness, and with unblemished honor.

Called to the bench on the nomination of President Jackson, in the year 1835, in the very noon of life, each succeeding year of his long service only made him more and more alive to the high duties of the judicial office, and, if possible, more resolute and constant in devoting to their fulfilment, without fear, favor, or affection, all his capacities, acquirements, and energies.

To the debt which the country owes for this long and faithful judicial life the bar must add the acknowledgment of its own peculiar and grateful obligation for the habitual courtesy and unaffected kindness which distinguished his deportment as a judge, and which everywhere marked him as a true and accomplished gentleman. Therefore

*Resolved*, That this public expression of the high esteem and affectionate regard in which we held the late Mr. Justice Wayne, and of our sincere sorrow at his death, be laid before the court, and that Mr. Attorney-General be requested to move that it be ordered to be recorded upon the minutes of the term.

*Resolved, further*, That the chairman communicate a copy of these proceedings, and of such orders as the court may take thereon, to the family of the deceased, with the assurance of our sympathy and respect.

He then moved that the resolutions should be entered upon the minutes of the court. The preamble and resolutions having been handed to the court, the Chief Justice said:

We all feel most sensibly the loss of our brother Wayne. The preamble and resolutions which have been adopted by the bar fitly express their sentiments of honor, veneration, affection, and sorrow, and express also, not less fitly, our own. We will direct that the proceedings of the bar, and the observations just made by the Attorney-General, in all of which we fully concur, be entered upon the records of the court.

Mention has been made of the fact that our departed brother was nominated to the bench by President Jackson. It was the remarkable fortune of that illustrious President to fill a majority of these seats by appointments to vacancies which occurred during his Presidency. Of the judges appointed by him our brother was the last survivor. He had previously acquired an honorable distinction as a member of the State judiciary of

Georgia, and he well maintained his honors here. With what learning, with what ability, with what courtesy, with what integrity he performed his various and responsible duties during his protracted service, those who knew him best and longest, whether associates on the bench or counsel at the bar, testify most fully and most cordially. Our lamented brother was not only a learned and conscientious judge, but a sincere and honest patriot. It was with no common devotion that he loved his country and that Union which made his country great and honorable among the nations. Nor were his titles to love and reverence less complete in his private than in his public relations. In sympathetic kindness for the lowly, in the delicate observance of all the proprieties of social intercourse, and in that nice sense of right which permits no deviation from the straightest line of rectitude, he was never wanting. More than all, he was a Christian. He acknowledged the incomparable work of Christian faith, and felt in his own experience the efficacy of its consolations. My personal acquaintance with him was comparatively recent; but it was sufficient to inspire sincere attachment and heartfelt respect. I can never cease gratefully to remember and acknowledge the kindness with which he welcomed me to his place, or the wisdom of his counsels, or the steadiness of his support. He has gone from among us full of years and full of honors. Let us tenderly cherish his memory and constantly follow his example.

The Chief Justice then directed that the proceedings should be entered upon the minutes, and announced that no ordinary business would be transacted this day. Whereupon the court adjourned.

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The duties of the CHIEF JUSTICE as President of the Senate, during the late trial of the President of the United States, prevented almost wholly his participating in the business of the court during the last week or two of the term.

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# DECISIONS

IN THE

# SUPREME COURT OF THE UNITED STATES,

## DECEMBER TERM, 1867.

---

### MAURAN *v.* INSURANCE COMPANY.

1. A taking of a vessel by the naval forces of a now extinct rebellious confederation, whose authority was unlawful and whose proceedings in overthrowing the former government were wholly illegal and void, and which confederation has never been recognized as one of the family of nations, is a "capture" within the meaning of a warranty on a policy of insurance having a marginal warranty "free from loss or expense by capture,"—if such rebellious confederation was at the time sufficiently in possession of the attributes of government to be regarded as in fact the ruling or supreme power of the country over which its pretended jurisdiction extended.
2. Accordingly, a seizure by a vessel of the late so-called Confederate States of America, for their benefit, was a capture within the terms of such a warranty.

ERROR to the Circuit Court for Massachusetts.

Mauran brought suit in that court against the Alliance Insurance Company on a policy of insurance upon the ship Marshall for one year from the 29th November, 1860, covering the sum of $8000. The insurance, as stipulated in the body of the policy, was "against the adventures and perils of the seas, fire, enemies, *pirates*, *assailing thieves*, restraints, and detainments of all kings, princes, or people of what nation or quality soever."

In the margin of the policy was the following:

"Warranted by the assured free from loss or expense arising from *capture*, seizure, or detention, or the consequences of any



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attempt thereat, any stipulations in this policy to the contrary notwithstanding."

The vessel was seized on the afternoon of the 17th of May, 1861, two or three miles inside of the bar at the mouth of the Mississippi River, on her way up to New Orleans, by the officers and crew of the steamer Music, belonging to the so-called Confederate States. Some persons on board the steamer at the time of the seizure, hoisted the Confederate flag to the mast-head of the Marshall, and informed the captain and pilot that the ship was "a prize to the Confederate States." Verdict and judgment having been given in favor of the insurance company, the question here on error was, whether this taking of the vessel by the naval forces of the so-called Confederate States was a *capture* within the warranty of the assured in the margin of the policy? If it was, then the loss was not one of the perils insured against, and the judgment below was right.

*Mr. Cushing (who submitted with his own, a learned brief of Messrs. R. H. Dana, Jr., and Horace Gray, Jr., in the case of another vessel before the Supreme Court of Maine), for the plaintiff in error:*

If this loss was by "assailing thieves" or "pirates," then the insurers are bound to pay; for undoubtedly a taking by assailing thieves or pirates does not operate to make in law a "capture." Rovers, thieves and pirates have always been treated as ordinary perils of the sea. Chancellor Kent* lays down the distinction in explicit terms:

"The enumerated perils of the sea, *pirates, rovers, thieves*, include the wrongful and violent acts of individuals, whether in the open character of felons, or in the character of a mob, or as a mutinous crew, or as plunderers of shipwrecked goods on shore. . . . But the stipulation of indemnity against *takings at sea, arrests, restraints, and detainments of all kings, princes, and people*, refers only to the acts of government for government purposes, whether right or wrong."

* 3 Commentaries, 302, note *d*, 6th ed.

Other writers make the same classification.* "Taking by pirates," says Mr. Dane,† "has none of the effects of legal capture."

Now, can *this court*, a court of *the United States*, treat the persons who made the seizure here otherwise than as pirates or thieves? The political department of the government, it will be conceded, has never acknowledged the rebel confederation as a government *de facto*, any more than one *de jure*. On the contrary, it is matter of common knowledge that it has most scrupulously, and in every form, avoided doing so. As to their captures of ships, it has actually treated them as "pirates."

The Crimes Act of 1790‡ makes the taking of a vessel of the United States by rebels an act of piracy. It says:

"If *any citizen* shall commit any *piracy* or *robbery* aforesaid, or any act of hostility *against* the United States, or *any citizen thereof*, upon the high seas, *under color of* any commission from any foreign prince or state, or *any pretence of authority* from *any person*, *such offender shall, notwithstanding the pretence of any such authority*, be deemed, adjudged, and taken to be a pirate, felon, and robber; and on being thereof convicted, shall suffer death."

In *United States* v. *Wiltberger*,§ the court, *obiter*, says that the *sole* object of this statute was to reach a citizen of the United States who depredates on commerce of the United States *under color of a foreign commission*. The word "foreign" here includes, of course, any government *other than the United States*, and especially a pretended government; and most especially a pretended government in rebellion against our own.

The definition of piracy by the law of nations is this:

"Depredating on the seas, without being authorized by any

* Nesbitt *v.* Lushington, 4 Term, 783; 2 Arnould on Insurance, §§ 303, 305, 306; 1 Phillips on Insurance, §§ 1106–1108; 2 Parsons' Maritime Law, 236, 246.

† 7 Abridgment, 92; and see 639 *et seq.*

‡ § 9, 1 Stat. at Large, 114.

§ 5 Wheaton, 76.

sovereign state, or with commissions from different sovereigns at war with each other."*

Of course, looking to all the conditions of the rebellion, cruising by rebels who are *as yet unacknowledged by anybody*, even as a *de facto* government, would be cruising *without being authorized by any sovereign*, and so would be piracy by the law of nations.†

The proclamation of the President of the United States of April 19, 1861,‡ is explicit, as follows:

"And I hereby proclaim and declare, that if any person, under the pretended authority of said (Confederate) States, or under any other pretence, shall molest a vessel of the United States, or the persons or cargo on board of her, such person will be amenable to the laws of the United States for the prevention and punishment of piracy."

This proclamation is fully justified by the section of the Crimes Act heretofore cited. It was in force at the time of the taking of the ship Marshall. Its applicability is recognized by successive acts of Congress,§ and it was obligatory on every citizen of the United States; construing every contract made within the United States between citizens of the same.

How then can this court, a depository of the judicial power of the United States, recognize as a government of *any* kind, a confederation whose representatives the political department proclaims to be pirates, and who, as in the case of Smith, tried before GRIER, J.,‖ have been tried and convicted as such.

In whatever light they may be to be looked on by the courts of foreign powers, certainly all cruisers, under the flag of whatever combination of persons, are, in all courts *of the United States*, to be regarded as pirates by the law of nations,

* Lawrence's Wheaton's Int. Law, 246, ed. 1863.

† United States *v.* Klintock, 5 Wheaton, 144.

‡ 12 Stat. at Large, 12, 58.

§ Act of 24 July, 1861, Id. 273; Act of 6 Aug., 1862, Id. 314.

‖ 3 Wallace, Jr., MS.

unless such persons have been recognized by the Executive as lawful belligerents, and so a *de facto* government. That this is a true principle of law, this court decided on all the questions arising out of the Spanish-American Revolution, holding that if the captors represented a *de facto* authority *recognized by the Executive* of the United States, they were not pirates by the law of nations,* but that if not so recognized by the Executive, they were.† Indeed, on these public questions, courts must respect the acts of their own governments, whether herein those acts be reasonable or unreasonable, or even right or wrong. They cannot stultify their own countries.

So also is the law of Great Britain. In a debate on a matter quite kindred to this one, Lord Chelmsford said:‡

"If the Southern Confederacy had not been recognized by us as a belligerent power, he agreed with his noble and learned friend (Lord Brougham), that any Englishman aiding them by fitting out a privateer against the Federal government would be guilty of piracy."

The Lord Chancellor (Campbell) impliedly admitted this, in saying that an Englishman entering the Confederate service could not be deemed a pirate after the publishing of the Queen's proclamation recognizing the Southern States as "entitled to the exercise of belligerent rights and carrying on what might be called a *justum bellum*."

In accordance with these views is the case of *Swinerton* v. *Columbian Insurance Company*, in the Superior Court of New York City. There a policy of insurance was made on a schooner against the usual perils, including "pirates, rovers, thieves," but "warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of

* United States *v.* Palmer, 3 Wheaton, 610, 634; The Divina Pastora, 4 Id. 52; Nuestra Senora de le Caridad, Id. 497; The Josefa Segunda, 5 Id. 338; Nueva Ana, 6 Id. 193; Santissima Trinidad, 7 Id. 337.

† United States *v.* Klintock, 5 Wheaton, 144; United States *v.* Smith, Id. 153.

‡ Hansard, vol. 162, p. 2082.

any attempt thereat." The vessel was lying at Norfolk, for repair, on the 21st of April, 1861, four days after the passage, by the State of Virginia, of her "secession ordinance," when a band of men came alongside of her with a steamboat, and professing to act by authority of the State of Virginia, without riot or tumult, towed her out into the channel, and there sunk her. The Superior Court, at first at *nisi prius*, and then *in banc*, held that the secession ordinance could not be admitted in evidence for the defence; and that the loss did not come within the exception, but was a loss by pirates, rovers, and thieves. So also in point is the case, before the Commercial Court, or Handelsgericht, of Bremen,* of the Harvest, captured by the Shenandoah, a rebel cruiser; where a similar decision was made, and supported by a learned opinion. It will be strange if foreign courts pay a respect to what is done by the political department of our government which the courts of our own country do not.

*Messrs. B. R. Curtis and Storrow, contra:*

The policy uses the word "pirates" in that simple and ordinary sense, in which it now is, and immemorially has been, known to the general commercial law of the civilized world; and not to describe offenders against some municipal criminal law, of some particular country. The interpretation and effect of policies belong to a system of law, existing before the statute of 1790, or any of President Lincoln's proclamations were made, and was not intended to be affected by them. This system of law is not merely a branch, or division of municipal law, but belongs to, and is part of, the common law of nations which defines piracy.†

Such instruments have no reference to the *legality* of governments: they refer always to *de facto* authority of kings, princes, and people; and an interpretation which

* Weser Weekly Zeitung, of January 12, 1867. A printed translation was furnished by Mr. Cushing to the court.

† Warren *v.* The Man. Ins. Co., 13 Pickering, 518; Deshon *v.* The Mer. Ins. Co., 11 Metcalf, 199; The Malek Adhel, 2 Howard, 232; The Antelope 10 Wheaton, 122.

should make a risk depend on the legality of an actual government, under whose authority the property had been captured, seized, or detained, would be unprecedented and dangerous.* Lemonnier† cites a decision of the Tribunal of Commerce, of Marseilles, that the revolted Colombians, having attacked only Spaniards, and not all nations like pirates, were to be considered a government.

No authority can be produced to show that a capture under a commission issued by a regularly organized *de facto* government, engaged in open and actual war, to cruise against its enemy, and against its enemy only, is piracy *under the laws of nations.*

The authorities are the other way.‡

The Executive government of the United States has, by public proclamations and messages to Congress, and in other appropriate public documents, recognized and affirmed a condition of open and public war, existing between the United States and a *de facto* government of the so-called "Confederate States."§ And the United States cannot at the same time insist that they have the belligerent rights which by the law of nations belong to a sovereign waging public war, and yet assert that there is no such public war as is known to the law of nations. That it is a *civil* war, does not change the rule of *the law of nations* respecting those who carry it on.‖

Any capture or seizure, whether rightful or wrongful, and

* Nesbitt *v.* Lushington, 4 Term, 783. † On Insurance, vol. 1, 251.

‡ The Savannah, Warburton's Report, 365–374; United States *v.* Smith, 5 Wheaton, 153, and note; Same *v.* Pirates, Id. 196; The Malek Adhel, 2 Howard, 211; The Sealskins, 2 Paine, 333; United States *v.* Hanway, 2 Wallace, Jr., 202; and see Mr. Burke's letter to Sheriffs of Bristol, vol. 2, p. 90, Little & Brown's edition of Burke's Works; Mr. Webster's Letter to Mr. Fox, 6 Webster's Works, 256, 257.

§ The President's Proclamation of April 19, 1861; his Reply to the Virginia Commissioners (Moore's Rebellion Record, vol. i, p. 61); his Proclamation of April 27, 1861; his Message to Congress, July 4, 1861; his Proclamations of August 12, 1861, and of August 16, 1861.

‖ Vattel (Chitty's ed.), 424; Lawrence's Wheaton, 516, 522; Halleck's International Law, 233, 343; Santissima Trinidad, 7 Wheaton, 283; United States *v.* Palmer, 3 Id. 610; Neustra Senora, 4 Id. 497.

whether made under a commission from a *de jure*, or *de facto* government, or made by mere pirates, is equally within the warranty in this case. Such is the interpretation of the words "capture, seizure, and detention," by writers of authority on Insurance,* and by courts also. The English cases of *Powell* v. *Hyde*,† and of *Kleinworth* v. *Shephard*,‡ are in point. In the former case it was held by Lord Campbell, Coleridge and Wightman, JJ., that the loss of a British vessel in the Danube by being fired upon by the Russians (then at war with Turkey, but not with England), was within the exception of "warrant free from capture and seizure," and in the second the terms were extended to a mutiny of Coolie passengers.§

And the words capture and seizure are so often used by correct writers and judges, and in legislation, to describe the acts of pirates and of persons acting under *de facto* governments, as to manifest a *jus et norma loquendi.*

Finally. The very question now raised has been fully argued and directly adjudicated in the Supreme Courts of Pennsylvania, Massachusetts, and Maine.‖

We may concede that the United States have never admitted the so-called "Confederate States" to be a government. And this is a matter most proper to be asserted by the United States in its dealings with both its own citizens and foreigners. It may well treat every citizen of the United States who aided in the rebellion as committing treason or piracy; and regard transfers of property, &c., made in virtue of the Confederate laws, and against those of the

* Marshall, pt. i, ch. xii, § 3; 1 Phillips, § 1110; 2 Arnould, *808, *811; Benecke, p. 348 (p. 230 of English ed.); Emerigon (by Meredith), 353; 3 Kent's Commentaries, *304; Pothier, Insurance, No. 54; Valin's Commentary, Art. 26, 46; 2 Boulay Paty Commercial Law, § 16, p. 102 (Brussels, 1838.)

† 5 Ellis & Blackburne, 607. ‡ 1 Ellis & Ellis, 447.

§ And see Goss *v.* Withers, 2 Burrow, 694; McCar *v.* New Orleans Insurance Co., 10 Robinson's Louisiana, 202, 334, 339; Tirrell *v.* Gage, 4 Allen, 245.

‖ Fifield *v.* Insurance Co., 47 Pennsylvania State, 166; Dole *v.* Same, 6 Allen, 373; Dole *v.* Same, 51 Maine, 464.

United States, as void. So in dealing with foreign powers it may properly assert that these did a wrong to us in recognizing the Confederacy as a belligerent power. But this case raises no such question as any of these. The fact remains that here was a great power capable of levying war against us, which did so levy and wage war, and which made a capture. Much of the disquisition by opposing counsel is therefore *from* the purpose. It has no practical application.

*Reply:* The case of *Powell* v. *Hyde*, the first of the two English cases, relied on by the other side, was that of a "capture" or "seizure," in the usual sense of the words, made by a power authorized to wage war, and then actually waging war.

*Kleinworth* v. *Shephard*, the other English case—the only case in which "seizure" has been said to include acts of individuals not acting under the authority of a recognized government, and in which it was extended by the Court of Queen's Bench to the mutiny by Coolie passengers—was argued before Lord Campbell, Wightman, Crompton, and Hill, JJ., but four of the fifteen English common law judges, none of which four had any peculiar experience or authority in commercial law, and the weight of whose opinion must therefore depend upon the soundness of the reasons assigned for it. The case, before it is finally disposed of, may be taken to the Court of Exchequer Chamber, if not to the House of Lords, and their decision overruled. It is hardly in any respect such a decision as should induce this court to go against the recent express decision, in *Swinerton* v. *Columbian Insurance Co.*, of the Superior Court of the City of New York, a tribunal which has long held the position of a very high authority on questions of maritime law; or against the able decision in the Commercial Court of Bremen, a tribunal in which public law in reference to this class of cases is of necessity very familiar to the court.

Mr. Justice NELSON delivered the opinion of the court.

The question in the case is, whether this taking of the

vessel by the naval forces of the so-called Confederate States was a capture within the warranty of the assured in the margin of the policy? If it was, then the loss is not one of the perils insured against, as the assured, in express terms, had assumed it upon himself.

A capture, as defined by some of the most eminent writers on insurance within the policy, is a taking by the enemy of vessel or cargo as prize, in time of open war, or, by way of reprisal, with intent to deprive the owner of it. This was probably the primary or original idea attached to the term in these instruments. Losses of ships and cargo engaged in commerce by the public enemy were the most to be apprehended and provided against. But usage, and the course of decisions by the courts, have very much widened this meaning, and it now may embrace the taking of a neutral ship and cargo by a belligerent *jure belli;* also, the taking forcibly by a friendly power, in time of peace, and even by the government itself to which the assured belongs.*

Capture is deemed lawful when made by a declared enemy, lawfully commissioned, and according to the laws of war, and unlawful when made otherwise; but, whether lawful or unlawful, the underwriter is liable; the words of the policy being broad enough, and intended to be broad enough, to include every species of capture to which ships or cargo, at sea, may be exposed. Any other rule would furnish but a very imperfect indemnity to the assured if we regard either the character of these seizures and the irregularities attending them, or the trouble, expense, and delay consequent upon the duty or burden of proving in a court of justice the unlawfulness of the act. It is never, therefore, a question between the insurer and the insured whether the capture be lawful or not. The recent case of *Powell* v. *Hyde*† is very decisive on this point. In that case a British ship passing

* Phillips on Insurance, §§ 1108–1109; Arnould on Same, 808, 814; 2 Marshall on Same, 495, 496, 507; Powell v. Hyde, 5 Ellis & Blackburne, 607.

† Already referred to; 5 Ellis & Blackburne, 607.

down the Danube was fired upon from a Russian fort and sunk. A war existed between Russia and Turkey, but none between the former and Great Britain. The policy of insurance in that case contained the warranty of the assured "free from capture, seizure," &c., upon which the underwriters relied, as here, for a defence. In answer to this it was urged for the assured that these words in the warranty related to a lawful capture or seizure, by a party having authority to make it, and that, inasmuch as the capture was in open violation of law and wholly illegal, it was not within the warranty, and the underwriters were, therefore, liable. But the court held otherwise, and determined that this term in the warranty was not confined to lawful capture, but included any capture, in consequence of which the ship was lost to the insured. This same principle was again deliberately asserted by the court in *Kleinworth* v. *Shepherd*.* The same question had been decided many years before by Lord Mansfield in *Berens* v. *Rucker*,† in which he held the insurer liable in case of an illegal capture of a neutral vessel by an English privateer. Chancellor Kent states the rule as follows: "Every species of capture, whether lawful or unlawful, and whether by friends or enemies, is also a loss within the policy."‡ As kindred to this rule is another, that the insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. In every case of an illegal capture the property is not changed, yet as between the insurer and the insured, the effect is the same as in case of a capture by an enemy in open war.

In the case of a capture under a commission from an organized government, against an enemy, *jure belli*, to bring the capture within the policy, it is not necessary that the commission should issue from a perfectly lawful government any more than that the capture itself should be lawful. The principle is the same. An illustration will be found in the

* 1 Ellis & Ellis, 447.

† 1 Blackstone, 313.

‡ 3 Commentaries, 304–5.

war between Spain and her revolted colonies in South America, which continued for many years. Our government was the first to recognize their independence, which was in 1822; but even down till this event, from the time the revolt had reached the dimensions of a civil war, the government had recognized the war, and conceded equal belligerent rights to the respective parties; and the capture of the vessels of Spain by a commander under a commission by one of the colonies in the exercise of this right, was recognized as legal as if it had occurred in open public war, and, as a matter of course, would have been within the marginal warranty clause of the insured in a policy of insurance. Indeed it has been so held. It will be observed that at this time these colonies had not achieved their independence; they were yet in the heat of the conflict; nor had they been recognized by any of the established governments on either continent as belonging to the family of nations. In this connection it will not be inappropriate to refer to the case of *United States* v. *Palmer*,* which was an indictment against the defendant for piracy in the capture of a Spanish vessel under a commission from one of these colonies, and which he set up as a defence. One of the questions certified from the circuit was, whether the seal annexed to the commission purporting to be a public seal used by persons exercising the powers of government in a foreign colony, which had revolted from its allegiance and declared itself independent, but had never been acknowledged as such by the United States, was admissible in a court of the United States as proof of its legal existence with or without proof of its genuineness. The court held that the seal of such unacknowledged government could not be permitted to prove itself, but that it might be proved by such testimony as the nature of the case would admit. The defendant was permitted, also, to prove that he was employed in the service of the colony at the time of making the capture, and which, it was agreed, would constitute a defence to the in-

* 3 Wheaton, 610.

dictment for piracy. The proof became necessary on account of the obscurity and unknown condition of this incipient state.

Another illustration will be found in a capture by a *de facto* government, which government is defined to be one in possession of the supreme or sovereign power, but without right—a government by usurpation, founded perhaps in crime, and in the violation of every principle of international or municipal law, and of right and justice; yet, while it is thus organized, and in the exercise and control of the sovereign authority, there can be no question between the insurer and the insured as to the lawfulness of the government under whose commission the capture has been made. If any presumption could properly be indulged as to the perils against which the insured would most desire to protect himself, it might well be captures by these violent and irregularly constructed nationalities. The court in the case of *Nesbitt* v. *Lushington*,* fitly described the character of the government contemplated in the clause respecting the restraints, &c., of kings, princes, or people, namely: "the ruling power of the country," "the supreme power," "the power of the country, whatever it might be,"—not necessarily a lawful power or government, or one that had been adopted into the family of nations.

Now, applying these principles to the case before us, it will be seen that the question is not whether this so-called Confederate government, under whose authority the capture was made, was a lawful government, but whether or not it was a government in fact, that is, one in the possession of the supreme power of the district of country over which its jurisdiction extended? We agree that all the proceedings of these eleven states, either severally or in conjunction, by means of which the existing governments were overthrown, and new governments erected in their stead, were wholly illegal and void, and that they remained after the attempted separation and change of government, in judgment of law,

* 4 Term, 763.

as completely under all their constitutional obligations as before.

The Constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for these proceedings, but they were, in every part of them, in express disregard and violation of it. Still, it cannot be denied but that by the use of these unlawful and unconstitutional means, a government, in fact, was erected greater in territory than many of the old governments in Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources, in men and money, to carry on a civil war of unexampled dimensions; and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government, such as the treatment of captives, both on land and sea, as prisoners of war; the exchange of prisoners; their vessels captured recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers the same as in open and public war.

We do not inquire whether these were rights conceded to the enemy by the laws of war among civilized nations, or were dictated by humanity to mitigate the vindictive passions growing out of a civil conflict. We refer to the conduct of the war as a matter of fact for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country, and hence captures under its commission were among those excepted out of the policy by the warranty of the insured.

We could greatly extend the opinion upon this branch of the case by considerations in support of the above view, but the question has undergone very learned and able examinations in several of the State courts, deservedly of the highest

eminence, and which have arrived at the same conclusion, and to which we refer as rendering further examination unnecessary.*

JUDGMENT AFFIRMED.

Dissenting, the CHIEF JUSTICE and Mr. Justice SWAYNE.

NOTE. At the same time with the preceding were argued and adjudged four other cases by the same plaintiff against other insurance companies, all four being adjudged in the same way as the one above reported. In two of them the policies and warranty were in the same language as in that case. In two others there was a difference in the marginal warranty of the insured in this, that while he warranted free from loss or expense by capture, &c., "ordinary piracy" was excepted, so that if the loss was on account of a capture or seizure by pirates, the insured would have been entitled to recover. But NELSON, J., giving the judgment of the court, observed that as the court had arrived at the conclusion that the capture of the vessel was under the authority of a *quasi* government, or government in fact (the ruling power of the country at that time), it was to be held to be within the warranty or exception in the marginal clause. Dissenting, the CHIEF JUSTICE and SWAYNE, J.

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## HAIGHT *v.* RAILROAD COMPANY.

A provision in a defeasance clause in a mortgage given by a railroad company to secure its coupon bonds, that the mortgage shall be void if the mortgagor well and truly pays, &c., the debt and interest, "*without any deduction, defalcation or abatement to be made of anything for or in respect of any taxes, charges or assessments whatsoever,*"—does not oblige the company to pay the interest on its bonds clear of the duty of five per cent., which by the 122d section of the revenue act of 1864, such companies "are authorized to deduct and withhold from all payments on account of any interest or coupons due and payable." On the contrary, the company complies with its contract when it pays the interest less five per cent. and retains the tax for the government.

ERROR to the Circuit Court for the Western District of Pennsylvania; the case, as derived from the statement of it

* Dole *v.* New England Mutual Ins. Co., 6 Allen, 373; Fifield *v.* Ins. Co., 47 Pennsylvania State, 166; Dole *v.* Merchants' Marine Ins. Co., 51 Maine, 464.

by the learned judge below (McCandless, J.), who sat for the Circuit Court, having been thus:

The 122d section of the internal revenue act of 1864, provides that "any railroad company indebted for any money for which bonds have been issued upon which interest is payable shall be subject to and pay a duty of five per cent. on the amount of all such interest whenever the same shall be payable, and said company are *authorized to deduct and withhold from all payments on account of any interest or coupons due and payable as aforesaid, the duty of five per cent.*, and the payment of the amount of said duty, so deducted from the interest or coupons, shall discharge said company from that amount of the interest on the bonds held by any person whatever. Except where said company may have contracted otherwise."

With this act of Congress in force, Haight, a citizen of New York, was the holder of bonds to the amount of $100,000, issued by the Pittsburg, Fort Wayne and Chicago Railroad Company, and secured by a mortgage on real estate. The bonds were in the ordinary form of coupon bonds, and promised that the Company would pay $1000 to the obligee or bearer, on the 1st of January, 1887, with interest at the rate of seven per cent., payable half yearly, on the presentation of the interest warrants, &c. The defeasance clause of the mortgage was thus:

"Provided, always, that if the said railway company or their successors do well and truly pay to the said Haight, the said $100,000 on the days and times hereinbefore mentioned, together with the interest payable thereon, without *any* deduction, defalcation or abatement to be made of anything for or in respect of *any* taxes, charges or assessments whatsoever, then," &c.

The railway company having retained five per cent. on the amount of the coupons, as they paid them, Haight brought suit against it, contending that it could not deduct the taxes from the interest due him, because it had, in the language of the act of Congress, "contracted otherwise."

The argument in the court below, derived from a very

critical examination of the different parts of the act of Congress in question, was that the tax of five per cent. laid in the 122d section, was a tax upon the *coupon* or *interest*, that is to say, a tax on the *thing* and not on Haight's income; and, therefore, that under the contract in the mortgage it was to be paid by the company from its own property and not from Haight's.

It was admitted that Haight paid no income tax at New York, his residence, on the interest received from these bonds.

The learned judge who heard the case, thought that the tax was on Haight's income, and gave his opinion to this effect:

> What are the coupons, upon which this suit is instituted, but income,—the annual profit upon money safely invested? There is no special contract to pay government taxes upon the interest. The measure of the company's liability is expressed in the bonds as being debt and interest only. It has nothing to do with the taxes which the government may impose upon the plaintiff for the interest payable to him. The clause in the mortgage cannot enlarge the duty which the mortgage was given to secure, that is, the payment of debt and interest. It is to be found in all mortgages. . . . The plaintiff, a citizen of New York, pays no internal revenue tax on these bonds at the place of his residence. It is therefore no case of double taxation. The tax should be paid somewhere, and it was to meet investments like this in banks, railroads, insurance and other companies, that the 122d section of the act of 1864 was passed.

Judgment was accordingly given for the company, and the case was brought by Haight on error to this court, where it was submitted on briefs.

*Mr. Knox, for the plaintiff in error; Messrs. Lowrie and McKnight, contra.*

Mr. Justice GRIER delivered the opinion of the court.

The facts in this case are properly stated and the law correctly decided by the learned judge of the Circuit Court.

Syllabus.

The provision in the condition of defeasance of the mortgage, has reference only to covenants between mortgagor and mortgagee, and is usual in every mortgage; being put there in order to secure the mortgagee, who may not be in possession, from demand for taxes incurred while the mortgagor was in possession. It can have no possible application to the income tax of bondholders. The 122d section of the revenue act of 1864, was enacted for greater facility of collection of the tax. These corporators often contract to pay for the bondholder all such taxes; but when they have not so contracted, they are authorized to deduct or withhold the amount of the tax. In all assessments of income tax the citizen is credited with the amount thus detained; so that there is no double taxation.

JUDGMENT AFFIRMED.

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## THE AMELIE.

1. In order to justify the sale, by the master of his vessel, in a distant port, in the course of her voyage, good faith in making the sale, and a necessity for it, must both concur; and the purchaser, in order to have a valid title, must show their concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed.
2. Where the sale of a vessel owned in Amsterdam, was made at Port au Prince, after a careful survey by five persons—one, the British Lloyd's agent; another, the agent of the American underwriters; and the remaining three, captains of vessels temporarily detained in port—the whole appointed by, and acting under the authority of the consul of the country where the vessel was owned—which five surveyors unanimously agreed that the vessel was not worth repairing, and advised a sale of her, this was held to pass a valid title—no evidence being before the master that the report was erroneous; and this, although the master did not consult his owners at Amsterdam, and though the vessel afterwards at a great expense—greater, as the court assumed, than her new value—was repaired, and went to her original port of destination, and thence abroad with another cargo.
3. A justifiable sale divests all liens.

Statement of the case.

4. A bill of sale from the master is not required to pass title. The sale, itself, followed by possession taken, does this.

APPEAL from the Circuit Court for the District of Massachusetts.

Fitz, of Boston, was owner of goods to the value of $8300, shipped at Surinam on board the Amelie, a Dutch vessel owned in Amsterdam, and to be delivered to him in Boston. The vessel when she left her port was apparently seaworthy and well provided, but having been struck with lightning in the course of her voyage, and encountering perils of the sea, was compelled to seek some harbor, and with difficulty she made Port au Prince. She was here surveyed by two masters of vessels appointed by the Dutch consul there. These examined the outside of the vessel and found damage upon it, which they reported. In an attempt to repair this, and after the outlay of $800 or $1000, further damage, on removing part of the cargo, was discovered. On this, a second survey was held. Upon this new survey there were two masters of vessels, the head of the shipyard at Port au Prince, the agent of the New York underwriters, and Lloyd's agent. They reported the outside of the vessel injured in the same manner that the first survey had reported, and reported other considerable injuries besides (which they specified), and recommended that new knees and planks should be put in, with other repairs, which they estimated would cost 10,000 Haytien dollars, and take from twenty-five to thirty days. They said that permanent repairs could not be made at Port au Prince, but that the repairs recommended would be sufficient to take the vessel to Boston.

In making these temporary repairs, one of the sides of the vessel was uncovered, and the timbers of the vessel, which were then first made visible, were found to be broken on the larboard side. The damage was of so serious a character that a third survey was ordered by the Dutch consul. This third survey had upon it the agent of the New York underwriters, Lloyd's agent, who were also on the second survey, and three masters of vessels. These last-appointed sur-

veyors made a report, stating at length the damage which they were able to find; their belief that additional damage would be found when the vessel was further uncovered; what the vessel would require; that there were no docks, nor competent ship-carpenters, nor requisite timber or materials at Port au Prince; and consequently that they were compelled to come to the conclusion that it would not be possible to make the necessary repairs in that port in a proper manner. They further reported that if materials could be obtained, the time taken would be not less than four months, and would cost more than the vessel would be worth after the repairs were made. The surveyors, for this reason, advised that the voyage should be broken up, the vessel sold for the interest of *all concerned*, and the cargo transshipped to Boston.

The vessel was accordingly put up at public auction, and, after full notice, knocked down for $407 in gold, to one Riviere, who took possession.

The surveys seemed to have been carefully made, the second one having occupied two hours in the examination, and the third, or last, half a day. The reports were full and particular.

After the purchase of the vessel by Riviere, he repaired her, at a cost in gold of $1695.31, and sent her to Boston.

At the time that the master sold the vessel at Port au Prince, he sold also a part of the cargo, the property, as already mentioned, of Fitz, for the proceeds of which ($2441) he never accounted.

On the arrival of the vessel at Boston, Fitz libelled her; asserting a lien and claiming damages for the non-delivery of the cargo. The vessel having been sold by order of court, the purchaser made repairs to the extent of about $143, took off her copper, which he sold for $1157, and sent her to England with a full cargo. She was forty days on the passage; had a good deal of bad weather; showed no symptoms of weakness, and appeared stanch and strong.

On a claim made by Fitz to the proceeds of the vessel in the Registry, $2138, the District Court dismissed the claim;

and this decree was affirmed in the Circuit Court. The matter was now here for review.

*Messrs. B. R. Curtis and F. C. Loring, for the appellants:*

I. The sale of the vessel was not justifiable, and it passed no title to Riviere.

1. The vessel was capable of being repaired, as is shown by the fact that she was repaired, and this at a less cost than her value; that she took a cargo to Boston, and afterwards to England, and that she was found to be stanch, strong, and seaworthy. The master, too, who sold a part of the cargo, had funds to pay for repairs and had not attempted a loan on bottomry. Now, if there is anything settled by the law, it is, that under such circumstances a master is under no legal necessity, and being under no such necessity, has no power to sell.*

2. Where there is a *possibility* of communicating with the owners without destructive consequences, it is the first duty of the master so to communicate and await his owners' instructions.† It is not suggested here, by the other side, nor does the case indicate, that the vessel was so situated as to be in immediate danger from any cause. She did not leak. She was in a safe harbor, her copper was heavy and in order, and in these days of steam navigation the master could have written to his owners in Amsterdam, and received their instructions probably in less than thirty days. According to the authorities he was bound to do so, and the sale was not of necessity. The burden is on the purchaser to show that there was no time for communication without danger of loss, and he does not attempt to do so.

3. If the master does not act in perfect good faith, the sale is void. Whether the master did so act, is a question of fact, and the burden is on the purchaser to prove that he

* The Sarah Ann, 13 Peters, 401; Freeman *v.* E. & I. Co., 5 Barnewall & Alderson, 617; The Fanny and Elmira, Edwards, 117; The Bonita, Lushington, 261.

† The Bonita, 1 Lushington, 253; Hall *v.* Franklin Insurance Co., 9 Pickering, 478.

did.* "While the power," says Grier, J.,† "is not denied, its exercise should be closely scrutinized." In this case fraud is to be inferred from the master's conduct. It does not appear that he had no funds of his owners, or could not procure them on their credit, or raise money on bottomry, before he proceeded to sell cargo. The temporary repairs recommended by the first survey would have cost $800, and that was all that he required at first, yet he sold to more than double the amount. He never advised the owners of the cargo of its sale, nor, so far as appears, the owners of the vessel. In fact, he stole the larger part of the proceeds of the cargo. The presumption is, in fine, every way against him, and the burden on the purchaser to remove it, and he has not attempted it.

It is not necessary to impute bad faith to the purchaser, the present claimant; yet it must not be overlooked, that he had means of knowing that the master was not acting rightly. He consequently bought at his peril, and if the owner, or one having his right, chooses to dispute his title, he must yield.‡

II. But even if the sale was proper under the circumstances, we insist that the purchaser Riviere, took the title subject to all existing liens.

Vessels, unlike other chattels, are subject to various maritime liens, necessarily secret, not requiring possession, and not obvious to strangers, yet protected from reasons of policy in all maritime states. Such are the liens created by bottomry; for repairs in a foreign port on the credit of the ship; of the owner of the cargo for its safe transportation and delivery; of the salvor; of the sailor for wages; of material men; the lien caused by a tortious collision; and others, all recognized by law, essential to the interest of commerce, constantly enforced by courts of admiralty, the existence of which are never apparent, and not always known to the master and owners, and therefore not to be

* The Sarah Ann, 13 Peters, 401.

† Post *v.* Jones, 19 Howard, 158.

‡ The Bonita, Lushington, 264.

learned by inquiry; valuable rights. Does the master of the vessel by a sale, destroy them, seamen's wages and all?

There is no analogy between a decree of a court of admiralty and the act of a master in making a sale. In the one case notice is given to all the world: any person interested has the right to appear, and in case of sale the proceeds are paid into court for the benefit of all concerned. In the other, no notice is given to any one, unless by the advertisement of a sale at auction; no one has the right or power to interfere, and the proceeds are paid to the master, who, as in this case, may appropriate them to his own use.

It is obvious what frauds the establishment of such a rule would encourage, and what temptations to make fraudulent sales would be opened. The policy of the law is to discourage sales by the master, but this would afford every inducement to make them.

Authorities seem, however, to render argument useless, for they settle the point, that a maritime lien is not displaced by a sale.

In *The Europa*,* it was held that a lien for damage by collision was not defeated by a sale to a *bonâ fide* purchaser without notice. A similar view has been taken in our own country as to the lien of a shipper for damages.†

In *The Catharine*,‡ a sale by the *master*, in a port of distress, was held not to devest lien of a lender on bottomry. Dr. Lushington says:

"I think that a British vessel coming into a foreign port cannot be sold by the master, so as to . . . . extinguish all mortgage claims and liens on bottomry or wages, even in a case of necessity. It is the duty of foreign purchasers to open their eyes and to take care what kind of a bargain they make, that they guard themselves against liens which adhere to the ship."

The authority of the master even in regard to the owners

* 8 Law Times, 368.

† The Rebecca, Ware, 212. See also on the subject generally, The Eliza Jane, Sprague, 152, and The Nymph, Swabey, 87.

‡ 1 English Law and Equity, 679.

is watched with jealousy. How much more ought it to be in regard to those who have not appointed him, but who as lenders may be concerned more than owners themselves! Is it said that the master is acting for all concerned? Concerned in what? In whether, of course, there shall be a sale. If their liens are devested, mariners, lenders on bottomry and other lien creditors are concerned. And if the master is acting for them, the liens are protected. If he is not acting for them, he is not acting for all concerned; and unless the law protects them, they are without any protection at the moment when most needing it. Will it be argued that the proceeds of the vessel are as good as the vessel, and take its place? This is not so; for a fraudulent captain easily disposes of the proceeds of the ship, as he has done here with those of the cargo sold. The vessel, whether in a good state or bad, is a better security.

III. The purchaser never acquired a valid legal title. The vessel was struck off to him at auction, and he afterwards took possession; but it is nowhere alleged or proved that the master executed a bill of sale in his own name, or that of the owner. By the general maritime law a bill of sale is necessary to transfer the title.* It is for him to sustain his claim and title.

*Mr. C. W. Loring, contra, argued:*

I. That a necessity has always been held to exist when a vessel is injured by perils of the sea to such an extent that the cost of repairs would be more than her value when repaired and arrived at her port of destination, and

That if, in the opinion of those best competent to judge, the vessel so injured is not worth repairing, and the master acting in good faith, and after careful investigation and conference, upon that opinion sells his vessel, he is justified in so doing, though it afterwards turns out that the opinion

* The Sisters, 5 Robinson, 138; The Segredo, 1 Spinks, 46, per Dr. Lushington; Atkinson *v.* Malling, 2 Term, 466; Ex parte Halkett, 19 Vesey, 473; 3 Kent's Commentaries, 186.

was incorrect, and the vessel could have been repaired at less cost and less than her value when repaired.

In all the cases cited below,* the vessels were in port when sold; they were sold by the masters without consulting the owners, and they were afterwards repaired, and all but one came to England, where they belonged. Yet the sales were all confirmed by reason of necessity.

But supposing that the vessel could have been repaired and forwarded, to the advantage of the owners of the cargo. It is submitted that this is one of those cases where the circumstances justify the master, though he were mistaken. Lloyd's agents, who represent the English underwriters, the agent of the New York underwriters (persons appointed for the express purpose of having vessels repaired when it is best to repair them), three masters of vessels, one of them who has given his deposition, and all appointed by the Dutch consul, say, after examining the vessel for a whole forenoon, and giving their reasons for it, "that they are obliged to come to the conclusion that it is not possible to make the necessary repairs in this port in a proper manner."

In the face of this advice, no master would have dared to repair the vessel. The underwriters' agents are selected for the sole purpose of attending to these matters. From their knowledge of vessels and of costs of repairs, they are the best advisers that can be obtained. In *The Bonita*,† Dr. Lushington did not confirm a sale, principally because Lloyd's agent advised repairing, and warned the master against selling. In *Gordon* v. *Massachusetts Fire and Marine Insurance Co.*,‡ it is said the only alternative left for a master is to follow advice of the surveyors.

II. *Are the liens discharged?* A lawful sale of a vessel, of necessity, by the master, is for all concerned, and passes a clean title to the purchaser: the proceeds in the master's hands take the place of the vessel.

1. Upon examining the authorities, we shall find that it

* The Glasgow, 1 Swabey, 150; The Australia, Id. 484; The Margaret Mitchell, Id. 382.

† 1 Lushington, 263.

‡ 2 Pickering, 264.

has always been considered that *the sale was for all concerned.** Grier, J., for this court, so speaks of it in *Post* v. *Jones.*†

2. There are several cases in which liens have been held to attach to the proceeds of a vessel.‡

In the case of *The Catharine*, cited on the other side, and where Dr. Lushington says that a sale by master does not discharge liens, he also says: "I am not satisfied in this case that there was a necessity for a sale." It was therefore a mere dictum where he says, that in a case of necessity, he should doubt whether, under such a sale, a ship could be sold free from lien.

III. No bill of sale was necessary, and *haud constat* but that one was given.

Mr. Justice DAVIS delivered the opinion of the court.

The principle of maritime law which governs this controversy is too well settled for dispute. Although the power of the master to sell his ship in any case, without the express authority of the owner, was formerly denied, yet it is now the received doctrine of the courts in this country as well as in England, that the master has the right to sell in case of actual necessity.

We are not called upon to discuss the reasons for the rule, nor to cite authorities in its support, because it has repeatedly received the sanction of this court.§

From the very nature of the case (the court say), there must be this implied authority of the master to sell. The injury to the vessel may be so great and the necessity so urgent as to justify a sale, and under such circumstances, the master becomes the agent of all concerned, and is re-

* New England Ins. Co. *v.* The Sarah Ann, 13 Peters, 402; Patapsco Ins. Co. *v.* Southgate, 5 Id. 620, 621; Gordon *v.* Massachusetts Fire and Marine Ins. Co., 2 Pickering, 262–4; Hunter *v.* Parker, 7 Meeson & Welsby, 342; Milles *v.* Fletcher, 1 Douglass, 234.

† 19 Howard, 158.

‡ Sheppard *v.* Taylor, 5 Peters, 675; Willard *v.* Dorr, 3 Mason, 168; Brown et al. *v.* Lull, 2 Sumner, 443.

§ The Patapsco Ins. Co. *v.* Southgate, 5 Peters, 620; The Sarah Ann, 13 Id. 400; Post et al. *v.* Jones et al., 19 Howard, 157.

quired to act for their benefit. The sale of a ship becomes a necessity within the meaning of the commercial law, when nothing better can be done for the owner, or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. As the power is liable to abuse, it must be exercised in the most perfect good faith, and it is the duty of courts and juries to watch with great care the conduct of the master. In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser, to protect his title, must be able to show their concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed.

If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary. And he should never sell, when in port with a disabled ship, without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings, strong evidence in justification of his conduct.

The facts of this case bring it within these well-settled principles of maritime law, and clearly show that the master was justified in terminating his voyage and selling his ship. When the voyage began, the ship was seaworthy and well provided, but after she had been at sea a short time, she became disabled during a violent storm, and with great dif-

ficulty was taken into the harbor of Port au Prince. The master at once entered his protest before the Dutch consul general (the ship being owned in Amsterdam), who caused three surveys to be made of the condition of the vessel. No action was taken on the first survey, but the result of the second was to incur an expense of one thousand Spanish dollars in partial repairs, decided by *it* to be practicable, and recommended, in order that the ship should be put in a proper condition to proceed on her voyage to Boston. In making these partial repairs, one of the sides of the vessel was uncovered, disclosing additional damages, of a serious character, not previously ascertainable, which caused the consul general to order a third survey. This third and final survey was thorough and complete. The men who made it were captains of vessels, temporarily detained in port, and the agents of American and English underwriters. No persons could be more competent to advise, or from the nature of their employment, better acquainted with the structure of vessels, and the cost of repairing them.

Their report is full and explicit. After the advice given in it, the master, who was bound to look to the interest of all parties concerned in the adventure, had no alternative but to sell. In the face of it, had he proceeded to repair his vessel, he would have been culpable. Being in a distant port, with a disabled vessel, seeking a solution of the difficulties surrounding him; at a great distance from his owners; with no direct means of communicating with them; and having good reason to believe the copper of his vessel was displaced, and that worms would work her destruction, what course so proper to pursue, as to obtain the advice "of that body of men, who by the usage of trade have been immemorially resorted to on such occasions?"* No prudent man, under the circumstances, would have failed to follow their advice, and the state of things, as proved in this case, imposed on the master a moral necessity to sell his vessel and reship his cargo.

* Gordon *v.* Mass. Ins. Co., 2 Pickering, 264.

But it is said, the fact that the vessel was repaired by the purchaser and sent to Boston, disproves this necessity. Not so. It may tend to prove the surveyors were mistaken, but does not affect the question of the duty of the master to follow their advice, when given in such strong terms, and with no evidence before him that it was erroneous. But in fact, the surveyors did not err in their conclusion that the vessel was not worth the cost of repairs, as the amount in the registry of the court for which the vessel was sold in Boston, will fail to reimburse the claimant the money expended by him, in purchasing and repairing her.

It is insisted, even if the circumstances were such as to justify the sale and pass a valid title to the vendee, he, nevertheless, took the title subject to all existing liens. If this position were sound, it would materially affect the interests of commerce; for, as exigencies are constantly arising, requiring the master to terminate the voyage as hopeless, and sell the property in his charge for the highest price he can get, would any man of common prudence buy a ship sold under such circumstances, if he took the title encumbered with secret liens, about which, in the great majority of cases, he could not have the opportunity of learning anything? The ground on which the right to sell rests is, that in case of disaster, the master, from necessity, becomes the agent of all the parties in interest, and is bound to do the best for them that he can, in the condition in which he is placed, and, therefore, has the power to dispose of the property for their benefit. When nothing better can be done for the interest of those concerned in the property than to sell, it is a case of necessity, and as the master acts for all, and is the agent of all, he sells as well for the lien-holder as the owner. The very object of the sale, according to the uniform current of the decisions, is to save something for the benefit of all concerned, and if this is so, the proceeds of the ship, necessarily, by operation of law, stand in place of the ship. If the ship can only be sold in case of necessity, where the good faith of the master is unquestioned, and if it

be the purpose of the sale to save something for the parties in interest, does not sound policy require a clean title to be given the purchaser in order that the property may bring its full value? If the sale is impeached, the law imposes on the purchaser the burden of showing the necessity for it, and this he is in a position to do, because the facts which constitute the legal necessity are within his reach; but he cannot know, nor be expected to know, in the exercise of reasonable diligence, the nature and extent of the liens that have attached to the vessel. Without pursuing the subject further, we are clearly of the opinion, when the ship is lawfully sold, the purchaser takes an absolute title devested of all liens, and that the liens are transferred to the proceeds of the ship, which, in the sense of the admiralty law, becomes the substitute for the ship.

The title of Riviere, the claimant, was questioned at the bar, because he did not prove the master executed to him a bill of sale of the vessel. We do not clearly see how this question is presented in the record, for there is no proof, either way, on the subject, but if it is, it is easily answered. A bill of sale was not necessary to transfer the title to the vessel. After it was sold and delivered, the property was changed, and no written instrument was needed to give effect to the title. The rule of the common law on this subject has not been altered by statute. The law of the United States, which requires the register to be inserted in the bill of sale on every transfer of a vessel, applies only to the character and privileges of the vessel as an American ship. It has no application to this vessel and this case.*

DECREE AFFIRMED.

* Wendover *v.* Hogeboom, 7 Johnson, 308; Sharp *v.* United States Insurance Co., 14 Id. 201; Weston *v.* Penniman, 1 Mason, 306.

## STEAMSHIP COMPANY *v.* PORTWARDENS.

A statute of a State enacting that the masters and wardens of a port within it, should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in that port, is a regulation of commerce within the meaning of the Constitution, and also, a duty on tonnage, and is unconstitutional and void.

ERROR to the Supreme Court of Louisiana.

The Constitution of the United States ordains that Congress shall have the power to "regulate commerce with foreign nations and among the several States;" that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and that "no State shall, without the consent of Congress, lay any duty on tonnage."

With these prohibitions of the Constitution upon State legislation in force as the supreme law of the land, a statute of the State of Louisiana, passed on the 15th of March, 1855, enacted that the master and wardens of the port of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five dollars, *whether called on to perform any service or not*, for every vessel arriving in that port.

Under this act the sum of five dollars was demanded of the steamship Charles Morgan, belonging to the Southern Steamship Company of New Orleans, and payment being refused, suit was brought against the owner and judgment recovered in a justice's court, which judgment was subsequently affirmed by the Supreme Court of the State. The object of this suit in error was to reverse that judgment.

The question presented by the record, therefore, was this: Is the act of the legislature of Louisiana repugnant to the Constitution of the United States?

*Mr. Durant, for the Port-Master and Wardens, defendants in error:*

The statute in question is not within any of the prohibitions of the Constitution.

1. It is not an attempt to "regulate commerce." It is but a regulation of the police of the port of New Orleans, and belongs to that class of laws which it will be admitted that the States have a right to enact; such as inspection, quarantine and health laws, and those regulating their pilots, or internal commerce, &c.

2. Nor can the fee of five dollars allowed to the portwardens be viewed as an "impost or duty on imports or exports." The fee is to be paid to the wardens for the same reason that half pilotage is to be paid to pilots when they offer their services, although the services are not accepted. It has always been held that this part of the pilotage law is constitutional.* The office and functions of portwardens are as indispensable for the purposes of navigation and commerce, as the office and functions of pilots.

3. Nor yet is it a "duty upon tonnage," which by necessary intendment is a duty proportioned to the tonnage of the vessel; that is to say, a certain rate or so much per ton.

*Mr. S. N. Salomon, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

That the power to regulate commerce with foreign nations and among the States is vested in Congress, and that no State without the consent of Congress can lay any duties or imposts on imports or exports, except what may be absolutely necessary for executing its inspection laws, or any duty of tonnage, are familiar provisions of the Constitution, which have been frequently and thoroughly examined in former judgments of this court.

The power to regulate commerce was given to Congress in comprehensive terms, and with the single exception of the

* Cooley *v.* Board of Wardens, 12 Howard, 299.

power to lay duties on exports. And it was thus given, so far as it relates to commerce between the States, with the obvious intent to place that commerce beyond interruption or embarrassment arising from the conflicting or hostile State regulations.

At the same time it was not intended to interfere with the exercise of State authority upon subjects properly within State jurisdiction. The power to enact inspection laws is expressly recognized as not affected by the grant of power to regulate commerce. And some other powers, the exercise of which may, in various degrees, affect commerce, have always been held not to be within the grant to Congress. To this class it is settled belong quarantine and other health laws, laws concerning the domestic police, and laws regulating the internal trade of a State.

There are other cases in which, either by express provision or by omission to exercise its own powers, Congress has left to the regulation of States matters clearly within its commercial powers. Of this description were the pilot laws recognized as valid by the act of 1789,* and 1837.†

That the act of the legislature of Louisiana is a regulation of commerce can hardly be doubted. It imposes a tax upon every ship entering the port of New Orleans, to be collected upon every entry. In the case of a steamer plying between that port and ports in adjoining States of Alabama or Texas, it becomes a serious burden, and works the very mischief against which the Constitution intended to protect commerce among the States.

It is claimed, however, that the tax is for compensation to the master and wardens, whose duty it is to perform, when called upon, the various services required of portwardens, and that the law for its collection stands therefore on the same constitutional grounds as the State laws authorizing the collection of pilotage.

But there are two answers to this proposition.

The first is, that no act of Congress recognizes such laws

* 1 Stat. at Large, 54.

† 5 Id. 153.

as that of Louisiana as proper and beneficial regulations, while the State laws in respect to pilotage are thus recognized.

The second is, that the right to recover pilotage and half pilotage, as prescribed by State legislation, rests not only on State laws but upon contract. Pilotage is compensation for services performed; half pilotage is compensation for services which the pilot has put himself in readiness to perform by labor, risk, and cost, and which he has actually offered to perform.* But in the case before us there were no services and no offer to perform any. The State law is express. It subjects the vessel to the demand of the master and wardens, "whether they be called on to perform any service or not."

It may be true that the existence of such a body of men is beneficial to commerce, but the same is true of the government of the State, of the city government, of the courts, of the whole body of public functionaries. If the constitutionality of the charge for the benefit of the master and wardens can be maintained upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels landing in its ports, can be questioned.

We think it quite clear, therefore, that the regulation of commerce made by the act before us comes within none of the limitations or exceptions to the general rule of the Constitution that the regulation of commerce among the States is in Congress.

We think, also, that the tax imposed by the act of Louisiana is, in the fair sense of the word, a duty on tonnage. In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the

* Steamship Company *v.* Joliffe, 2 Wallace, 450.

States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty.

In this view of the case, the levy of the tax in question is expressly prohibited.

On the whole we are clearly of opinion that the act of the legislature of Louisiana is repugnant to the Constitution, and that the judgment of the Supreme Court of the State must therefore be

REVERSED.

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## CRANDALL *v.* STATE OF NEVADA.

1. A special tax on railroad and stage companies for every passenger carried out of the State by them is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel, and is not a simple tax on the business of the companies.
2. Such a tax imposed by a State is not in conflict with that provision of the Federal Constitution which forbids a State to lay a duty on exports.
3. The power granted to Congress to regulate commerce with foreign nations and among the States, includes subjects of legislation which are necessarily of a national character, and, therefore, exclusively within the control of Congress.
4. But it also includes matters of a character merely local in their operation, as the regulation of port pilots, the authorization of bridges over navigable streams and perhaps others, and upon this class of subjects the State may legislate in the absence of any such legislation by Congress.
5. If the tax on passengers when carried out of the State be called a regulation of commerce, it belongs to the latter class; and there being no legislation of Congress on the same subject the statute will not be void as a regulation of commerce.
6. The United States has a right to require the service of its citizens at the seat of Federal government, in all executive, legislative, and judicial departments; and at all the points in the several States where the functions of government are to be performed.

7. By virtue of its power to make war and to suppress insurrection, the government has a right to transport troops through all parts of the Union by the usual and most expeditious modes of transportation.
8. The citizens of the United States have the correlative right to approach the great departments of the government, the ports of entry through which commerce is conducted, and the various Federal offices in the States.
9. The taxing power being in its nature unlimited over the subjects within its control, would enable the State governments to destroy the above-mentioned rights of the Federal government and of its citizens if the right of transit through the States by railroad and other ordinary modes of travel were one of the legitimate objects of State taxation.
10. The existence of such a power in the States is, therefore, inconsistent with objects for which the Federal government was established and with rights conferred by the Constitution on that government and on the people. An exercise of such a power is accordingly void.

ERROR to the Supreme Court of Nevada.

In 1865, the legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the State. For the purpose of collecting the tax, another section required from persons engaged in such business, or their agents, a report every month, under oath, of the number of passengers so transported, and the payment of the tax to the sheriff or other proper officer.

With the statute in existence, Crandall, who was the agent of a stage company engaged in carrying passengers through the State of Nevada, was arrested for refusing to report the number of passengers that had been carried by the coaches of his company, and for refusing to pay the tax of one dollar imposed on each passenger by the law of that State. He pleaded that the law of the State under which he was prosecuted was void, because it was in conflict with the Constitution of the United States; and his plea being overruled, the case came into the Supreme Court of the State. That court—considering that the tax laid was not an impost on "exports,"

nor an interference with the power of Congress "to regulate commerce among the several States"—decided against the right thus set up under the Federal Constitution.

Its judgment was now here for review.

*No counsel appeared for the plaintiff in error, Crandall, nor was any brief filed in his behalf.*

*Mr. P. Phillips, who filed a brief for Mr. T. J. D. Fuller, for the State of Nevada:*

The law in question is not in conflict with that clause of the Constitution of the United States, which provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," &c. *Persons* carried out of a State are not "exports" within the meaning of this clause. An export is a "*thing* exported," not a *person*.*

Nor in conflict with the provision that "Congress shall have power to regulate commerce among the several States," &c. The grant of power here given to Congress has never yet been exercised by it. It has enacted no statute upon the subject of inter-state travel. And while thus dormant and not exercised by Congress, it does not deprive the several States of the power to regulate commerce among themselves, a power which confessedly belonged to them before the adoption of the Constitution of the United States. In all decided cases where analogous laws of the several States have been held unconstitutional, it has been because of their alleged conflict with laws *actually enacted* by Congress under the power given that body by the Constitution "to regulate commerce with foreign nations and with Indian tribes." In such case of course the State law must give way.†

* Brown *v.* State of Maryland, 12 Wheaton, 438; City of New York *v.* Miln, 11 Peters, 136; License Cases, 5 Howard, 594.

† Gibbons *v.* Ogden, 9 Wheaton, 200; Houston *v.* Moore, 5 Id. 21; Willson *v.* Blackbird Creek Marsh Company, 2 Peters, 252; Brown *v.* State of Maryland, 12 Wheaton, 448; License Cases, 5 Howard, 504, 574, 578, 579, 580-6; Ib. 607, 618, 619, 624-5.

In addition the law in question is not intended as a regulation of commerce among the States, but *as a tax* for the support of the State government. A law passed thus *diverso intuitu* does not become a regulation of commerce merely because in its operation it may bear indirectly upon commerce.*

The power of taxation, like the police power, is indispensable to the existence of a State government, and it has never been pretended that it is impaired by any clause of the Federal Constitution, except so far and in such respects as that instrument *expressly* prohibits it. To take away that power *by inference* would be to open the way for entire destruction of State government.†

Finally. The tax in question is not a poll-tax, nor can it be made so by being described by the law as a "capitation tax." It is not levied on, nor paid by the passenger himself; but it is paid by the common carrier, at the rate of so much for each passenger carried by him. It is strictly a tax on his business, graduated by the amount of such business, as are license taxes, which often are made to vary *pro rata* with the amount of business done by the person taking the license. Suppose that the State, after examining the affairs of this particular stage company, had found that it carried a thousand passengers per year, and without any reference to what they had observed, laid a tax of a thousand dollars a year on all stage companies engaged in business like that of Crandall. Would that tax be unconstitutional? The State makes roads. It keeps them in repair. It must in some way be paid in order to be able to do all this. And what difference does it make whether it be paid by a tax of one dollar on each passenger, or by the same sum collected at a toll-gate, or by a gross sum for a license?

Nor does the tax become a poll-tax by falling ultimately

* Gibbons *v.* Ogden, 9 Wheaton, 201-4; City of New York *v.* Miln, 11 Peters, 102.

† Cases generally cited *ante;* McCulloch *v.* State of Maryland, 4 Wheaton, 316, 427-36.

upon the passengers carried, any more than does the tax upon liquors become a poll-tax because ultimately paid by him who drinks the liquor. It remains a tax upon the business, whoever pays it at last.

Mr. Justice MILLER delivered the opinion of the court.

The question for the first time presented to the court by this record is one of importance. The proposition to be considered is the right of a State to levy a tax upon persons residing in the State who may wish to get out of it, and upon persons not residing in it who may have occasion to pass through it.

It is to be regretted that such a question should be submitted to our consideration, with neither brief nor argument on the part of plaintiff in error. But our regret is diminished by the reflection, that the principles which must govern its determination have been the subject of much consideration in cases heretofore decided by this court.

It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.

If the act were much more skilfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person travelling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised. The statute before us is not, however, embarrassed by any nice difficulties of this character. The language which we have just quoted is, that there shall be levied and collected a capitation tax upon every person leaving the State by any railroad or stage coach; and the remaining provisions of the act, which refer to this tax, only provide a mode of collecting it. The officers and agents of the railroad companies, and the proprietors of the stage coaches, are made responsible for this, and so become the collectors of the tax.

We shall have occasion to refer hereafter somewhat in detail, to the opinions of the judges of this court in *The Pas-*

*senger Cases*,* in which there were wide differences on several points involved in the case before us. In the case from New York then under consideration, the statute provided that the health commissioner should be entitled to demand and receive from the master of every vessel that should arrive in the port of New York, from a foreign port, one dollar and fifty cents for every cabin passenger, and one dollar for each steerage passenger, and from each coasting vessel, twenty-five cents for every person on board. That statute does not use language so strong as the Nevada statute, indicative of a personal tax on the passenger, but merely taxes the master of the vessel according to the number of his passengers; but the court held it to be a tax upon the passenger, and that the master was the agent of the State for its collection. Chief Justice Taney, while he differed from the majority of the court, and held the law to be valid, said of the tax levied by the analogous statute of Massachusetts, that "its payment is the condition upon which the State permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. It is demanded of the captain, and not from every separate passenger, for convenience of collection. But the burden evidently falls upon the passenger, and he, in fact, pays it, either in the enhanced price of his passage or directly to the captain before he is allowed to embark for the voyage. The nature of the transaction, and the ordinary course of business, show that this must be so."

Having determined that the statute of Nevada imposes a tax upon the passenger for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel, we proceed to inquire if it is for that reason in conflict with the Constitution of the United States.

In the argument of the counsel for the defendant in error, and in the opinion of the Supreme Court of Nevada, which is found in the record, it is assumed that this question must be decided by an exclusive reference to two provisions of

* 7 Howard, 283.

the Constitution, namely: that which forbids any State, without the consent of Congress, to lay any imposts or duties on imports or exports, and that which confers on Congress the power to regulate commerce with foreign nations and among the several States.

The question as thus narrowed is not free from difficulties. Can a citizen of the United States travelling from one part of the Union to another be called an export? It was insisted in *The Passenger Cases* to which we have already referred, that foreigners coming to this country were imports within the meaning of the Constitution, and the provision of that instrument that the migration or importation of such persons as any of the States then existing should think proper to admit, should not be prohibited prior to the year 1808, but that a tax might be imposed on such importation, was relied on as showing that the word import, applied to persons as well as to merchandise. It was answered that this latter clause had exclusive reference to slaves, who were property as well as persons, and therefore proved nothing. While some of the judges who concurred in holding those laws to be unconstitutional, gave as one of their reasons that they were taxes on imports, it is evident that this view did not receive the assent of a majority of the court. The application of this provision of the Constitution to the proposition which we have stated in regard to the citizen, is still less satisfactory than it would be to the case of foreigners migrating to the United States.

But it is unnecessary to consider this point further in the view which we have taken of the case.

As regards the commerce clause of the Constitution, two propositions are advanced on behalf of the defendant in error. 1. That the tax imposed by the State on passengers is not a regulation of commerce. 2. That if it can be so considered, it is one of those powers which the States can exercise, until Congress has so legislated, as to indicate its intention to exclude State legislation on the same subject.

The proposition that the power to regulate commerce, as granted to Congress by the Constitution, necessarily excludes

the exercise by the States of any of the power thus granted, is one which has been much considered in this court, and the earlier discussions left the question in much doubt. As late as the January Term, 1849, the opinions of the judges in *The Passenger Cases* show that the question was considered to be one of much importance in those cases, and was even then unsettled, though previous decisions of the court were relied on by the judges themselves as deciding it in different ways. It was certainly, so far as those cases affected it, left an open question.

In the case of *Cooley* v. *Board of Wardens*,* four years later, the same question came directly before the court in reference to the local laws of the port of Philadelphia concerning pilots. It was claimed that they constituted a regulation of commerce, and were therefore void. The court held that they did come within the meaning of the term "to regulate commerce," but that until Congress made regulations concerning pilots the States were competent to do so.

Perhaps no more satisfactory solution has ever been given of this vexed question than the one furnished by the court in that case. After showing that there are some powers granted to Congress which are exclusive of similar powers in the States because they are declared to be so, and that other powers are necessarily so from their very nature, the court proceeds to say, that the authority to regulate commerce with foreign nations and among the States, includes within its compass powers which can only be exercised by Congress, as well as powers which, from their nature, can best be exercised by the State legislatures; to which latter class the regulation of pilots belongs. "Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." In the case of *Gilman* v. *Philadelphia*,† this doctrine is reaffirmed, and under it a bridge across a stream navigable from the ocean, authorized by State law, was held to be

* 12 Howard, 299.

† 3 Wallace, 713.

well authorized in the absence of any legislation by Congress affecting the matter.

It may be that under the power to regulate commerce among the States, Congress has authority to pass laws, the operation of which would be inconsistent with the tax imposed by the State of Nevada, but we know of no such statute now in existence. Inasmuch, therefore, as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which those cases were decided, that it violates the clause of the Federal Constitution which we have had under review.

But we do not concede that the question before us is to be determined by the two clauses of the Constitution which we have been examining.

The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the States and from the people of the States. Here resides the President, directing through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secon-

dary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the States, as its exercise has affected the functions of the Federal government, has been repeatedly considered by this

court, and the right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied.

The leading case of this class is that of *McCulloch* v. *Maryland.** The case is one every way important, and is familiar to the statesman and the constitutional lawyer. The Congress, for the purpose of aiding the fiscal operations of the government, had chartered the Bank of the United States, with authority to establish branches in the different States, and to issue notes for circulation. The legislature of Maryland had levied a tax upon these circulating notes, which the bank refused to pay, on the ground that the statute was void by reason of its antagonism to the Federal Constitution. No particular provision of the Constitution was pointed to as prohibiting the taxation by the State. Indeed, the authority of Congress to create the bank, which was strenuously denied, and the discussion of which constituted an important element in the opinion of the court, was not based by that opinion on any express grant of power, but was claimed to be necessary and proper to enable the government to carry out its authority to raise a revenue, and to transfer and disburse the same. It was argued also that the tax on the circulation operated very remotely, if at all, on the only functions of the bank in which the government was interested. But the court, by a unanimous judgment, held the law of Maryland to be unconstitutional.

It is not possible to condense the conclusive argument of Chief Justice Marshall in that case, and it is too familiar to justify its reproduction here; but an extract or two, in which the results of his reasoning are stated, will serve to show its applicability to the case before us. "That the power of taxing the bank by the States," he says, "may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power which acknowledges no other limits than those prescribed by the Constitution, and, like

* 4 Wheaton, 316.

sovereign power of any description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State in the article of taxation is subordinate to, and may be controlled by, the Constitution of the United States." Again he says, "We find then, on just theory, a total failure of the original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question of its surrender cannot arise." . . . . "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very means, is declared to be supreme over that which exerts the control, are propositions not to be denied. If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

It will be observed that it was not the extent of the tax in that case which was complained of, but the right to levy any tax of that character. So in the case before us it may be said that a tax of one dollar for passing through the State of Nevada, by stage coach or by railroad, cannot sensibly affect any function of the government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.

A case of another character in which the taxing power as exercised by a State was held void because repugnant to the Federal Constitution, is that of *Brown* v. *The State of Maryland.**

The State of Maryland required all importers of foreign merchandise, who sold the same by wholesale, by bale or by package, to take out a license, and this act was claimed to be unconstitutional. The court held it to be so on three different grounds: first, that it was a duty on imports; second, that it was a regulation of commerce; and third, that the importer who had paid the duties imposed by the United States, had acquired a right to sell his goods in the same original packages in which they were imported. To say nothing of the first and second grounds, we have in the third a tax of a State declared to be void, because it interfered with the exercise of a right derived by the importer from the laws of the United States. If the right of passing through a State by a citizen of the United States is one guaranteed to him by the Constitution, it must be as sacred from State taxation as the right derived by the importer from the payment of duties to sell the goods on which the duties were paid.

In the case of *Weston* v. *The City of Charleston*† we have a case of State taxation of still another class, held to be void as an interference with the rights of the Federal government. The tax in that instance was imposed on bonds or stocks of the United States, in common with all other securities of the same character. It was held by the court that the free and successful operation of the government required it at times to borrow money; that to borrow money it was necessary to issue this class of national securities, and that if the States could tax these securities they might so tax them, as to seriously impair or totally destroy the power of the government to borrow. This case, itself based on the doctrines advanced by the court in *McCulloch* v. *The State of Maryland*, has been followed in all the recent cases involving State

* 12 Wheaton, 419.

† 2 Peters, 449.

taxation of government bonds, from that of *The People of New York* v. *Tax Commissioners*,* to the decisions of the court at this term.

In all these cases the opponents of the taxes levied by the States were able to place their opposition on no express provision of the Constitution, except in that of *Brown* v. *Maryland*. But in all the other cases, and in that case also, the court distinctly placed the invalidity of the State taxes on the ground that they interfered with an authority of the Federal government, which was itself only to be sustained as necessary and proper to the exercise of some other power expressly granted.

In *The Passenger Cases*, to which reference has already been made, Justice Grier, with whom Justice Catron concurred, makes this one of the four propositions on which they held the tax void in those cases. Judge Wayne expresses his assent to Judge Grier's views; and perhaps this ground received the concurrence of more of the members of the court who constituted the majority than any other. But the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases, and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not in his opinion be maintained. He then adds: "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State in the Union. . . . For all the great purposes for which the Federal government was formed we are one people, with one common country.

* 2 Black, 620.

We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument.

Those principles, as we have already stated them in this opinion, must govern the present case.

Mr. Justice CLIFFORD. I agree that the State law in question is unconstitutional and void, but I am not able to concur in the principal reasons assigned in the opinion of the court in support of that conclusion. On the contrary, I hold that the act of the State legislature is inconsistent with the power conferred upon Congress to regulate commerce among the several States, and I think the judgment of the court should have been placed exclusively upon that ground. Strong doubts are entertained by me whether Congress possesses the power to levy any such tax, but whether so or not, I am clear that the State legislature cannot impose any such burden upon commerce among the several States. Such commerce is secured against such legislation in the States by the Constitution, irrespective of any Congressional action.

The CHIEF JUSTICE also dissents, and concurs in the views I have expressed.

JUDGMENT REVERSED, and the case remanded to the Supreme Court of the State of Nevada, with directions to discharge the plaintiff in error from custody.

## STATE OF GEORGIA *v.* STANTON.

1. A bill in equity filed by one of the United States to enjoin the Secretary of War and other officers who represent the Executive authority of the United States from carrying into execution certain acts of Congress, on the ground that such execution would annul and totally abolish the existing State government of the State and establish another and different one in its place—in other words, would overthrow and destroy the corporate existence of the State by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would be maintained—calls for a judgment upon a political question, and will therefore not be entertained by this court.
2. This character of the bill is not changed by the fact that in setting forth the political rights sought to be protected, the bill avers that the State has real and personal property (as for example, the public buildings, &c.), of the enjoyment of which, by the destruction of its corporate existence, the State will be deprived; such averment not being the substantive ground of the relief sought.

THIS was a bill filed April 15, 1867, in this court, invoking the exercise of its original jurisdiction, against Stanton, Secretary of War; Grant, General of the Army, and Pope, Major-General, assigned to the command of the Third Military District, consisting of the States of Georgia, Florida, and Alabama (a district organized under the Acts of Congress of the 2d March, 1867, entitled "An act to provide for the more efficient government of the rebel States," and an act of the 23d of the same month supplementary thereto), for the purpose of restraining the defendants from carrying into execution the several provisions of these acts; acts known in common parlance as the "Reconstruction Acts." Both these acts had been passed over the President's veto.

[The former of the acts, reciting that no legal State governments or adequate protection for life or property now existed in the rebel States of Virginia and North Carolina, South Carolina, *Georgia*, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, divided the States named into five military districts, and

made it the duty of the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce his authority within his district. It made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, *either through the local civil tribunals or through military commissions*, which the act authorized. It provided, further, that when the people of any one of these States had formed a constitution in conformity with that of the United States, framed by a convention of delegates elected by male citizens, &c., of twenty-one years old and upwards, "of whatever race, color, or previous condition," who had been residents in it for one year, "except such as may be disfranchised for participation in the rebellion," &c., and when such constitution should provide, &c., and should be ratified by a majority of the persons voting on the question of ratification, who were qualified for electors as delegates, and when such constitution should have been submitted to Congress for examination and approval, and Congress should have approved the same, and when the State by a vote of its legislature elected under such constitution should have adopted a certain article of amendment named, to the Constitution of the United States, and ordaining among other things that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State where they reside," and when such article should have become a part of the Constitution of the United States, then that the States respectively should be declared entitled to representation in Congress, and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede them.

The second of the two acts related chiefly to the registration of voters who were to form the new constitutions of the

States in question, and which registration by the act, could include only those persons who took and subscribed a certain oath set forth in such second act, as that they had "not been disfranchised for participation in any rebellion or civil war against the United States," &c.]

The bill set forth the existence of the State of Georgia, the complainant, as one of the States of this Union under the Constitution; the civil war of 1861–1865 in which she was involved; the surrender of the Confederate armies in the latter year, and submission to the Constitution and laws of the Union; the withdrawal of the military government from Georgia by the President, commander-in-chief of the army; and, the revival and reorganization of the civil government of the State with his permission; and that the government thus reorganized was in the possession and enjoyment of all the rights and privileges in her several departments—executive, legislative, and judicial—belonging to a State in the Union under the Constitution, with the exception of a representation in the Senate and House of Representatives of the United States.

It set forth further that the intent and design of the acts of Congress, as was apparent on their face and by their terms, was to overthrow and to annul this existing State government, and to erect another and different government in its place, unauthorized by the Constitution and in defiance of its guarantees; and that, in furtherance of this intent and design, the defendants (the Secretary of War, the General of the Army, and Major-General Pope), acting under orders of the President, were about setting in motion a portion of the army to take military possession of the State, and threatened to subvert her government, and to subject her people to military rule; that the State was wholly inadequate to resist the power and force of the Executive Department of the United States. She therefore insisted that such protection could, and ought, to be afforded by a decree, or order, of this court in the premises.

The bill then prayed that the defendants might be restrained:

1. From issuing any order, or doing, or permitting any act or thing within or concerning the State of Georgia, which was or might be directed or required of them, or any of them, by or under the two acts of Congress.

2. From causing to be made any registration within the State, as specified and prescribed in the last of the aforesaid acts.

3. From administering, or causing to be administered within the State, the oath or affirmation prescribed in said act.

4. From holding, or causing to be held within the State, any such election, or elections, or causing to be made any return of any such elections for the purpose of ascertaining the result of the same according to said act.

5. From holding, or causing to be held within the State, any such convention as is prescribed therein.

The bill in setting forth the political rights of the State of Georgia, and of its people sought to be protected, averred among other things, that the State was owner of certain real estate and buildings therein (the State capitol, at Milledgeville, and Executive mansion), and of other real and personal property, exceeding in value $5,000,000; and that putting the acts of Congress into execution and destroying the State would deprive it of the possession and enjoyment of its property. This reference and statement were not set up, however, as a specific or independent ground of relief, but apparently only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it. And the matter of property was not noticed in the prayers for relief.

*Mr. Stanbery*, *A. G.*, at the last term moved to dismiss the bill for want of jurisdiction.

*In support of this motion.* Our first objection is that we have not such parties here as authorize this court to entertain any case. Who is this controversy with? It is with officers of the United States of a very high grade. Is it with them as individuals? Not at all; but with them as officers of the United States, who have no State citizenship,

but are bound to reside here. The place of official residence of the Secretary of War and commanding general is by law in the District. Now, when you are asked to entertain the limited jurisdiction given to this court in an original case, and find that as to parties it must, by the terms of the Constitution,* be a controversy between "a State and *citizens* of another State," is there anything that fulfils the idea of such a controversy? Suppose to-morrow Mr. Stanton is removed, or resigns his post as Secretary of War, what becomes of Stanton, a citizen of Ohio, defendant in this case? Is there any controversy left between Georgia and Stanton as an individual and a citizen of Ohio? None.

Next, as to the nature of the right set up here, the alleged infractions of that right, and the relief which is asked from this court to establish that right.

The bill is premature; it involves at the same time a political question only. It involves, therefore, a political question which may never arise. The uncertainty whether *any* question will ever arise, and the fact that if any does arise it will be political, are both fatal to the bill.

Look at the state of things when this bill was filed. A controversy that raged a few weeks ago in Congress is brought here to be settled. The President attempted to settle it. Constitutionally he attempted to give the relief which is sought here. In the exercise of his constitutional powers, the President, while these acts were upon their passage, attempted to stop them by his veto, but Congress, also acting under the Constitution, passed them over his veto, by the requisite majority. The laws were passed. Now if there is jurisdiction in this court to stop the execution of these laws, there was jurisdiction on the 24th of March, when the last act was passed, before the President had even appointed military commanders; because the danger threatened here is altogether prospective. But what would this be? Nothing but judicial veto; a veto, in fact, far superior to the Presidential veto. A judicial veto, a judicial sentence of a court

* Article III, § 2.

of the last resort is final, and one which no Congress, and no two-thirds in Congress, could change or modify. It would stand as fixed as the law pronounced by a tribunal that remains here for life; it could not be set aside by any changes in the popular sentiment. It would be settled forever. This would be an absolute veto; the same veto that the Roman Tribunes had. What was that? Those officers, chosen during the Republic to protect the interests of the people, called Tribunes, had no insignia of office. No rods or lictors preceded them; no emblems of sovereignty accompanied them. They had not a house; they sat on benches. They dared not enter the Senate-house. They could only be elected from the plebeians. And yet the majesty of the Roman people was represented by them, and they had authority, by pronouncing one word, *veto*, to stop every ordinance of the Senate, to stop the execution of every law, absolutely and conclusively, without any appeal. That power was called by Cæsar *ultima jus Tribunorum*. What is this but that?

If this can be done, the same jurisdiction may be invoked wherever a court can get nominal parties; may be invoked in regard to every law that Congress may pass before it proceeds to execution, and before as yet a case has arisen under it. In the present case, the complainant carries his prayer for an injunction down to the meeting of the convention. But he might as well carry it further, and ask to enjoin the convention from framing a constitution; a little further, and enjoin the people from ratifying the constitution; a little further yet, and enjoin the president of the convention from sending that new constitution here to the President of the United States; a step further, and enjoin the same President from sending that constitution to Congress; a step further, and enjoin Congress from accepting it. For, after all, that is the point; that works all the mischief, and nothing but that does work it, for until Congress acts all that is done is unimportant. Why not, then, have gone a step further, and, to get relief, have now enjoined Congress from ratifying the constitution?

If there is a power in this court to veto laws which the Congress considers wholesome and necessary, such a power has never before been invoked. A suggestion that there should be some such a power was made in the convention that framed the Constitution. The scheme then presented was not half so bad as this, but something like it was proposed by Mr. Randolph, the elder. In the convention he offered this resolution:

*Resolved*, That the executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by —— of the members of each branch.

Here was an attempt to give a qualified veto power, to be vested, not in the judiciary alone, but in the judiciary with the executive, sitting as a council of revision upon every law after its passage, before it had gone into operation, before its mischiefs were developed. It found no favor with the convention; it was rejected; and instead of that, the actual veto power as it now exists, proposed by General Pinckney, was adopted, separating the judiciary from the consideration of such questions, leaving them to consider a law only when it should regularly come before them in its execution upon a proper case and with proper parties.

The case is political and uncertain in every way that you look at it. It is a bill by a State to vindicate its political rights. The State of Georgia here comes into court alleging that it is a State, putting that matter in issue. We do not make any question now as to a court of equity being a fit court to decide whether a State is in the proper enjoyment of its political franchises. Opposite counsel allege that Georgia is now a State of the Union, and ask the court to find that it is so. If they allege it as a matter of fact, we

have a right to deny it; and what is the consequence? If this court has jurisdiction to decide that Georgia is a State, it has just the same jurisdiction to decide that Georgia is not a State, and that great political question, State or not a State, is settled and settled forever by this court.

*The Cherokee Nation* v. *The State of Georgia** goes far to decide this case. The attempt there was by the Cherokees, as a separate nation, to prevent the execution of certain laws of Georgia violating their rights secured by treaty. But the court declined to interfere in this way. It acted upon what was declared long before by Ellsworth, C. J., in *New York* v. *Connecticut*.† "In no case can a specific performance be decreed unless there is a substantial right of soil, not a *mere political jurisdiction to be enforced*."

But what next? It is alleged that Georgia has certain political rights and privileges, and also that she has certain property. We can see very well where the learned counsel were tending when they came to that part of the case, and that they had at least some inkling of the difficulties of bringing a State into a court of equity to vindicate its political rights and the franchises and rights of its citizens. They saw that there was no precedent for such a proceeding as that. They saw the necessity of founding the equity jurisdiction of the court upon the State of Georgia as a corporation, and as a corporation whose franchises and rights were about to be disturbed, and therefore entitled to preventive relief, as an individual would be to protect his property and his rights from irreparable mischief and injury. But although it is mentioned that the State owns lands, it is not alleged that anybody is going to take those lands. It does not appear that anybody has erected a nuisance on those lands or is about to erect one. It does not appear that anybody is about to bring suit in regard to those lands, and that it is necessary to stop litigation and prevent the State being vexed by suits. It is simply alleged that the State has such lands. These military officers do not pro-

* 5 Peters, 1.

† 4 Dallas, 5; 2d ed., *note*.

pose to take the lands, nor can they take them. What, then, is the danger to these lands? It is, that if finally these acts are consummated,—if finally there is a new constitution provided for Georgia, and ratified by the people of Georgia, which new constitution becomes the constitution of that State, the present organism of Georgia ceases; the present State government is displaced and loses its hold of these lands. Then where do they go? Who does the present government hold them for? For the people of Georgia for public uses. If a new constitution shall come into operation and be ratified by the people of Georgia, the new government will hold these lands for the same purposes, not for waste, not for destruction, not for changing their destination, not as in the case of a charity to devote them to other uses, not as in the case of the property of a private corporation to turn them to other uses and to the purposes of a foreign corporation, but at last, change the form of government as you please, the people of the State of Georgia will own all their lands, undisturbed in any way, if these laws are carried out.

Before we even touch these lands, before we touch a single one of these rights of Georgia, this court is asked to interpose. And what is it asked to do? I take a distinction between matters that lie in the choice or discretion of the commanding general as to the extent to which he will execute military law there and other matters. He has simply said: "I will execute the law." Now, under the acts, he can execute it in either of two ways. He can execute it by making it a military despotism at once, by unshipping all the civil tribunals, courts, and officers, or he can execute the law just as well by leaving them all untouched. It is not alleged that Pope threatens that he is going to displace the governor, the legislature, the courts, the executive officers, the whole machinery of civil government in Georgia. He has simply said that he will execute the law. Whether he will execute it by the rigor of martial rule, displacing the civil authorities, or execute it by leaving them all in perfect play, he has never said. The first practical thing to be done under these laws is the appointment of

boards of registry to make a registration of voters, preparatory to the election. That is the initiatory step. It has not yet been taken, but it is to be taken; and the especial prayer of this injunction is to stop that very thing, with a series of others that are to follow afterward.

Here, then, is an attempt to induce a court of equity to stop an election,—a political election; to prevent the registration of voters by a decree of a court of equity before any registration is made. The evil lies away beyond that; the evil is not in registering the voters, but in something that the voters are afterward to do, and something that the convention is afterward to do, and something that is to be the result of all these labors. But these things have not yet happened, and counsel propose to begin by asking you to stop the registration of voters. They say they can have no adequate relief against that registration, and the evils that lie beyond, except in a court of equity. They cannot wait until the laws are executed, but they must have relief now. There have been many bills in equity in various States, but who has heard that it was the function of a court of equity to stop an election? What are the consequences of an election? To make officers and invest them with powers. If these officers and these powers are going to invade any rights, they are the rights of other officers legally executing some power. Do we go to a court of equity to be relieved against an officer elected? Take the case of an officer illegally elected at an illegal election. Being so elected, he has no right to intrude upon the legal officer; but that is no case for a court of equity. It is a case for a *quo warranto*.

But these defendants cannot compel the registration. These laws compel no man in Georgia, black or white, to be registered; nor do they authorize the military commander to seize and punish any one for not going to the election. It is left entirely to the citizens to decide for themselves whether they shall be registered or not. You cannot very well stop them. What next? An election is held. Who votes at the election? Just who chooses. How do you know that anybody is going to attend that election?

How do you know that an election will be ordered, or that, if ordered, Georgia is going to accept the offer made by Congress? The people that the State of Georgia comes here to protect, can protect themselves against all this mischief by not going to the election, because the mischief is the election of a government that is going to displace the existing government. But suppose the people go to the election and vote for delegates; the delegates are not obliged to go to the convention; there is no law to punish them for not attending. If they go, they frame a constitution. That is left to themselves. Congress simply says that a certain provision in regard to suffrage must be inserted in the constitution, or it will not be recognized by the legislative department. If the convention cannot agree, there is an end of the whole proceeding; but if they agree and make a constitution containing the stipulation provided for by Congress, the people are then to hold an election to ratify it. If the people ratify it, it will be because they like it. It is left to them to do it or not. If they do it, the next step is to send the constitution to the President, and by him it is to be sent to Congress, and then Congress is to act.

These things all lie in the unknown and unascertained future. As yet, not one of us is so wise as to see into that future and know what is to happen, or whether the mischiefs that opposite counsel see in the distance are ever going to take bodily shape. Counsel must show a controversy with a party, not a controversy with the law; they must show an individual right, not a general public right. This court does not sit as conservators over public rights, and as such to guard them in the very beginning against the execution of an obnoxious law. It sits only in a controversy after a controversy has arisen. If there was no other objection to the case, this would be sufficient, namely, that no controversy has ever arisen under this law with any party, citizen of a State, public officer, or anybody else.

But suppose that the mischiefs which the bill says will be consummated are consummated; suppose that what is proposed to be done is done, and all that is future and contin-

gent becomes actual and past, and a constitution is framed under these laws and is accepted and ratified by Congress as the constitution of Georgia, and then an appeal is made to the court not to prevent, but to restore, to keep, to preserve the right of the contesting State organization as the State government of Georgia,—what sort of a question would the court then encounter? The same that it encountered in the Dorr case, *Luther* v. *Borden.** A new constitution formed by the people of a State under the authority of these acts, and an older State constitution formed by the people under due authority, as they alleged,—these two sovereignties at once enter into a contest for supremacy. Is that a sort of controversy which the court can decide as a court of equity? In the first place, the parties will not stop to come to a court; they will settle things by force. The old State government, if it is a legal one, has a right to resist any usurped government that pretends to be the State. If that usurped government brings against it a force that it cannot withstand, what then is its remedy? To come to a court of equity to ask them to enjoin the advance of the hostile force; to say to the commanding general, "You shall stop your march; we hold that you are not the rightful government; this other is?" Certainly not. The Constitution contemplates exactly that state of things. If the existing State government of Georgia, which the opposite counsel represent, is the legal State, it will remain the legal State, notwithstanding these laws. If, as they say, these laws are unconstitutional and void, no authority given under them can ever prejudice the State. Is there no remedy? If the new constitution is supported by an armed force greater than the present government can bring to bear against it, what is the remedy? A court? No; but Congress and the President, —the political power. They are then precisely in the situation pointed out by the Constitution,—a State in insurrection; a lawful State warred upon by an unlawful, unauthorized body claiming to be a State, using force against force

* 7 Howard, 1.

that the rightful State cannot overcome. Then comes a case for political interference. Then Congress and the President must decide which of these two is the rightful State; and when they decide it, it is decided for this court and for all; for that is the only tribunal that can decide it.

*Messrs. Charles O'Connor, R. J. Walker (with whom were Messrs. Sharkey, Black, Brent, and E. Cowan), contra:*

It is said that we have not proper and competent parties. That is a very narrow view of the subject. It is true that the framers of the Constitution do not seem to have been so cautious as to take into their consideration this nice exception that, by possibility, there might be some people living within the district, ten miles square or less, that might be ceded to Congress for the seat of Government, who would not be citizens of any State, and therefore not provided for by this provision. Nor that there ever would be any considerable number of persons in the whole world other than citizens of the menaced State, against which the State would have any cause of complaint that it would desire to redress, except their fellow-citizens of other States of the Union, or strangers who were subject to foreign nations. But they did provide that a State should have a judicial remedy against any individuals who were beyond the reach of its power and process, who might do it an injury, and of course who might menace an injury. This right is given in the Constitution itself. This is the court of first instance into which the State is to come. What is it to have here? All the remedies, surely, for the enforcement of its rights that are usual and customary according to the laws of the parent State, and the existing laws of the Colonies as they were, and the laws of these States during the short period they had existed as States, that were allowed in courts in cases at law or in equity.

The rejection in the convention of the proposition for a a council of revision offers no objection to the jurisdiction of the court in this case. This court was not thereby separated from political questions. Not at all. It was separated

indeed from any participation, in any shape, in legislation. At least, legislative power was not conferred upon it. The jurisdiction of the court, as a court created under the Constitution, was, of course, intended to apply to all questions with which the court was capable of dealing. The Attorney-General has spoken of a *quo warranto* as being the proper remedy. There can be no *quo warranto* in this court upon the governor of a State for exercising his powers. His is a State office, and a *quo warranto* by the judiciary of a State against its governor would be very much like that so ably condemned, not long since, by Mr. Attorney himself in *Mississippi* v. *Johnson, President*,*—a writ issuing out of this court against the Chief Executive.

Much has been said about all the evil alleged in the bill being contingent and future. The argument is, that though the sword is suspended above us, the hair by which it hangs may never break. But we have presented plainly and distinctly, facts that cannot and have not been denied. The President says that he will execute these acts of Congress. General Grant, it is known to all, has issued an order, to the commanders of these various districts, declaring that the acts are to be carried into execution. The minor officers have declared their intention to execute them. Counsel say that the court will not act upon fears and apprehensions. The fact is quite otherwise. A bill *quia timet* is one of the very heads of equity jurisdiction. It must, to be sure, be a stable and substantial fear; but when the Executive of the United States declares that he will execute a certain set of provisions, when his General-in-Chief declares that he will execute them, when that necessarily involves the bringing into play of the whole military force of the Union against a particular State, shall it be said that the fears are not substantial?

The Attorney-General quite understates the effects of these Reconstruction Acts. Their actual effect is to restrain at once the holding of any election within the State for any

* 4 Wallace, 475.

officers of the present State government by any of the State authorities; to direct all future elections in the State to be held under the direction of, and by officers appointed by, the military commander; and that all persons of certain classes described shall be the electors permitted to vote at such election. It is, therefore, an immediate paralysis of all the authority and power of the State government by military force; a plain setting aside of the present State government, and depriving it of the necessary means of continuing its existence. It is substituting in its place a new government, created under a new constitution, and elected by a new and independent class of electors. What is the effect of this upon the State government and upon the State now existing? The same, just, as if in the case of a private corporation (which could only keep up its existence by regular periodical elections by its stockholders), the persons having an interest in it, the owners of its franchise, and the right to perpetuate it, were forbidden to vote, deprived of the right,—or a large number of them were so forbidden and deprived—and a mass of persons having no right whatever were introduced. This is a direct attack upon the constitution of the corporation in the case supposed—a direct attack upon the constitution and fundamental law of the State in the case before the court.

To grant an injunction in such a case is manifestly within the jurisdiction of equity.*

The grievance of which Georgia complains is analogous; a proceeding to divest her of her legally and constitutionally established and guaranteed existence as a body politic and a member of the Union. To explain. By the fundamental law of Georgia, as we know, its constituent body is, and always has been, composed of the "free white male citizens of the State, of the age of twenty-one years, who have paid all taxes which may have been required of them, and which

* Ward *v.* The Society of Attorneys, 1 Collyer's New Cases in Chancery, 379; Simpson *v.* Westminster Palace Hotel Company, 8 Clark (House of Lords' Cases), 717; Dodge *v.* Woolsey, 18 Howard, 341.

they have had an opportunity of paying agreeably to law for the year preceding the election, being citizens of the United States, and having resided six months either in the district or county, and two years within the State."*

A State is "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an *artificial* person. It has its affairs and its interests. It has its rules. It has its rights.† A republican State, in every political, legal, constitutional, and juridical sense, as well under the law of nations, as the laws and usages of the mother country, is composed of those persons who, according to its existing constitution or fundamental law, are the constitutent body. All other persons within its territory, or socially belonging to its people, as a human society, are subject to its laws, and may justly claim its protection; but they are not, in contemplation of law, any portion of the body politic known and recognized as the State. On principle it must be quite clear that the body politic is composed of those who by the fundamental law are the source of all political power, or official or governmental authority. Dorr's revolutionary government in Rhode Island was an attempted departure from it.‡ In that case the precise thing was done by Dorr and his adherents which these acts in the present instance seek to perform. There was a State government in the hands of a portion of the people of that State constituting its whole electoral body. Dorr was of opinion, and his adherents supported him in it, that a greater number of electors ought to be admitted, and he therefore undertook, by spontaneous meetings, to erect an independent State government. He failed in so doing. The court decided that it was no government, but that the original chartered government which there existed was the legitimate and lawful government, and consequently Dorr failed. The same reasons would lead to the overthrow of these acts of Congress. The

* Constitution of Georgia, 1865, Art. 5, § 1.

† Chisholm *v.* Georgia, per Wilson J., 2 Dallas, 45.

‡ Luther *v.* Borden, 7 Howard, 1.

State has a right to maintain its constitution or political association. And it is its duty to do what may be necessary to preserve that association. And no external power has a right to interfere with or disturb it.* In *Rhode Island* v. *Massachusetts*,† this court says, that "the members of the American family [meaning the States] possess ample means of defence under the Constitution, which we hope ages to come will verify." What means of defence under the Constitution is possessed by Georgia, if this suit cannot be maintained?

The change proposed by the two acts of Congress in question is fundamental and vital. The acts seize upon a large portion—whites—of the constituent body and exclude them from acting as members of the State. It violently thrusts into the constituent body, as members thereof, a multitude of individuals—negroes—not entitled by the fundamental law of Georgia to exercise political powers. The State is to be Africanized. This will work a virtual extinction of the existing body politic, and the creation of a new, distinct, and independent body politic, to take its place and enjoy its rights and property. Such new State would be formed, not by the free will or consent of Georgia or her people, nor by the assent or acquiescence of her existing government or magistracy, but by external force. Instead of keeping the guaranty against a forcible overthrow of its government by foreign invaders or domestic insurgents, this is destroying that very government by force. Should this be done, and the magistracy of the new State be placed in possession, the very recognition of them by the Congress and President, who thus set them up, would be a conclusive determination, as between such new government and the State government now existing. This court would be, then, bound to recognize the latter as lawful.‡

Independently of this principle, the forced acquiescence of the people, under the pressure of military power, would soon work a virtual extinction of the existing political society.

* Vattel's Law of Nations, book 1, ch. 2, § 16; Ib., book 2, ch. 4, § 57.

† 12 Peters, 745.

‡ Luther *v.* Borden, 7 Howard, 1.

Each aspect of the case shows that the impending evil will produce consequences fatal to the continuance of the present State, and, consequently, that the injury would be irreparable.

The great objection, of the other side,—viz., that the subject-matter of the bill, the case stated, and the relief sought, are *political in their nature*,—is without force.

Had it been asserted that this court was without political *power*, or without any physical power; that it could not supervise or control action on questions of policy touching the administration of any power of government, internal or external, committed by the Constitution to either or both of the departments commonly denominated the political departments, the assertion would be correct. But when, under cover of an undefined phrase, it is asserted that this court cannot pronounce upon the validity of an act which may be confessedly at war with the Constitution, repugnant to its whole spirit and intent, and which cannot be brought within the range of any power conferred by the Constitution, or any duty committed by it to any of the departments, the phrase is not correct. Political power cannot, indeed, exist anywhere except under and by force of the Constitution; and whenever it does exist, it must be exercised exclusively by those officers or persons to whom the Constitution has committed it. But whether under the Constitution it exists at all, in a given case, is a question as clearly within the range of judicial cognizance as any other that can arise.

It is untrue that questions of a political nature, according to the vulgar acceptation of that phrase, are unsuited to judicial cognizance. Of course no court can, judicially, investigate or determine *any* question unless parties, between whom it has cognizance, are regularly before it; unless the disputable facts, if any, be susceptible of a judicial trial, and unless the relief sought be judicial in its form and nature: but when these three circumstances concur, the nature of the questions of law or fact never presents any obstacle to the exercise of judicial power.

Thus, the writ of *habeas corpus* is the absolute constitu-

tional right of the citizen. Upon that writ, from the earliest period at which civil liberty had a place or name, down to *Ex parte Milligan*, in the last published volume of Wallace,* the humblest individual has had power to arraign before the judicial magistrate any act of the political departments affecting his imprisonment, and to procure a judicial deliverance from the grasp of any executive officer, however exalted. The judicial power—whether State or Federal—can examine and condemn, as unconstitutional and utterly void, every legislative act and every executive decree which, by its terms, purport, or intent, would debar the prisoner from a discharge to which, in the judgment of the judiciary, he is entitled by the Constitution. So in prize cases, in questions of title to land involving a determination as to the boundaries of States and Territories, foreign or domestic,—questions as completely within the idea of a "subject-matter political in its *nature*" as can be conceived,—are of every-day occurrence in the judicial tribunals.

It is, in short, no impediment in any case that this judicial power may condemn acts of men exercising political power which work a prejudice to the rights of any juridical or natural person suing for justice. If the rights imperilled be of a civil nature, entitled to protection under the principles of the Constitution and capable of being protected by the ordinary operation of known and established judicial remedies, the jurisdiction is perfect.

Such cases do not present *political* questions, in any proper sense. For when the term is employed for any definite purpose in jurisprudence, it means a question which the Constitution, or some valid law, intrusts exclusively to the one or both of the departments, commonly styled political.

II. That a question affecting *political rights* can be the subject of judicial cognizance was decided affirmatively, in the face of the objection now urged, both at the bar and in the hall of conference, in *Rhode Island* v. *Massachusetts*.† The suit brought by Rhode Island was to vindicate the right of juris-

* 4 Wallace, 4.

† 12 Peters, 669.

diction and sovereignty in and over a disputed territory; the kind of question that in other countries begins in diplomacy and ends in a treaty or in war. The great State of Massachusetts vigorously—almost indignantly—repelled the jurisdiction as an assumption of *political* power. She intimated power in her self to resist, and inability by the court to enforce, its judgment.

Mr. Austin, her counsel,* said:

"This court has no jurisdiction, because of the nature of the suit. It is in its character political; in the highest degree political; brought by a sovereign, in that avowed character, for the restitution of sovereignty. The judicial power of the United States extends, by the Constitution, only to cases of law and equity. The terms have relation to English jurisprudence. Suits of the present kind are not of the class belonging to law or equity, as administered in England."

This pointed presentation of the question was sustained by the powerful dissent of Taney, C. J. He says:

"In the case before the court, we are called on to protect and enforce the 'mere political jurisdiction' of Rhode Island; and the bill of the complainant, in effect, asks us to 'control the legislature of Massachusetts, and to restrain the exercise of its physical force' within the disputed territory."

The dissent, however, is only a dissent. It has no authoritative force. It only serves, like all dissenting opinions, to prove the distinctness with which the question was presented, and to set out in relief, and to give emphasis and power to the decision of the court. The *court* maintained the jurisdiction.†

Mr. Hazard, for Rhode Island, met and answered the objection. The case did not involve the title to land or to money; nor does the Constitution say a word about boundary in giving jurisdiction over cases between States. It was a case of disputed sovereignty and jurisdiction over five

* Page 671.

† And see Fowler *v.* Lindsey, 3 Dallas, 413.

thousand people; and the court entertained jurisdiction because of the parties, and pronounced definitive judgment.

The early case of *New York* v. *Connecticut*,* and *Pennsylvania* v. *The Wheeling Bridge*,† are in accordance with our views.

The Attorney-General places much reliance upon *The Cherokee Nation* v. *The State of Georgia*. The court there held that the Cherokee Nation was not a foreign state in the sense of the Constitution—was not a state that could sue in the courts of the United States, and, therefore, that the court had no jurisdiction, for the want of a proper party to the bill. All beyond that was *obiter dictum*. But what was that case? It was a bill, not against the agents of the State of Georgia, but a bill to restrain the State, as a State in its corporate capacity, from the execution of its laws, and at a time when the State was actually executing them by force. If the present bill was filed against the government of the United States to restrain it, as a government, from executing by force the laws in question, there might be some analogy; but it is not a bill against the government; it is a bill to restrain subordinate officers. The decision in *Marbury* v. *Madison* shows that such a bill is sustainable.

Independently of all this, rights of property are here involved. The bill alleges that more than $5,000,000 of real and personal estate are about to be taken away.

*Reply:* The cases of *New York* v. *Connecticut*, and *Rhode Island* v. *Massachusetts*, show that the Supreme Court entertains jurisdiction of cases involving questions of boundary because a right to land is in dispute. The fact that political consequences were involved was a mere incident. In the latter case the primary object of the bill was, that the northern boundary between Rhode Island and Massachusetts might be ascertained and established, and that the rights of jurisdiction and sovereignty would be ascertained and settled also was a consequence of this. In the Wheeling Bridge case, the

* 3 Dallas, 4.

† 13 Howard, 579.

State of Pennsylvania was granted relief, not because of her political character, but because she was the owner of canals and railroads terminating at Pittsburg, costing her treasury many millions, which it was held would be irreparably injured by the bridge. This bill shows no such case. Property is here a mere accessory or incident, and no injury is threatened to it that equity will enjoin. From beginning to end, there is no ground set out in the bill upon which anything like judicial cognizance can be founded by any power of this court.

The bill having been dismissed at the last term, Mr. Justice NELSON now delivered the opinion of the court.

A motion has been made by the counsel for the defendants to dismiss the bill for want of jurisdiction, for which a precedent is found in the case of *The State of Rhode Island* v. *The State of Massachusetts.** It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved, and presented for adjudication, are political and not judicial, and, therefore, not the subject of judicial cognizance.

This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the Constitution.

The judicial power is vested in one supreme court, and in such inferior courts as Congress may ordain and establish: the political power of the government in the other two departments.

The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction.†

* 12 Peters, 669.

† Nabob of Carnatic *v.* The East India Co., 1 Vesey, Jr., 375–393, S. C., 2 Id. 56–60; Penn *v.* Lord Baltimore, 1 Vesey, 446–7; New York *v.* Connecticut,

It has been supposed that the case of *The State of Rhode Island* v. *The State of Massachusetts** is an exception, and affords an authority for hearing and adjudicating upon political questions in the usual course of judicial proceedings on a bill in equity. But, it will be seen on a close examination of the case, that this is a mistake. It involved a question of boundary between the two States. Mr. Justice Baldwin, who delivered the opinion of the court, states the objection, and proceeds to answer it. He observes,† "It is said that this is a political, not civil controversy, between the parties; and, so not within the Constitution, or thirteenth section of the Judiciary Act. As it is viewed by the court, on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles River, is the only question that can arise under the charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plain by Woodward and Saffrey, in 1842, is the true point from which to run an east and west line as the compact boundary between the States. In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals." In another part of the opinion, speaking of the submission by sovereigns or states, of a controversy between them, he observes, "From the time of such submission the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power. It comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law, appropriate to its nature as a judicial question, depending on the exercise of judicial powers, as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires."

4 Dallas, 4–6; The Cherokee Nation *v.* Georgia, 5 Peters, 1, 20, 29, 30, 51, 75; The State of Rhode Island *v.* The State of Massachusetts, 12 Ib. 657, 733, 734, 737, 738.

* 12 Peters, 657. † Page 736.

And he might have added, what, indeed, is probably implied in the opinion, that the question thus submitted by the sovereign, or state, to a judicial determination, must be one appropriate for the exercise of judicial power; such as a question of boundary, or as in the case of *Penn* v. *Lord Baltimore*, a contract between the parties in respect to their boundary. Lord Hardwicke places his right in that case to entertain jurisdiction upon this ground.

The objections to the jurisdiction of the court in the case of Rhode Island against Massachusetts were, that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion.* The very elaborate examination of the case by Mr. Justice Baldwin, was devoted to an answer and refutation of these objections. He endeavored to show, and, we think did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case. The right of property was undoubtedly involved; as in this country, where feudal tenures are abolished, in cases of escheat, the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

In the case of *The State of Florida* v. *Georgia*,† the United States were allowed to intervene, being the proprietors of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The State of Florida was also deeply interested as a proprietor.

The case, bearing most directly on the one before us, is *The Cherokee Nation* v. *The State of Georgia*.‡ A bill was filed in that case and an injunction prayed for, to prevent the execution of certain acts of the legislature of Georgia within the territory of the Cherokee Nation of Indians, they claim-

* 12 Peters, 752, 754. † 17 Howard, 478. ‡ 5 Peters, 1.

ing a right to file it in this court, in the exercise of its original jurisdiction, as a foreign nation. The acts of the legislature, if permitted to be carried into execution, would have subverted the tribal government of the Indians; and subjected them to the jurisdiction of the State. The injunction was denied, on the ground that the Cherokee Nation could not be regarded as a foreign nation within the Judiciary Act; and, that, therefore, they had no standing in court. But, Chief Justice Marshall, who delivered the opinion of the majority, very strongly intimated, that the bill was untenable on another ground, namely, that it involved simply a political question. He observed, "That the part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power, to be within the province of the judicial department." Several opinions were delivered in the case; a very elaborate one, by Mr. Justice Thompson, in which Judge Story concurred. They maintained that the Cherokee Nation was a foreign nation within the Judiciary Act, and, competent to bring the suit; but, agreed with the Chief Justice, that all the matters set up in the bill involved political questions, with the exception of the right and title of the Indians to the possession of the land which they occupied. Mr. Justice Thompson, referring to this branch of the case, observed: "For the purpose of guarding against any erroneous conclusions, it is proper I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed for by the bill may be beyond the reach of this court. Much of the matters therein contained by way of complaint, would seem to depend for relief upon

the exercise of political power; and, as such, appropriately devolving upon the executive, and not the judicial department of the government. This court can grant relief so far, only, as the rights of persons or property are drawn in question, and have been infringed." And, in another part of the opinion, he returns, again, to this question, and, is still more emphatic in disclaiming jurisdiction. He observes: "I certainly do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." We have said Mr. Justice Story concurred in this opinion; and Mr. Justice Johnson, who also delivered one, recognized the same distinctions.*

By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," &c., and as applicable to the case in hand, "to controversies between a State and citizens of another State,"—which controversies, under the Judiciary Act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction, and we agree, that the bill filed, presents a case, which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of

* 5 Peters, 29–30.

proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But, they are grievances, because they necessarily and inevitably tend to the overthrow of the State as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is, that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the State, which is or may be directed, or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true, the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers, that Georgia owns certain real estate and buildings therein, State capitol, and executive mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But, it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants.

The CHIEF JUSTICE: Without being able to yield my assent to the grounds stated in the opinion just read for the

dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill, is one of which this court has no jurisdiction.

BILL DISMISSED FOR WANT OF JURISDICTION.

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## LUKINS *v.* AIRD.

A debtor in failing circumstances cannot sell and convey his land, even for a valuable consideration, by deed without reservations, and yet secretly reserve to himself the right to possess and occupy it, for even a limited time, for his own benefit. Nor will this rule of law be changed by the fact that the right thus to occupy the property for a limited time is a part of the consideration of the sale, the money part of the consideration being on this account proportionably abated.

APPEAL (submitted) from the District Court of the United States for Western Arkansas. Aird being indebted, and having subsequently failed, either sold, or conveyed under a pretence of a sale, certain town lots, at Fort Smith, Arkansas, which he owned, and which had cost him, it seemed, $1900, to one Spring. Spring paid him $1200 in money; agreeing that Aird should have the use of two of the lots for one year free of rent, and with a privilege, so long as Spring did not desire to make any use of them himself, or to sell them, of renting them at $100 a year—the money paid being made less on account of this right to use the lots rent free for the year. Aird was at this time a single man, but was married directly afterwards, and occupied the two lots from November 23, 1853, till the spring of 1856. Lukins, one of his creditors, now filed a bill against both Aird and Spring, alleging that the transaction was fraudulent in fact and in law, and praying that the conveyance might be declared void, and the property subjected to the claims of creditors. The court below, conceiving that the proofs established no fraud in fact, and apparently, that the interest reserved was a part of the consideration, and not of great value, dismissed the bill. Lukins appealed, and the case was now here for review.

Opinion of the court.

*Mr. A. H. Garland, for the appellant*, went into an analysis of the evidence to show fraud in fact, and contended, also, that independently of this the case showed such fraud *in law* as vitiated the deed; referring to the statutes of 13 and 27 Elizabeth, and to the commentary on them, in Twyne's Case,* where goods were sold, and possession retained.

*No opposing counsel.*

Mr. Justice DAVIS delivered the opinion of the court.

It is not important to inquire, whether, as a matter of fact, the defendants had a purpose to defraud the creditors of Aird, for the fraud in this case is an inference of law, on which the court is as much bound to pronounce the conveyances in question void as to creditors, as if the fraudulent intent were directly proved. There is no necessity of any general discussion of the provisions of the statutes of Elizabeth, concerning fraudulent and voluntary conveyances, as this suit is within narrow limits, and the principle on which we rest our decision too well settled for controversy. The law will not permit a debtor, in failing circumstances, to sell his land, convey it by deed, without reservations, and yet secretly reserve to himself the right to possess and occupy it for a limited time, for his own benefit.† Such a transfer may be upon a valuable consideration, but it lacks the element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor, at the expense of those he owes. A trust, thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right—the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors.

* 1 Smith's Leading Cases, 1; see also Sexton *v.* Wheaton, 1 American Leading Cases, 18.

† Wooten *v.* Clark, 23 Mississippi (1 Cushman), 75; Arthur *v.* Com. & Railroad Bank, 9 Smeedes & Marshall, 394; Towle *v.* Hoit, 14 New Hampshire, 61; Paul *v.* Crooker, 8 Id. 288; Smith *v.* Lowell, 6 Id. 67.

In this case the conveyances which are impeached are attended with a trust of this nature, and cannot be sustained against the creditors of Aird. It is in proof that Aird retained the possession of the premises, which he sold and conveyed, from the 23d day of November, 1853, the date of the deed, until the spring of 1856, in pursuance of a parol agreement, incompatible with the conditions of the deed. By this agreement he reserved the right of possession for one year free of rent, and this reservation constituted a part of the consideration paid by Spring for the property, and, being contrary to the provisions of the deed, was the creation of a secret trust, for the benefit of Aird, to the extent of the interest reserved, and therefore rendered the conveyance fraudulent as to creditors, and void. If Spring could, in this way, pay part of the consideration, why not extend the term of the reservation, and pay the whole of it? It makes no difference in the legal aspect of this case, that the interest reserved was not of great value. It is enough that it was a substantial interest, for the benefit of the grantor, reserved in a manner which was inconsistent with the provisions of the deed.

DECREE REVERSED, and the court below ordered to enter a decree setting aside the conveyance as fraudulent.

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## WOOD *v.* STEELE.

The alteration of the date in any commercial paper,—though the alteration *delay* the time of payment,—is a material alteration, and if made without the consent of the party sought to be charged, extinguishes his liability. The fact that it was made by one of the parties signing the paper before it had passed from his hands, does not alter the case as respects another party (a surety), who had signed previously.

ERROR to the Circuit Court for the District of Minnesota.

Mr. Justice SWAYNE delivered the opinion of the court.

The action was brought by the plaintiff in error upon a promissory note, made by Steele and Newson, bearing date October 11th, 1858, for $3720, payable to their own order

one year from date, with interest at the rate of two per cent. per month, and indorsed by them to Wood, the plaintiff.

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time, it appeared on the face of the note, that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury, "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment. Instructions were asked by the plaintiff's counsel, which were refused by the court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the court as expressed to the jury, covered the entire ground of the controversy between the parties.

The state of the case, as presented, relieves us from the necessity of considering the questions,—upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month, exonerates the maker who has not assented to it.

Was the instruction given correct?

It was a rule of the common law as far back as the reign of Edward III, that a rasure in a deed avoids it.* The effect of alterations in deeds was considered in *Pigot's case*,† and

* Brooke's Abridgment, Faits, pl. 11. † 11 Coke, 27.

most of the authorities upon the subject down to that time were referred to. In *Master* v. *Miller*,* the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed: another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that *it is not his deed;* and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as

* 4 Term, 320, 1 Smith's Leading Cases, 1141.

little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly.*

The instruction was correct and the

JUDGMENT IS AFFIRMED.

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## WILSON *v.* WALL.

1. *Semble*, that under the treaty of the United States with the Choctaws, in 1830, by which the United States agreed that each Choctaw head of a family desirous to remain and become a citizen, &c., should be entitled to one section of land; "and in like manner shall be entitled to one-half that quantity *for* each unmarried child which is living with him over ten years of age, and a quarter section *to* such child as may be under ten years of age, *to adjoin the location of the parent;*" no trust was meant to be created in favor of the children. They were named only as measuring the quantity of land that should be assigned to the head of the family.
2. However this may be, if under the assumption that no trust was meant to be created, the United States have issued under the treaty a patent to a Choctaw head of a family, individually and in fee simple for all the sections, a purchaser from him *bona fide* and for value will not be affected with the trust, even though he knew that his vendor was a Choctaw head of a family, and in a general way that he had the land in virtue of the treaty.
3. Where it is sought to affect a *bona fide* purchaser for value with constructive notice, the question is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence.

ERROR to the Supreme Court of Alabama.

By the fourteenth article of a treaty made in 1830, between the Choctaw Indians and the United States, by which the

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* Goodman *v.* Eastman, 4 New Hampshire, 456; Waterman *v.* Vose, 43 Maine, 504; Outhwaite *v.* Luntley, 4 Campbell, 180; Bank of the United States *v.* Boone, 3 Yates, 391; Mitchell *v.* Ringgold, 3 Harris & Johnson, 159; Stephens *v.* Graham, 7 Sergeant & Rawle, 509; Miller *v.* Gilleland, 19 Pennsylvania State, 119; Heffner *v.* Wenrich, 32 Id. 423; Stout *v.* Cloud, 5 Little, 207; Lisle *v.* Rogers, 18 B. Monroe, 529.

Choctaws ceded their territories to the United States, it was thus stipulated:

"Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so by signifying his intention to the agents, &c., and thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines, and in like manner, shall be entitled to one-half that quantity *for* each unmarried child, which is living with him, over ten years of age; and a quarter section *to* such child as may be under ten years of age, *to adjoin the location of the parent.*"

Hall was such a head of a family, and at the date of the treaty had living with him seven children, of whom three were over and four under ten years of age. This gave one section as respected himself, and two and a half sections as respected his children. Having reported to the agent of the United States in making his claim, the number and ages of his children, but not their names, he secured a reservation of three and a half sections, including the section on which he lived. In 1841, a patent issued to him directly for the whole three and a half sections; the instrument reciting that these had been "located in favor of the said William Hall as *his* reserve." The words of grant in the patent "were to him and *to his heirs*," with a *habendum*, "*to his or their heirs and assigns forever.*"

In 1836, anticipating the issue of the patent, he sold the whole three and a half sections for $750, which was paid him, to one Wilson, who took possession and made valuable improvements on the land.

In April, 1849, Hall himself being dead, his children, now grown up, filed a bill in the Chancery Court of Alabama, against Wilson, to recover the two and a half sections, which were granted as respected them. Wilson admitted in his answer, knowledge that Hall was a Choctaw head of a family entitled to a reservation, but denied knowledge of what article of the treaty he claimed under.

It was conceded that in ascertaining to whom the patents

should issue for the lands under the treaty in question, it was not customary to take down or return to the government the names of children of heads of families, but that in executing the treaty, the agent returned the names of heads of families, with the number and ages of their children; and that in issuing the grants in fee simple, it had been customary to issue them in the form of the patent to Hall, until the year 1842. In that year an act was passed by Congress,* directing that as to lands located for Choctaw children, the patent should issue to such "Indian child if living," and if not living, to his heirs and representatives. A statute had previously passed,† referring to article fourteenth of the treaty, and appointing commissioners with full power to examine and ascertain the names of persons who had fulfilled the conditions of settlement so as to entitle them to patents, and to ascertain the quantity for each child "*according to the limitations contained in said article.*"

It also seemed that from the date of the treaty down to the act of 1842, the construction of the Executive Department had been, that no provision was made for children as independent beneficiaries, but that they were named as measuring the quantity of land that should be assigned to the head of the family. At least, referring to these provisions, the Commissioner of Indian Affairs had said to the Attorney-General in 1842:

"These words were construed by Mr. Secretary Cass, to give to the parent the title to the halves and quarters of a section stipulated for, in right of the children. This construction has been the uniform one of the department in executing the treaty, and patents have issued accordingly, of the correctness of which no doubt has been entertained heretofore. The register of those that applied to the agent under the article, contained the names of the heads of families only, which would seem to show that the children were not entitled in the opinion of the Indians themselves who furnished the materials for the register."

* 5 Stat. at Large, 515.

† Id. 180.

View of the court below.

On this case the questions were,

1. Whether, on a true construction of this fourteenth article of the treaty, Hall himself had held the two and a half sections adjoining the one on which he lived *in trust* for his children?

2. Whether, if he had himself held the sections in trust, Wilson, a *bona fide* purchaser for value, was affected with notice of that trust, the same not having been set forth on the face of the patent to Hall?

The Supreme Court of Alabama, where the suit finally went in that State, was of the affirmative opinion on both points.*

On the first question, that court's view was,—although a grant to one person *for* another, ordinarily created a trust,—that here the expression "*for* each unmarried child" might be admitted, if by itself, to be equivocal. But the words immediately following—"and a quarter section *to* such child as may be under ten"—the court thought shed light on the previous obscure expression, and sufficiently indicated the sense in which it was used. This was made more plain, the court considered, by the direction that the lands given in respect of the children should "adjoin the location of the parent." What was meant by the location of the parent? Obviously the section on which the parent's "improvement" was situated, where he lived, and which was reserved to him in absolute right. Lands which *adjoined* a parent's could hardly be deemed lands of the parent himself. The construction given to the article by the Executive Department of the government, and the form in which the patents were issued could not, the court conceived, change the meaning of the words of the treaty, nor control any court in interpreting them. There was therefore a trust for the children.

*On the second question*, the Supreme Court of Alabama thought that as Wilson knew when he made his purchase that Hall was "the Choctaw head of a family" and that

* See 34 Alabama, 288.

his right arose under the treaty, he ought, as a prudent man, to have inquired further. Lord Mansfield's language in *Keech v. Hall*,* was that "whoever wants to be secure should inquire after and examine the title deeds." Had Wilson made an examination of the treaty it would have informed him,—so the court considered,—that the right of Hall was confined to the single section on which his improvement was situated, and that all the rest of the land was for his children. He had failed to make an inquiry which it was his duty to make; and a court of equity would accordingly treat him as if he had actual notice.

Judgment having gone therefore in favor of the children, the case was now for review, here, where it was fully argued by *Mr. P. Phillips for the appellants*, in opposition to the view enforced by the State court of Alabama in its opinion as above presented. *No opposite counsel appeared.*

Mr. Justice GRIER delivered the opinion of the court.

When the United States acquired and took possession of the Floridas under the Louisiana treaty, the treaties which had been made with the Indian tribes remained in force over all the ceded territories, as the laws which regulate the relations with all the Indians who were parties to them. They were binding on the United States as the fundamental laws of Indian right, acknowledged by royal orders and municipal regulations. By these, the Indian right was not merely of possession, but that of alienation.

The parties to this contract may justly be presumed to have had in view the previous custom and usages with regard to grants to persons "desirous to become citizens." The treaty suggests that they are "a people in a state of rapid advancement in education and refinement." But it does not follow that they were acquainted with the doctrine of trusts. With them lands were either held in common by the whole nation or tribe, and the families were its fractions or portions. The head of the family could dispose of the property of the

* Douglas, 22

family as the heads of the tribe or nation could that of the nation.

Under the Spanish and French dominions, grants of land were always made to individuals in proportion to the number of persons composing the family. Thus, in *Frique* v. *Hopkins*,* the court said as follows:

"By the regulations of the Spanish government, if the individual who applied for land was unmarried, a certain quantity was given to him; if he had a wife this quantity was increased, and if he had children an additional number of acres were conceded. Now, if the circumstance of his being married made the thing given become the property of both husband and wife, we must, on the same principle, hold that where children were the moving cause, they too should be considered as owners in common of the land conceded. *That such was the effect of the donee having a family, was never even suspected. It certainly is unsupported by law.* Many donations are made in which the donee's having a wife and being burdened with a large family is a great consideration for the beneficence of the donor, but this motive in him does not prevent the person to whom the gift is made from being considered its owner, nor prevent the thing from descending to his heirs."

We can hardly expect the Indians to be very profound on the subject of adverbs or prepositions, and the agents of the government do not seem to have exhibited much greater knowledge of the proprieties of grammar, or they would not have left this section of the treaty capable of misconstruction or doubt when it was so easy to avoid it. The words of this 14th section of the treaty were construed by Mr. Secretary Cass, to give to the parent the title to the whole. This construction had been the uniform one of the department in executing the treaty, and patents were issued accordingly, of the correctness of which no doubt was entertained. The register of those that applied to the agent under the article, contained the names of the heads of families

* 4 Martin, 212.

only, which would seem to show the Indian construction of the contract or treaty. Accordingly, on the 29th of June, 1841, a patent was granted to William Hall, *not* for himself and his children—but to him and his heirs. At this time the Secretary had no means of ascertaining the names of the children so that separate patents might be given them in case of a different construction given to the treaty. In all others of the numerous treaties made with the Indians (more of them made by Governor Cass than by any other person), where lands were reserved, or agreed to be granted to any Indian, the name of the grantee and quantity to be given were carefully stated in the treaty.

As this section of the treaty was capable of a different construction, Congress, on the 23d of August, 1842, in order to save something for the children from the folly or incapacity of the parent, appointed commissioners with full power to examine and ascertain the names of the parties who had fulfilled the conditions of settlement to entitle them to patents for their land, and ascertain the quantity for each child, "*according to the limitations contained in said article.*"

Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the department, it cannot affect titles before given by the government, nor does it pretend to do so. Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals. The legislature may prescribe to the executive how any mere administrative act shall be performed, and such was the only aim and purpose of this act.

In the Cherokee treaty, where a grant of 640 acres was given to persons "willing to become citizens," a life estate only was given to the settler, with *reversion to his children.* This treaty makes no such provision for children. The construction given by the representatives of both parties to the treaty, and the grants issued under it, were not revoked, nor could they be, by mere legislative act, founded on a different

construction of a doubtful article of the treaty. The treaty only describes the person who is contingently entitled to the reservation. He must be a Choctaw, and a head of a family, and *desirous not only* to remain, but must signify to the agent his *intention to do so.* These are conditions precedent, on the performance of which he shall, "*thereupon* be entitled to a reservation of 640 acres, and *in like manner shall be entitled* to half that quantity *for* each unmarried child which is living with him over ten years, and a quarter section *to* such child as may be under ten years," and if they reside upon the land, intending to become citizens for *five years, &c.*, "*a grant in fee-simple shall issue,*" *&c.* The father alone could fulfil the conditions; he would not be entitled to the additional land unless for a child that "*was living with* him." The treaty did not operate as a grant, and a patent was necessary to the person who alone could perform the conditions.

We do not consider it necessary to vindicate the conclusion to which we have arrived in this case, by further argument on the grammatical construction of this section of the treaty. Assume that the construction put on the treaty by the court below may possibly be correct. What then are the facts of the case? The complainants below have applied to a court of chancery, which should be a court of conscience, to vacate the title of a *bona fide* purchaser, who purchased and paid his money and expended a life's labor on land granted by patent from the United States, conveying a fee-simple estate, which was issued by the officers of the government without intention of imposing any trust on the grantee, or limiting it on the face of the deed.

It is contended that the purchaser is affected with notice of the terms of the treaty referred to in his patent.

If there be any trust for children it must be a constructive trust, which is negatived by the express terms of the grant. How can a chancellor build up by the words *for* and *to*—words of equivocal import and doubtful construction—an equitable title in the children? The fact is clear that such was not the construction under which the grantor gave the deed or the grantee accepted it. A chancellor will not

be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors,* where he says: "In *Ware* v. *Lord Egmont* the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

The application of these principles of equity to the present case is too apparent to need further remark.

JUDGMENT REVERSED.

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## THE WATCHFUL.

1. A libel case, charging the vessel and cargo to be prize of war, dismissed because no case of prize was made out by the testimony.
2. But because the record disclosed strong *prima facie* evidence of a violation of the laws of navigation, and probably of our revenue laws also, the case was remanded, with leave to file a new libel according to these facts.

APPEAL from the District Court for the Eastern District of Louisiana.

In that court the schooner Watchful and cargo had been libelled as prize of war, and a decree rendered dismissing the libel, and restoring the property to the claimant.

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* Page 622.

Statement of the case.

The claimant, one Wallis, to whom the property plainly belonged, was a citizen of Pennsylvania, residing at Philadelphia, and the evidence showed no reason to doubt his loyalty to the Federal government during the recent war. Nor was there any proof of intention to break the blockade or to trade with the enemy. It appeared only that the claimant had sold, in the late civil war in Mexico, to that party which was led by President Juarez, two hundred and fifty-two cases of firearms, which he had agreed to deliver on the Mexican coast, near Matamoras, and when his vessel arrived near that place, it was found that the French army occupied the post, and no delivery could be made to the Juarez party. Under these circumstances, the officer in command started for New Orleans, not then blockaded, but in possession of the Union forces. On the way to that port his vessel was captured and sent in as prize.

The record did, however, seem to disclose some facts, in other respects, of a sinister character. It seemed to show that the vessel had cleared for Hamburg, when her real destination was Matamoras; that after she was out at sea, her clearance had been altered by erasing the word "Hamburg" and substituting in its place the word "Matamoras;" that a false manifest had been used, and that the fact of the main cargo of two hundred and fifty-two cases of arms being on board, had been purposely concealed from the custom-house officers at New York, whence the vessel sailed.

Upon these latter facts, the Attorney-General now insisted that even admitting that there might be no sufficient proof of intent to break the blockade or to trade with the enemy, and so that the case was not one of prize, yet that the record before the court disclosed such a gross violation of our navigation laws, and possibly of our revenue and neutrality laws, that the case should be remanded to the District Court, with leave to file a new libel, or for such other proceedings as the government may deem advisable in the matter.

The claimant was not represented in this court by counsel.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

It is very clear that there is no case of prize made out by the evidence. The property, which was undoubtedly Wallis's, was therefore not enemy property; nor is there any evidence of intention to break the blockade or to trade with the enemy. The case is so destitute of all the elements of prize that the present libel was properly dismissed.

As to the other point more insisted on by the Attorney-General. The record, as it stands, shows that the vessel cleared for Hamburg, when her destination was certainly Matamoras. That her clearance was probably altered after she was at sea, by writing over the word "Hamburg" the word "Matamoras." That a false manifest was used, and the fact of the main cargo of two hundred and fifty-two cases of arms being on board, was carefully concealed from the officers of the customs at New York, from which port she sailed. It is not necessary to go any further into this evidence, or to express any other opinion on it, than to say that it presents a *prima facie* case of violation of municipal law, which justifies further investigation.

In the case of *United States* v. *Weed et al.*,* we had occasion, at the last term, to consider the question of the practice proper under such circumstances. We then came to the conclusion that where sufficient evidence was found to justify it, the case would be remanded to the court below for an amendment of the libel, or for such other proceedings as the government might, under all the circumstances, choose to adopt.

The judgment of the District Court, dismissing the libel in prize, is accordingly affirmed, but that part of the decree awarding restitution of the vessel and cargo, is reversed, with directions to allow libellant a reasonable time to file a new libel. If this is not done within the time thus fixed by the court, the property to be restored by a new decree.

* 5 Wallace, 62.

## WICKER *v.* HOPPOCK.

1. The rules about judicial sales which make void as against public policy agreements that persons competent to bid at them will not bid, forbid such agreements alone as are meant to prevent competition and induce a sacrifice of the property sold. An agreement to bid, the object of it being fair, is not void.
2. On a breach of a contract to pay, as distinguished from a contract to indemnify, the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken.

ERROR to the Circuit Court for Northern Illinois.

Caldwell being owner of a distillery, subject to a mortgage to Hoppock, leased it to Chapin & Co. for three years; it being agreed by the lease itself that the rent, so much a year, should be paid by Chapin & Co. directly to Caldwell the mortgagee, so as to keep down in part the interest on the mortgage. Chapin & Co., after being for about eighteen months in occupation of the distillery, and accumulating at it a considerable amount of personal chattels, such as are commonly used about such a place, assigned the lease to one Wicker under some sort of partnership arrangement, and Wicker went in. The rent not having been paid, according to his agreement, by Chapin & Co. to Hoppock, the mortgagee, Hoppock applied now to Wicker to pay it, giving him to understand that unless he did pay it, suit of foreclosure would have to be brought on the mortgage, and he dispossessed. After some negotiations, Wicker, who it seemed was desirous of becoming owner of the personal chattels which Chapin & Co. had left at the distillery, agreed with Hoppock that if he, Hoppock, would sue Chapin & Co. for the amount of rent in arrear and obtain judgment and levy on the property, he, Wicker, "would bid it off for whatever the judgment and costs might be." Hoppock did accordingly sue and obtain judgment against Chapin & Co.; the judgment having been for $2206. Chapin & Co. were indebted also to Wicker on some transactions growing out of the distillery; and Wicker, who asserted himself to have advanced money on it, caused most of the property already mentioned as left by Chapin & Co., to be removed to Chi-

cago. Hoppock's counsel meaning to proceed with his execution, gave notice to Wicker of the intention to sell and of the day of sale. Wicker, however, did not attend the sale, nor was any bid made in his name. And all the property of Chapin & Co. that was there and could be levied on was knocked down to Hoppock, the only bidder, for the sum of two dollars. Thereupon Hoppock brought *assumpsit* in the Circuit Court for Northern Illinois—the suit below—against Wicker to recover damages for the breach of his agreement to appear at the sheriff's sale and bid off the property levied on for the full amount of the judgment for which the execution issued.

The court below, against requests by the defendant's counsel to charge otherwise, considered and charged—

1. That the agreement between Hoppock and Wicker was not invalid as tending to prevent the fairness of a judicial sale, and therefore against public policy.

2. That the measure of damages was the amount of the judgments with interest and costs.

The case was now here on writ of error by Wicker, for a review on these points.

*Mr. C. H. Reed, for the plaintiff in error:*

The agreement between Wicker and Hoppock was invalid because calculated to interfere with, and prevent the fairness and freedom of a judicial sale; and prevent competition, and therefore against public policy.

1. The law guards all judicial sales with jealous care, and any agreement or understanding, that any one person competent to bid will abstain from bidding, will not be enforced, no matter how pure the motive moving to such agreement. It matters not even if the defendant in the writ assents to such agreement, for his creditors, as well as himself, have a right to say that nothing shall be done tending to sacrifice his property.* In this case, by carrying out the agreement,

* Thompson *v.* Davies, 13 Johnson, 112; Jones *v.* Caswell, 3 Johnson's Cases, 29; Brisbane *v.* Adams, 3 Comstock, 129; Slingluff *v.* Eckel, 24 Pennsylvania State, 472.

Hoppock could not bid at the sale. It is no answer to say that Hoppock was not bound to bid, and might not have done so even if there had not been this agreement. It is sufficient to say, that independently of this agreement (which in its spirit did put him under an obligation to leave all bidding to Wicker), he was competent and at liberty to bid.

2. *As to the measure of damages.* Hoppock himself now holds the judgment against Chapin & Co., in full force, except as to the two dollars bid by himself; and he holds at the same time a judgment against Wicker for the full amount of such judgment, and he holds over and above both the property sold to him at the sheriff's sale. And he would seem to have the right to hold on to and enforce and enjoy all unless this judgment against Wicker be reversed; for Wicker does not stand in the relation of surety for Chapin & Co., nor is he in any position upon any known principle of law or equity, to be subrogated to the judgments against them, on paying the judgment against himself. This singular result is the consequence of the erroneous rule of damages adopted by the court below. It arose out of a departure by the court from that salutary and elementary principle, that in all actions upon contract, "the damages are *strictly limited* to the *direct pecuniary* loss resulting from a breach of the agreement in question."*

If Chapin & Co. were solvent, and they are presumed to be,† then the direct pecuniary loss sustained by Hoppock by the failure of Wicker to bid, was but nominal, as his judgments would be worth par, and they could be worth no more had Wicker fulfilled his agreement. If they were good for a portion, then Hoppock's direct pecuniary loss was only equal to the balance. Whatever the property was worth that Hoppock bid off at the sheriff's sale, should also be deducted from his direct pecuniary loss, for had Wicker bid it off, Hoppock certainly could not. Yet without any ref-

* Sedgwick on Damages, 204.

† Walrod *v.* Ball, 9 Barbour, 271.

erence to these questions, the court below instructed the jury peremptorily to find as damages the full amount of the judgments and interest.

*Mr. S. W. Fuller, contra:*

1. The rules relied on by the other side about judicial sales only forbid agreements made with a fraudulent purpose, and agreements *not to bid* at such sales. See specially in the Supreme Court of Massachusetts, *Phippen* v. *Stickney*;* in that of New York, *Bame* v. *Drew*,† and in Illinois, *Garrett* v. *Moss et al.*‡

2. The amount which would have been received if the contract had been kept, is the measure of damages, if the contract is broken.§

Mr. Justice SWAYNE delivered the opinion of the court.

It is said that the agreement between the parties "was invalid because calculated to interfere with, and prevent the fairness and freedom of a judicial sale; and prevent competition, and therefore against public policy."

The contract was, that the defendant in error should procure judgments against Chapin & Co. for the rent in arrear, levy upon the machinery and fixtures in the distillery, and expose them for sale, and that the plaintiff in error should bid for them the amount of the judgments.

The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished. If the object be fair—if there is no indirection—no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained.

In one of the cases to which our attention has been called,‖

* 3 Metcalf, 384. † 4 Denio, 287. ‡ 20 Illinois, 549.

§ Alder et al. *v.* Keighley, 15 Meeson & Welsby, 116; Hill *v.* Smith, 12 Id. 617; Thompson *v.* Alger, 12 Metcalf, 428; Thomas *v.* Dickinson, 23 Barbour, 431.

‖ Phippin *v.* Stickney, 3 Metcalf, 384.

there was an agreement between two persons, that one of them only should bid, and that after buying the property, he should sell a part of it to the other upon such terms as the witnesses to the agreement should decide to be just and reasonable.

In another* it was agreed that a party should bid a certain amount for a steamboat, about to be sold under a chattel mortgage, and transfer to the mortgagor an undivided interest of one-third, upon his paying a corresponding amount of the purchase-money.

In a third case† the agreement was between a senior and a junior mortgagee. The former agreed to bid the amount of his debt for a specific part of the mortgaged premises.

In each of these cases the arrangement was sustained upon full consideration by the highest judicial authority of the State.

In the case before us the agreement was, that Wicker should bid. There was no stipulation that Hoppock should not. There was nothing which forbade Hoppock to bid, if he thought proper to do so, and nothing which had any tendency to prevent bidding by others. The object of the contract obviously was to be secure—not to prevent bidding. The benefit and importance of the arrangement to the interests of the judgment debtors is made strikingly apparent when the subject is viewed in the light of the consequences which followed the breach of the agreement. Instead of the property selling for the amount of the judgments, Hoppock was the only bidder, and the property sold was struck off to him for a nominal sum.

There was no error in the ruling of the court upon this subject.

It is urged that the court erred in instructing the jury, that if the plaintiff was entitled to recover, the measure of damages was the amount of the judgments, with interest and the cost.

* Bame *v.* Drew, 4 Denio, 290.

† Garrett *v.* Moss et al., 20 Illinois, 549.

Opinion of the court.

The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. In some instances he is made to bear a part of the loss, in others the amount to be recovered is allowed, as a punishment and example, to exceed the limits of a mere equivalent.

It has been held that, "where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach thereof, at a trifling expense or with reasonable exertions, it is his duty to do it; and he can charge the delinquent party with such damages only, as with reasonable endeavors and expense, he could not prevent."*

If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case, a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid.

In a note of Sergeant Williams to *Cutler and others* v. *Southern and others*, it is said that in all cases of covenants to indemnify and save harmless, the proper plea is *non damnificatus*, and that if there is any injury, the plaintiff must reply it, but that this plea "cannot be pleaded, when the condition is to *discharge or acquit* the plaintiff, from such bond or other particular thing, for the defendant must set forth affirmatively the special manner of performance."†

In *Port* v. *Jackson*,‡ the assignee of a lease covenanted to

* Miller *v.* Mariners' Church, 7 Greenleaf, 56; Russell *v.* Butterfield, 21 Wendell, 304; Ketchell *v.* Burns, 24 Ib. 457; Taylor *v.* Read, 4 Paige, 571; United States *v.* Burnham, 1 Mason, 57.

† Sanders, 117, note 1.

‡ 17 Johnson, 239.

fulfil all the covenants which the lessee was bound to perform. It was held that the agreement was substantially a covenant to pay the rent reserved, as it should accrue; that a plea of *non damnificatus* was bad, and that the assignor could recover the amount of the rent in arrear as soon as a default occurred, without showing any injury to himself by the delinquency of the assignee. The assignee was liable also to the lessor for the same rent by privity of estate. The judgment was unanimously affirmed by the Court of Errors.

In *The Matter of Negus*,* the covenant was to pay certain partnership debts, and to indemnify the covenantee, a retiring partner, against them. It was held that the covenant to indemnify did not impair the effect of the covenant to pay, and the same principle was applied as in the case of *Port* v. *Jackson*. We might refer to numerous other authorities to the same effect, but it is deemed unnecessary.

In the case before us, as in the cases referred to, the defendant made a valid agreement, in effect, to pay certain specific liabilities. They consisted of the judgments of Hoppock against Chapin & Co. If Wicker had fulfilled, the judgments would have been extinguished. As soon as Hoppock performed, the promise of Wicker became absolute. No provision was made for the non-performance of Wicker, and the further pursuit by Hoppock of the judgment debtors. Indemnity was not named. That idea seems not to have been present to the minds of the parties. The purpose of Hoppock obviously was to get his money without the necessity of proceeding further against Chapin & Co. than his contract required. There is no ground upon which Wicker can properly claim absolution. He removed and keeps the property he was to have bought in. The consideration for his undertaking became complete, when it was exposed to sale. The amount recovered only puts the other party where he would have been if Wicker had fulfilled, instead of violating the agreement.

The rule of damages given to the jury was correct.

JUDGMENT AFFIRMED.

* 7 Wendell, 503.

## UNITED STATES *v.* ADAMS.
## SAME *v.* JOHNSON.
## SAME *v.* CLARK.

1. The act of March 3, 1863, concerning the Court of Claims, confers a right of appeal in cases involving over $3000, which the party desiring to appeal can exercise by his own volition, and which is not dependent on the discretion of that court.
2. When the party desiring to appeal signifies his intention to do so in any appropriate mode within the ninety days allowed by that statute for taking an appeal, the limitation of time ceases to affect the case; and such is also the effect of the third rule of the Supreme Court concerning such appeals.
3. It is no ground for dismissing such appeal, that the statement of facts found by the Court of Claims is not a sufficient compliance with the rules prescribed by the Supreme Court on that subject.
4. But the Supreme Court will of its own motion, while retaining jurisdiction of such cases, remand the records to the Court of Claims for a proper finding.
5. A finding which merely recites the evidence in the case, consisting mainly of letters and affidavits, is not a compliance with the rule; but a finding that a certain instrument was not made in fraud or mistake *is* a proper finding without reporting any of the evidence on which the fact was found.

THESE were three motions: the first two to dismiss appeals from the Court of Claims, one in the case of Adams, and one in the case of Johnson; the third, in the case of Clark, a motion for a *certiorari* designed to require that court to make a more extended statement of the evidence on which they had made a particular finding. The motion in the first two cases resting on more grounds than one; in the third, on one ground only.

To understand the cases well, it is necessary to refer to the statutes and rules which regulate appeals from the Court of Claims. An act of March 3, 1863, provides that "either party may appeal to this court, &c., where the amount in controversy exceeds $3000, *under such regulations as the said Supreme Court may direct: Provided*, That such appeal shall be taken within *ninety* days after the rendition of such judgment or decree."

Statement of the case.

At the December Term, 1865, the Supreme Court prescribed certain regulations by which appeals might be taken.

The first rule prescribes that the *Court of Claims* shall make a *finding of the ultimate facts* or propositions which the evidence shall establish, in the nature of a *special verdict*, and *not* the evidence on which these ultimate facts are founded, and also conclusions of law, which findings of fact and conclusions of law shall be certified to the Supreme Court as part of the record.

The third rule prescribes that "in all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof, in vacation, is essential, *and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.*"

The forty-eighth rule of the Court of Claims provides that "whenever such application for an appeal is made in vacation, the same shall be filed with the clerk of this court, *and such filing shall be deemed the date of the application for an appeal.*"

The act of March 3, 1863, provides "that the said Court of Claims shall hold *one* annual session, commencing on the first Monday in October in each year, and continuing as long as may be necessary for the prompt disposition of the business of the court;" and an act of March 17, 1866, "that the *regular session* of the Court of Claims shall hereafter commence on the first Monday of December, in each year."

In this state of statutes and rules, judgment was rendered by the Court of Claims in the case of *Adams* in his favor on the 19th March, and in the case of *Johnson*, on the 25th. The court adjourned on the 20th of May to the 25th of June. On the 10th of June the solicitor of the United States for the Court of Claims, Mr. Norton, filed in the office of the clerk, a paper, in the case of Adams, of which the following is a copy:

*Theodore Adams* v. *The United States.*

1886.

The United States, by E. P. Norton, its solicitor, makes application to the Honorable Court of Claims for an appeal of the

case of *Theodore Adams* v. *The United States*, to the Supreme Court of the United States.

E. P. NORTON,
Solicitor for the United States.

A similar paper was filed in the case of Johnson, at the same time. On the first day that the court was in actual session, to wit, on the 25th day of June, the solicitor moved for an allowance of these appeals, and on the next day the court made an order allowing them. The order was thus made more than ninety days after the judgments were rendered.

In these two cases, therefore, grounds of motion to dismiss were:

1. Because the appeal must be taken within ninety days after the rendition of the decree, and in this case the said period has elapsed.

2. Because the taking of an appeal in cases decreed by the Court of Claims consists of two things: 1st. Of an application for an appeal, which may be made to the court in term time, or by filing an application in the method prescribed by the rules when made in vacation. 2d. Of an allowance of the appeal so applied for by the court, and that both the application for and the allowance of the appeal must be made within the said term of ninety days from the rendition of the decree.

3. Because the application made for an appeal in this case, and filed in the clerk's office June 10, 1867, is irregular and void, having been made in term time, and not in vacation, as contemplated by the rules of court.

And in all three of the cases an additional ground was assigned, viz.:

That the record had not been made up and settled, as the first rule of the Supreme Court, made at December Term, 1865, required.

As to this part of the matter it appeared—

1. *In the Adams case*, that the findings were put under twenty different numbered paragraphs; that under one of

them a joint resolution of Congress was set out in full; and under others, parts of acts of Congress. Withal, the finding made a sequent, orderly and intelligible statement, and was comprised within less than six pages 8vo, chiefly of small pica type.

2. *In the case of Johnson*, the form of finding was different. Somewhat less than two pages were occupied with narrative and clear account of a settlement by him upon valuable and unoccupied public lands in Washington Territory, where he erected buildings, which the government of the United States, operating against hostile Indians, had taken to its own use. But the rest of the finding consisted of nine pages of Government Correspondence from the Land Office, Department of the Interior, Register's Office at Vancouver, with various affidavits from settlers and others, a joint resolution of Congress, and many other documents, about twenty in all, set out *in extenso*, signatures, &c., with very little in the nature of a finding of *ultimate* facts. It ended with a succinct statement of the court's conclusions of law, on what was called "findings of fact."

3. *In the case of Clark*,—where the motion was for a *certiorari* to require the Court of Claims to make a more extended statement of the evidence on which they found,—no documents or evidence were set out. On the contrary, the petition having set forth that the petitioner having agreed by *correspondence*, with its authorized agents, to furnish to the government a certain quantity of potatoes, in a certain manner, the government agents had afterwards prepared formal articles of agreement, which he signed without advice of counsel, and not knowing at the time but that they truly and fairly stated the actual agreement of the parties, and that the contract was not truly stated in the articles, but by mistake or fraud was misstated,—the finding on this head ran thus:

"That the allegations of fraud or mistake in the concoction of the written agreement is not sustained by the evidence in the case."

*Messrs. Carlisle, Corwine, and Wills, in support of the motion to dismiss the appeals of Adams and Johnson:*

I. *As to the regularity of those appeals.* The statute gives an appeal under such regulations as this court may prescribe. The regulations when prescribed are as if part of the statute. By the terms of the statute, the appeal must be taken within ninety days. No regulation can alter this. The time is peremptory. In this case no appeal was "taken," "allowed," or even prayed for, till the ninety days had expired. All the party did was to pray an appeal generally, and of this jurisdiction cannot be taken.

There was no "vacation" between the 20th May and the 25th June. By the act of March 3d, 1863, and that of 17th March, 1866, the term is limited, but its duration is without limit. The "vacation," therefore, referred to in the rule under consideration, had not occurred when this application was filed with the clerk: on the contrary, the court was in session.

A vacation is defined by Bouvier to be the period of time between the end of one term and the beginning of another.*

A vacation is a different thing from a continuance, the result of an ordinary adjournment.† Adjournment, in the English practice, is a day so called from its being a further day appointed by the judges at the regular sittings to try causes at *nisi prius*. Adjournment day in Error, in English courts, is a day appointed some days before the end of the term, at which matters left undone on the affirmance are finished. But the whole term is considered as but one day. So, no vacation having occurred, the application should have been made to the court, the only tribunal or authority at that time authorized to receive and hear it.

II. *As to the forms of the findings in all three cases, and of the motion for certiorari in the third.* The object of the rule laid down by the Supreme Court was to get a clean, clear narrative of ultimate facts, a case like a case stated, or agreed on or found by special verdict, so that the court could give an

* 2 Law Dictionary. † 1 Id.

opinion, in a form perfectly abstract, *upon* that case, and without any arguing of what the case was, or summoning up or back of facts. In the case of Adams, and especially in that of Johnson, the first and second cases, we have evidence of facts; leaving this court to settle the facts, a matter which it was the purpose of the rule to relieve it of. In the case of Clark, the finding is objectionable in the other way; that is to say, from its curtness. A *certiorari* to bring up a fuller case is necessary.

*Mr. Norton, Solicitor of the Court of Claims, contra:*

I. *As to the appeals of Adams and Johnson.* The appeal is *taken* when the application is made; for what else can the applicant for an appeal do? He has no bond to give, no additional act to perform; no control over any subsequent proceeding. The order of allowance may be made at any time.

The rule of the Supreme Court does not prescribe how the application shall be made, whether in open court orally, or by the filing of an application with the clerk, but that the making of the application, whether in the one mode or the other, shall be all that is required from the appellant.

The statute allowing ninety days would be nugatory, if the appellant had not been permitted to file his application with the clerk. If the court be not in session or the chief justice is absent, there is no other mode of taking an appeal.

It is contended that there can be no *vacation* until after the final adjournment *sine die*. But the act of March 17th, 1866, in providing that the *regular* session of the Court of Claims should be on the first Monday of December in each year, contemplated that there might be *irregular* sessions.

In the early period of the history of English courts, *vacations* of courts had no regularity, and the word was sometimes applied to the interval of a portion of a day. The words *interval*, *recess*, and *vacation*, are synonymes.

II. The objections to the finding seem to be too technical. As to the cases of Adams and Johnson, if requiring to be rectified, the findings can be rectified by a remand, and without dismissing the cases. As to the case of Clark, where

a *certiorari* is asked to enlarge the finding, the finding seems in precise right form.

Mr. Justice MILLER delivered the opinion of the court.

Motions are made in the case of *United States* v. *Adams*, and of the *Same* v. *Johnson*, to dismiss the appeals, upon the ground that they were not taken within the ninety days to which the act of Congress limits the right of appealing from the judgments and decrees of that court.

The fifth section of the act of March 3, 1863, under which the proceedings in appeal were had, enacts that "either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court, wherein the amount in controversy exceeds three thousand dollars, under such regulations as said Supreme Court may direct: *Provided*, that such appeal shall be taken within ninety days after the rendition of such judgment."

This language implies that taking an appeal is a matter of right, and is something which the party as distinguished from court may do. When the court has rendered its judgment "either party may appeal." That is, has the right to appeal, and may exercise that right by his own volition. The court cannot prevent it, nor is the right dependent upon any judicial discretion.

So also the language of the *proviso* is to the same purport. The appeal is to be *taken* within ninety days, not granted, or allowed, or permitted, but taken—a word which implies action on the part of the appellant alone. So that, whatever the proceeding may be which constitutes appealing, or taking an appeal, it must be something which the party can do; and it would seem that no regulation of the Supreme Court, nor any judicial discretion of the Court of Claims, can deprive him of the right, though the former may frame appropriate rules in accordance with which the right must be exercised.*

* Hudgins et al. *v.* Kemp, 18 Howard, 530; Dos Hermanos, 10 Wheaton, 306; The Enterprise, 2 Curtis C. C. 317.

We consider the paper filed by the solicitor in the office of the clerk of the court as sufficient in form to indicate the intention to exercise this right. It is addressed to the court, refers properly to the case, claims an appeal, and calls upon the court to take the action which the rules prescribed by the Supreme Court require of it.

But it is claimed that the rule so prescribed has not been complied with, and therefore the appeal is not taken within time. The third rule, the one here referred to, is this: "In all cases an order of allowance of appeal by the Court of Claims, or by the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal."

The language of the rule would have been more technically accurate if the word "taking" had been used instead of "granting," but the latter word is used in the rule to express the idea conveyed by the former in the statute.

To understand why the Supreme Court required an allowance of the appeal by the Court of Claims it is necessary to consider the two rules which precede this. A statute passed a year or two after the one we have been considering gave the right of appeal in cases where judgments had been rendered long previous to its passage. In framing rules upon this subject the Supreme Court determined that these rules should be so drawn that only questions of law could be brought here for review. The first rule provided that the party desiring to appeal, in cases decided before the rules were made, should present his petition to the Court of Claims, setting forth the questions of law decided against him which he desired to have reviewed; and that court was required to certify what had been its rulings on those questions. By the second rule the court was required, in all appealable cases thereafter decided, to make a finding of facts, and of their conclusions of law thereon, and make it a part of the record.

It is obvious that in both of these classes of cases it was proper that the attention of the court should be called to the

taking of an appeal, and that it should not be treated as perfected until that court had prepared the statement of facts, or the statement of its rulings on questions of law which these rules prescribed. If something of this kind had not been required, the appeal might have been taken and the record filed in this court before the rule had been complied with.

But that the delay in doing this might not prejudice the party desiring to appeal, the rule expressly provides that the statute of limitations shall cease to run from the time the application is made. In other words, the framers of the rule, treating the appeal as taken within the meaning of the statute when the application is made for its allowance, provide that the delay in making out a proper statement of facts and judicial rulings, and then allowing the appeal (which C. J. Taney says, in *Hudgins* v. *Kemp*, "is merely an authority to the clerk to transmit the record"), shall not operate to defeat the appeal.

Much minute criticism has been expended on the question whether the adjournment of the court from May to June was a vacation within the meaning of the rule, and whether the application should have been made to the court or to the chief justice. The rule says, the *allowance* may be made by the court, or, if there is a vacation, by the chief justice, but it does not prescribe the form of the application, or how or to whom it shall be made. We think that whether done in vacation or in session, or during a temporary recess, the rule adopted by that court of requiring the application to be made by filing it with the clerk, is a very proper one.

We are therefore of opinion that the filing of this paper was taking the appeal, and that the delay in the subsequent proceeding to render it effectual do not touch its validity.

Another ground for the motion to dismiss these cases is, that the statement of facts found by the court, and their conclusions of law thereon, are not a sufficient compliance with the rule of the Supreme Court on that subject. It is said that the statement of facts is a mere recital of the evidence, and not the results of evidence as found by the court.

Conceding for the present that these records are fairly liable to the objection made, does it follow that for this reason the appeals should be dismissed?

In discussing the first ground on which the dismissal of these cases is claimed, we have seen that an appeal is a right given to the party by the statute, of which the Court of Claims cannot deprive him. It would be a violation of this principle if this court should refuse to consider his appeal, because the Court of Claims has erred in its attempt to comply with a rule of this court prescribing the character of the record to be sent here.

If the Court of Claims had made no attempt to comply with this part of the rule, we do not perceive how that would deprive this court of its jurisdiction of the case, or the appellant of his right to be heard. In such case, there is undoubtedly in this court, as in all appellate courts, a means of enforcing compliance with the rule, without permitting its jurisdiction, or the rights of appellant, to be defeated. But there is no such case here. The Court of Claims has made a finding of facts, and conclusions of law, and has shown its intention to comply in good faith with the rule of this court. Whether it be a sufficient compliance or not, is a question which does not affect the jurisdiction of this court, and is no ground for dismissal of the cases. The motions to dismiss are therefore overruled.

The rule above referred to, however, was made for the protection of this court, as well as to secure a finding of facts, by a tribunal which must of necessity inquire into them fully, and which, having ample time, and being otherwise every way competent, may be relied on to find them truly. In consequence of the suggestions of counsel in these cases, and in several others, said to be in the same category, we have examined into the statement of facts certified to us, to see if the rule is complied with. In all that we have examined, except the two named at the head of this case,* the statement is free from objection. In the case of *United*

* *Supra*, p. 101.

*States* v. *Adams*, the propositions of fact are stated more *in extenso* than is either necessary or desirable, and are subdivided into a greater number of distinct propositions than are useful or conducive to clearness.

There are also certain acts and joint resolutions of Congress found as facts, of which this court must take judicial notice, which are, therefore, in no sense, facts to be found.

But after all, there is within a reasonable compass, and fairly stated, the main ultimate propositions of fact, on which this court can determine the principles of law, which must control the case.

But in the case of *United States* v. *Johnson*, it is different. We have first a detailed history of Johnson's transactions in settling on certain land, which is the foundation of his claim, with no attempt to deduce from this recital any ultimate fact, to which a proposition of law can be applied. This is followed by from fifteen to twenty affidavits and letters, given in full, from various officers in the department of the public lands, and other persons. What facts these letters and affidavits are intended to establish, we have not stopped to inquire, because it was the object of the rule to impose upon the Court of Claims the duty of drawing the inferences and conclusions which such documents are supposed to establish, or to decide that they do not establish them. The statement in this case is, in this respect, a reproduction of the finding which we rejected in the case of *Burr* v. *The Des Moines Navigation Co.*,* to which this court refers in the rules as containing a judicial exposition of the principles on which they are founded.

No doubt it is often difficult to draw the line between a mere recital of the evidence produced in the case, and a finding of the facts which that evidence establishes; and where the statement certified by the Court of Claims is reasonably sufficient, we hope we shall not be found captious. But in the case we have mentioned, there is such a wide departure from the principle which lies at the foundation of the rule,

* 1 Wallace, 102.

that while we shall retain jurisdiction of the case, the record will be remanded to the Court of Claims, with directions to return a finding of the facts, in accordance with the rule.

These principles also dispose of the motion for *certiorari* in the case of *Clark et al.* v. *United States*. The motion there is designed to require the Court of Claims to make a more extended statement of the evidence on which they find, "that the allegation of fraud or mistake in the concoction of the written agreement is not sustained by the evidence in the case."

This is precisely the character of finding which the rule of this court was intended to produce. The existence of the fraud or mistake set up in the pleading is one of the ultimate facts to which the law of the case must be applied, in rendering a judgment, and this court does not purpose to go behind the finding of the Court of Claims on that subject. To do so would require an examination of evidence, and a comparison of the weight to be attached to each separate piece of testimony, and the drawing of inferences from the whole, which is the peculiar province of a jury, and which, by our rule, we intended to exclude from the consideration of this court, by making such finding by the Court of Claims conclusive. The motion in that case is, therefore, overruled.

MOTIONS OVERRULED in all the cases, but in the second case the record remanded with directions to make a new finding of facts in accordance with the rules of court on the subject.

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## LEAGUE *v.* ATCHISON.

Under the fifteenth section of the statute of limitations of Texas, which enacts that "every suit instituted to recover real estate as against him, her, or them in possession under title or color of title, shall be instituted within three years next after the cause of action shall have accrued," and which adds that "by the term *title*, as used in this section, is meant *a regular chain of transfer* from or under the sovereignty of the soil; and *color of title* is constituted by a *consecutive chain* of such transfer down to

him, her or them in possession, *without being regular* (as if one or more of the muniments be not registered or not duly registered, or be only in writing, or *such like defect*," &c.), there is neither title nor color of title when any link in the chain is so wanting, as that there is a *hiatus* in the chain; that is to say, when the case is not that of a defect or flaw in some link which makes the chain weak at that point, but when there is no *chain* at all.

ERROR to the District Court for the Eastern District of Texas.

The statute of limitations of Texas, after making ten years a protection to one who enters without title, and five years a protection when the party has entered with claim under a deed on record, and has paid the taxes and made cultivation during that term, enacts by its fifteenth section as follows:*

"That every suit to be instituted to recover real estate, as against him, her or them in possession, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. By the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a *consecutive chain* of such transfer down to him, her or them in possession, *without being regular;* as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, warrant, or land-scrip, with a chain of transfer down to him, her or them in possession; and provided this section shall not bar the right of the government."

With this act in force Atchison brought suit against League to recover a lot of ground in Galveston.

On the trial, it appeared that both parties claimed title under the Directors of the Galveston City Company, from whom the title was deraigned, to one Hasbrook. The plaintiff asserted himself to be the owner of Hasbrook's title

* Hartley's Digest, Art. 2391.

through a deed from him to one Curtis. The defendant denied the validity of this deed to Curtis, alleging it to be a forgery, and claimed under a levy and sale of the property under a judgment against Hasbrook *posterior* to the alleged sale of Hasbrook to Curtis. The validity of this deed was one of the issues to be tried, one however not involved in the case as here presented. The defendants pleaded the statute whose fifteenth section as to limitation of three years is above quoted. On this point the plaintiff's counsel requested the court to instruct the jury as follows:

"That, if the jury, under the instructions of the court, find a conveyance from Hasbrook and wife to Curtis to be valid, then the sheriff had no authority to make the levy, under the execution against Hasbrook, on the lot in question, or to make the deed to Atchison, and there is no such transfer of title from Hasbrook to Atchison as will sustain the plea of limitation."

The court refused the instruction, and whether it had done so rightly or not was the point for review here.

The case was fully argued *in behalf of the plaintiff in error by Messrs. C. Robinson and W. G. Hale*, who relied on the fifteenth section above quoted, as clear of itself; citing in addition, however, by way of illustration, the statutes of Kentucky, Pennsylvania, and other States, and decisions upon them, to show what possession was adverse.

*Messrs. Green Adams, and W. P. Balinger, contra.*

Mr. Justice GRIER delivered the opinion of the court.

The only question involved in this case arises on the construction to be given to the 15th section of the statute of limitations of the State of Texas. It is somewhat peculiar in its terms, and is well suited to the policy of a new State desirous to encourage emigration, and the settlement of its vacant lands.

For this purpose the usual limitation of twenty years, which alone would protect one who had entered without title, was held insufficient. Hence the legislation of Texas

reduced the term to ten years. This term was also reduced to five years when the disseizor entered with a claim of title under a recorded deed, and had paid the taxes and cultivated the land for that length of time.

The limitation of three years now under consideration was intended to protect settlers under junior grants emanating from the State of Texas against older titles under the former Mexican sovereignty, as well as a fraudulent issue of head-right certificates or land scrip under the Republic. This policy is clearly exhibited in this peculiar term and the provisions of this section.

As respects the instruction requested by the plaintiff's counsel, we are of the opinion that the court erred in refusing it.

There was no dispute that the defendant purchased with full notice of the previous deed to Curtis. The only question was, whether this deed from the sheriff gave him such a title or color of title as is required by the statute.

Unnecessary labor and learning has been expended by counsel, as to the construction of similar statutes in other States, and as to whether the possession of defendent was adverse or not. This section of the statute is its own interpreter. It was not made to protect mere adverse possession; it carefully defines the construction of the words used. By the term title, as used in this section, is meant "*a regular chain of transfer from, or under the sovereignty of the soil;* and color of title is constituted by a consecutive chain of such transfer down to him or her or them in possession, without being regular, as if one or more of the memorials or instruments be not registered, or not duly registered, or be only in writing, *or such like defect*," *&c., &c.*

Now, this case shows no such "chain of title or transfer from the sovereignty," as to constitute either title or color of title. As defined by the act, a link in the chain is absent, which is necessary to make the whole one chain. It is not merely a defect or flaw in some link in the chain which may make it weak at that point, but there is no chain at all. A sale of the sheriff on a judgment against "A," confers nei-

ther title nor color of title to the property of "B." In *Thompson* v. *Cragg*,* the court say: "Nor can there be color of title where there is a complete hiatus in the chain. Color of titles differs from titles only in externals. The substance of both is the same, were this not so. If color of title were something intrinsically and substantially less or weaker than title, then the wisdom of the legislature could not be vindicated," &c. This construction of the statute as thus settled by the courts of Texas is conclusive, even if we doubted its correctness, which we do *not*.

JUDGMENT REVERSED, AND A VENIRE DE NOVO AWARDED.

[See *infra*, next case, *Osterman* v. *Baldwin*, in regard to this same section 15 of the Texas statute of limitations.—REP.]

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## OSTERMAN *v.* BALDWIN.

1. A citizen of the United States, and who, as such, was of course before the admission of Texas into the Union, an alien to that republic, and so, as against office found, incompetent to hold land there, became on the admission, competent, no office having been previously found.
2. A purchaser at sheriff's sale buys precisely the interest which the debtor had in the property sold, and takes subject to all outstanding equities.
3. Trusts of real estate are not embraced by the statute of frauds of Texas, and may be proved, as at common law, by parol.
4. A mere declaration in writing by a vendor of a vendee's purchase of land, that the vendee had paid the money for it, and that the vendor intended to make deeds when prepared to do so, is not a document purporting to convey title; and accordingly will constitute neither a link in "a consecutive chain of transfer," nor "color of title" within the meaning of the fifteenth section of the statute of limitations of Texas.

APPEAL (submitted) from the District Court for the Eastern District of Texas.

In 1839, prior to the admission of Texas into our Union, and that country being then an independent republic, Bald-

* 24 Texas, 596. See also Wright *v.* Daily, 26 Id. 730; Berry *v.* Donley, Id. 737; Harris *v.* Hardeman, 27 Id. 248.

win, a citizen of New York, and an alien, of course, to Texas, purchased and paid for three lots in Galveston, from the Galveston City Company, a corporation created by law, with power to sell real estate, and which owned the lots sold. As the company was not at the moment ready to execute deeds, he received certificates of the purchase. These described the purchased lots, acknowledged the receipt of the purchase-money, and added that Baldwin was entitled to receive a conveyance, so soon as the company was prepared to execute deeds in proper form. These certificates were made out in Baldwin's own name. The constitution of Texas, however, prohibiting aliens from holding lands there, he transferred them to James S. Holman, a Texan; the purpose having been "to place the lots in the hands of a citizen to watch over and protect them, for the payment of taxes and otherwise." No consideration moved from Holman, and the transfer was on an express agreement (made only by parol, however), that Holman was to hold the lots, and take a conveyance of them from the company, as Baldwin's trustee. The certificates were placed in an envelope, on which was indorsed a memorandum, thus:

"No. 113.
"JAMES S. HOLMAN.
"Lots No. 5 and 11, in block 617, &c. &c.,
"In trust."

This envelope, with the certificates inclosed, was subsequently found in the office of the company, having, as was said by the one side, been left there for safe keeping at the time, and by the other, having been brought there in order that a deed might issue to Holman, and surrendered and filed on the issue of a deed accordingly. The letters and figures, "No. 113," indicated the number of the deed to be issued for these lots.

In September, 1846, the lots were levied on by the sheriff of Galveston County, upon a judgment obtained by one McKinney against Holman. Notice was given to McKinney of Baldwin's ownership of the lots, and that Holman had never had any interest in them, except as trustee for Baldwin.

At the sale, October 6th, 1846, full notice was read aloud by Baldwin's agent, to the persons assembled, of Baldwin's claim to the lots, and of the exact state of his title. The sale was then proceeded with, and one lot was struck off to Osterman, others to other persons. The purchasers took possession.

In May, 1850, *that is to say, more than three years after the sale*, Baldwin filed a bill in the District Court for the District of Texas, making the Galveston City Company, Holman, Osterman, McKinney, and others, defendants; and praying that the Galveston City Company might be directed to execute a conveyance in fee simple to him, that the sale and proceedings under the judgment and execution against Holman might be declared void, and the defendants enjoined from setting up title under the same, and be ordered to deliver up possession of the lots held by them respectively.

The defences set up were:

1. Baldwin's alienage and consequent incapacity to hold; that even if the lands were meant to be held by Holman in trust for him, the trust was void; that on this part of the defence it mattered not whether there was a deed or certificate, Holman's estate, if but equitable, being liable to levy and sale; that however a deed was made.

2. That if these defences failed, the suit was barred by the statute of limitations of Texas.

As to the fact whether any deed had been made to Holman, the testimony was not quite consistent. On the one hand, the secretary of the company, the complainant's witness, testified thus:

"Whenever the holder of a certificate wished a deed, he produced his certificate to the company and delivered up the same, and the company issued a deed to him. The certificate was then filed away in the records of the company. Books were kept showing the issue of deeds upon the certificates, by memorandum entered against the number of the lot. All the certificates in this case were filed away in the records of the company, in the same place and manner, with the certificates upon which deeds had been issued. The books and records of the company

bear the same evidence of a deed to Holman on these certificates, that they do of the issue of any deed whatever. If the records of the company are true, a deed issued to Holman. The memorandum No. 113, in the envelope, indicates that that was the number of the deed issued on the certificates."

On the other hand, Holman himself remembered no deed: and one Edmunds, the agent of McKinney, who seemed to manage the whole matter of the execution under a bargain for a large contingent share of its proceeds, twice examined the books of the City Company, once by himself and once ("thinking it an important matter") with another person, an attorney-at-law,—and found that the books "showed that no deed had then been issued," and that "the title still appeared to be by certificates in the name of Holman."

As respected a bar by the statute of limitations, the second defence set up, it appeared that the Texas act in its fifteenth section ran thus:*

"Every suit to be instituted to recover real estate as against him, her or them in possession under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. By the term *title* as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to him, her or them in possession, without being regular; as if one or more of the memorials or muniments be not registered or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, land warrant or land scrip, with a chain of transfer down to him, her or them in possession."

The District Court decreed in favor of the complainant. The purchasers appealed; Holman and the company not denying Baldwin's equities, and acquiescing.

* Paschal's Digest, Art. 4622.

Argument for the appellants.

*Messrs. Adams, Coombs, and Ballinger, for the appellants:*

1. The evidence of the deed's having issued, greatly preponderates over that of its having not issued. The possession by the company among *its* papers, of the certificates, the only evidence of individual ownership, and the testimony of the secretary of the company, offered a strong presumption that there was a deed. The purpose of conveying to Holman was that a deed should issue to him. It matters not, however, as respects this branch of the defence, whether Holman's title were legal or equitable, if *he* had the real title—of any kind. Equities can be levied on in Texas as well as legal estates.

2. He had such title. It having been illegal for the complainant to hold lands in Texas at the date of these assignments, the law did not imply, create or allow any trust whatever in his favor, nor create one in favor of the government of Texas; but Holman took and held the property free and clear of any trust or right whatever for or on the part of Baldwin or the government.*

Nor did the admission of Texas into the Union help the matter. The law not having previously raised or recognized any trust in behalf of Baldwin, nor of the government as the sovereign, by escheat or other paramount right, no trust or right of any kind in his favor was created by that political act.

At best, the only evidence of any trust in favor of Baldwin was parol; a dangerous sort of proof on which to rest the title to real estate; and a sort which the British statute of frauds would not allow to be given in such a case.

3. If Holman was thus the sole owner—either legal or equitable—Baldwin had no title, and the various notices were of no value. They were notices of nullities.

Waiving all these points, however, we have above and independent of the other defence—

* Hubbard *v.* Goodwin, 3 Leigh, 492; Leggett *v.* Dubois, 5 Page, 114; Taylor *v.* Benham, 5 Howard, 270; Phillips *v.* Crammond, 2 Washington's Circuit Court, 447.

4. *The Statute of Limitations.* If the Galveston City Company made a deed to Holman, then the appellants had a "regular chain of transfer" with the single exception from its regularity that the deed to Holman was not recorded, a circumstance which confessedly would not affect it. We have referred to the evidence of the existence of the deed. "A regular chain of transfer" relates to the deeds, the muniments, the paper evidences of right. If on their face, they constitute a title, the actual nature of that title, arising from extrinsic facts, from the existence of a superior or better title, either in the first link by a previous grant from the government, or in any subsequent link by a previous better conveyance, is unimportant. If possession be held three years under a chain of deeds from the sovereignty of the soil, by the 15th section the character of the actual title at any point of the chain is unimportant. "Intrinsic fairness and honesty" is not a question where a regular chain of transfer is shown. They apply to *color of title* where the transfers are not regular. But the meaning is, not that the consecutive chain of transfer, or any link of it, must be fair and honest in relation to the adverse, better title, but simply that if one or more of the links, instead of being a regular deed—for instance, from A. or B.—is such a transfer of the right of A. or B., whatever that right is, as amounts fairly and honestly to a conveyance of it, then it constitutes color of title. In short, "title" is *legal;* "color of title" is *equitable.**

*Messrs. Sherwood and Goddard, contra.*

Mr. Justice DAVIS delivered the opinion of the court.

It is true, as the defendants insist, that when the purchases were made by Baldwin, Texas was a foreign country, with a constitution forbidding aliens to hold real estate. But the defendants cannot object on that ground. Until office found, Baldwin was competent to hold land against third persons. No one has any right to complain in a col-

* Pearson *v.* Burdett, 26 Texas, 157; Wallace *v.* Wilcox, 27 Id. 60.

lateral proceeding, if the sovereign does not enforce his prerogative. This court, in *Cross* v. *De Valle*,* say: "That an alien may take by deed, or devise, and hold against any one but the sovereign, until office found, is a familiar principle of law, which it requires no citation of authorities to establish." Even if the defendants could have made this objection, while the Republic of Texas existed, they cannot make it *now*, because, when Texas was admitted into the Union, the alienage of Baldwin was determined. His present status is that of a person naturalized, and that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of his former title.†

It is insisted the legal title to the lots in controversy, is in Holman, by deed from the Galveston City Company, and if so, that the execution against Holman was properly levied on them, and they were rightfully sold.

There is evidence tending to show a deed to Holman, but it falls short of proving it. It is almost certain a deed was never made, and quite certain, if made, it was never delivered. Holman, who ought to know, has no recollection about it, and he is fortified by Edmunds (the active agent in hunting up property to levy on), who swears, the books of the company were examined, and did not show the making of the deed—a matter deemed of importance by him and his attorney. The deed is not produced; is not recorded; the directors who must have executed it, are not called; and its existence is but a matter of conjecture.

Even if made and delivered, it cannot help the title of the defendants, for the sheriff sold with express notice of Baldwin's rights, and his intention to enforce them, and no one who bought can be considered an innocent purchaser for value. If Holman had the bare, naked, legal title, without any beneficial interest in the property sold, and no possession, nothing passed by the sale. A purchaser, at a sheriff's sale, buys precisely the interest which the debtor has in the property sold, and takes subject to all outstanding equities.

* 1 Wallace, 8. † Jackson *v.* Beach, 1 Johnson's Cases, 401.

But no deed was, in fact, made, and the legal title is still in the Galveston City Company. If, in equity Baldwin is entitled to have that title conveyed to him, the defence in this case must fail, unless the plea of the statute of limitations can be successfully maintained.

It is proven, beyond dispute, that Baldwin purchased the lots and paid the money for them, and that Holman had no interest in them.

It is in equal proof, that Holman agreed to hold them in trust for Baldwin—the object being to place them in the hands of a citizen of Texas, who could pay taxes and protect them. The trust, thus created, is an express trust—not one resulting by implication of law—proved, it is true, by parol, but equally efficacious for the purposes of this suit, as if in writing. The declaration of an express trust, under the statute of frauds of 29 Charles II, was required to be in writing, and could not be proved by oral testimony. But the courts in Texas hold, that trusts are not embraced in their statute of frauds, and that a trust may be proven as at common law, by parol evidence.* The equitable title is, therefore, in Baldwin, and there is no reason why he should not have the legal title also, unless his rights are cut off by the statute of limitations.

The defendants claim that they have possessed the land peaceably for more than three years, under title, or color of title, derived from the sovereign authority, thus claiming the benefit of the fifteenth section of the act of limitations of Texas.† But this claim is unavailing, because one link in "the chain of transfer," from the government down to the defendants, is broken. There is no conveyance from the Galveston City Company to Holman. A "consecutive chain of transfer" is required by the statute, and the writing possessed by Holman is not, in any legal sense, a link in that chain. It does not purport to convey title. It is nothing more than a declaration by the company of the purchase of the lots, the payment of the money, and the intention to

* Miller v. Thatcher, 9 Texas, 484. † Hartley's Digest, Art. 2391.

make deeds, when prepared to do so. If this writing, upon its face, professed to pass title, but failed to do it, either because the city company had no title, or for want of proper execution, it could be used as color of title. But an agreement to convey title at some future period, is not color of title, within the meaning of the law.

The Supreme Court of Texas has decided the precise question here presented. That learned court, in discussing this subject, in *Thompson* v. *Cragg*,* say: "Nor can there be color of title, as defined by the statute, where there is a complete hiatus in the chain. Color of title differs from title only in externals. The substance of both is the same. Were this not so, if color of title were something intrinsically and substantially less, or weaker than title, then the wisdom of the legislature could not be vindicated in applying the same period of limitation to a possession supported by the one as is applied to a possession supported by the other."

DECREE AFFIRMED.

[See *supra*, preceding case, *League* v. *Atchison*, in regard to this same statute of limitations in Texas.—REP.]

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## WALKER *v.* VILLAVASO.

1. When the question is whether this court has jurisdiction under the twenty-fifth section of the Judiciary Act, nothing out of the record certified to the court can be taken into consideration.
2. Accordingly, when it was sought by counsel to bring before it as matter of which it would take judicial cognizance, the fact that a judgment in a primary State court of the South,—affirmed in the highest State court after the restoration of the Federal authority,—was rendered after the State was in proclaimed rebellion, and by judges who had sworn allegiance to the rebel confederacy, the record not disclosing the fact that the want of authority under the Federal Constitution of such primary court was in such court drawn in question and decided against—this court dismissed the writ.

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* 24 Texas, 596.

Argument against dismissal.

3. When the proceeding is according to the law of Louisiana, the case within the section must appear by the statement of facts and decision, as usually made in such cases by the court.

ERROR to the Supreme Court of Louisiana.

This was a motion by *Mr. Janin* to dismiss the writ of error. The suit,—a suit instituted by Villavaso against Walker, in the District Court of the parish of St. Bernard, Louisiana,—was one of the ordinary sort for foreclosure and sale under a mortgage according to the practice prevailing in Louisiana. Between the 25th January and the 17th August, 1861, Louisiana had passed an "ordinance of secession" from the Union, adopted the constitution of the Rebel States, required all office-holders to swear allegiance to *it*, and had been proclaimed in a state of insurrection by the President of the United States. During this term, to wit, on the 18th October, 1861, an order of sale of the mortgaged premises was made. It was made by the same judges who had sat before the secession; and who remained in office apparently until May, 1865, when loyal judges were appointed under act of Congress. The Supreme Court of the State having, in 1867, affirmed the decree of foreclosure made in the parish court, the affirmance was brought here as within the 25th section of the Judiciary Act, which declares that where a controversy in a State court draws in question an authority exercised under the United States, and the decision is against its validity, the matter may be reviewed here; but declares also that no other cause shall be regarded as ground of reversal, than "such as appears on the face of the record." No question apparently about the legality of the court had been raised on the trial or decided by the parish court.

*Mr. Durant, against the motion:*

The case presented to the Supreme Court of Louisiana, by the appeal, was one where a judge had exercised an authority under an insurgent organization, assuming to be an independent state and part of a confederacy, unacknowledged and at war with the United States, and such authority was repugnant to the Constitution and laws of the United

States. Such exercise of authority was null, and it was the duty of the Supreme Court of Louisiana so to declare it. For a court of error will take judicial notice of the nature and extent of the jurisdiction of the inferior court, whose judgment it revises.*

Where the judge is incompetent *ratione materiæ*—still more so where he is a mere usurper—the want of jurisdiction may be shown at any stage of the cause.† And the judge is bound to notice such defect *ex officio*.‡

The fact that the inhabitants of Louisiana were, in October, 1861, in insurrection, was one which the Supreme Court of Louisiana was bound to notice, and so noticing it to declare that no judicial authority could be recognized under it as valid by a court sitting under the Constitution.

They did not do this. On the contrary, in confirming the judgment of the so-called court of the parish of St. Bernard, they did thereby sustain and decide in favor of an authority exercised under a State in insurrection, and a constitution and laws drawn in question as repugnant to the Constitution of the United States. The insurrectionary court *must* have been decided by the Supreme Court of Louisiana to be a valid authority, in order to have induced the judgment affirming its decision. And in such a case it is not necessary that it should appear on the face of the record that the question was raised or the decision made in so many words.§

*Mr. Janin, in reply:*

Vattel, Grotius, Puffendorf, and other writers on public law, declare that a civilized nation, after having conquered another, will not add to the sufferings inseparable from war the unspeakable misery which would result from a destruction of all private dealings which took place previous to the conquest. This most civilized one has throughout the late

* Chitty *v.* Dendy, 3 Adolphus & Ellis, 319.

† Lapeyer's Ex. *v.* Lafon, 1 Louisiana (New Series), 704; Merlin Repertoire de Jurisprudence, vol. 7, p. 122, edition, Brussels, 1826.

‡ Kerr *v.* Kerr, 14 Louisiana, 179; Grenier *v.* Thielen, 6 Robinson, 365; Fleming *v.* Kiligsberg, 11 Id. 80.

§ Bridge Proprietors *v.* Hoboken Co., 1 Wallace, 116.

troubles acted in the same spirit. When General Butler took possession of New Orleans, in May, 1862, he issued a proclamation, announcing that "all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States," and that "civil causes between party and party will be referred to the ordinary tribunals." This court, in commenting on it in *The Venice*,* say:

"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."

In Louisiana three volumes of reports, vols. 16, 17, and 18, of the Annual Reports of the Decisions of the Supreme Court, have been printed since the commencement of the political troubles. Neither of them has in the syllabus the word "rebellion." Vol. 16 contains the decisions rendered from January, 1861, to February, 1862, the judges being the same which held office before secession. The reports do not contain the slightest allusion to the political circumstances under which it was produced. The new court, organized in 1865, took cognizance of cases decided by the district courts before the restoration of Federal authority in Louisiana, without ever questioning their validity, between private individuals. In *White* v. *Cannon*,† a judgment had been rendered by the Supreme Court on January 31, 1861, five days after the secession of Louisiana. In 1865 the party cast made a motion in the new court to reinstate the case for reargument, because "the judgment of the Supreme Court, having been rendered after the ordinance of secession, has become absolutely null and void." The court said:

"The only question before us is whether the judgment in question is absolutely null and void or not. We are clearly of opinion that it is not tainted with absolute nullity. As to the

* 2 Wallace, 277.

† 16 Louisiana Annual, 85.

ordinance of secession, it was an absolute nullity, and produced no legal effect. The Supreme Court was not affected or changed by its passage."

But the case is not within the twenty-fifth section at all. No authority of the United States was set up in the parish court at all; and if it had been, it does not appear "on the face of the record." This ends the matter.

Mr. Justice NELSON delivered the opinion of the court.

The suit in the District Court for the parish of St. Bernard was an ordinary one for seizure and sale under a mortgage according to the practice prevailing in the courts of Louisiana. Indeed, this is hardly denied by the learned counsel for the plaintiff in error, but he relies on some infirmity in the jurisdiction of the court to hear and determine the case; and refers in support of it to certain insurgent proceedings in the State of Louisiana, against the then existing government, and to acts of Congress on the subject. But this question as to the competency of the court was not made on the trial, nor did the court below consider or determine any such question.

In order to give this court jurisdiction under the twenty-fifth section, it must appear on the record itself to be one of the cases enumerated in that section, and nothing out of the record certified to the court can be taken into consideration; and when the proceeding is according to the law of Louisiana, the case within the section must appear by the statement of facts and decision, as usually made in such cases by the court.* No such case or question appears on the present record.

WRIT DISMISSED.

* Armstrong *v.* Treasurer, 16 Peters, 285.

## INSURANCE COMPANY *v.* WEBSTER.

Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus, "The insurance on this application to take effect when approved by E. P. D., general agent," &c., does not make the previous transaction a *nullity* until approved. Hence, though the general agent sent back the application directing the agent who had delivered the policy, to return to the party insured his premium note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor cancelled the policy.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan; the case having been thus:

One Webber, on the 25th of September, 1860, was, and for a long time had been, the agent of the Ætna Insurance Company, at East Saginaw, in Michigan, and was duly authorized to make insurances, by policies of the company countersigned by himself, against loss by the perils of inland navigation.

To facilitate the making of such insurances with promptitude, the agent was furnished with blank policies duly signed by the president and secretary of the company, and requiring nothing to make them obligatory contracts except to be filled up and countersigned by him.

These things being so, a certain Webster applied, on the 25th of September, 1860, to Webber for insurance on the schooner Ottoca for the residue of the current season of navigation. And thereupon Webber filled up, countersigned, and delivered to Webster a policy of insurance duly executed by the president and secretary of the company, by which seventeen hundred and thirty-three dollars were insured upon the Ottoca from that day (September 25th, 1860)

to the 30th of November, 1860. Webster, on his part, paid the premium by an indorsed note in the usual mode.

The same schooner had previously, in 1858, been insured in like manner on the application of Webster in the same company through the same agent.

On the 25th of October, 1860, the schooner was wrecked, and became a total loss from perils covered by the policy, and notice of the wreck and loss was duly given to the insurance company.

Such was the substance of the proof on the part of the plaintiff below.

On the part of the defendant it was proved that immediately after the delivery of the policy by Webber to Webster, a paper, partly written and partly printed, and called an application, was signed by the latter at the request of the former. This paper contained a general statement of the substance of the transaction, and was also signed by Webber. Following the signatures appeared this printed memorandum:

"The insurance on this application is to take effect when approved by E. P. Dorr, general agent of the Ætna Insurance Company, at Buffalo, New York."

This paper was immediately transmitted by Webber to Dorr, was received on the 29th of September, but the application did not receive his approval, and was sent back to Webber with a letter directing him to return to Webster the premium note received, and to cancel the policy. This letter was received by Webber on the 2d of October.

It also appeared from the evidence that Webber, apparently dissatisfied, wrote to Bennett, another general agent at Cincinnati, on the subject, and seems to have expressed in his letter some apprehension that the course directed by Dorr would "earn for the company the reputation of backing out from contracts regularly made." No attempt was made to cancel the policy, nor was the premium returned, nor was any notice given to Webster of the action of the

general agent until after the loss, when Webster called to give notice of it to the company.

Then, for the first time, Webber informed him that his application for insurance had been rejected, and offered to return the premium note; which Webster declined to receive, and insisted on his contract. The company declining to pay, Webster brought suit against them; and under instructions given by the court and excepted to by the company, verdict and judgment were given for the plaintiff. The Insurance Company then sued out this writ of error.

*Mr. Hibbard, for the plaintiff in error:*

The approval was the *condition* on which the contract became operative. Without that approval there was no contract. Had the original risk been binding until disapproved by the company, and a contract once shown in existence, as was the case in *Perkins* v. *The Washington Insurance Company*,* it perhaps might have been the duty of the company to give notice of its disapproval. But the insurance company chose to make no contract but the one in this case, and as there could be no contract until the approval of the application by the company, then the event did not happen upon which alone the contract could exist. Suppose that no policy had been handed by the agent to Webster, and that *the rights of the parties depended on the application alone*, could there be a pretence that there was a contract actually made? It would be like any other application made to an underwriter for insurance, which the insurer did not assent to.

*Mr. Wells, contra:*

The case of *Perkins* v. *The Washington Insurance Co.*, cited on the other side, concludes this. There an insurance company of New York empowered R., a surveyor in Savannah, to make an insurance to take effect from the time when the premium should be paid, and should be received at New York, provided the office should recognize the rate of pre-

* 4 Cowen, 645, 664.

mium, and be otherwise satisfied with the risk. R. advertised at Savannah the terms, and P. paid the usual premium on certain goods on the 5th of January, 1820, to R., who gave him a receipt for the money. Before, however, the premium was received at New York, the goods were consumed by fire, and P. afterwards tendered the premium to the company, and demanded that they should indemnify him, or execute the contract of insurance. It was held that the company was bound. *Lightbody* v. *The North American Insurance Co.** is even a stronger case.

The CHIEF JUSTICE delivered the opinion of the court.

We are of opinion upon the case presented, that the liability of the insurance company attached, subject to revocation, on the making and delivery of the policy of insurance, and the receipt of the premium by its agent.

The facts in the case are much stronger against the company than in that of *Perkins* v. *The Washington Insurance Company.*†

In that case the agent had no power to make insurance, but only to receive proposals and determine rates, with an understanding, sanctioned by the company, that if the rates and proposals should prove satisfactory, the company would issue a policy accordingly, and that in the meantime the risk should be binding on it. The court held that the right of the company to refuse a risk upon such proposals was not arbitrary; but that the conditional arrangement of the agent would bind it absolutely in the absence of fraud or misconduct on his part, known to the applicant for insurance.

In the case before us the agent was fully authorized to make insurance, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration, actually delivered to Webster, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract.

* 23 Wendell, 18.

† 4 Cowen, 645.

The only limitation of this general authority known to Webster was that expressed in the memorandum appended to the formal application signed by him.

In respect to this it is to be observed that Webster was not asked to sign this formal application until after the execution and delivery of the policy; and that it is by no means certain that the appended memorandum even attracted his notice, and, in strictness, it might be well held that validity and effect of the policy was not affected at all by the subsequent acts of the parties.

It is urged, however, that the memorandum is so connected with the formal application, and the application with the contract, that both must be regarded as making part of the entire transaction; and we will consider the case under that point of view.

What, then, is the true effect of the memorandum? In strictness, and taken apart from the transaction, its terms make the validity of the policy depend upon the approval of the general agent. "The insurance on this application to take effect when approved by E. P. Dorr, general agent, at Buffalo." But it is clear that such was not the understanding of the parties, nor of the general agent himself. The policy issued was perfect in form and substance; the premium note was in the usual form, and for the proper sum; the delivery of the policy and the receipt of the note were significant acts. If the general agent had never acted upon the application at all, and the term of insurance had expired without loss, it will hardly be maintained that the insured could set up his omission or neglect in this respect as a defence to an action upon the premium note. The transaction, then, was not a nullity until approved. It must be regarded, we think, as an insurance of the same character as that passed upon in the case from Cowen's Reports. The memorandum, considered in connection with other parts of the transaction, must be treated as, at most, the reservation of a right, not however to be arbitrarily exercised by the general agent, to disapprove the insurance, and annul the contract on notice to the insured and on return of

the premium note. The evidence shows that it was in this light substantially that both the agents regarded the transaction until after the loss. The general agent at Buffalo sent back the application, directing the agent at Saginaw to return to the party insured his premium note, and cancel the policy. The agent at Saginaw, not satisfied with this direction, as is shown by his correspondence with another general agent at Cincinnati, neither returned the note nor cancelled the policy.

It is a necessary consequence of these views that, in the absence of all notice of disapproval until after the loss, the policy must be regarded as valid and effectual.

What has been said covers substantially the several instructions given to the jury by the Circuit Court, and disposes of the exceptions to them.

JUDGMENT AFFIRMED.

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## THOMPSON *v.* RAILROAD COMPANIES.

1. Though usually where a case is not cognizable in a court of equity the objection must be interposed in the first instance, yet if a plain defect of jurisdiction appears at the hearing or on appeal, such court will not make a decree.
2. Though State legislatures may abolish, in State courts, the distinction between actions at law and actions in equity, by enacting that there shall be but one form of action, which shall be called "a civil action," yet the distinction between the two sorts of proceedings cannot be thereby obliterated in the Federal courts.

   Hence if the civil action brought in the State courts is essentially, as hitherto understood, a suit at common law, the common law form and not an equitable one must be pursued if the case is removed into a Federal court.
3. Nor does the fact that by statute in the State courts "the real parties in interest" must bring the suit, whereas in the Federal courts, in a common law suit, such as was presented in the civil action brought in the State courts, one party would sue to the use of another, change this rule. A plaintiff in the State court may remain plaintiff on the record in a Federal court, and prosecute his suit in that court as he is authorized by State laws to prosecute it in the State courts.

Statement of the case.

APPEAL from the Circuit Court for the Southern District of Ohio.

The case was this: The code of civil procedure of Ohio provides that every action must be prosecuted "*in the name of the real party in interest*," &c.; and "that the distinction between actions at law and suits in equity, and the *forms* of all such actions and suits heretofore existing, are *abolished;* and in their place there shall be, hereafter, *but one form of action, which shall be called a civil action.*"

With this provision of the code in force, the Central Ohio and another railroad company agreed to transport over their road, for one Thompson, a quantity of horses and mules, stipulating for payment in a certain mode, to which Thompson assented. In conformity with this agreement (the service having been performed), drafts were drawn on Thompson, which he neglected or refused to pay. These drafts, for convenience of collection, were drawn payable to the order of a certain D. Robinson, cashier; Robinson having, however, no interest in the proceeds. To enforce the collection, what is termed as above mentioned, by the code in Ohio, a civil action, was instituted in one of the courts of the State, against Thompson, in the name of the railroad companies. The petition (used in lieu of a declaration), stated the original indebtedness from Thompson for freight, the giving of the drafts, their protest for non-acceptance or non-payment, and after averring that the plaintiffs were compelled to take them up, asked for judgment against the defendant for principal and interest. Thompson being a citizen of Kentucky removed the cause to the Federal court. When it reached there, by leave of the court, a bill in equity (setting up the same cause of action) was substituted for the petition originally filed in the State court, and the suit went on as a cause in chancery. The Circuit Court rendered a decree in favor of the complainants for the amount of the drafts, with interest. From this decree the defendants appealed, assigning as the chief ground of error that the complainants had a plain and adequate remedy at law, which they had in fact

pursued in the State court, and which they ought to have followed out in the Federal court.

*Messrs. Carlisle and McPherson, for the appellants, and in support of that view.*

*Mr. H. H. Hunter, contra, for the Railroad Companies, appellees:*

1. Where a case is supposed to be not cognizable in a court of equity, the objection should be interposed in the first instance. After the suit has been regularly heard below upon its merits, the objection comes too late.

2. But had the complainant adequate and plain remedy at law? The case was commenced in the State court, and from a legal necessity, in the names of the complainants as plaintiffs. They were "the real parties in interest" in the drafts, and they were exclusively interested in them. Being thus, necessarily, the plaintiffs in the case in the State court, they also, from legal necessity, remained plaintiffs in the Circuit Court after the removal of the case.

It is incontrovertible that the legal title of the drafts was in the payee, Robinson, and equally certain that the complainants were the equitable owners of them. Hence no action at law could be sustained on them in the names of the complainants, but only in the name of Robinson. By the practice of courts in general, the complainants, being the equitable owners, had the right to sue, at law, in the name of Robinson. But, by the Ohio code such mode of suit is expressly forbidden.

The cause of action on which the relief is prayed are the drafts specifically. To enforce the collection of *them*, the suit or civil action was originally brought. The suit is not on the contract, which, though referred to, is referred to only as an inducement and to disclose the equity of the complainants to the drafts.

Mr. Justice DAVIS delivered the opinion of the court.

Has a court of equity jurisdiction over such a case as is presented by this record? If it has not, the decree of the

court below must be reversed, the bill dismissed, and the parties remitted to the court below to litigate their controversies in a court of law. Usually, where a case is not cognizable in a court of equity, the objection is interposed in the first instance, but if a plain defect of jurisdiction appears at the hearing, or on appeal, a court of equity will not make a decree.*

The Constitution of the United States and the acts of Congress, recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles.† "And although the forms of proceedings and practice in the State courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."‡

This case does not present a single element for equitable jurisdiction and relief.

The suit brought in the State court was nothing but an ordinary action at law. When it was removed to the Federal court a bill in equity (alleging the same cause of complaint) was substituted, by leave of the court, for the petition originally filed in the State court, and the suit progressed as a cause in chancery. Thus, an action at law, which sought solely to recover damages for a breach of contract, was transmuted into a suit in equity, and the defendant deprived of the constitutional privilege of trial by jury. The absence of a plain and adequate remedy at law, is the only test of equity jurisdiction, and it is manifest that a resort to a court of chancery was not necessary, in order to enable the railroad companies to collect their debt.

* Penn *v.* Lord Baltimore, 1 Vesey, 446.

† Robinson *v.* Campbell, 3 Wheaton, 212.

‡ Bennett *v.* Butterworth, 11 Howard, 674.

Whether their proper course was to sue upon the contract, or upon the drafts, or upon both together, the remedy at law was complete.

If the remedy at law was adequate in the State court, why the necessity of going into a court of equity, when the jurisdiction was transferred to a Federal tribunal? The reason given is, because in Ohio the real parties in interest must bring the suit, and as the nominal legal title in the drafts was in the payee, Robinson, the railroad companies (after the transfer) could not proceed at law, and continue plaintiffs on the record, and were, therefore, obliged to change the case from an action at law into a suit in equity. If this position were sound, it would allow a Federal court of equity to entertain a purely legal action, transferred from the State court, on the mere ground, if it were not done, the plaintiff would have to commence a new proceeding. It surely does not need argument or authority to show, that the jurisdiction of a Federal court is not to be determined by any such consideration.

But there was no necessity for a change from law to equity after the suit was transferred.

The railroad companies mistook the course of proceeding in courts of the United States in actions at law, in suits brought up from State courts. In this case, as the action was a purely legal one, if they could have maintained it in their names in the State court, they had an equal right to maintain it in their names when it arrived in the Federal court.

In actions at law the courts of the United States may proceed according to the forms of practice in the State courts, and in such actions they administer the rules of evidence as they find them administered in the State courts. There was, therefore, no difficulty whatever in the plaintiffs in the State court remaining plaintiffs on the record, and prosecuting their suit in the same manner they were authorized to prosecute it by the laws of the State. If, in Ohio, the drafts could have been received in evidence in a State court, in a suit brought by the railroad companies against Thompson,

then, on the transfer of the suit to the Federal court, and trial had there, they would have been equally receivable in evidence. The law of Ohio directs that all suits be brought in the name of the real party in interest. This constitutes a title to sue, when the suit is brought in the State court, in conformity with it; and in all cases transferred from the State to the Federal court, under the 12th section of the Judiciary Act, this title will be recognized and preserved; and when a declaration is required by the rules of the Circuit Court, it may be filed in the name of the party who was the plaintiff in the State court.

DECREE REVERSED and the cause remanded, with directions to dismiss the bill without prejudice, and to proceed in conformity with this opinion.

Mr. Justice SWAYNE did not sit in this case, being a stockholder in one of the corporations.

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## WEST *v.* AURORA CITY.

A suit removable from a State court under the twelfth section of the Judiciary Act must be a suit regularly commenced by a citizen of the State in which the suit is brought by process served upon a defendant who is a citizen of another State.

Hence no removal can be made of a defence or answer, though of such a character as that, under statute of the State, it becomes, by a discontinuance of the original suit itself, a proceeding that may go on to trial and judgment, as if, in some sense, an original suit.

ERROR to the Circuit Court for Indiana.

The twelfth section of the Judiciary Act provides:

"That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, . . . . and the defendant shall, *at the time of entering his appearance*, file his petition for the removal of the cause for trial in the next Circuit Court, . . . . and

offer good and sufficient surety for his entering appearance in such State court, on the first day of its session, and file copies of said process against him, . . . it shall be the duty of the State court to accept the surety and proceed no further in the cause, . . . and such copies being entered as aforesaid in such court of the United States, the cause shall proceed there in the same manner as if it had been brought by original process."

The code of Indiana also provides that in suits brought in that State—

"The defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

With these statutory provisions in existence, West and Torrance, citizens of Ohio, brought suit in one of the State courts of Indiana against the City of Aurora, Indiana. The nature of their action did not clearly appear from the record, but it seemed to have been a suit, by petition, under the State code, against the city just named, for the recovery of the amount of the matured interest coupons of certain bonds.

To this suit the defendants seemed to have made defences by answer under the code, and subsequently to have filed, by leave of the court, as an additional answer, three paragraphs setting up new defensive matter, in each of which the defendant prayed an injunction to restrain the plaintiffs from further proceeding in any suit on the coupons or bonds, and from transferring them to any third parties, and for a decree that the bonds be delivered up to be cancelled.

Upon the filing of these additional paragraphs the plaintiffs entered a discontinuance of their suit, and, assuming that under the code the new paragraphs of the answer would remain, in substance, a new suit against them for the cause and object set forth in them, filed their petition for the removal of the cause into the Circuit Court of the United States. The petition was allowed by the State court, and the new paragraphs, without any other portion of the record

of the suit in that court, except enough to show its title and the entry of discontinuance, were sent into the Circuit Court. By that court they were remanded to the State court as not constituting a suit that could be removed under the twelfth section of the Judicial Act.

To this action of the Circuit Court, West and Torrance took exceptions, and the case was now here on error; the question being whether the action of the Circuit Court was right.

*Mr. T. G. Mitchell, for the plaintiff in error*, argued that the "additional paragraphs" constituted under the Indiana code a counter-claim; and that notwithstanding the discontinuance of West and Torrance of *their* action, and the consequent withdrawal of the issues tendered by them, they could not discontinue the "counter-claim" presented in the additional paragraphs by the other side. These made a cross-action by the defendants against the plaintiffs; one but incidental to the original action, so long as that original action was in course of existence and progress, but independent of it, as soon as it was withdrawn, and so destroyed. Hence the removal to the Federal court was proper and the remand error.

*Mr. T. D. Lincoln, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

We think that the Circuit Court was clearly right in its action. The filing of the additional paragraphs did not make a new suit within the meaning of the Judicial Act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the code of Indiana, might give them, in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the State court. The right of removal is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action.

And it is given only to a defendant who promptly avails himself of the right at the time of appearance, by declining to plead and filing his petition for removal.

In the case before us, West and Torrance, citizens of Ohio, voluntarily resorted, as plaintiffs, to the State court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit, removable on their application to the Circuit Court of the United States.

It is equally fatal to the supposed right of removal that the record presents only a fragment of a cause, unintelligible except by reference to other matters not sent up from the State court and through explanations of counsel.

A suit removable from a State court must be a suit regularly commenced by a citizen of the State in which the suit is brought, by process served upon a defendant who is a citizen of another State, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State court.

This is not such a suit, and the order of the Circuit Court remanding the cause to the State court must therefore be

AFFIRMED.

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## RECTOR *v.* ASHLEY.

1. Where a case is brought here by a writ of error to a State court under the 25th section of the Judiciary Act, this court can only review the decision of the State court on the question or questions mentioned in that section.
2. Therefore, if in addition to the decision of the State court on such question or questions, that court has rested its judgment on some point in the case not within the purview of that section, and that point is broad enough to sustain the judgment, then, although the ruling of the State court might be reversed on the point which is of Federal cognizance, this court will not entertain jurisdiction of the case.

Statement of the case.

3. In the present case it appeared by the *opinion* of the Supreme Court of a State, that the statute of limitations was one of the grounds on which the appellant's case had been dismissed. This, if fairly in the record, was a sufficient ground for such dismissal, and was not subject to review here.
4. But the *opinions* of the State courts (even though required by a statute of the State to be filed among the papers of the case), constituting no part of the record of the cause in which they are given (as the court here decided that they did not), nor being to be looked to for the question decided by those courts, and neither the pleadings in the case nor any other part of the record having raised the question of the statute, this court would not presume that it was in the case.
5. An appellant's title having been dependent on an act of Congress, and the judgment of the State court having been adverse to the claim set up by him under that act, the case comes within the purview of the section of the Judiciary Act before referred to.
6. In perfecting a title to land located under the act of February 17th, 1815, for the benefit of the inhabitants of New Madrid, no vested interest in the land, nor any appropriation of it binding on the United States, was effected until after the survey was made and returned into the office of the recorder of land titles.

ERROR to the Supreme Court of Arkansas; the question in the court below being the validity of a title set up by Ashley's executors on bill to a piece of land in that State, south of the Arkansas River, near Little Rock, as against a title set up on the other hand by Rector on cross-bill, each party seeking to have his title quieted as against the other.

The title of the respective parties was thus:

Ashley claimed under a certain act of Congress of June 23d, 1836,* granting to the State of Arkansas, for the purpose of completing the public buildings at Little Rock, a quantity of land, not exceeding five sections, to be located under the authority of the General Assembly of that State, on any of the *unappropriated* lands of the United States in Arkansas. Such proceedings were had under this act, that on the 8*th day* of June, 1838, the legal title to the land in controversy became vested in Ashley, unless it had been previously *appropriated* by virtue of the proceedings under a certain act of Congress of February 17th, 1815, through which

* 5 Stat. at Large, 58.

Rector set up a prior equitable ownership of the same land. This last-mentioned act provided that any person owning lands in the county of New Madrid, in Missouri (then recently visited by earthquakes), and whose lands had been materially injured by them, should be authorized to locate the like quantity of land on any of the public lands of the said territory, the sale of which was authorized by law, not exceeding six hundred and forty acres.

The material facts relating to the title of Rector thus set up, as far as they were disclosed by the record, were these: On the 30th November, 1815, there was issued to Henry Cockerham, by Frederick Bates, recorder of land titles at St. Louis, a certificate of the loss of six hundred and forty acres of land by the earthquake, entitling him to locate the same quantity on any of the public lands of the Territory of Missouri, the sale of which was authorized by law. Next in order was a paper signed by William O'Hara, directed to the surveyor of the lands of the United States for the States of Illinois and Missouri, and the Territory of Arkansas, referring to this certificate, and stating that the said O'Hara, as the legal representative of Cockerham, located the said six hundred and forty acres on the south side of the Arkansas River, near Little Rock; describing the location so as to enable the surveyor to identify it, and praying an order of survey. This paper was dated St. Louis, October 30th, 1820, but no evidence was given that it was ever filed in the surveyor's office, nor any to show from whence it was produced; though for the purpose of the opinion given by it, this court considered that it might be conceded that it was regularly filed in the surveyor's office at the time it bore date, and that O'Hara had authority to act as the representative of Cockerham in the matter.

Then followed in the record, a survey purporting to be made under Cockerham's certificate, dated May 30th, 1838, and this was certified on the 16th day of June, 1838, to be then on file in his office, by F. R. Conway, recorder of land titles at St. Louis; and he further certified that by virtue thereof, the said Cockerham, or his legal representa-

tive, was entitled to a patent for the tract so surveyed, amounting to six hundred and forty acres of land. This appeared to be a transcript from the records of the General Land Office. There was also, in another part of the record, a survey dated May 2d, 1839, purporting to be made under the same certificate, apparently not identical with the former survey, and which was certified to be a copy from the records of the surveyor of public lands for the district of Arkansas. There was nothing to show whether this survey was ever filed in the office of the recorder of land titles or not. It was understood that the description in the order of O'Hara to the surveyor, and the first of these surveys, and probably the second also, covered the land in dispute.

It was this title thus set up under the act of 1815 which Rector sought to have quieted and confirmed by his cross-bill. In the *pleadings* the titles were rested on the two acts of Congress respectively; though in the original bill in support of Ashley's title, filed by his executrix and one Beebe, it was averred, after a full statement of the title derived under the act of 1836—which title alone was set forth as the substantive ground of Ashley's bill—that Rector had "never had anything more than temporary actual possession or occupation" of any part of the said lands "alleged to have been located by virtue of the said pretended New Madrid location, except," &c.; while it was stated on the other hand that Ashley and his representatives "have continuously had actual and constructive possession of the same." Beyond this the pleadings showed no reference to possession and lapse of time as an element of title.

The Supreme Court of Arkansas decided the case in favor of Ashley, giving a learned opinion (which was now in print before this court, but forming no part of the record sent up), to the effect that the land had not been "appropriated" until after Ashley's title was fixed, and going also into an argument to show that under the statute of limitations of the State of Arkansas, Rector was barred by lapse of time. By a statute of Arkansas the opinions of the court are required to be filed among the papers of the case. Judgment

was accordingly given in favor of Ashley's executors, and the case was now here under the twenty-fifth section of the Judiciary Act, which declares that a final decree of the highest court of a State, where is drawn in question the construction of any statute of the United States, and the decision is against the title, right or privilege so set up, may be reviewed here.

The two questions here were, 1st, jurisdiction; 2d, the validity of the claim of Rector.

*Messrs. Martin, Rose, and Watkins, for Ashley's heirs, the defendants in error*, contended—

1. That this court could not entertain the case under the 25th section, and that it ought in fact be dismissed for want of jurisdiction, since it was plain that the question of title under the statute of limitations was passed on by the court below, whose opinion the statutes of Arkansas required to be filed among the papers of the case, and which was so made, the counsel argued, part of the record; and was in fact, also, presented sufficiently even by the record proper, in which reliance was had on continuous "actual and constructive possession;" and that this court, therefore, was not competent under the section named to review a decision on the State statute, which decision was to be taken as certainly correct.

2. As regarded the claim of Rector, that on the facts of the case, it appeared that the land had been appropriated to Ashley on the 8th June, 1838, before any pretence of title appeared in Rector; which at earliest was 16th of the same month. Among other cases, *Lessieur* v. *Price* in this court* was in point. There the court held that a return of the survey to the office of the recorder was necessary to make an appropriation, and to give the title.

*Messrs. Reverdy Johnson, Bradley, Sr., and A. H. Garland, for Rector, plaintiff in error, contra*, argued—

1. That the court could look to the record alone, where no

* 12 Howard, 60.

title was set up by limitations, and where, notwithstanding a few words in the bill by Ashley's executors about possession, it could not be said that such a defence was even adumbrated.

2. That in *Lessieur* v. *Price*, cited on the other side, the title spoken of by the court was the legal title, not the equitable one; that here Rector had obtained an equitable title which the United States could not devest; that Congressional surveys had been extended over the land when it was claimed by O'Hara, and so no further survey was necessary.

Mr. Justice MILLER delivered the opinion of the court.

The first question presented grows out of a denial of the jurisdiction of this court by defendants in error.

It is conceded that one of the points decided in the Supreme Court of that State against the plaintiff in error would be a sufficient ground for the jurisdiction, if it were the only one on which that court decided the case; but it is claimed that the decree is also based on another and distinct ground, over which this court has no jurisdiction, and that, therefore, we cannot examine the first point. If there *is* this second ground on which the decree may still be supported, although the first were decided in favor of the plaintiff in error, it would be a useless labor to inquire into the correctness of the point which is of Federal cognizance; because, as the ruling of the State court must be assumed to be correct on the other proposition, no reversal could follow if that proposition was sufficiently broad to sustain the decree.

It is claimed that the statute of limitations of the State of Arkansas is made by the Supreme Court a distinct ground for dismissing the cross-bill of Rector. If this be found by the record to be true, it is undoubtedly sufficient in itself to sustain the decree, and is beyond the revisory power of this court. But a careful examination of the pleadings in the case has not enabled us to discover that any of the parties, in whose favor the decree was rendered, have distinctly set up the bar of that statute, as a defence to the relief claimed by Rector. It is true that there is a casual reference in the

original bill of Ashley's executrix and Beebe, to their actual and constructive possession, but it seems used rather argumentatively in favor of their title than as setting forth a distinct ground of relief; and in their answer, and in all the other answers to Rector's cross-bill—the bill which sets up the main title in controversy—nothing is said of the possession of defendants.

We cannot see, then, either from the pleadings or from any decree in the case, that this question was raised or considered by the court.

But the opinion of the Supreme Court of Arkansas is produced, and in that it is stated that the defendants are protected by the statute, and this is given as one of the reasons for the decree rendered.

We have of late been frequently urged, in this class of cases, to look into the opinions delivered in the State courts, to ascertain on what grounds their judgments were based; and the point has been one of some controversy. It is not, however, an open question. More than forty years ago the same question arose in the case of *Williams* v. *Norris*, reported in 12 Wheaton.* The proposition was pressed upon the court for the same reason that it is in this case, namely, that by the statute of the State the opinions of the court are required to be filed in writing among the papers of the case. Marshall, C. J., speaking for the court, held that, notwithstanding this act, the opinion of the State court constituted no part of the record, and could not be looked to as the foundation on which this court would take or refuse jurisdiction.

Leaving out the opinion of the State court, there is nothing in the record before us to show that its decree decided any other controverted proposition than the validity of the title set up by complainant, Rector. This title was dependent upon the act of Congress of February 17th, 1815, for the relief of the inhabitants of New Madrid, who had suffered by earthquakes, and the decision was against the claim set

* Page 117.

up by him under that statute. It is, therefore, a proper case for a writ of error under the twenty-fifth section of the Judiciary Act.

2. As respects then the claim of Rector, who seeks to have his title quieted by the cross-bill which he has filed. The validity of this claim is the point to be decided by this court.

[His honor here stated the facts and proceedings on which the claim of Rector rested, as already given, and proceeded:]

The questions to be considered on these facts are, did these proceedings establish a right in the parties who represent Cockerham, to the land covered by the survey, which would withdraw it from the category of *unappropriated* lands on which the Arkansas grant could be located? And if they did, at what point in the proceeding did this right become fixed?

It seems to us that this court has already settled these questions in a manner which leaves nothing more to be said, unless we overrule its decisions.

In the case of *Bagnell* v. *Broderick*,* which raised a question concerning a title derived under the New Madrid act, the court, after describing the proceeding necessary to secure its benefit, says: "The United States never deemed the land appropriated until the survey was returned" (to the recorder of land titles), "for the reason that there were many titles and claims, perfect and incipient, emanating from the provincial governments of France and Spain, and others from the United States, in the land district where the New Madrid claims were subject to be located. So there were lead mines and salt springs excluded from entry." Again, speaking of an act of the legislature of Missouri, which authorized an action of ejectment on a New Madrid location, it is further said: "Our opinion is, first, that the location referred to in the act, is the plat and certificate of survey *returned to the recorder of land titles*, because by the laws of the United States this is deemed the first appropriation of the land, and the legislature of Missouri had no power, had it made the attempt, to declare the notice of location filed with the sur-

* 13 Peters, 436.

veyor-general, an appropriation contrary to the laws of the United States."

In *Barry* v. *Gamble*,* the court says: "By the certificate of the recorder of land titles at St. Louis, Lafleur was entitled to 640 acres of land in compensation for lands of his injured by the earthquake in New Madrid County. On this the survey of 1815 is founded. *Its return by the surveyor*, with a notice of location, *to the office of the recorder*, *was the first appropriation of the land.*"

The case of *Lessieur* v. *Price*,† is not distinguishable from the one before us. In that case, as in this, plaintiff claimed under a New Madrid certificate, and the defendant under an act granting to Missouri four sections of land to aid in erecting public buildings, as the defendant in this case claims under a similar act for the benefit of the State of Arkansas. The case there, as it does here, turned upon the question which party first made a valid appropriation of the land in dispute. The court there declares that, for this purpose, the location under the New Madrid act must be an appropriation of the land, and its acquisition by the locator, with corresponding right to possess and enjoy it as against the United States; and the inquiry arose, what acts were required on the part of the locator to devest the United States of title? After reciting the language of the act on which this question is declared to depend, the court proceeds: "The notice of location in this instance was delivered to the surveyor-general, June 2d, 1821, for the land in dispute, and is claimed as the inception of title, and location in fact, within the meaning of the State law authorizing ejectments on New Madrid locations. That it was the mere act of the party, not having the assent of the government, must be admitted. The act of Congress provides 'that in every case where such location shall be made according to the provisions of this act, the title of the person or persons to the land injured shall revert to and become absolutely vested in the United States.' A concurrent vestiture of title must have occurred. The injured land must have vested in the United States at the

* 3 Howard, 32. † 12 Id. 60.

same time that the title was taken by the new location. It was intended to be an exchange between the parties, and the question arises, when did the United States take title?" After further consideration of the relative duties of the recorder of land titles, and of the surveyor, under the act of 1815, the court again rules that the return of the survey to the office of the recorder is essential to the appropriation of the land.

We are much pressed in the present case with the argument that the title here spoken of by the court, is the legal and not the equitable title; and that inasmuch as the applicant has done all that he can do, to make good his claim to the land, when he has deposited with the surveyor his certificate of loss, with a description of the land desired in exchange, he has thus acquired an equitable interest in the land so described, which the United States cannot devest by giving it to another.

But the rights of claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do; and if a sound construction of that act shows that he acquires no vested interest in the land until the officers of the government have surveyed the land, and until that survey is filed in the office of the recorder, and approved by him; then as claimant's rights are created by that statute, they must be governed by its provisions, whether they be hard or lenient. It seems to us clear, from the foregoing cases, that the court intended to decide, that until this was done the claimant acquired no vested right to the land; no title, legal or equitable. It is evident that in the case of *Lessieur* v. *Price*, the court is not speaking of the legal title. The statute of 1815 required a patent to be issued on the return of the survey to the recorder's office. The strict legal title remained in the United States until the patent issued; and the court could not have referred to that.

On the contrary, it is obvious that the court was endeavoring to fix the point in the proceedings, when the right of the claimant became vested, when his equity became a fixed fact, when the land he sought was appropriated to him, and

when his injured land became the property of the United States; and by each of the three decisions we have cited this is held to be when the survey is returned to the office of the recorder of land titles. The legal title conveyed by the patent may not issue for years afterward, but by the act of the legislature of Missouri, an action of ejectment could be maintained on the equitable title thus acquired. In the Federal courts, however, according to repeated decisions, this could not be done for want of the legal title.

These views must dispose of the present case. The title of Ashley became a full vested legal title on the 8th day of June, 1838.

The earliest evidence we have of the return of the survey, under Cockerham's certificate, to the recorder of land titles, is the certificate of that officer of the 16th of June, 1838. The land, therefore, was *unappropriated* within the meaning of the act for the benefit of the State of Arkansas, when Ashley acquired title according to its provisions.

It is said that the Congressional surveys had been extended over the land in dispute when they were claimed by O'Hara, and described in his application to the surveyor, and that, therefore, no other survey was necessary. It is not important to decide here whether this would obviate the necessity of a survey, or of some equivalent return to the recorder's office, to show what land was intended to be appropriated under the certificate of loss, which emanated from that officer; for the description of O'Hara, while it refers to certain legal subdivisions of the public lands, refers also to other claims located in the same subdivisions, in such a manner that it can be ascertained only by a survey, how much and what parts of these legal subdivisions are necessary to make up his six hundred and forty acres. Such seems to have been his own opinion, when he prayed for an order of survey. It was undoubtedly necessary to an identification of the land.

The decree of the Supreme Court of Arkansas, having been made in conformity to these principles, is

AFFIRMED.

## RUBBER COMPANY *v.* GOODYEAR.

1. Though a decree have been entered "*as*" of a prior date—the date of an order settling apparently the terms of a decree to be entered thereafter—the rights of the parties in respect to an appeal are determined by the date of the actual entry, or of the signing and filing of the final decree.
2. The question of sufficiency of an appeal bond is to be determined in the first instance by the judge who signs the citation; but after the allowance of the appeal it becomes cognizable here. It is not required that the security be in any fixed proportion to the amount of the decree; but only that it be sufficient. Where a decree had been for a large sum ($310,752), security in less than double the amount was accepted by this court, and the appellants allowed to withdraw a bond given in such double sum.

APPEAL from the Circuit Court for the District of Rhode Island. On motions.

Two motions were made in this cause. The first by the appellees, to dismiss the appeal, the other by the appellants to reduce the amount of the bond given on appeal. This had been required in double the amount of the decree; one for $310,752.72.

The first motion was founded on the allegation that the final decree of the Circuit Court was entered on the 28th of November, 1866, while the appeal was taken to the December Term, 1867, of this court. And if the decree was, in fact, entered on the day alleged, it was obvious that the appeal should have been taken to the next term of this court, which commenced on the first Monday—that is to say, on the 3d day of December, 1866, and that the appeal actually taken would have to be dismissed as not authorized by law.

The important question then was, on what day the decree of the Circuit Court was actually made.

It appeared from the return of the clerk of that court to a *certiorari* issued from this court, that *on the 28th day of November*, 1866, the following order was entered on the minute-book:

"1. In the cause in equity, *Goodyear, Executor, et al.* v. *Providence Rubber Company*. ORDERED, That the exceptions of the

complainants to the master's report be, and the same are hereby, overruled.

"2. That the several exceptions of the respondents to the master's report be, and the same are hereby, overruled.

"3. That the report of the master in the case be, and the same is hereby, confirmed.

"4. That the profits made by the respondents, in violation of the rights of the complainants, under the patents in this case, are the sum of $310,757.72.

"5. That the complainants do recover of the respondents in this case the sum of $310,757.72 and costs, taxed at ——.

"Respondents enter an appeal in open court. If appeal is to act as a *supersedeas*, a bond is to be filed in ten days in double the amount of the judgment. If not, execution to issue for judgment and costs, and a bond for costs on appeal to be filed in the sum of $500.

"The district judge to decide upon the sufficiency of the sureties."

Afterwards, *on the 5th of December*, 1866, *two days after the commencement of the December Term of this court*, a final decree was filed and entered as follows:

"Final decree. November Term, 1866. This cause came on to be heard at this term, upon exceptions to the final report made therein by Charles Hart, Esq., one of the masters of this court, bearing date ——, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows."

Then followed three clauses identical with the first three of the previous order; and the two concluding clauses in these words:

"Fourth. That the profits made by the respondents in violation of the rights of the complainants under the letters-patent number 1084, granted to Charles Goodyear, June 15, 1844, reissued December 25, 1849, extended June 14, 1858, and again reissued to Charles Goodyear, Jr., executor, November 20, 1860, in this case, are the sum of three hundred and ten thousand seven hundred and fifty-seven dollars and seventy-two cents.

"Fifth. That the complainants do recover of the respondents, the Providence Rubber Company, in this case, the sum of three hundred and ten thousand seven hundred and fifty-seven dollars and seventy-two cents, and costs, taxed at seven thousand four hundred and twenty-nine dollars and ninety-one cents."

This decree was "entered *as of November* 28, 1866," and signed, "J. R. BULLOCK, District Judge."

*Messrs. Curtis, Ackerman, and C. S. Bradley, in support of the first motion;* Messrs. Cushing, Payne, and Parsons, in support of the second,† and vice versâ, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

The final decree, filed and entered on the 5th of December, 1866, it will be seen, is for the most part in the very language of the order; but uses the introductory words appropriate to a decree, and describes particularly the patents in controversy, and ascertains the amount of costs taxed. It omits the explanatory directions of the order as to the bond to be given on appeal; but the entry of the decree is followed immediately by another entry stating that an appeal was prayed for by respondents in open court, and was allowed, upon filing a bond within ten days with sureties to the satisfaction of the district judge.

Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.

We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the

* Citing on the first motion, Castro *v.* United States, 3 Wallace, 49; The Steamer Virginia *v.* West, 19 Howard, 182; Mesa *v.* United States, 2 Black, 721. On the second, Stafford *v.* Union Bank, 16 Howard, 135.

† Citing on the first motion, Seymour *v.* Freer, 5 Wallace, 822; Silsby *v.* Foote, 20 Howard, 290. On the second, Black *v.* Zacharie, 3 Howard, 483.

proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree.

It appears to have been entered "as of the 28th of November." But this circumstance did not affect the rights of parties in respect to appeal. Those rights are determined by the date of the actual entry, or of the signing and filing of the final decree. That test ascertains, for the purpose of appeal, the time of rendering the decree, as the 5th of December, 1866. The appeal in this case, therefore, was rightly taken to the present term.

The motion to dismiss must therefore be denied.

We have also considered the motion of appellants for the reduction of the amount of the bond for *supersedeas*.

In equity cases the appellate jurisdiction of this court attaches upon the allowance of the appeal. In order to make the appeal operate as a *supersedeas*, it is necessary for the appellant to give good and sufficient security for the prosecution of the appeal, and for all costs and damages that may be adjudged against him. This security is usually given by bond, with one or more sureties, and the twenty-second section of the Judiciary Act requires that it be taken by the judge who signs the citation on appeal. It is not required that the security shall be in any fixed proportion to the decree. What is necessary is, that it be sufficient, and when it is desired to make the appeal a *supersedeas*, that it be given within ten days from the rendering of the decree. The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable here.

It is, therefore, matter of discretion with this court to increase or diminish the amount of the bond, and to require additional sureties or otherwise as justice may require.

In this case the decree was for $310,757.72 damages, and $7429.91 costs; and, following a usual practice, the judge required a bond in double the amount of the decree. We are satisfied that a bond in a much less amount will be entirely

sufficient, and inasmuch as it appears that security in part, for the amount they might be decreed to pay, had been given by the present appellants before the bond on appeal was required, by a deposit of bonds of the United States, and other private bonds, amounting in all to a sum not less than $200,000, we will order that the appellants have leave to withdraw the appeal bond now on file upon filing a bond in lieu thereof in the sum of $225,000, with good and sufficient sureties, to the satisfaction of the clerk of this court.

FIRST MOTION DENIED; SECOND ONE GRANTED.

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## SAVERY *v.* SYPHER.

1. An attorney-at-law having no power *virtute officii* to purchase for his client at judicial sale land sold under a mortgage held by the client, the burden of proving that he had other authority rests on him.
2. On an application to a court in equity to refuse confirmation of a master's sale and to order a resale—a case where speedy relief may be necessary—the court may properly hear the application, and act on *ex parte* affidavits on both sides, and without waiting to have testimony taken with cross-examinations.

APPEAL from the Circuit Court for the District of Iowa.

Keene having conveyed to Savery a piece of land, Savery gave him a mortgage on the same to secure the purchase-money. Keene died before receiving payment of this money; and the administratrix of his estate, Mrs. Sypher, filed a bill to foreclose the mortgage. Answers and replications were put in, but no proofs were taken, and when the cause was called for hearing, the parties, by their attorneys, in open court agreed on the amount that was due, and a regular decree of foreclosure in the usual form was entered by the court. The money not having been paid by the day appointed, the property was advertised and struck off by the master at the instance of White, the attorney of record, to Mrs. Sypher, the administratrix, in satisfaction of the decree. A controversy now arose between Savery and Mrs. Sypher,

the administratrix, as to whether this sale thus made to her by order of her attorney White, should be confirmed.

It appeared that Savery had been desirous of returning the land to Keene's estate, and of having the mortgage cancelled. Negotiations were accordingly had between the parties. Whether, as converting personalty into realty, they resulted in an agreement obligatory on the administratrix, was one question raised; the validity of it being denied by the counsel here of the appellee. In any case, there was conflict in the testimony as to the terms of the agreement. Mrs. Sypher swore that she consented to receive the property, provided it was returned to her in the same condition as when it was conveyed to Savery, and that she positively refused to sign written stipulations concerning the sale and purchase which were presented to her for her signature before the sale by her attorney, White, and afterwards by Seeley, his clerk, because the stipulations did not provide for a payment of the taxes that had become due on the property, about $300, since the sale or conveyance. Savery, who was also sworn, contradicted this statement in material points, and he was sustained by White, while Seeley and another witness, Mrs. Price, directly supported Mrs. Sypher. Upon this case—*which on each side was made wholly by* ex parte *affidavits*—the court below refused to confirm the master's sale, and ordered a resale of the property. Savery appealed to this court to have those proceedings reviewed.

*Mr. Ashton, for the appellant:*

1. *On the facts.* The court below was not justified, upon the affidavits before it, in finding that the appellant had ever promised to pay the taxes due on the land.

2. *On the law.* The court below erred in attempting to determine the issue, raised by the motions, upon these *ex parte* affidavits. The question of fact, as to the existence of the agreement set up by the appellee, should have been determined only after a full opportunity had been given to the appellant to cross-examine her witnesses before an examiner or master in chancery, and to contradict them by counter

evidence. No other form or method of investigation, was adequate to the real purpose in view, to wit: the ascertainment by the court of the fact alleged by the appellee, in avoidance of her purchase.*

*Mr. P. Phillips, who filed a brief for Messrs. Mason, Polk, and Hubbell, contra.*

Mr. Justice DAVIS delivered the opinion of the court.

On the issue of fact the court heard evidence and decided the case adversely to the appellant, and we think correctly. The burden of proof was imposed on Savery, who seeks to confirm the sale, to show the authority of White; for an attorney, *virtute officii*, has no authority to purchase property in the name of his client. If the negotiations between Savery, the appellant, and the administratrix, Mrs. Sypher, resulted in a valid agreement, binding on the administratrix, there is direct conflict in the testimony as to the terms of it. In number of witnesses, the case is in favor of the decree, and there is nothing in the record to enable this court to pass either upon the veracity or intelligence of the several parties. Doubtless, the court below placed great reliance on the evidence of Mrs. Price and Mr. Seeley, who were unconnected with the transaction, and wholly disinterested.

As this whole controversy turns on the payment of taxes—not involving a large amount—it seems extraordinary that the appellant did not end it, by paying the taxes, and thus secure the confirmation of a sale, in which he had such a great personal interest.

The power of Mrs. Sypher as administratrix, to make such an agreement as it is alleged she did, was denied at the bar, but it is unnecessary to discuss the point, as we find, that the purchase by White for her was unauthorized, and in violation of the real agreement under which she was willing to take back the mortgaged property.

It is argued, that the Circuit Court erred in determining the issue raised by the motion upon *ex parte* affidavits. Not

* See Daniels's Chancery Pleading and Practice, 1513; Id. 1237.

so; for courts of equity must be able to act in a summary manner upon motions of this kind, and any other mode of investigation than the one adopted in this case, would have failed to give the speedy relief necessary under the circumstances. The practice pursued by the court was the usual and proper practice, and we see no good reasons to depart from it.

DECREE AFFIRMED.

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## REICHART *v.* FELPS.

1. A decision in the highest court of a State against the validity of a patent granted by the United States for land, and whose validity is drawn in question in such court, is a decision against the validity of an authority exercised under the United States, and the subject of re-examination here, although the other side have also set up as their case a similar authority whose validity is by the same decision affirmed.
2. Patents by the United States for land which it has previously granted, reserved from sale, or appropriated, are void.
3. A patent or instrument of confirmation by an officer authorized by Congress to make it, followed by a survey of the land described in the instrument, is conclusive evidence that the land described and surveyed was reserved from sale.
4. Where the United States, receiving a cession of lands claimed in ancient times by France, and on which were numerous French settlers, directed that such settlers should be "confirmed" in their "possessions and rights," and ordered a particular public officer to examine into the matter, &c.,—confirmation by *deed* was not necessary. The officer, being admitted to have authority to make confirmation, could make it by instrument in writing without seal.
5. Congress has no power to organize a board of revision to annul titles confirmed many years by the authorized agents of the government.

ERROR to the Supreme Court of Illinois; the case, which was one of ejectment, being thus:

In 1784, after the War of the Revolution, the State of Virginia then claiming the Northwest Territory, a part of which makes the now State of Illinois—and in which, from early times, inhabitants of Canada, while Canada was yet a French province, had settled—yielded her claim and title in the territory to the United States, on condition "that the

French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincent's, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their *possessions and titles* confirmed to them, and be protected in the enjoyment of their rights and liberties."

On the 20th of June, 1788, Congress enacted, that from any general sale of lands in this region there should be a reserve of so much land as should satisfy all the just claims of the ancient settlers; "that they should be confirmed in the possession of such lands as they may have had at the beginning of the Revolution; that measures be immediately taken for confirming them in their possessions and titles, and that the governor of the Northwestern Territory be instructed to examine the titles and possessions of the settlers, as above described, in order to determine what quantity of land they may severally claim, *which shall be laid off for them* at their own expense."

Under this authority, and some instructions not necessary to be mentioned, but reciting them all, the then governor of the Northwestern Territory, General St. Clair, on the 12th of February, 1799, issued a document, somewhat in the form of a land-patent, to one Jarrot, who "laid claim" to a piece of land in the county then and now known as St. Clair, Illinois, "confirming" to him in fee a tract described. This instrument of confirmation, signed by General St. Clair, and duly registered, October 19th, 1804, ended thus:

"In testimony whereof, I have hereunto set my hand, *and caused the seal of the Territory to be affixed*, at Cincinnati, &c., on the 12th day of February, A.D. 1799, and of the Independence of the United States the 23d."

The land claimed and thus described in the patent was regularly surveyed, April 10th, 1798, by one McCann, "lawfully authorized to survey such claims."

This title of Jarrot, thus confirmed, became afterwards vested in one Felps.

But an opposing title also came into existence. On the 20th of February, 1812, an act of Congress was passed,

authorizing a board of commissioners to revise and re-examine the confirmations made by the governor of the Northwestern Territory; and the board, in pursuance of the act, made such a report to the government of the United States, that the government by its proper officers rejected this claim, and subsequently exposed the land previously confirmed to Jarrot to public sale, when a certain Reichart became the purchaser. Two patents were accordingly issued to him by the United States, one in 1838 and one in 1853.

Reichart, asserting the title conferred by these patents, now brought ejectment in a State court of Illinois against Felps, relying on his old French claim confirmed by Governor St. Clair.

The plaintiff having given his patents of 1838 and 1853 in evidence, the defendant on his part offered the survey of McCann, and a certified copy from the records of the instrument of confirmation given by Governor St. Clair. On this certified copy no evidence appeared of a seal having ever been on the original; though there was oral testimony tending to show that the original did have a seal in wax, with an emblem and letters.

The plaintiff objected to the survey, and to the copy of the instrument from Governor St. Clair, because it showed that the original had no seal.

The court overruled the exception, and gave judgment for the defendant, so deciding against the validity of the patents of the United States issued in 1838 and 1853; though deciding in effect in favor of the validity of the instrument of confirmation professing to be done under authority of Congress. The judgment having been affirmed in the Supreme Court of Illinois,* the case was brought here under the 25th section of the Judiciary Act of 1789, giving a right to the court to re-examine the final judgments of the highest State courts, "where is drawn in question the validity of a statute or of an authority exercised under the United States, and the decision is *against* their validity."

* Reichart *v.* Felps, 33 Illinois, 433.

Argument for the defendant in error.

*Mr. Baker, for the plaintiff in error; a brief being filed for Mr. Koerner:*

The deed of cession, of 1784, put the title *into* the United States. There was no tract of which possession did not vest in the United States. No power was given by any act of Congress to the governors of the Northwestern Territory to issue patents or deeds of confirmation. Moreover, whatever confirmations those governors did issue, were not considered final either by the Executive or by Congress. The copy of the patent shows that no seal was ever affixed to the instrument of confirmation. The instrument was, therefore, never executed, and is void. Oral testimony cannot countervail the better evidence of the copy.

*Mr. Lyman Trumbull, contra:*

The validity of the confirmation or grant of Governor St. Clair was brought before the Supreme Court of Illinois in 1829, in an ejectment by one Hill, who had entered and obtained a patent for a portion of the premises as public land. The court held the governor's confirmation valid.* After this decision, the United States, recognizing it as establishing the validity of the grant by Governor St. Clair, passed an act, August 11th, 1842, refunding the money paid by the patentee who had entered it as public land.†

This history of the government's dealing with the land in controversy, shows that it was reserved from the beginning from the public lands which were to be sold, and that the government never intended it should be sold as public land.

The patent issued by Governor St. Clair in 1799, devested the United States of any claim it might have had to the land, and its subsequent sale as public land was therefore void. It is assumed by the plaintiff that no authority was given to the governor of the Northwestern Territory to make confirmations or grants of these ancient possessions and titles. But the act of June 20th, 1788, affords an answer to this assumption; where it instructs the governor of the North-

* Doe ex dem. Moore and others *v.* Hill, Breese, 236.

† 6 Stat. at Large, 860?

western Territory to "examine the titles and possessions of the settlers, *in order to determine what quantity of land they may severally claim, which shall be laid off for them at their own expense.*" Who was to determine the quantity of land the claimants were to have, and to lay it off for them at their own expense, except he whose duty it was to examine the titles and possessions for that purpose? When this was done, and the land laid off as the law declared it should be, the United States gave up all claim, if it ever had any, to the land thus set off. No other evidence of this would have been necessary than the survey which was made and entered upon the Land Office records; and the fact that the governor thought proper to evidence the claimant's right by a more solemn instrument, in the shape of a patent, is only confirmatory of what would have been a good title without it. All that was necessary to be done was to separate the private claims from the other lands, so that the latter might be brought into market. The United States never pretended to make claim to the lands set off to private claimants; on the contrary, it has, by numerous acts, as shown in the history of this case, recognized them as valid. The governors exercised this power of confirmation for more than twenty years, and their confirmations are styled patents in acts of Congress.*

A grant, or a concession, made by that officer who is by law authorized to make it, carries with it *prima facie* evidence that it is within his power. No excess of or departure from them is to be presumed.†

The land having been thus previously granted, reserved from sale, or appropriated, the patents of 1838 and 1853 are void.‡

The objections taken below as to the want of seal, &c., it is submitted, need no reply here.§ The original patent, it is testified, had a seal. None, however, was necessary.

* Act of April 21, 1806. Pub. Land Laws, &c., part 1, 143.

† Delassus *v.* United States, 9 Peters, 134.

‡ Stoddard *v.* Chambers, 2 Howard, 317.

§ See what is said in Reichart *v.* Felps, the case below, 33 Illinois, 439.

Mr. Justice GRIER delivered the opinion of the court.

The patents under which the plaintiff claimed in the State court were declared by that court to be void. The case, therefore, is properly cognizable in this court under the twenty-fifth section of the Judiciary Act of 1789.

He claimed under two patents of the dates of 1838 and 1853, which exhibit conclusive evidence of title if the land claimed had "not been previously granted, reserved from sale, or appropriated." The only question to be decided in this case is, whether the land had been so granted, reserved, or appropriated.

The patent of Governor St. Clair, February 12th, 1799, duly registered in 1804, with the survey of McCann, April 10th, 1798, are conclusive evidence that the land in question was reserved from sale. The case of *Moore* v. *Hill*,* decided nearly forty years ago in the Supreme Court of Illinois, on the same survey and grant which is now before us, should have been conclusive against the objections which have been revived on the present writ of error. "This very able and elaborate opinion received the concurrence of the bar and the country at the time it was delivered, and has never been called in question since. There is no fact in the present case calculated to produce a result different from the one there announced."†

The objection that the patent from the governor was without a seal ought not to have been made. The act of Congress giving power to the governor did not require him to issue a patent nor to execute an instrument under seal. Any written evidence of his confirmation would have been a sufficient execution of the power. All that was necessary was an authentic declaration by the United States, through their authorized agent, that they had no claim to the land. It was not a grant by the United States, because the title was not in them.

Congress is bound to regard the public treaties, and it had

* Breese, 236.

† Reichart *v.* Felps, 33 Illinois, 439, A. D. 1864, per Breese, J., who reported the case A. D. 1829.

no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the government. And Congress became afterwards so well satisfied itself of this that it passed an act restoring to the purchasers the money which they had paid for titles obtained on the assumption of such a right.

JUDGMENT AFFIRMED.

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## RIGGS *v.* JOHNSON COUNTY.

After a return unsatisfied of an execution on a judgment in the Circuit Court against a county for interest on railroad bonds, issued under a State statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a mandamus from the Circuit Court will lie against the county officers to levy a tax, even although prior to the application for the mandamus a State court have perpetually enjoined the same officers against making such levy; the mandamus, when so issued, being to be regarded as a writ necessary to the jurisdiction of the Circuit Court which had previously attached, and to enforce its judgment; and the State court therefore not being to be regarded as in prior possession of the case.

ERROR to the Circuit Court for the District of Iowa.

The case somewhat fully stated was thus:

Statutes of Iowa enact:

That the county commissioners of any county may submit to the people of it at any election, the question whether the county will aid to construct *any road* which may call for extraordinary expenditure.

That when a question, so submitted, involves the borrowing of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes, and *no vote adopting the question proposed* will be of effect unless it adopt the tax also.

That the county judge, on being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause certain records to be made; after which the

vote and the entry thereof on the county records, *shall have the force and effect of an act of the General Assembly.*

That neither contracts made under propositions thus adopted, nor the taxes appointed for carrying them out, can be rescinded.

That money raised for such purposes is specially appropriated, and constitutes a fund distinct from all others in the hands of the treasurer, until the obligation assumed is discharged.

The questions, whether the foregoing statutory provisions authorized a county to aid in the construction of a *rail*road, and whether, if so, the legislature could, under the State constitution, confer such power upon counties, was adjudged in several decisions by the Supreme Court of Iowa in the affirmative. After these decisions, bonds were issued by several counties in the State, in aid of the construction of railroads. Subsequently to the issuing and negotiation of them, the Supreme Court of Iowa, on a review of their former decisions, overruled these decisions, and held that the above statute did not confer the power in question upon counties, and that the legislature could not constitutionally confer the power; and that bonds issued by the counties and cities of the State, in aid of the construction of railroads, were void.*

*This* court, however, in the case of *Gelpcke* v. *The City of Dubuque*,† and in other cases afterwards, refused to follow these later decisions of the Iowa court, and established, for the Federal courts, that the earlier Iowa decisions, affirming the power to issue the bonds, should be regarded as decisive of the question, as to all bonds issued while those decisions remained unreversed. Notwithstanding which, however, the State courts apparently considered bonds in like case still void.

While the State decisions, that the county *could* issue such bonds, were yet unreversed, the commissioners of Johnson County issued, in a negotiable form, a large number of coupon bonds, payable to bearer. The bonds recited on

* See the history set out in Gelpcke *v.* The City of Dubuque, 1 Wallace, 175.

† 1 Wallace, 175.

their face that they were issued under authority of the act of Assembly, and of the required vote, &c., and (as the fact was) that they had been issued by the county for stock in a railroad company specified.

Marcus Riggs having become the holder of several of them, brought suit and obtained judgment in the Circuit Court of the United States for Iowa; but execution being issued, it was returned *nulla bona*. There was nothing which by the laws of Iowa—where statutes exempt public property of a county and the property of the private citizen from being levied on to pay debts of a civil corporation—could be found to satisfy the execution. After this, various tax-payers of the county filed a bill in chancery in one of the State courts against the county commissioners (none of the bond-holders, however, being made parties to the proceeding or having notice of it), alleging that the bonds and coupons were void from the beginning, and had been repeatedly held so by the Supreme Court of Iowa, and praying a perpetual injunction to the commissioners against levying any tax to pay them: which injunction the State court granted. *After* the injunction upon this proceeding instituted in the State court had been issued, Riggs—by petition reciting his judgment, unsatisfied after execution, and the fact that it was obtained on the bonds such as above described, *reciting also the vote of the county to pay the tax*, and that it had the effect of a law—applied to the Circuit Court of the United States for a mandamus to the commissioners to compel them to lay a tax, "sufficient to pay the amount of the said judgment and cost and of the principal and interest falling due for each year on said bonds, and especially the interest warrants or coupons included in the aforesaid judgment, *and to continue the same from year to year, until the said bonds and coupons or interest warrants are fully paid*, in payment for the coupons or interest warrants annexed to said bonds, now due and unpaid, and not included in the aforesaid judgment, and of such coupons or interest warrants as they *shall* become due." The commissioners answered, making as return the injunction *previously* laid on them by the State court. Riggs demurred to the

answer, assigning four causes of demurrer, the substance of the one chiefly relied on, and considered here, being, that "after the judgment was rendered" in the Circuit Court, the State court had "no jurisdiction, power or authority" to prevent him "from using the PROCESS of this court by writ of mandamus to collect his judgment."

The Circuit Court overruled the demurrer, and judgment was given for the commissioners. The case was now here on error.

To better understand the argument it may be well to state—

1. That by an act of Congress (sometimes called the Process Act), passed, first in 1789, and improved and made permanent in 1792,* it was provided:

"That the forms of writs and executions, . . . . and the modes of process, in suits at common law, . . . . shall be the same in each State respectively as now used or allowed in the Supreme Courts of the States."

And by a later act† (May, 1828)—

"That writs of execution, and other final process issued on judgments rendered in the Federal courts, *and the proceedings thereupon*, shall be the same in each State as are now used in the courts of such State."

2. That in the Revised Statutes of Iowa (A. D. 1860), a mandamus is stated to be, and thus regulated under the head—

ACTION BY MANDAMUS.

"§ 3761. An order of a court of competent jurisdiction commanding an inferior tribunal, corporation, board, or person to do or not to do an act, the performance or omission of which the law specially enjoins as a duty.

"§ 3762. That the plaintiff shall state his claim and facts sufficient to constitute a cause for such claim."

"§ 3766. That the *pleadings and other proceedings* in any *action*

* 1 Stat. at Large, 93; Id. 276.

† See 4 Id. 274; 5 Id. 499, 789.

in which a mandamus is claimed shall be the same in all respects, as nearly as may be, as in an *ordinary action for the recovery of damages.*"

"§ 4181. That when the *action* of mandamus is by a private person there may be joined therewith the injunction of chapter 155, . . . . and the *action* shall be by ordinary proceedings."

3. That by the fourteenth section of the Judiciary Act,* it is enacted that Circuit Courts among others named—

"Shall have power to issue writs of *scire facias*, *habeas corpus*, and other writs *not specially provided for by statute*, which may be *necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law."

4. That the same act, in the thirteenth section† enacts that—

"The Supreme Court shall . . . . have power to issue . . . . writs of *mandamus*, . . . . to any courts appointed or persons holding office *under the authority of the United States.*"

At the same time with the present case was another, *Thompson* v. *Henry County*, exactly like it in principle; the two being argued consecutively.

*Messrs. Fellows, Blair, Dick, Grant, Rogers, and Howell, for the relator, plaintiff in error, in the different cases:*

Since the cases of *Gelpcke* v. *The City of Dubuque*, and others after it, the Circuit Court of the *United States* for Iowa has uniformly sustained the validity of these county bonds, and numerous judgments have been recovered in it by the bondholders against various counties and cities of the State. On one of these judgments the present proceeding is founded, and the decision in this case is to settle the question, whether or not all these judgments, and all the bonds and coupons not yet in judgment, are, for any practical purpose, so much waste paper; that is to say, whether it is in

* 1 Stat. at Large, 81.

† Id. 81.

the power of the Iowa State courts, not only to close their own doors against any remedy in behalf of the bondholders, but also to effectually defeat the collection of any judgments which the bondholders may recover on their bonds in the Federal courts, by the simple and easy process of perpetually enjoining the officers of the several counties and cities throughout the State from levying any taxes to pay the bonds or judgments recovered or to be recovered thereon (a process which amounts to enjoining them from *paying* such bonds and judgments) in suits brought for that purpose by tax-payers against the county or city officers, without making a single bondholder a party, or giving them notice. We submit that such a defence is in the face of all precedents in this court.

1. The jurisdiction of the entire case, existed in the United States court, from service of the writ of summons to appear and answer to the action, down to the actual execution of all process which the court might consider necessary to enforce its judgment; and therefore such jurisdiction covered the time when the proceedings in the State court were begun.

In *Wayman* v. *Southard*,* which involved the question, whether executions issued by the Federal courts could be controlled by State authority, the court, referring to § 14 of the Judiciary Act, say:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be *satisfied*. Many questions arise on the process subsequent to the judgment, in *which jurisdiction is to be exercised*. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done; and would, consequently, be necessary to the beneficial exercise of jurisdiction."

The court next proceeded to show that in the Process Act,

* 10 Wheaton, 1.

from the language used, it was the intention of Congress to provide for the entire proceedings in a case, down to the enforcement of the execution. They say:

"To the forms of writs and executions, the law adds the words, 'and modes of process.' These words must have been intended to comprehend something more than the forms of writs and executions. We have no right to consider them as mere tautology. They have a meaning, and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, *but is also applicable to every step taken in a cause.* It indicates the progressive course of the business from its commencement to its termination."

In *The Bank of the United States* v. *Halstead*,* land in Kentucky had been offered for sale under execution from the United States Circuit Court, and as the State law would not permit it to be sold unless it brought three-fourths its appraised value, the United States marshal followed the State law, and returned the land not sold, because it did not bring that much.

But this court, in speaking of the power of Federal courts over its process, say:

"The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, *if after judgment* it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the law of the United States. . . . The general policy of all the laws on this subject is very apparent. It was intended to adopt and conform to the State process and proceedings as a general rule, *but under such guards and checks as might be necessary to insure the due exercise of the powers* of the courts of the United States. They have authority, therefore, from time to time, to alter the process in such manner as they shall deem expedient, and likewise to make additions thereto, which *necessarily implies a power to enlarge the effect and operation* of the process."

Having thus shown the possession of this power in the

* 10 Wheaton, 51.

courts, the next point settled was that it was beyond the interference of the State government. Thus:

"If the court then had the power so to frame and mould the execution in this case, as to extend to lands, the only remaining inquiry is, whether *the proceedings on the execution could be arrested and controlled by the State law.* And this question would seem to be put at rest by the decision in the case of *Wayman* v. *Southard*. . . ."

In *Peck* v. *Jenness*,* this court say:

"It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide *every question* which occurs in the cause; . . . and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have ever attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in amity, but in necessity; for if one may enjoin, another may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other."

2. When the Circuit Court rendered judgment on the coupons attached to the railroad bonds, all questions involved in that cause, as between the relator, plaintiff there, and all parties liable on account of said bonds, became *res adjudicata.* One of the questions and the main question involved in that judgment, was the validity of the bonds; and it being determined therein, not only put the question at rest, but such decision was necessarily accompanied by the order, that the appropriate process of execution should issue.

3. Here then was nothing left undecided between the relator and the corporation of Johnson County, as to not only whether it ought, but should pay said bonds. Nothing was left behind for the State court to act upon, when the parties

* 7 Howard, 612, 624; and see Abelman *v.* Booth, 21 Id. 515; Dodge *v.* Woolsey, 18 Id. 331.

began proceedings to stop the execution of the judgment of the United States court.

4. A writ of mandamus is simply *a process of enforcing the execution* of the judgment rendered in this cause. The Revised Statutes of Iowa show that mandamus is a remedy well known and much used in that State. If not a "writ" or "execution" within the old Process Act, it is yet a "mode of process," something regarded by that act as different from "writ" or "execution," but which is to give the creditor the fruit of his judgment. Or, if it be not "a mode of process," it is assuredly a "proceeding" upon a judgment, and within the act of May, 1828. If it be any one of these, we are entitled to use it through the Federal courts as it is used in the "courts of such State." It is moreover a "mode of process" or a proceeding which falls within the original understanding of the contracting parties. There has been a return of *nulla bona* to the execution. Taxation is the only means which can be relied upon, to meet the public obligations. Therefore the award of execution in the judgment, to be effectual, carries the writ of mandamus to oblige the county officers to raise the appropriate tax.

The case of *Knox County* v. *Aspinwall*,* as it came the second time before this court, is in point. There the plaintiff having, in accordance with a prior decision on his case in this court, recovered judgment on railroad bonds, and the court determining that under the law of Indiana it was defendant's duty to levy a tax to pay the judgment, granted the mandamus, "*to enforce the execution of this judgment:*" and they decide, that this writ of execution is issued under the fourteenth section of the Judiciary Act of 1789, referring to the powers of the court under that act, as declared by the above-cited case of *Wayman* v. *Southard*.

The power of the United States court to issue a mandamus as a writ of execution was also and more lately decided in *Von Hoffman* v. *City of Quincy*.† There this court denied the power of the State legislature to withdraw the authority

* 24 Howard, 376, 383.

† 4 Wallace, 552.

which had been given to lay a tax, at the time the municipal bonds had been issued, on the ground, that the remedy being an essential part of the contract, could not be impaired in the slightest degree; and that it was the duty of the United States court to execute the process of mandamus, to enforce the remedy, notwithstanding the act of interference on the part of the State.

*Messrs. Thomas Ewing, Senior, of Ohio; Browning, Rankin, and McCrary, Strong, Farrall, and Boal, contra:*

1. The case of *Knox County* v. *Aspinwall*, which decided that circuit courts might grant a mandamus to enjoin State officers, is hardly, we submit, to be supported. This court is specially authorized, by the 13th section of the Judiciary Act, to issue "writs of mandamus, in cases warranted by the principles and usages of law, *to any courts appointed or persons holding office under the authority of the United States*"—not to courts appointed or persons holding office under the authority of the several States. Thus the writ of *mandamus* is "*specially provided for* by statute;" and it is limited to issue only to courts of the United States and *persons holding office under the authority of the United States. Expressio unius, exclusio est alterius.*

Then the 14th section gives the courts of the United States power to issue "writs of *scire facias*, *habeas corpus*, and all other writs *not specially provided for by statute*, which may be necessary for the exercise of their respective jurisdiction." The mandamus, however necessary it may be, having been *specially provided for by statute*, is limited by the terms of the statute providing for it, and does not come within the grant of power in the 14th section. Such are the provisions of the Constitution and the law, to guard against disastrous conflicts of jurisdiction in the case of this writ, which were likely, if not so limited, to arise.

In *Knox County* v. *Aspinwall*,* singularly enough, the provision of the 13th section of the Act of 1789, *specially providing "by statute"* for the writ of *mandamus*, and limiting its

* 24 Howard, 376.

use, was wholly overlooked by the counsel, and consequently by the court.

2. However, conceding that *Knox County* v. *Aspinwall* was rightly decided, that is to say, that a mandamus may rightly issue from a circuit court to compel State officers to levy a tax where levy has not been previously enjoined by State courts—that case is not this. Here previously to the issue of the mandamus to levy, an injunction from the State court forbade a levy. That is the special feature of our case. It will be observed then, that in this case the mandamus cannot be granted and enforced, without compelling the respondents to do that which they are enjoined from doing by another court of competent jurisdiction. If the mandamus is allowed, they must *of necessity* disobey the one process or the other; and thus, by no possibility can they avoid liability to punishment for contempt, and that punishment is generally, if not always, imprisonment. If it be said that this result would not be the fault of the Federal courts, we reply that no more would it be the fault of the respondents. They stand before this court in no attitude of contumacy. There is no intimation in their answer of any wilful intent to disregard the orders of this court; but they do show us, we think, that their hands are completely tied, and that what the relator asks of them is a legal impossibility. They are within the jurisdiction of the State court. That court having clearly the power so to do, has adjudged the bonds in question void, and has enjoined the respondents from levying any tax to pay them. That injunction has been duly issued and duly served. The decisions of the State courts upon the question of the validity of the bonds, are not, except in special cases, subject to revision by this court. Within the scope of its jurisdiction, and as to all persons or property coming within that jurisdiction, the State judiciary is supreme, and its adjudications final. Whatever may be thought of the propriety or impropriety of its decisions, they must be accepted as binding upon parties properly before it, and persons legally brought within its jurisdiction.

The certainty of an occasional difference of opinion be-

tween two courts having jurisdiction over the same questions, long ago suggested the establishment of a rule to prevent any serious conflicts—a rule which will in every case, when applied and enforced in its true spirit, promote perfect harmony. We refer of course to the well-known rule, thus stated by this court,* and than which none can be more firmly settled, that "in all cases of concurrent jurisdiction, the court which first has possession of the subject, must decide it." It is that rule, we submit, which governs this case, and distinguishes it wholly from *Knox County* v. *Aspinwall*. There is no country in the world where so many distinct tribunals have a right to exercise complete jurisdiction over the same subject-matter. And, to enable the State and Federal courts, sitting in the same places, administering justice for the same people, and over the same subjects, to work smoothly, the rule is of inestimable value, and must be carefully acted upon.

Over this subject-matter we admit that the Circuit Court of the United States sitting in Iowa has, in a proper case, jurisdiction, and its having jurisdiction gives it power either to compel or prohibit the levy of such tax. But we assert, further, that the District and Supreme Courts of the State of Iowa have jurisdiction over precisely the same subject-matter. This will not be denied, and needs no proof. It follows, then, that neither the State nor Federal judiciary, have exclusive jurisdiction over the subject-matter of this proceeding. Either may compel the levy of the tax in question, and either may prohibit it. Nor can it be said that the Circuit Court sitting within the State of Iowa, *in construing and enforcing the constitution and laws of Iowa*, is in any sense superior to the State courts. The Federal courts are the final judges of all questions arising upon the construction of the Constitution of the United States and the acts of Congress, but in construing and enforcing the State constitution and laws they stand upon a perfect equality with the

* Smith *v.* McIver, 9 Wheaton, 532; and see Shelby *v.* Bacon, 10 Howard 67.

tribunals created by the constitution of the State for that purpose.*

The State court having then got possession of the matter first, cannot be disturbed in its jurisdiction of it.

3. The whole argument of the other side rests and *must* rest upon an assumption that a mandamus is like a *fi. fa.*, or *habere facias possessionem*, mere *process* issuing upon a judgment. But this is assumption of that which is false; a mistaken view of what a *mandamus* is. It is not a writ of final process at all.

In most of the States, as in England, the proceeding is not only begun by a petition or complaint and notice, but all of the proceedings and pleadings are the same, precisely the same, in every particular as in any other action at law. The defendant may plead or demur to the information upon which it is sought, or move to quash the alternative writ, or the plaintiff may reply or demur to or move to quash the answer or return of the respondent, and judgment is rendered as in any other cause. Such especially is the case in the State of Iowa,† where the code calls it, over and over again, an "action," and where its "form of pleading" is prescribed; being made the same as in *assumpsit*.‡

As said by this court,§ in modern practice it is nothing more nor less than an ordinary suit at law.

This is peculiarly the case when the proceeding as here is against third persons who were not a party to any other action with the relator, and where the relief sought is not simply to compel a defendant in a judgment to do some act, which by the judgment he is legally required to do, but where the relief is beside the judgment, and in aid of the rights of the plaintiff against a defendant, who was no party to the mandamus. In no court, under no circumstances, can this writ be granted, except in term time, and upon due notice to the party, *the very person* against whom it is sought. In

* Pulliam *v.* Osborne, 17 Howard, 471, and cases there cited.

† Chance *v.* Temple, 5 Iowa, 179. ‡ See *supra*, pp. 169–70.

§ Commonwealth *v.* Dennison, 24 Howard, 97; Kendall *v.* Stokes, 3 Id. 100.

this important regard it differs from the ordinary writ of execution incident to a judgment, and to which the creditor is entitled as of course. It is a writ which the court may grant or refuse to grant, depending upon the case made.

The idea that a mandamus will in any case issue as "process" in order to obtain the fruits of a judgment in the event of a failure to get the money on ordinary execution, is wholly new. As respects this special case we submit that it is absurd. The petition for the mandamus sets forth a contract and relies on it; and accordingly asks for a mandamus to compel the levy of a tax not only now to pay the judgment, but to pay also all coupons that have become due *since* the judgment, and all that *shall* become due until the maturity of the bond. Was ever "process" like this heard of on an ordinary judgment upon an ordinary railroad bond? As respects the State of Iowa, with which we are here concerned, this position is in the very face of its code. The action cannot be got under the Process Act at all. When you call it a "proceeding," the matter is given up, unless you prove that it is a proceeding in the nature of final process, and not one in the nature of an action: the rule about comity prevails. There is but one writ in Iowa, or elsewhere, which issues to enforce a judgment at law and as a part of the suit, and that is the ordinary writ of execution. It often happens indeed that a plaintiff fails to get his money by an execution, and has therefore to resort to some other remedy, as *ex. gr.*, to a bill in chancery. But is there, among the numerous cases of such bills, one in which it has been held that the court in which the creditor's bill is filed, gets a jurisdiction dating from the commencement of the original suit? Yet if the court which is applied to for a mandamus to aid in the collection of its judgment, may assume that its jurisdiction in the mandamus case reaches back to the commencement of the original suit, why not the same thing when a creditor's bill is filed for the same purpose? The most that can be said of this mandamus is that it is a proceeding—a suit—instituted in *aid* of the execution, or to create a fund on which the execution may be levied. But

such is the fact in every case where a creditor's bill is filed. We call in short upon counsel to point out to this court how, in any single feature or particular, a suit by *mandamus* in modern practice, differs from any other suit so as to authorize them to assume or conclude, that it is not simply a suit at law, though a suit which the court will not entertain when the party seeking it has other adequate remedy. They have produced no such authority or anything analogous to it by this or any other court. Would it not be at variance with the history and spirit of this tribunal to court unnecessary conflict with the co-ordinate tribunals of the States, and in the face of all direct authority, and of controlling analogy, to seek such occasion by holding that these suits are not suits?

In this particular case the mandamus is not only a new suit, but is one separate and distinct from the former, in that the subject-matter of the two are not the same. The object of the suit on the bonds was to recover a judgment. The object of this proceeding is to compel the levy of a tax.

In addition to all this, the court will not grant the writ to compel a party to do an act which it is not in his power, legally, to do, or which will subject him to punishment by another court having jurisdiction of him, in obedience to whose writ he is acting. It will not, to use an expression of Brinkerhoff, J.,* "place him between two fires;" and this is a universal rule of all courts, and has been as uniformly recognized in England as in this country. In *The Queen* v. *Sir Gilbert Heathcote*, so far back as the Modern Reports,† Eyre, J., speaking for the court, says:

"No instance could be produced where the courts have granted the writ, where obedience shall expose a man to *trouble or inconvenience*. Whereas, in this case, if Sir Gilbert obeys the man-

* Ohio and Indiana R. R. Co. *v.* The Commissioners, 7 Ohio State, 278; and see Insurance Co. *v.* Adams, 9 Peters, 571, and Ex parte Fleming, 4 Hill, 581.

† 10 Modern, 48; and see The Queen *v.* The Justices of Middlesex, 1 Perry & Davidson, 402.

damus, he will be liable to an action for false return to the court of aldermen."

Counsel replied that it was his own fault, and he might suffer the consequence. But Eyre, J., further says:

"I agree, that unless some mandamus will lie in this case there is no remedy. But it ought to be the concern of a court of justice to take care that while they are granting a remedy to one, they do not at the same time expose others to great inconveniences."

In the same case Lord Chief Justice Parker, after saying that there was no doubt about the jurisdiction of the court, says:

"As to Sir Gilbert, if he obey the writ he is subject to an action for a false return to the court of aldermen, and no instance yet has been produced where obedience to a mandatory writ of this court exposes a man to an action."

Far less will a court grant a mandamus to compel a man to do that which another court of co-ordinate power has enjoined him from doing. This follows necessarily and with greater reason from the authorities already referred to.

It is quite impertinent to say that in a suit in the State court for damages, he can plead the mandamus; and if the plea is not respected, he can, if the highest court of Iowa affirm the decision of the lower State court on that point, come here term after term to Washington, under the twenty-fifth section of the Judiciary Act, and at a thousand miles from Iowa, and at a cost which may ruin him, get the decision reversed. Or to say that if imprisoned he can get out on order of the Federal court through the Force Bill of 1833, or some other Federal statute. The doctrine declared in the case just cited is that a court will not subject an innocent man, discharging his duty under judicial order, to this sort of inconvenience and cost; an inconvenience which may involve him in suits for the residue of his life, and costs which it may be absolutely impossible for him to pay.

The case of *Knox County* v. *Aspinwall*, much relied on by the other side, is not, as is there supposed, in point. Certainly it decides that a mandamus may issue from this court after judgment to compel county commissioners to levy a tax. But no injunction had been *previously* laid on the commissioners there not to do it. There was no State court previously in possession of the matter on which the mandamus asked for was to act. That is the *point* of our present case. That decision does not hold, nor say, nor suggest, that a mandamus is "process" like an execution, nor that it issues as a part of the original suit. The case needed no such decision. The decision is not only wholly consistent with the idea that it is an "action," a new suit, but is inconsistent with any other. The court, Grier, J., giving the opinion, speaks of it, not as an execution, nor as process; but as "remedy," and one to *enforce* the *execution* of the judgment. It does not hold that a mandamus is not a new suit. It has in short, then, no bearing at all upon the questions raised in this cause. The suit, moreover, in that case* was brought for mandamus against the original defendants against whom the judgment had been rendered, so that the parties in the original and in the mandamus case were the same, while in this they are different.

The point decided in *Wayman* v. *Southard*, and relied on too, was that the Federal courts have power to issue *executions* for the enforcement of their judgments. Of course they have; executions such as belong to the judgment and grow out of it; the sort alone of which the court was speaking. So since *Knox County* v. *Aspinwall*, they may issue mandamus even to State officers, if mandamus be "necessary for the exercise of their respective jurisdiction." But of course they can issue it only in subordination to fixed principles of law; one of which is the rule of comity that allows a court already in possession of a case to keep it. But the right to issue a mandamus to a State officer does not go one step to prove that a mandamus is final process,

* 21 Howard, 539.

and so outside the rule; and to make the mandamus a *part* of the former case. But to assume that it is a "process," or *quasi* process, is to assume the whole case: to assume that which is contrary to the settled definition of the word; contrary to what has been always adjudged; and to assume what is wholly denied.

So of the other cases cited *contra* to the same effect as *Wayman* v. *Southard*.

It is urged that without the allowance of a mandamus the relator's judgment cannot be collected. If this were true, the law would remain as we have stated it. There are many judgments which cannot be collected. The same result might have followed, if an execution issued upon the relator's judgment had been levied the day after a State court had through its process levied upon the property of the county subject to execution. But this court would, nevertheless, adhere to its well-settled and salutary rule, of yielding the property to the State court in such cases.

*Reply:* The doctrine of comity and prior possession is inequitably invoked in a case like this. The State court, not regarding the principles laid down by this court in *Gelpcke* v. *The City of Dubuque*, as binding on them, but treating the bonds still as void, will issue any number of injunctions. There is nothing to prevent counties getting them, and unless the decision below is reversed they will all get them, of course. The bondholders are powerless to prevent it.

It is true that the case of *Wayman* v. *Southard*, and cases to the same effect cited by us, were cases of writs of execution. But the principle which that case and the other cases establish is, that the jurisdiction continues till the judgment is satisfied; satisfied, whether by writs of execution or by other "modes of process" or "proceeding," is unimportant. It is not necessary to regard the mandamus as "process." Many cases have been decided in this court that a supplemental proceeding, either at law or equity, to execute or perform the prior judgments of the Federal courts, is auxiliary to the original suit, and maintained without regard to the

jurisdiction of the court as to the parties. *Minnesota Company* v. *St. Paul Company*,* where there had been a former suit—an action of foreclosure against the La Crosse and Milwaukee Railroad Company—was such a case. The court there say: "The present suit is really a continuation of that one." The "present suit" spoken of was by a different plaintiff against different defendants, for a different object; yet being connected with the same subject-matter, about the same railroad, and the mortgaged property of the same, the court overruled the plea to the jurisdiction, holding the "present bill necessary in order to have a declaration of what was intended by the order and decree made in that (former) suit, *and to enforce the rights which were established by it.*"

So too, Pratt and White, who had bought the railroad at the marshal's sale, and held the title thereto, were citizens of the same State with the plaintiff, and this matter was set up to devest the Federal court of its jurisdiction, as undoubtedly it would, had the last suit been considered a new suit; but the court refused to entertain the plea, saying:

"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."

The argument drawn from position "between two fires," is without weight. The mandamus if pleaded will be a bar to any suit for damages in the State court; and if not so regarded by it, a writ of error lies hence under the twenty-fifth section of the Judiciary Act. As to imprisonment, the Force Bill of 1833 gives a complete remedy. We need not enlarge on provisions so abundantly known.

Mr. Justice CLIFFORD delivered the opinion of the court.

Application of the relator to the Circuit Court was for a mandamus to compel the defendants, as the supervisors of

* 2 Wallace, 632.

the county, to assess a tax upon the taxable property of the county to satisfy the judgment described in the transcript. Pursuant to the usual practice the court granted the alternative writ, commanding the defendants to assess the taxes, or show cause to the contrary, on or before the second day of the next term of the court. Service of the writ was duly made, but they neglected to levy the tax, and elected to show cause against the application.

They appeared, and in their return to the writ, they deny that it is their duty to levy the tax to pay the judgment, or that the relator is entitled to a peremptory writ, and allege that they have been enjoined not to assess a tax for that purpose by the State court, and aver that they cannot do so without being guilty of contempt and becoming liable to punishment. Plaintiff demurred specially to the return, and assigned the following causes of demurrer: 1. That the relator was no party to the proceedings in the State court. 2. That the proceedings in the State court were subsequent to the judgment of the relator in the Circuit Court. 3. That the State court had no jurisdiction, power, or authority, to prevent the relator from using the process of the Circuit Court to collect his judgment. 4. That the decree for an injunction rendered in the State court was no bar to the application of the relator for relief. But the court overruled the demurrer and decided that the return was sufficient. Judgment was thereupon rendered for the defendants, and the plaintiff sued out this writ of error.

I. Power was vested by law in the county judge of a county in the State of Iowa, to submit the question to the people of his county, whether they would construct or aid in the construction of roads or bridges; but when the question proposed involved the borrowing or the expenditure of money, the requirement was that it must be accompanied by a provision to lay a tax for the payment of the same in addition to the usual taxes, and the legislative enactment was, that such special tax, if voted under those circumstances, should be paid in money and in no other manner.

II. Revision of the proceedings was also devolved upon

the county judge; but if satisfied that they were correct, and that a majority of the votes had been cast in favor of the measure, it was made his duty to cause the proposition and the result of the vote to be entered at large in the minute-book of the county; and the same section of the act provides, that the entry, when so made, shall have the force and effect of an act of the General Assembly. Moneys so raised for such a purpose are regarded as specially appropriated by law and as constituting a fund, distinct from all others, in the hands of the treasurer, until the obligation assumed is discharged. Contracts made under such regulations are declared irrepealable, and the provision is that the taxes appointed for carrying the object into effect cannot be rescinded.*

III. Corporation defendants, acting under the authority of those provisions of law, on the first day of December, 1853, issued fifty bonds to the Lyons Iowa Central Railroad Company, of one thousand dollars each, with interest warrants, at the rate of seven per cent., payable semi-annually. Recitals in the respective bonds are, that they were issued by the authority of that act of the General Assembly, and of the required vote of the qualified voters of the county, taken in pursuance of that act. They were issued in payment of a subscription of five hundred shares in the capital stock of the railroad, and the record shows that the plaintiff is the holder of forty-seven of the bonds.

IV. Payment of the interest warrants having been refused, the plaintiff sued the defendants in the Circuit Court and recovered judgment against them for the same in the sum of five thousand one hundred and eighty-nine dollars and twenty-six cents, which is in full force and unsatisfied. Execution was duly issued on the same, and the marshal returned that he found no corporate property. Unable to enforce payment of his judgment, through the ordinary process of an execution, the plaintiff applied to the Circuit Court in which the judgment was recovered, for a mandamus to com-

* Code, §§ 114, 120.

pel the defendants to levy the tax as authorized by the people of the county at the time they voted to aid in the construction of the railroad and to issue the bonds.

V. Principal defence stated in the return of the supervisors is, that they had been enjoined from levying the tax as prayed, by a prior decree of the State court, and the record shows that the State court, at the suit of a tax-payer of the county, issued an injunction perpetually enjoining the defendants from levying the special tax voted at the time the proposition to grant aid to the railroad was adopted. Want of jurisdiction in the Circuit Court was not alleged in the return, nor was any such ground assumed by the circuit judge who refused the writ. Experienced counsel, however, have made that point in this court, and it becomes the duty of the court to determine it before examining the merits. Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.*

Express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record.†

Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution. Congress, it is conceded, possesses the uncontrolled power to legislate in respect both to the form and effect of executions and other final process to be issued in the Federal

* Rhode Island *v.* Massachusetts, 12 Peters, 718.

† Wayman *v.* Southard, 10 Wheaton, 23; Suydam *v.* Williamson, 20 Howard, 437; 2 Tidd's Practice, 1134; Co. Lit., 288, b.

courts. Implied concession also is, that Congress might authorize such courts to employ the writ of mandamus to enforce a judgment rendered in those courts in a case where the ordinary process of execution is inappropriate, and where the judgment creditor is without other legal remedy; but the defendants insist that Congress has not made any such provision. Federal courts, it is argued, cannot act in any way on State officers, except in the specified cases in this court under the twenty-fifth section of the Judiciary Act. Support to that proposition is attempted to be drawn from the last clause of the thirteenth section of that act, which, in terms, authorizes this court to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States.*

Neither State courts nor State officers are named in the clause, and the argument is, that the authority to issue the writ does not extend to any courts or persons except those enumerated. *Expressio unius est exclusio alterius.* Particular consideration of that point, however, is unnecessary, as there is no application to this court for any such writ. Examination of the record, even for a moment, will show that the application for the writ in this case was to the Circuit Court, and that the case was brought here by writ of error to the judgment of that court. But this court cannot issue the writ of mandamus in any case in the exercise of original jurisdiction, as no such power is conferred by the Constitution. Direct decision of this court in the case of *Marbury* v. *Madison*,† was that the clause of the thirteenth section of the Judiciary Act referred to by the defendants, so far as it professes to authorize this court to issue the writ to persons holding office under the United States, other than judicial officers, was not warranted by the Constitution, because it contemplated the exercise of original jurisdiction in a case other than those enumerated in the instrument.

Second proposition of the defendants is, that the four-

* 1 Stat. at Large, 81.

† 1 Cranch, 175.

teenth section of the Judiciary Act does not confer the power upon the Federal courts to issue the writ to a State officer in any case. They argue that it does not authorize those courts to issue it at all, as it is not one of the writs named in the section, and is specially provided for, as appears in the preceding section. Nothing, however, is better settled than the rule that the Circuit Courts in the several States may issue the writ in all cases where it may be necessary, agreeably to the principles and usages of law, to the exercise of their respective jurisdictions. Such was the construction given to the fourteenth section of the Judiciary Act at the same time that the last clause of the preceding section, except as applied to judicial officers, was held to be unconstitutional and void, and that construction has been followed to the present time.*

None of the Circuit Courts in the several States can issue the writ as an exercise of original jurisdiction, any more than this court, but they may issue it whenever it is necessary, agreeably to the principles and usages of law, to the exercise of their proper jurisdiction, and their judgments in such cases may be re-examined in this court, on writ of error, under the twenty-second section of the Judiciary Act. Objections to the jurisdiction of the Circuit Court, and of this court, are therefore overruled.

VI. Before proceeding to consider the operation and effect of the injunction issued by the State court, it becomes necessary to examine more closely into the source, nature, and operation of Federal process, and the jurisdiction and power of the Circuit Courts in the several States. Circuit Courts were created by the act of Congress, under which the judicial system of the United States was organized, but the act made no provision for the forms of process. Forms of processes in the Federal courts were regulated by the act of Congress, which was passed five days later.†

Writs and processes issuing from a Circuit Court were required by that act to bear the test of the chief justice of

* McIntire *v.* Wood, 7 Cranch, 504; McClung *v.* Silliman, 6 Wheaton, 601; Conklin's Treatise, 161.

† 1 Stat. at Large, 93.

the Supreme Court, to be under the seal of the court, and to be signed by the clerk. By the second section of the act, it was provided that the forms of writs and executions, . . . . and the modes of process, in suits at common law, . . . . should be the same as were then used in the Supreme Courts of the States. Subsequent act adopted substantially those provisions, and made them permanent.* Legal effect of those enactments was, that Congress adopted the forms of writs and executions, and the modes of process, as then known and understood in the courts of the States, for use in the several Circuit Courts.

Modes of process, and forms of process, were in use in the States at that period, other than such as were known at common law as understood in the English courts. Radical changes had been made in some of the States, not only in the forms of mesne process, and the rules of pleading, but in the modes of process in enforcing judgment, as was well known to Congress when the Judiciary and Process Acts were passed.

Executions, it is admitted, may be issued by the Circuit Court, but the power of such courts to issue the other writs necessary to the exercise of jurisdiction, is equally clear, with the single restriction that the writ, and the mode of process, must be agreeable to the principles and usages of law. Usages of law, and not of the common law, it will be observed, are the words of the provision, which, doubtless, refers to the principles and usages of law as known and understood in the State courts at the date of that enactment.

Forms of process, mesne and final, and the modes of process varied in essential particulars from the principles and usages of the common law, and in many cases they were different in the different States. Intention of Congress, in passing the Process Acts, was, that the forms of writs and executions, and the modes of process, and proceedings in common law suits, in the several Circuit Courts, should be the same as they were at that time in the courts of the re-

* 1 Stat. at Large, 276.

spective States. Instead of framing the forms of process, and prescribing the modes of process, Congress adopted those already prepared and in use in the respective States, not as State regulations, but as the rules and regulations prescribed by Congress for use in the several Circuit Courts. Adopted as they were, by an act of Congress, they became the permanent forms and modes of proceeding, and continue in force wholly unaffected by any subsequent State legislation. Alterations can only be made by Congress, or by the Federal courts, acting under the authority of an act of Congress.

Practical effect of the course pursued was, that the forms of writs and executions and the modes of process and proceedings were the same, whether the litigation was in the State court or in the Circuit Court of the United States. They were not always the same in different States nor in different circuits; and in some instances they were widely different in the different States of the same circuit. Those diversities, or many of them, continue to the present time.

Great diversity in the forms of real actions and of indictments were the necessary effect of the system. Different rules of pleading necessarily followed. Modes of process also were different, both in respect to mesne and final process. Attachment of personal and real property upon mesne process is allowed in one district, while the power to create any such lien in the service of such process is entirely unknown in another district, even in the same circuit. Lands of the debtor were subject to seizure and sale on execution in one district, while in another real property was only subject to seizure and an extent corresponding to a modified *elegit* as at common law. Money judgments in one district became a lien upon the lands of the judgment debtor, while in another the judgment creditor must first seize the lands before he was entitled to any such preference.

Remedies on judgments against municipal corporations partook of the same diversity in the different districts as that appearing in the modes of process to enforce judgments recovered against private persons. Judgment against

such a corporation might be enforced in one district by levying the execution, as issued against the corporation, upon the private property, personal or real, of any inhabitant of the municipality, while in another the appropriate remedy, in case the execution against the corporation was returned *nulla bona*, was mandamus to compel the proper officers of the corporation to assess a tax for the payment of the judgment.*

Circuit courts, by virtue of those acts of Congress, became armed with the same forms of writs and executions, and vested with the authority to employ the same modes of process, as those in use in the State courts. Permanent effect of that wise measure was, that the forms of writs and executions and the modes of process were the same, whether the litigation was in the forums of the State or in the Circuit Court of the United States.

Remark should be made that those Process Acts in terms apply only to the old States, but the Federal courts in States since admitted into the Union are, in virtue of subsequent enactments, governed by regulations substantially similar.†

Express provision in the third section of the act of the nineteenth of May, 1828, is, that writs of execution, and *other final process issued on judgments* rendered in the Federal courts, AND THE PROCEEDINGS THEREUPON, shall be the same in each State as are now used in the courts of such State.

VII. Public buildings and all other public property of a county in the State of Iowa, are exempt from execution under the law of the State, and the same law enacts that the property of the private citizen can in no case be levied upon to pay the debt of a civil corporation.‡

Return of *nulla bona* in this case therefore showed that the creditor was without remedy, unless the Circuit Court in which the judgment was recovered could issue the writ of mandamus to compel the proper officers of the county to

* Angell & Ames on Corporations, § 629.

† 4 Stat. at Large, 274; 5 Id. 499, 789.

‡ Code, sec. 1895; Revision, sec. 3274.

levy the tax voted for that purpose when the consent of the county was given to incur the liability.

VIII. Definition of mandamus, as given in the code of the State, is, that it is an order of a court of competent jurisdiction commanding "an inferior tribunal, corporation, board, or person, to do or not to do an act, the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station." *

Established rule in the Supreme Court of the State is, that where the debt of a municipal corporation has been reduced to judgment and the judgment creditor has no other means to enforce the payment, mandamus will be issued to compel the proper officers of the municipality to levy and collect a tax for that purpose.†

Apart from the injunction, therefore, it is an incontrovertible fact that the appropriate remedy of the plaintiff, if his judgment had been recovered in the State court, would have been mandamus to compel the defendants, as the supervisors of the county, to levy the tax previously voted to pay the judgment.

Same views have also been advanced by this court in several cases, in which there was no dissenting opinion. Mandamus, said Mr. Justice Grier, in an analogous case, is a remedy, according to well-established principles and usages of law, to compel any person, corporation, public functionary, or tribunal, to perform a duty required by law, where the duty sought to be enforced is clear and undisputable, and the party seeking relief has no other legal remedy.‡

Petitioner in that case had previously recovered judgment for interest due on bonds issued by the county as material aid in the construction of a railroad, and the report of the case shows that the same legislative act which authorized the subscription made provision that the commissioners should annually "assess a special tax sufficient to realize the

* Code, sec. 2179; Revision, 3761.

† Coy *v.* City Council of Lyons, 17 Iowa, 1; Dox *v.* Johnson Co., 12 Id. 237; Clark *v.* City of Davenport, Id. 335.

‡ Commissioners of Knox Co. *v.* Aspinwall et al., 24 Howard, 303.

amount of interest to be paid for the year." Unanimous decision of this court was, that the writ of mandamus was the proper legal remedy to enforce that duty in case of neglect and refusal, and the judgment of the Circuit Court granting the writ was affirmed. Decision of the court was placed upon the ground not only that the writ was necessary to the exercise of jurisdiction in the Circuit Court, but that the law providing for a special tax was a part of the contract.

Necessary conclusion is, that the decision in that case is an authority for everything asked in the plaintiff's application, unless it be held that the power of the Circuit Court to grant relief in this case was displaced and overruled or perpetually suspended by the injunction issued from the State court.

Exactly the same views have been expressed by this court in later cases. Where a State has authorized a municipal corporation to contract and to exercise the local power of taxation to the extent necessary to meet the engagement, the power thus given cannot be withdrawn until the contract is satisfied.*

Regularity of the proceedings in the primary suit are not open to inquiry, and it is conceded that the judgment was in regular form; and if so, then the power of the Circuit Court to issue final process, agreeably to the principles and usages of law, to enforce the judgment, is undeniable.†

Authority of the Circuit Courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the State courts or by any act of a State legislature. Such an attempt was made in the early history of Federal jurisprudence, but it was wholly unsuccessful.‡ Suit in that case was ejectment and the verdict

* Von Hoffman *v.* Quincy, 4 Wallace, 554; Supervisors *v.* United States, Id. 444.

† Wayman *v.* Southard, 10 Wheaton, 22; Bank of the United States *v.* Halstead, Id. 56.

‡ McKim *v.* Voorhies, 7 Cranch, 281.

was for the plaintiff. Defeated in the Circuit Court, the defendant went into the State court and obtained an injunction staying all proceedings. Plaintiff applied for a writ of *habere facias possessionem*, but the judges of the Circuit Court being opposed in opinion whether the writ ought to issue, the point was certified to this court; and the decision was that the State court had no jurisdiction to enjoin a judgment of the Circuit Court, and the directions were that the writ of possession should issue. Prior decisions of the court had determined that a Circuit Court could not enjoin the proceedings in a State court, and any attempt of the kind is forbidden by an act of Congress.*

Repeated decisions of this court have also determined that State laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of the process or proceedings in the Federal courts.†

The Constitution itself becomes a mockery, say the court in that case, if the State legislatures may at will annul the judgments of the Federal courts, and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals.‡

Congress may adopt State laws for such a purpose directly, or confide the authority to adopt them to the Federal courts, but their whole efficacy when adopted depends upon the enactments of Congress, and they are neither controlled or controllable by any State regulation.§

State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts.‖ Circuit courts and State courts act separably and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of

* Diggs et al. *v.* Wolcott, 4 Cranch, 179; 1 Stat. at Large, 335.

† United States *v.* Peters, 5 Cranch, 136.

‡ Slocum *v.* Mayberry, 2 Wheaton, 9; Beers et al. *v.* Haughton, 9 Peters, 359.

§ United States *v.* Peters, 5 Cranch, 136; Boyle *v.* Zacharie et al., 6 Peters, 658.

‖ Duncan *v.* Darst et al., 1 Howard, 306; Peck *v.* Jenness, 7 Id. 625.

the other, as if the line of division between them "was traced by landmarks and monuments visible to the eye."* Appellate relations exist in a class of cases, between the State courts and this court, but there are no such relations between the State courts and the Circuit courts.

Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit courts are wholly independent of the State tribunals. Based on that consideration, the settled rule is, that the remedy of a party, whose property is wrongfully attached under process issued from a Circuit court, if he wishes to pursue it in a State tribunal, is trespass, and not replevin, as the sheriff cannot take the property out of the possession and custody of the marshal.† Suppose that to be so, still the defendants insist that the writ was properly refused, because the injunction was issued before the plaintiff's application was presented to the Circuit court. Undoubtedly Circuit courts and State courts, in certain controversies between citizens of different States, are courts of concurrent and co-ordinate jurisdiction, and the general rule is, that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court. Such questions usually arise in respect to property attached on mesne process, or property seized upon execution, and the general rule is, that where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first attached or seized.‡

Corresponding decisions have been made in this court, as

* Ableman *v.* Booth, 21 Howard, 516.

† Freeman *v.* Howe et al., 24 Id. 455; Buck *v.* Colbath, 3 Wallace, 341.

‡ Payne *v.* Drewe, 4 East, 523.

in the case of *Hagan* v. *Lucas*,* where it was held that the marshal could not seize property previously attached by the sheriff, and held by him or his agent, under valid process from a State court. Rule laid down in the case of *Taylor* v. *Carryl et al.*† is to the same effect as understood by a majority of the court.‡

Argument for the defendants is, that the rule established in those and kindred cases, controls the present controversy, but the court is of a different opinion, for various reasons, in addition to those already mentioned. Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear that the proposition is wholly untenable. Theory of the plaintiff is, that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction which has previously attached, and that, in such cases, it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract. Grant that such is the nature and character of the writ, as applied in such a case, and it is clear that the proposition of the defendants must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a State court cannot enjoin the process or proceedings of a Circuit court.

Complete jurisdiction of the case, which resulted in the judgment, is conceded; and if it be true that the writ of mandamus is a remedy ancillary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument, as it cannot be contended that a State court can enjoin any such process of a Federal court. When issued by a Federal court, the writ of mandamus is never a prerogative writ.§ Outside of this district no Circuit court can issue it at all in the exercise of original jurisdiction.

Power of the Circuit courts in the several States to issue

* 10 Peters, 400.

† 20 Howard, 595.

‡ Mallett *v.* Dexter, 1 Curtis C. C. 174.

§ Kentucky *v.* Dennison, 24 Howard, 97.

the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Express determination of this court is, that it can only be issued by those courts in cases *where the jurisdiction already exists*, and not where it is to be acquired by means of the writ.*

Proposition of the defendants proves too much; for if it be correct, the Circuit courts in the several States cannot issue the writ in any case. Such a proposition finds no support in the language of the Judiciary Act, or in the decisions of this court. Twice this court has affirmed the ruling of the Circuit court in granting the writ in analogous cases, and once or more this court has reversed the ruling of the Circuit court in refusing the writ, and remanded the cause, with directions that it should be issued.† Learned courts in the States have advanced the same views, and it does not appear that there is any contrariety of decision.‡

Tested by all these considerations, our conclusion is, that the propositions of the defendants cannot be sustained, and that the Circuit courts in the several States may issue the writ of mandamus in a proper case, where it is necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law. Where such an exigency arises, they may issue it, but when so employed, it is neither a prerogative writ nor a new suit, in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract.§

Next suggestion of the defendants is, that if the writ is

* Kendall *v.* United States, 12 Peters, 615–627; McClung *v.* Silliman, 6 Wheaton, 601; McIntire *v.* Wood, 7 Cranch, 506.

† Knox County *v.* Aspinwall et al., 24 Howard, 385; Von Hoffman *v.* Quincy, 4 Wallace, 554; Supervisors *v.* United States, Id. 446.

‡ Thomas *v.* Allegheny County, 32 Pennsylvania State, 225; Hamilton *v.* Pittsburg, 34 Id. 509; Armstrong *v.* Allegheny, 37 Id. 279; Graham et al. *v.* Maddox et al., 6 American Law Register, 620; Carroll *v.* Board of Police, 28 Mississippi, 38; Moses on Mandamus, 126.

§ Kentucky *v.* Dennison, 24 Howard, 97.

issued, and they should obey its commands, they may be exposed to a suit for damages or to attachment for contempt, and imprisonment. No such apprehensions are entertained by the court, as all experience shows that the State courts at all times have readily acquiesced in the judgments of this court in all cases confided to its determination under the Constitution and laws of Congress. Guided by the experience of the past, our just expectations of the future are that the same just views will prevail. Should it be otherwise, however, the defendants will find the most ample means of protection at hand. Proper course for them to pursue, in case they are sued for damages, is to plead the commands of the writ in bar of the suit, and if their defence is overruled, and judgment is rendered against them, a writ of error will lie to the judgment, under the twenty-fifth section of the Judiciary Act.

Remedy in case of imprisonment is a very plain one, under the seventh section of the act of the second of March, 1833, entitled, an act further to provide for the collection of the duties on imports. Prisoners in jail or confinement for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof, may apply to either of the justices of the Supreme, or a judge of any District court of the United States for the writ of habeas corpus, and they are severally authorized to grant it, in addition to the authority otherwise conferred by law.*

Under any such circumstances, the wisdom of Congress has provided the means of protection to all persons sued or imprisoned for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any Federal judge or court of competent jurisdiction.

Views here expressed also control the decision in the case of *Thomson* v. *Henry County*.

JUDGMENT REVERSED, and the cause remanded with direc-

* 4 Stat. at Large, 634.

tions to sustain the demurrer and for further proceedings in conformity to the opinion of the court.

Mr. Justice MILLER, dissenting.

In the case of *Gelpcke* v. *Dubuque*, reported in 1st Wallace,* I felt called upon to point out the evil consequences likely to flow from the doctrine there asserted for the first time, that the construction given by the State courts to their own constitutions and statutes, could be disregarded and overruled by the Federal courts sitting in the same States and deciding the same controversies.

These consequences are now apparent in the judgments just rendered, whereby the State officers are commanded to disobey an injunction of a State court, rendered in regular judicial proceedings, to which they were proper parties, in a matter of which that court had undoubted jurisdiction, concerning the levy of a tax under State laws.

It may not be inappropriate to review the steps by which this court has gradually arrived at the conclusion that it can do this, for the purpose of enforcing the payment of bonds, issued without authority of law, out of the property of those who never consented to their issue or agreed to pay them.

In almost all the cases where municipal corporations have any authority at all to issue such bonds, the statutes which give the authority require that there shall first be a vote of the majority of the people of the municipality, approving the purpose for which they are issued, and authorizing their issue. Of course the law fixes the manner of taking this vote; and I believe that, until this court decided to the contrary, no court had ever held that such bonds were valid without a substantial compliance with the statutes on that subject.

But in the case of the *Commissioners of Knox County* v. *Aspinwall*, 21 Howard,† it was held that the commissioners, whose duty it was to issue these bonds in the event that a majority voted them, were to be the exclusive and final

* Page 207. † Page 539.

judges of their own authority. It was said that because it became their duty to determine whether the bonds had been legally voted or not, before they issued them, therefore the fact that they had issued them was conclusive of the vote and of their own authority, and precluded all inquiry into that question.

These commissioners were merely the agents of the people of the municipality. Their authority depended on no private instructions, but on the public statutes of the State, which every person who dealt with them could examine. The proceedings for a vote were all of record, as well as the return of the officers taking the vote.

Yet, in the face of all this, when these agents transcend their authority, and attempt to bind upon the people of the county a load of debt which may absorb all their property, and heavily burden them for years, we are told that the agents were the final and exclusive judges of their own authority. When the highest court in the land renders a judgment or a decree, any other court before which the matter may come has a right to inquire into its authority to pass such judgment; but these mere agents of the people, whose powers are limited by law, may, by merely asserting their authority, pass a decree which no court can examine, because none can dispute their jurisdiction.

After this decision, no matter how illegal, fraudulent, or unauthorized were corporation bonds, no defence could be made to them in the Federal courts, and, of course, they were all sued upon in those courts.

But when judgments were obtained, it was found that the ordinary executions did not always produce the money, and some new device was to be resorted to for this purpose. Accordingly, we find Mr. Aspinwall applying for a writ of mandamus to compel the board of commissioners to levy the tax necessary to pay his judgment. This court held, in 24th Howard,* that he was entitled to the writ. This was decided only seven years ago, and is the first instance in which a

* Page 376.

Federal court ever issued a writ of mandamus to a State officer in the history of this government.

I shall examine into its authority to do so hereafter, but merely note it in passing as among the new doctrines which this court has found it necessary to establish to enforce payment of county bonds.

The next step was the decision already mentioned of *Gelpcke* v. *Dubuque*, in which the court held that the later decisions of a State court on the construction of its own constitution, although unanimous, would be disregarded in this court in county bond cases, in favor of earlier decisions made by a divided court.

In the present case we are required to take another step in the same direction, and one still more serious. We are asked by mandamus to compel these municipal officers to disobey an injunction of the State court duly served on them, and made perpetual by a decree to which they were parties, and which, if they disobey, they will be imprisoned for such disobedience. Before doing this we are requested to reconsider the question of the right of the Federal courts to control the officers of the State in the execution of State laws, by writ of mandamus, by counsel who is commended to our consideration not more by his age and experience in the law, than by his acknowledged ability as a constitutional lawyer. In doing this, he points out that a provision of the statute bearing directly on the question did not receive the attention either of counsel or of the court, in the decision of *Aspinwall* v. *Knox County*, nor in any subsequent case.

This question must be determined by a consideration of sections thirteen and fourteen of the Judiciary Act of 1789.

The court, in the case above mentioned, bases the authority to issue this writ on the following language of section fourteen: "All the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The writ of mandamus is not here mentioned spe-

cifically, and can only be authorized when it is necessary to the exercise of jurisdiction already existing, and when agreeable to the principles and usages of law; and if it is specially provided for by statute, it is not included in the "other writs" referred to in this section.

It is asserted, in this class of cases, to be necessary to the exercise of the jurisdiction of the court.

It is a little remarkable that the first case which required its use by a Circuit court against State officers, should have arisen seventy years after the authority was granted, under which it is now called into exercise. While this consideration may not be conclusive, that the writ is unnecessary to the exercise of that court's jurisdiction, it affords a strong presumption against the existence of such necessity; and also that its issue in such cases is not agreeable to the principles and usages of law.

But any doubt we may have in the construction of the fourteenth section, standing alone, is removed by the provisions of the section which immediately precedes it. It is there said that "the Supreme Court shall also have appellate jurisdiction from the Circuit courts, and courts of the several States, in cases hereinafter specially provided for, and shall have power to issue writs of prohibition to District courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, *to any courts appointed or persons holding office under the authority of the United States.*"

I shall not attempt, in the face of this statute, to argue that the power granted by it to the Supreme Court to issue the writ of mandamus is limited to courts appointed and to persons holding office under the United States, when, as in the present case, it is to be directed to a person, by virtue of his office. The concluding words of the section are useless but for the purpose of so limiting it, and if these words are useless, they are the first which, in eighty years, have been found to be so in this admirable statute.

If, then, Congress, in the very sentence in which it gives appellate jurisdiction over State courts, expressly denies to

this court the right to issue the writ of mandamus to State courts and State officers, while it grants it in cases of Federal courts and Federal officers, did it intend in the next section to authorize the inferior courts, which have no appellate jurisdiction whatever over any State tribunal, to issue mandamus to State courts or to State officers? Or did it intend that while the Supreme Court itself was forbidden, both in its appellate and original jurisdiction, to issue a mandamus to State officers, that court might effect the same purpose by ordering the Circuit courts to do it? This would be an inconsistency of which there is no other like instance in the statute, and which is at variance with the care and skill which are apparent in all its parts. This view could be well supported, if the occasion justified it, by an examination of all the legislation of that period, showing the jealousy with which the rights of the States and of the State courts were guarded.

If, however, the Federal courts can, under proper circumstances, take control of these officers for the purpose of compelling them to levy taxes, it is incontrovertible that the power of the State courts over such officers, and over the subject of their right to tax, is as full and complete as that of the Federal courts can possibly be. It is, indeed, a concession to say that the jurisdiction of the Federal courts is concurrent with that of the State courts.

In the cases now under consideration it is conceded that the State courts had issued their injunction after due course of legal proceedings, in which the tax-payers were complainants and the supervisors were defendants, before any application was made to the Federal court for a mandamus.

In order to prevent such conflicts as threaten to grow out of the matter before us, in cases of concurrent jurisdiction it has been established as a rule that the court which first obtains jurisdiction of the case shall have the exclusive right to decide the matter in issue, and that any other court which may have subsequently assumed to act in the matter must, when the fact of this priority of jurisdiction is brought to its attention, proceed no further.

This principle is necessary, and is recognized in all courts; and when properly applied in the spirit of comity which should actuate courts, will be found sufficient to prevent unseemly collision between them. It has been recognized by this court so repeatedly as the rule which governs in matters of concurrent jurisdiction between the State and Federal courts that a citation of authorities is hardly necessary, but I mention *Shelby* v. *Bacon*,* *Carroll* v. *Taylor*,† *Freeman* v. *Howe*,‡ and *Buck* v. *Colbath*.§

This principle being conceded, and the return of the supervisors to the alternative writ of mandamus, showing that they were enjoined from levying the tax to pay these bonds before the application was made to the Federal court for the writ of mandamus to compel them to levy it, it would seem to follow that the decree of the State court must be respected, and the return be held sufficient.

But here we are met with another of those judicial subtleties of which the corporation bond litigation seems to be the prolific parent.

We are told that the writ of mandamus is not a new or original proceeding, but is merely the ordinary exercise of the court's jurisdiction in enforcing a judgment at law already rendered for the payment of money; that a judgment had been rendered in favor of the relator against the County of Johnson before the injunction issued from the State court, and therefore the Federal court had first acquired jurisdiction of the case.

Let us inquire for a moment of what case the Federal court had acquired jurisdiction. Of an action of assumpsit, in which Marcus Riggs was plaintiff and Johnson County was defendant, and in which the plaintiff recovered a judgment for his debt. Of what case was it the State court had jurisdiction? Of a bill in chancery, brought by the resident tax-payers of Johnson County against the board of supervisors of that county, to enjoin them from levying a tax to pay certain bonds. Neither party to the suit in the Federal

* 10 Howard, 56.
† 20 Id. 583.
‡ 24 Id. 454.
§ 3 Wallace, 334.

court was party to the suit in the State court, or was a necessary or a proper party to it. The subject-matter of the suit in the Federal court was the ordinary collection of a debt from Johnson County. The subject-matter of the suit in the State court was the attempt of the board of supervisors to levy an illegal tax. The County of Johnson is a corporation capable to sue and be sued. The supervisors are officers of whom certain duties are required. They are not identical, and cannot be sued for the same purpose.

It surpasses my ingenuity to see how the suit in the Federal court can be said to have first obtained jurisdiction of the case in the State court. The parties, plaintiff and defendant, are all different, and the subject-matter of the suit is different, and the relief sought is different.

Much has been said in the course of argument by counsel of the incapacity of a State court to enjoin the judgment of a Federal court, or to restrain or interfere with its process.

Nothing of the kind is attempted, nor any such power claimed by the State court in the proceedings relied on in the return. The judgment of the Federal court is not mentioned or alluded to in the proceedings in the State court. Neither plaintiff nor defendant in the Federal court are made parties to the suit in the State court. Nor is any decree rendered touching its process or designed to interfere with it. All the ordinary writs, and all the ordinary powers of a court in a judgment at law, may be exhausted by the Federal court without the possibility of any collision between that court and the decree of the State court. It is only when the plaintiff in the Federal court, having exhausted his remedy in that action, brings a new suit, with new defendants, praying for a new and different relief, that the courts come into collision.

It is said in answer to all this that the writ of mandamus as applied for in this case is no new action, but is the ordinary process by which the court enforces its judgment, and that this is especially so in the Iowa Circuit, because such is the case in the Iowa State courts.

The Revision of 1860, of the Iowa statutes, must determine

the soundness of this proposition so far as the courts of that State are concerned. Chapter 153 is headed in capitals, "Action of mandamus." § 3761 describes the cases to which the action is applicable in the language used by common law writers. § 3762 says the plaintiff shall state his claim and facts sufficient to constitute a cause for such claim. § 3766. The pleadings and other proceedings in any action in which a mandamus is claimed shall be the same in all respects, as nearly as may be, as in an ordinary action for the recovery of damages. § 4181 says that when the action of mandamus is by a private person, there may be joined therewith the injunction of chapter 156, . . . . and the action shall be by ordinary proceedings.

I believe I have quoted substantially all that there is on this subject in the statutes of Iowa, and these govern the practice of her courts. I think I am also entitled to speak of the actual practice in those courts. It is clear that it is not a mere ancillary writ, but is in all cases a separate action, with pleadings as in other actions, and judgment thereon. How then can it be said that this is one of the ordinary powers of the court, incident to, and consequent upon, the judgment of the court, in an action of debt or assumpsit?

But the statutes of Iowa in this respect have not changed the common law. Bacon, in his Abridgment, says, that "since this statute (9 Ann., chap. 20), a mandamus is in the nature of an *action*, special replications and pleadings therein being admitted, and costs awarded to either side that prevails."

In the case of *Kendall* v. *Stokes*,* this court held, that "the proceeding on mandamus, is a case within the meaning of the act of Congress. . . . . It is an action, or suit brought in a court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings." And in another case between the same parties, reported 3 Howard, 100, the court says, it is now regarded as an action by the party on whose relation it is granted; and holds that the former action

* 12 Peters, 615.

of mandamus is a bar to an action of assumpsit for the same cause. So in *Kentucky* v. *Denison*,* it is said, "a mandamus, in modern practice, is nothing more than an action at law between the parties."

Passing from these conclusive evidences of what this very court considers to be the nature of the writ of mandamus, and what the statutes of Iowa (appealed to in the opinion of the majority as the basis of their judgment) intend it to be, if we look to the essential nature of the present proceeding we shall still be more convinced that it is a new suit in every sense of the word. We have already shown that the parties are different. The purpose of it is to enforce the levy of a tax; an object which could never be obtained, and which is not within the scope of an action of assumpsit. The parties seeking the writ in the information which they filed in the present case, did not rest their claim on the statement that they had a judgment against a corporation which they could not enforce by execution, but they go back of that and recite the issue of the bonds, and the vote of the tax to pay them by the county, and pray for this writ to enforce specifically that contract. And in the opinion just delivered, it is declared to be the object of the writ to enforce the judgment of the court, by levying the tax, "*as provided in the contract.*"

So that it is clear, that both the plaintiff in his information, and the court in its opinion, consider the writ in this case as in the nature of a bill in chancery, to enforce specific performance of a contract.

And that is precisely what it is. Was it ever heard that such a bill is merely ancillary to a judgment at law, and is only used for the purpose of enforcing a judgment for damages, for failing to pay a note or bond? The obligation of the supervisors to levy this tax, if it exist at all, is as perfect in regard to bonds on which there is no judgment, as it is where judgment has been rendered; and this duty can as well be enforced by mandamus in the one case as in the other. It is this duty which is sought to be enforced in the

* 24 Howard, 97.

present case. If a mandamus is liable to issue without the judgment, how can it be said to be an incident to the judgment, and a part of that suit?

But if I am mistaken in all that I have thus far been saying, there is another proposition, supported by a uniform current of authorities, which would preclude the issuing the writ of mandamus in this case. That is, that the writ is never issued to a party whom it would expose to imprisonment or other serious damage for obeying it.

I have not time to quote from the authorities on this subject, but they are numerous and without contradiction.*

The cases before us have been argued with great zeal and ability on both sides, and counsel for the relator were challenged to produce a single reported decision in which a mandamus had been issued to parties who would be subjected to danger, to expense, or to suffering, by obeying its order. No such case has been found, and I feel authorized to say none can be found. With all the respect which I have for this court, and for my brethren who differ with me, I take the liberty of saying it has no right to set aside all precedent, and disregard established rules in the belief, however confidently entertained, that it is done in the cause of justice.

The CHIEF JUSTICE. I concur mainly in the views and wholly in the conclusions of my brother Miller

GRIER, J. I concur.

NOTE.

Immediately after the delivery of the judgment in the preceding case, was delivered by CLIFFORD, J., the opinion in another, in all essential matters just like it; the doctrine of the preceding case being affirmed. It was the case of *Weber* v. *Lee County*.

* See The Queen *v.* Sir Gilbert Heathcote, 10 Modern, 48; The Queen *v.* Justices of Middlesex, 1 Perry & Davidson, 402; King *v.* Dyer, 2 Adolphus & Ellis, 606; People *v.* Gilmer, 5 Gilman, 243; Ex parte Fleming, 4 Hill N. Y. 581; The Ohio and Indiana Railroad Company *v.* Commissioners of Wyandot, 7 Ohio State, 278.

## WEBER *v.* LEE COUNTY.

In this case, where the questions presented for decision were the same as those decided in the preceding case, the doctrine of that case was affirmed.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

*Messrs. Dick and Grant, for the plaintiff in error; Mr. Thomas Ewing, Sr., contra.*

Mr. Justice CLIFFORD delivered the opinion of the court; stating the case.

Bonds to the amount of four hundred and fifty thousand dollars were issued by the proper officers of Lee County in the State of Iowa, in favor of three railroad companies, in equal proportions. Recitals of the respective bonds were, that they were issued to some one of those railroad companies, pursuant to a vote of the people of the county, at an election held September 10th, 1856, authorizing the county judge to make a subscription to the capital stock of the railroad, and issue the bonds for the amount of the subscription.

Irregularities occurred in the preliminary proceedings, but the legislature of the State, on the twenty-ninth day of January, 1857, passed an act declaring, in substance and effect, that all of the votes taken in the county, in the form of a joint or several proposition, whether the county would aid in the construction of one or more railroads, specifying the amount to be given to each, as a joint or several proposition, and the subscriptions made by the county, and the bonds of the county, issued or to be issued in pursuance of those votes and subscriptions, should be regarded as legal and valid, and that such bonds, issued or to be issued under such votes and subscriptions, should be a valid lien upon the taxable property of the county.

Second section of the same act also provided that the county judge, or other proper authority of the county, should levy and collect a tax to meet the payment of the principal and interest of such bonds; and that the county, in any suit brought to recover the principal or interest of the bonds, should not be allowed to plead that the same were usurious, irregular, or invalid, in consequence of the informalities cured by that act.

Determined, as it would seem, to cure all informalities, the legislature added a third section, which provides that all bonds issued by the county, in pursuance of any such vote of the people of the county, shall be valid and of full legal and binding force and effect, notwithstanding any informality or irregularity in the submission of the question to a vote of the people, or in the taking of the vote authorizing the subscription to such railroad and the issuing of such bonds.

On their face they purport to have been issued under the authority of a vote of the people of the county, and therefore fall directly within the terms of the curative act of the General Assembly. They are for one thousand dollars each and are payable in twenty years from date, with interest at the rate of eight per cent., payable semi-annually, on the delivery of the interest coupons.

Plaintiff was the holder of a large number of these bonds, and the corporation defendants failing to pay the interest as it accrued, he commenced an action of assumpsit against them to recover the same, in the Circuit Court of the United States for the District of Iowa, and the judges of the Circuit Court for that district being interested in the event of the suit, the same was, with the consent of the defendants, transferred to the Circuit Court of the United States for the Northern District of Illinois. Defendants appeared and demurred to the declaration, and the judgment was for the plaintiff in the sum of eighteen thousand two hundred and seven dollars and ninety-two cents.

The undisputed facts are that the judgment remains unsatisfied; that the county has no property subject to execution; that the property of a private citizen cannot be taken in that State to satisfy a judgment against a municipal corporation; that the general laws of the State provide that where a judgment has been recovered against such a corporation, a tax must be levied to pay the judgment; that the power to levy the special tax, as authorized in the curative act of the General Assembly, has been by law transferred from the county judge to the defendants, and that they have neglected and refused to levy and collect any tax to pay the judgment.

Unable to enforce the judgment, the plaintiff, being without other legal remedy, applied to the Circuit Court, in which he recovered judgment, for a writ of mandamus to compel the defendants to levy the special tax, as provided in the act of the

General Assembly. Adopting the usual course, the court issued the alternative writ and it was duly served. Due return was made by the defendants to the writ, in which they state that they refuse to levy the tax, and assign for cause that, at the suit of certain tax-payers of the county, they had previously been enjoined by the State court from levying any tax to pay the judgment, and allege, as matter of belief, that if they should obey the writ they would be subject to a penalty for contempt, and therefore that they cannot obey the writ and levy the tax.

Views of the plaintiff were, that the return was insufficient, and he accordingly moved the court to quash it, for the following reasons: 1. Because the decree of injunction, having been pleaded as a bar to the action to recover the interest, and the plea having been overruled in that suit, is not a sufficient answer to the application and alternative writ to enforce the judgment. 2. Because the relator was no party to the suit in which the injunction was obtained.

Parties agree that the plaintiff was not a party to that suit. They were heard at a subsequent day and the court overruled the motion to quash, discharged the rule for a peremptory writ, and rendered judgment for the defendants.

Exceptions were duly taken by the plaintiff to the decision of the court in overruling the motion to quash, discharging the rule for a peremptory writ, and in rendering judgment in the case; and he, the plaintiff, sued out this writ of error.

Attention to the facts of the case as stated will show that the questions presented for decision are the same as those just decided in the preceding case.

Public property of a county in the State of Iowa is exempt from execution, and the act of the General Assembly provides that the property of the citizen shall in no case be taken to satisfy the debt of the municipality.

Proper remedy of the judgment creditor in such a case in the State court, is by mandamus to compel the proper officers of the county to levy a tax to pay the judgment. Such a creditor having recovered judgment in the Circuit Court, is entitled to the same remedy under the Process Acts passed by Congress.

Mandamus, when issued in such a case by the Circuit Court, is neither a prerogative writ nor a new suit. On the contrary, it

Statement of the case.

is a writ authorized by the fourteenth section of the Judiciary Act, as necessary to the exercise of jurisdiction which has previously attached; and when issued in such a case becomes the substitute for the ordinary process of execution to enforce the judgment. State courts cannot enjoin the process of proceedings in the Circuit courts, not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action.

JUDGMENT REVERSED and the cause remanded, with directions to grant the motion of the plaintiff and quash the return as insufficient, and for further proceedings in conformity to the opinion of the court.

Mr. Justice MILLER took no part in this judgment, being a tax-payer in Lee County.

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## THE ROCK ISLAND BRIDGE.

A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It cannot arise upon anything which is fixed and immovable. It does not, therefore, exist upon a bridge.

THIS was a libel filed in the District Court for the Northern District of Illinois, against that part of the Rock Island Railroad Bridge which is situated in the Northern District of Illinois, for alleged damages done by that part of the bridge to two steamboats, the property of the libellant, employed in the navigation of the Mississippi River. It alleged that, by law and the public treaties of the United States, the Mississippi River is, for the distance of two thousand miles, a public navigable stream and common highway, free and open to all the citizens of the United States, who are entitled to navigate the same by sailing and steam vessels, and otherwise, without impediment or obstruction; that the Rock Island Bridge obstructed the free navigation of the stream; and that by collision with this obstruction the steam vessels

of the libellant had been injured, and that he had in consequence been damaged to an extent exceeding seventy thousand dollars.

In accordance with the prayer of the libel, process was issued and the property attached. The Mississippi and Missouri Railroad Company and others then intervened as claimants, and filed an exception to the jurisdiction of the court to proceed against the property in question in the manner "in which the same is sought to be proceeded against by the libel." In other words, they objected to the jurisdiction of the court to take a proceeding *in rem* against the property. The exception was sustained by the District and Circuit Courts, and the libel dismissed. The correctness of this ruling was the sole question presented for the determination of this court.

*Messrs. Arrington and Rae, in support of the jurisdiction:*

The jurisdiction of the American admiralty extends to all cases of tort committed on navigable waters. It may be said that the bridge is attached to, and is a part of the land; that it is like a wharf, and can no more be libelled than it. This is not so. A wharf is the shore. A bridge is not a shore. A bridge is like a vessel,—over or on the stream. A floating bridge would be within the admiralty jurisdiction: a bridge aground must be so also. When the *termini* rest upon either shore, the bridge is not more attached to the soil than a vessel chained to the shore. The shore, in either case, is but the incident.

To make the admiralty jurisdiction depend upon subject-matter and not upon locality, would lead to a perplexing confusion of ideas. The principle of jurisdiction in cases of *tort* ought to depend upon place, not upon the *object affected.* Like crime, it is essentially local. In *The Volant*,* Dr. Lushington says that the jurisdiction "does not depend upon the existence of the *ship*, but upon the origin of the questions to be decided, and the *locality.*"

*Mr. B. B. Cook, contra.*

* 1 W. Robinson, 388.

Opinion of the court.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

There is no doubt, as stated by the counsel for the appellant, that the jurisdiction of the admiralty extends to all cases of tort committed on the high seas, and in this country on navigable waters. For the redress of these torts, the courts of admiralty may proceed *in personam*, and when the cause of the injury is the subject of a maritime lien, may also proceed *in rem*. The latter proceeding is the remedy afforded for the enforcement of liens of that character.

A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosesoever hands it may pass. The only object of the proceeding *in rem*, is to make this right, where it exists, available—to carry it into effect. It subserves no other purpose.

The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise. Such is the language of the Privy Council in the decision of the case of *The Bold Buccleugh*.* "A maritime lien," says that court, "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

There is an expression in the case of *The Volant*,† attributed to Dr. Lushington, which militates against this view. He is reported to have said, that the damage committed on

* 7 Moore, 284.

† 1 W. Robinson, 388.

the high seas confers no lien upon the ship, and this is cited by the counsel of the appellant to show that a maritime lien is not the foundation of a proceeding *in rem.* But the expression is a mere dictum, and the Privy Council in the case cited allude to it, and observe that it is doubtful, from a contemporaneous report of the same case,* whether the learned judge made use of it, and add, that if he did, the expression is certainly inaccurate, and not being necessary for the decision of the case cannot be taken as authority.

A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien.

DECREE AFFIRMED.

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## THE HYPODAME.

1. In cases of collision depending on fact, where the evidence is conflicting, this court will not readily reverse a decree made by the District, and affirmed by the Circuit Court. It declares that the District Court, which can examine witnesses *ore tenus*, and summon, if it pleases, experienced masters of vessels to help them, as Trinity masters do the English courts in cases depending on nautical experience, has better opportunities than any other courts can have for examining such cases, and for forming correct conclusions on them.
2. When a steam vessel proceeding in the dark hears a hail before it from some source which it cannot or does not see, it is the duty of the steam vessel instantly to stop and reverse her engine; not simply to "slow."
3. The captain of a steam propeller is not a competent lookout; though the propeller be a river propeller and not a steamer of the larger size. There should be a lookout specially placed to see what is ahead.

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* 1 Notes of Cases, 508.

Statement of the case.

4. Where a collision at night between a steamer and a sailing vessel is the consequence of a sudden and unexpected change of course on the part of the steamer, which produces a sudden peril and leaves no time to the sailing vessel to display a light before a collision—or do more than shout—where the steamer, if it had had a sufficient lookout, might easily have avoided the collision, it has no right to demand that the damages should be divided as where both are in fault.
5. Though damages for collision ought not to be awarded to an amount beyond the stipulation given on the release or discharge of the offending vessel from attachment, yet within that amount they may be given, though exceeding those claimed by the libel originally, and while it was uncertain what the damages would be, if the libel have been properly amended.

APPEAL from the Circuit Court for the Southern District of New York.

Chapin libelled the propeller Hypodame for a collision which had occurred on the Hudson River, on a December night, 1862, a little below Dunderberg, between the propeller just named, then going up the river, and a schooner of his descending it, by which the schooner was struck on its port side near the cathead, split open for ten feet or more, and sunk before she could be towed into shallow water.

His allegation was that the propeller, ascending the river on its *east* side, at the rate of eleven or twelve miles an hour, with no proper lookout stationed or attending to his duty, with plenty of room to have passed safely, had not done so, but, making a rank sheer from her previous course, though hailed by the schooner, and though the hail was heard, had run at full speed into the schooner, descending the river on its west side at the rate of but a mile and a half an hour, and sunk her; that by reason of the collision he had been put to great expense to raise and recover the vessel and cargo; to repair the one and save the other, "*the amount and particulars whereof could not as yet be correctly stated*," but would as believed "*exceed* in the aggregate $6000."

On the other hand, the answer denied that the propeller was going at any such rate of speed as that pretended by the libel, averring that the speed was much slower than even six miles an hour; in fact, "very slow;" that she had one bright light on the stem forward, which shone right ahead, and four

points on either bow; two bright lights on the flag-staff aft, which shone all around; a red light on the larboard side, and a green light on the starboard; *with a competent lookout* placed in a proper position on the forward part of the propeller, and attentive to his duty, as was the master, and also the other officers; that to avoid an apprehended danger with a steam-tug and tow descending the river, she had changed her course to the westward, giving the usual signal of such intention by two blasts of her steam whistle; that shortly after this change of course had been made, a hail was heard on board the propeller from *some* boat or vessel on the river, but that no boat or vessel could be seen from the propeller by reason of the darkness of the night and from the omission on the part of the vessel to show any light; that the propeller's engine was immediately *slowed*, and *then* stopped, when, at that same moment, the head-lights of the propeller, shining on the sails of a vessel, revealed, for the first time, the schooner; that the bells of the propeller were rung to reverse the engine, and that this was promptly done, and the steamer's helm ported to ease the blow of the collision; inevitable, now, however, by any effort on the part of the propeller, from the close proximity and course of the schooner at the time of the hail and of the discovery on the propeller of her critical position.

The facts as assumed by both the courts below, were essentially these:

The night was dark. Those in charge of the schooner discovered the lights of the steamer after she had rounded Verplanck's Point, about two miles below the place of collision. The schooner was moving very slowly down the river, west of the middle of the stream, the steamer coming up at the rate of six to eight miles on the east side, a course which, if it had been continued, would have carried her clear of the schooner. After the steamer had passed Verplanck's Point, she discovered a tow descending the river, and was about to go to the eastward, when, seeing the light of a vessel on the east, the master decided to pass to the westward of the tow, and starboarded his vessel for that purpose, making in fact

a rank sheer. He had hardly got her head turned so as to clear the tow when he heard a shout, and he told the man at the wheel to *slow* the boat. Supposing that the sound came from some small boat, he asked the helmsman where the boat was. The man replied that he saw nothing; the steamer's head-lights the next moment shining full upon the sails of a schooner, not till this moment thought of, but now seen immediately under the bow, and some one on board of her shouting out, "In the name of heaven, are you coming into us? are you going to sink us?" The helmsman testified that when he heard the first shout, he told the captain to stop the boat, that there was something ahead; and that the captain did not stop her. The steamer had no lookout except the captain, who had charge of navigating her. Though the night was dark, the court "could not conclude from the evidence that a proper lookout on the bow of the steamer would not have discovered her in time to have cleared her." Witnesses from the schooner testified that by a good lookout she might have been seen half a mile off.

The schooner was neither carrying a light at the time of the accident nor exhibited one; no statute at that time compelled her to carry one. She had, however, a lookout. It did not appear that she understood the meaning of steam-signals.

Though a hawser was thrown from the steamer at once, and made fast to the schooner, with a view of towing her into shoal water, the blow from the steamer had so laid her open, that she went down almost immediately. She was, however, ultimately raised and repaired at large cost, as hereafter mentioned.

On this case the District Court considered that the propeller was the sole cause of the collision, and should be made liable for all the damages.

As respected these, the libel, as already said, alleged that they would exceed $6000, and stipulations for costs and value were entered into and accepted for $7250. But upon the reference, the proof showed, and the commissioner reported, that they amounted to a larger sum. The claimant

filed various exceptions to the commissioner's report; the most important one having been that he had erred in allowing any greater amount of damages than what had been claimed in the libel, viz., $6000; whereupon the libel was amended by increasing the sum originally claimed by it. The District Court entered its decree for $7513.07. Upon appeal to the Circuit Court, it appearing that that sum with interest and costs exceeded the stipulations, the excess was struck out, thus reducing the recovery to $7250 for the damages and costs, that being the amount of the stipulation, and, with this reduction, the Circuit Court affirmed the decree of the District Court.

The whole case was now here for review.

*Mr. Van Santvoord, for the appellants:*

I. After the propeller signalled by her steam-whistle her intention to change her course and to pass toward the side of the river where the schooner was, the schooner should have exhibited a light, to show that she was on the river, and her position there. The night was dark, and the schooner could reasonably have inferred that the steamer might not, as she did not, see her.

Whatever may be the rule in respect to the duty of sailing vessels to exhibit a light at night on the high seas, it would seem to be the rule in this country, that vessels sailing at night in narrow waters like the Hudson, must exhibit a light to an approaching vessel.

In *The Osprey*,* in the third circuit, a case of collision on a river, the court say:

"The rule of passing to the right, or porting the helm, in the case of vessels meeting on the same line, is founded upon the supposition that each party can see the other. But when one is blind and the other knows it, he should not put himself within reach of injury by any mistake of the blind."

And though the court there said that it could not "estab-

* 2 Wallace, Jr., 268; and see Peck *v* Sanderson, 17 Howard, 178; also, Jacobsen, Sea Laws, 340; The Scioto, Davies, 359, per Ware, J.

Argument for the propeller.

lish any rule to bind vessels navigating the high seas after night to carry signal lights," they yet declared that "where one party does this, and the other does not, we can and will treat the dark boat as the wrongdoer."

We desire not even so much as the application of this principle. If the schooner had only shown a light for the moment it would have been sufficient. By not having done so, the persons navigating her were, themselves, the authors of her misfortune.

II. As respects the propeller. Was there fault on her part? We think not.

1. As to the lookout. The Hypodame was a river propeller, as the case shows; not one therefore that carried passengers, nor a large or first-class propeller, such as navigate the ocean; but one of a class on our rivers navigated by the master, who is also a pilot, and a steersman, alternating with a pilot and a steersman, and on which the master or steersman, on the master's watch, acts as lookout, and the pilot or steersman, on the pilot's watch, acts as lookout while the other steers. There can be no reasonable intendment that without the exhibition of a light the schooner would or could have been earlier seen by any number of lookouts on the propeller assigned to that special duty; and to impute negligence to the propeller, which had a right to act upon the supposition that if there was a vessel sailing off to westward in the darkness, on the propeller's change of course she would exhibit a light, on the ground that she had no other lookout than is usual on vessels of her class, would seem to be straining a point to charge the propeller.

2. The propeller slowing, stopping her engine and shifting her helm to port on hearing the hail, after she had been on the course toward the place of the schooner for four or five minutes and within five or six seconds of the collision, instead of slowing, stopping, and backing, is not to be regarded as a fault. A propeller, even if not of the higher class, is yet, with her water-tanks, fuel, and engines, very heavy, weighing doubtless from two to three hundred tons. Such a vessel cannot be brought to a dead stop in the water in less than

one and a half to two minutes while she sheers quick. If the pilot erred in this matter, it should be attributed to the suddenness of the emergency caused by the omission of the schooner to exhibit a light.

But if the propeller should be adjudged to have been in fault, the schooner was clearly in fault also in not exhibiting a light on the propeller's change of direction toward her, and the damages should be divided.

III. As to the damages, it is submitted that no greater should be allowed than were claimed in the libel.

*Mr. Owen, contra:*

I. The propeller was clearly and alone in fault, and is responsible for all damages.

1. She was in fault in not having a competent lookout properly stationed and faithfully attending to that duty. No person pretends to have acted as lookout except the captain, and he was incompetent, as he had other duties to perform in piloting his vessel, signalling and passing the descending tow.*

2. She was also in fault in proceeding forward after hearing the shout from the schooner. She should have stopped immediately.†

II. The schooner was not in fault. The collision was not caused by any act or omission on her part.

The only fault alleged against her is, that she did not display a light on the approach of the propeller. But the law did not at that time require her to carry, nor, unless the night was so dark that she could not have been seen by a vigilant lookout on the propeller far enough to have avoided her, even to exhibit a light. In addition, the sheer was abrupt, rank, and totally unexpected, so that there was no sufficient time afterwards and before the collision to display a light.

But if there had been sufficient time to display a light,

* The Ottawa, 3 Wallace, 268; Chamberlain *v.* Ward, 21 Howard, 548; Henry *v.* Balt. Packet, 23 Id. 287.

† Nelson *v.* Leland, 22 Howard, 48.

still that would have been no better than the shout. And even though a light might have been better than the hail, still the schooner should not be held responsible, if, under the impending danger in which she was suddenly placed, without any previous fault on her part, she failed to adopt the best mode of disclosing her presence.

III. As to the damages. When the libel was filed the amount and particulars of damages, it was stated, could not be specified, though it was asserted that they would exceed $6000. Certainly when it was discovered on the raising of the vessel that they would so exceed the sum, the libel was rightly amended. Being within the stipulation, the appellant has no cause of complaint, as they have been reduced by the Circuit Court below the amount really lost.

*Reply:* All the cases cited in regard to lookouts, and that there should be on vessels a lookout specially designated *ad hoc*, will be found, on examination, to be cases of vessels quite different from our ordinary river propellers; steamers of a larger class, having their pilot-houses on hurricane decks high up, and where, unless a person stands on the bow all the time, he cannot see; steamers employing moreover and requiring in their navigation a fuller complement of men; making it practicable to assign a greater number of men to different duties, but without in general securing a better result, so far as exemption from casualties is concerned, than is accomplished by a smaller force on steamers of the class of the Hypodame.

Mr. Justice GRIER delivered the opinion of the court.

In cases of collision the testimony is often conflicting and irreconcilable. Each party can make out a plausible case supported by some evidence. In such cases we have frequently decided that where the district and circuits concur in opinion on the facts, and there is testimony supporting their decision, we will not reverse it on doubts raised by ingenuity of counsel.*

* See Norton *v.* Newell and Ship, 3 Wallace, 267.

The District Courts have better opportunities for examining such cases and forming a correct conclusion than any other. They may examine witnesses *ore tenus*, and although they may not have Trinity masters to assist them, yet in difficult cases depending on nautical experience the judge may call to his aid experienced masters of vessels (as is done in one district at least),* whose report will greatly assist the court in coming to a correct conclusion.

In the case before us we see no reason to doubt that the conclusions of both courts below on the facts in the case are correct.

We concur also with the court below, that the propeller had no competent lookout, as required by the frequent decisions of this court.† The evidence shows that the schooner might have been seen a half-mile off if there had been a competent lookout.

When the propeller made the sudden sheer towards the western shore, the man at the wheel told the captain "to stop the boat, there was something ahead; he did not stop her; her wheel was then put to port. I then pulled the bell," &c.

The sheer was abrupt and totally unexpected. Previous to that there was no danger calling for any peculiar precautions. The schooner was in her proper place, and could not possibly anticipate such a sudden change of course. All they could do under the circumstances was to shout—they were heard—but no attention was paid to the warning. Producing a light at that time would have been equally unavailing.

The defence relied on here was, that the schooner was in fault in not exhibiting a light on the propeller's change of direction towards her. The collision took place before the passage of the act of the 20th of April, 1864. This act (article 5th) requires sailing ships, "under way or being towed, to carry the same lights as steamships under way, with the exception of *the white mast-head lights, which they*

* The Eastern District of Pennsylvania.

† See The Ottawa, 3 Wallace, 268

*shall never carry*," an exception justified by experience, which showed that it caused many collisions, arising from mistaking it for a light on shore; the case of "*Propeller Monticello* v. *Mollisson*,"* being an example. There the steamer was running on a course a mile wide of the schooner, but mistaking her mast-head light for a light-house, she steered with such accuracy of aim as to strike the schooner exactly and with such force as to sink her.

By the customs and rules of navigation every vessel at anchor in a harbor or roadstead is bound to keep a light suspended on board. But previous to the passage of this act sailing vessels on the rivers and on the ocean were not bound by any law or custom to carry lights. The case of *The Osprey*, cited by the appellant's counsel, applies to vessels meeting in the same line, where one party can plainly see the other and yet keeps dark. But where the danger of collision is the consequence of a sudden and unexpected change of course, which produces a sudden peril and leaves no time to the sailing vessel to display a light before a collision—or do more than shout—where the steamboat, if it had had a sufficient lookout, might easily have avoided the collision, it has no right to complain or demand that the damages should be divided as where both are in fault.

The exceptions to the master's report are without just foundation after the Circuit Court had reduced the damages to the amount of $513.

DECREE OF THE CIRCUIT COURT AFFIRMED.

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## THE VANDERBILT.

1. Where the usage in navigating a river is, that both ascending and descending vessels shall keep to the right of the centre of the channel,—which is the usage in the River Hudson,—the omission to comply, seasonably, with that regulation, if the omission contributes to the collision, is a fault for which the offending vessel and her owners must be responsible.

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* 17 Howard, 152.

Statement of the case.

2. Compliance with such a usage is required in all cases where the course of a vessel is such that, if continued, there would be danger of collision with other vessels navigating in the opposite direction.
3. Unless precautions are seasonable, they constitute no defence against a charge of collision, although they may be in form such as the rules of navigation require.
4. Objections to the amount of damages, as reported by a commissioner and awarded by the admiralty court, will not be entertained in this court in a case of collision where it appears that neither party excepted to the report of the commissioner.

APPEAL from the Circuit Court for the Southern District of New York.

On the morning of May 16th, 1863, the steam-tug Hubbard was slowly descending the *west* side of the Hudson River, here one thousand or more feet wide. She was about one hundred and seventy-five feet from the shore, and had in tow four canal-boats, of which the Canisteo was one. She was now opposite the lower part of Troy, a city on the east side of the river. At the same time the Vanderbilt, a large steamer, regularly plying on the stream, was coming up it, and was making for her dock about a mile off, in the upper part of Troy. But she was on the west side of the channel also, and had been sailing on that side of it. The morning had been clear, but a fog-bank settling itself at that part of the river, both vessels as they entered it were unable to see ahead. Running each on its course, they suddenly discovered one another, the two in immediate proximity. There was apparently no exception to be taken to the manœuvres of navigation of either vessel in the circumstances. But coming thus, unawares, on each other, the Vanderbilt, in spite of all efforts made at so late a moment, struck the Canisteo, and being much the larger vessel, sunk her at once. No difficulty had existed as to sea room for the steamer to pass to the right and east of the descending tow. The owner of the Canisteo now libelled the Vanderbilt in the District Court for the Southern District of New York, where a decree was given for the libellant; that court considering that the Vanderbilt was "disproportionately out of the channel toward the west shore." On reference to a commissioner,

the damages were fixed at $7020. An appeal was taken to the Circuit Court; no exception being taken in either court to the amount of damages. On the appeal the following opinion was delivered by

NELSON, J. The point pressing on the steamer is that she was too far to the west of the channel of the river, and, therefore, out of her proper course. This view was taken by the court below, and upon it a decree was rendered for the canal-boat. We are inclined to concur in this result. The west side is the natural and ordinary track for descending vessels, and the Vanderbilt, we think, was bound to take notice of this fact, and to have kept nearer to the middle of the river. She had no right to act upon the idea that, the descending boat would take that course, and expect her to pass to the left or starboard, between her and the west shore. What makes the case more marked in this respect, is the fact that the steamer's dock was on the east shore, some mile above the place of collision.

DECREE AFFIRMED.

The case being now here for review, was submitted by *Mr. Charles Jones, for the appellant*, who contended that the decree was wrong in general result, and by *Mr. S. P. Nash, contra.*

Mr. Justice CLIFFORD delivered the opinion of the court.

The libel was filed in the District Court by the owner of the canal-boat called the Canisteo against the steamer C. Vanderbilt in a cause of collision, civil and maritime. Employment of the Vanderbilt was to transport passengers and freight between the cities of New York and Troy, upon the Hudson River, and the libel alleges that the canal-boat was employed in transporting freight between the former city and divers ports and places on the same river and the Erie Canal. Allegations of the libel are, that the collision occurred on the sixteenth day of May, 1863, on the west side of the river, nearly opposite the arsenal at Troy. Lading of the canal-boat was corn and flour, and the proofs showed that she was sunk by the collision, and that the boat and

cargo became a total loss. Charge in the libel is, that the disaster and loss were wholly occasioned by the carelessness and negligent and unskilful management of those intrusted with the navigation of the steamer.

Parties were fully heard in the District Court, and the district judge being of the opinion that the charge in the libel was true, entered a decree for the libellant, and sent the cause to a commissioner to ascertain the amount of damages.

Subsequently the commissioner made his report, and neither party excepting to the same, it was confirmed by the court, and a final decree entered for that amount in favor of the libellant. Appeal was taken by the claimants to the Circuit Court, where the parties were again heard upon the same evidence, and the circuit judge being of opinion that there was no error in the record, affirmed the decree, and thereupon the claimants appealed to this court.

1. When the collision took place the canal-boat, with three others, was in tow of the steam-tug O. C. Hubbard, and she was proceeding down the river, having left her berth, at Troy, on the west side of the river, at six o'clock in the morning. None of the boats in tow carried any motive power, and the testimony shows that the Canisteo was lashed to the larboard side of the steam-tug, with one of the other three fastened to her larboard side, and the other two were arranged in the same way on the starboard side of the steam-tug, which constituted the necessary motive power. Berth of the Vanderbilt, at Troy, was on the east side of the river, and she was on her return trip, from Albany, with passengers and freight.

Although there was some fog when the tug, with the four canal-boats in tow, left the wharf in the morning, yet the witnesses testify that objects could be seen at the same time on both sides of the river, and that it was good weather. Heavy rains had caused the water to rise eight or ten feet above the ordinary low water in summer, which very much increased the breadth of navigation, as the largest vessels could safely pass close to the shore. Speed of the steam-tug as she was proceeding down the river on the western side

was not much greater than the current of the river, which did not exceed four or five miles an hour. Usual pathway of steamers ascending the river is on the east side of the centre of the channel, but the Vanderbilt came up on the western side in the usual pathway of descending boats and vessels, and the testimony proves that she was moving through the water at nearly double the rate of the steam-tug with the tows. Length of the canal-boats was much greater than that of the steam-tug; and the proofs show that the Vanderbilt struck the Canisteo on her starboard bow six or eight feet from the stem. Plain inference from the position and character of the blow is, that the steamer had ported her helm, and when the collision occurred was steering towards the east side of the river.

Just before the collision took place both vessels passed into a dense fog, which rested on the water, and the appellants contend that the state of the weather was such that the steam-tug, with her tows, ought not to have left her berth and started down the river. But the weight of the evidence shows that the proposition involved in the defence is not well founded. On the contrary, it is quite clear from the evidence that the indications as to the weather at the time those in charge of the tug and tows decided to start on the trip, fully justified their determination. Suggestion is made that the tow was a large one, but it was well arranged, and the boats, two on each side of the steam-tug, being well over on the western side of the channel, were proceeding slowly down the river in their proper pathway. Ample room was left for the steamer to have gone to the right, as the river there, at that stage of the water, is nearly a thousand feet wide. Steamers may doubtless ascend on either side of the river in the daytime when the view is not obstructed or obscured by fog, but it was a fault in the steamer, when she found she was approaching a fog-bank, that she did not port her helm and leave the accustomed pathway of descending boats and vessels. Witnesses on board the steamer testify that the whistle was blown to warn descending boats, and that orders were given to stop and back as soon as the steam-tug and

tows were discovered, but it is quiet evident that all these precautions were too late, as the collision was then inevitable. Precautions not seasonably taken afford no defence against the charge of negligence in cases of collision where it appears that the disaster might have been prevented by earlier action. Steamers approaching each other from opposite directions are required by the general rules of navigation, as well as by the recent act of Congress, to port their helms and pass to the right, but it is obvious that one or both may omit to comply with the requirement until their proximity is so close that a compliance is wholly inadequate to accomplish any valuable purpose.

Proofs in this case show that the Vanderbilt ported her helm, but the change of her course was so late that it insured the collision which might, perhaps, have been avoided if she had made an effort to pass the descending boats on the starboard side next to the western shore. The great fault was that she did not change her course and pass to the eastern side of the channel before entering the fog-bank, as all the witnesses agree she might have done without danger or serious inconvenience. Electing, as she did, to continue her course up the river on the western side, where those in charge of her navigation knew she was liable to meet descending boats, she was bound to exercise great care and caution; and it is clearly proved that she failed to comply with requirement until it was too late to prevent the disaster.

Objection is made to the amount of the damages awarded, but the objection cannot prevail, as no exceptions were taken to the commissioner's report in the District Court. Such objections will not be entertained in this court unless the claimant gave notice of the same in the court below by appropriate exceptions to the commissioner's report. Parties should present their objections at the stage of the litigation when the errors, if any, may be corrected without inconvenience and unnecessary expense; and if they fail to do so without just excuse, they must be understood as having acquiesced in the decision of the court.

DECREE AFFIRMED WITH COSTS.

## MASON *v.* ELDRED ET AL.

1. Under the plea of the general issue in actions of assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the action.

   Accordingly, if a promissory note upon which an action is brought has been merged in a judgment previously recovered thereon, such judgment being a bar to the action, an exemplification of its record is admissible under the general issue.

2. The rule of the common law, declared in this case to be that a judgment against one upon a contract merely joint of several persons, bars an action against the others; and that the entire cause of action is merged in the judgment. The case of *Sheehy* v. *Mandeville & Jamesson* (6 Cranch, 254), commented upon, shown not to have been generally approved, and in effect here overruled.

3. The common law rule above stated is altered by statute in Michigan, the statute declaring that a judgment recovered in an action brought against all the copartners shall not merge the liability of the copartners not served with process and not appearing in the action, but that the judgment shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established.

ON certificate of division between the judges of the Circuit Court for Wisconsin. A statute of Michigan, known as "the Joint Debtor Act,"* thus enacts:

1. "In actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process issued against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process.

2. "Such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

* Compiled Laws of Michigan of 1857, vol. 2, chap. 133, page 1219.

Other sections provide that execution shall be issued *in form* against all of the defendants; that the execution shall be levied on the sole property of the defendant served, or on the joint property of all the defendants, and that the plaintiff may sue out a *scire facias* against the defendants not served to show why the plaintiffs ought not to have execution against them, the same as if they had been served with the process by which the suit was commenced.

With this statute in force in Michigan, Mason sued, in the Circuit Court for *Wisconsin*, Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a partnership note of theirs. Process was served on *Anson* Eldred alone, who alone appeared, and pleaded *non assumpsit*. On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the State courts of Michigan, showing that Mason had already brought suit in that court on the same note against the partnership; where, though *Elisha* Eldred was alone served and alone appeared, judgment in form had passed against all the defendants for the full amount due upon the note.

The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named except Elisha Eldred, who alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of, and to defeat a recovery against Anson Eldred, was certified to this court for decision as one on which the judges of the Circuit Court were opposed.

*Mr. G. W. Lakin, for the plaintiff:*

1. The record offered was inadmissible under the plea of *non assumpsit*. That plea puts the plaintiff to the proof of all that he alleges. It makes no allusion to a "*former recovery*," nor to any claim that the supposed original liability has assumed a higher form. It is also at variance with the

rule, that a matter of defence, which *admits* the facts stated in the declaration, but avoids them, should be specially pleaded.*

2. There is a distinction between copartnership promissory notes, or contracts, and ordinary joint notes, or contracts. The former are in effect several, as well as joint.

3. A judgment against one joint debtor, is no bar to a suit against the other, even though pleaded. In *Sheehy* v. *Mandeville & Jamesson*,† in this court, the plea interposed by Mandeville, was, in substance, that, in a former suit, judgment had been rendered in favor of Sheehy, against Jamesson (his partner) on the same note. The note had been signed, "Robert B. Jamesson." In the first action it was treated as the note of Jamesson alone, and judgment rendered against him. In the second as the note of Mandeville & Jamesson, trading under the name of "Robert B. Jamesson." There was a judgment against Jamesson, and this court decided it to be proper to give judgment against the other partner. This is the point presented in the case at bar. There have been many attempts in State courts, to overturn this decision, and sometimes, in the Federal courts, to evade it, by getting up and drawing fancied distinctions, but it stands, because founded in good reason. "In point of real justice," says Marshall, C. J., "there can be no reason why an unsatisfied judgment against Jamesson should bar a claim upon Mandeville." In *Dennett* v. *Chick*,‡ a case in Maine, the same doctrine was held.

4. The statute of Michigan, correctly construed, negatives the conclusion that the judgment against Elisha Eldred is a bar to an action against Anson Eldred.§

*Mr. J. W. Cary*, *contra*, contended:

1. That under the general issue, anything was admissible that showed that no cause of action existed at the time of bringing the suit.

* See Chitty's Pleading, 479; 3 Id. 929; Dexter *v.* Hazen & Arnold, 10 Johnson, 246.

† 6 Cranch, 253.

‡ 2 Greenleaf, 191.

§ Bonesteel *v.* Todd, 9 Michigan, 371; Oakley *v.* Aspinwall, 4 Comstock, 513.

2. That whether *Sheehy* v. *Manderille*, was, or was not analogous in all its features to the case at bar, it had, as generally understood, never been well received; and that numerous cases establishing a better principle were arrayed against it.

3. That the statute of Michigan affirmed the conclusion, that the judgment in Michigan was a bar to an action against Anson Eldred in Wisconsin. Why else did it permit the *joint property* of the defendants to be bound by this judgment?

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The counsel of the plaintiff suggests that the question presented by the certificate of the judges of the Circuit Court is divisible into two parts: 1st. Whether the record of the judgment recovered in Michigan was admissible under the pleadings; and, 2d. Whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment.

If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit.* On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note

* Young *v.* Black, 7 Cranch, 565; Young *v.* Rummell, 2 Hill, 480.

against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the joint debtor act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought, were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord Mansfield in giving the judgment of the King's Bench in *Rice* v. *Shute*,* "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with

* Burrow, 2511.

the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a copartnership contract the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several, that in a suit against him judgment would pass for the whole demand, if the non-joinder of his copartners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of *Sheehy* v. *Mandeville & Jamesson*, decided by this court, and reported in 6 Cranch, 254. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant, Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different States. It was elaborately reviewed by the Supreme Court of New York in the case of *Robertson* v. *Smith*,* where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the Supreme Court of Massachusetts a ruling similar to that of *Robinson* v. *Smith* was made.† In *Wann* v. *Mc-*

* 18 Johnson, 459. † Ward *v.* Johnson, 13 Massachusetts, 148.

*Nulty*,* the Supreme Court of Illinois commented upon the case of *Sheehy* v. *Mandeville*, and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several State courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons.

In *Smith* v. *Black*,† the Supreme Court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not."

In its opinion the court referred to *Sheehy* v. *Mandeville*, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the Supreme Court of the United States, was not of binding authority, and it was disregarded.

In *King* v. *Hoar*,‡ the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the Court of Exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached, that by the judgment recovered the original demand had passed *in rem judicatam*, and could not be made the subject of another action. In the course of the argument the case of *Sheehy* v. *Mandeville* was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice Marshall, but that

* 2 Gilman, 359.

† 9 Sergeant & Rawle, 142.

‡ 13 Meeson & Welsby, 495.

the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice Story, in *Trafton* v. *The United States*,* refers to this case in the Exchequer, and to that of *Sheehy* v. *Mandeville*, and observes that in the first case the Court of Exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common law rule were to govern the decision of this case, we should feel obliged, notwithstanding *Sheehy* v. *Mandeville*, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that State† the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them,

* 3 Story, 651.

† Compiled Laws of Michigan of 1857, vol. 2, chap. 133, page 1219.

the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that, "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded.* Nor is the demand against the parties not sued merged in the judgment against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the State to limit the operation of the judgment thus recovered. The State can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

A similar statute exists in the State of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterwards before the court, if found within the State, that such parties may be sued upon the original demand.

In *Bonesteel* v. *Todd*,† an action of covenant was brought

* D'Arcy *v.* Ketchum, 1 Howard, 165.

† 9 Michigan, 379.

against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the joint debtor act of New York, process in that State having been served upon his co-defendant alone. The court below held the judgment to be a bar to the action. On error to the Supreme Court of the State this ruling was held to be erroneous. After referring to decisions in New York, the court said, "No one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

In *Oakley* v. *Aspinwall*,* the Court of Appeals of New York had occasion to consider the effect of a judgment recovered under the joint debtor act of that State upon the original demand. Mr. Justice Bronson, speaking for the court, says: "It is said that the original demand was merged in, and extinguished by the judgment, and consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the original action. But the joint debtor act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course; it can work no injury to any

* 4 Comstock, 513.

one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action, which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that State, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.

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## STATE OF GEORGIA *v.* GRANT.

Though there is no general rule of court in regard to the matter, yet where a party desires to file a bill in original jurisdiction in equity, it has been usual to hear a motion in his behalf for leave to do so. This motion, except in peculiar circumstances (as where the bill asked to be filed was against the President of the United States), is heard only on the part of the complainant. Ten printed copies of the bill were in this case ordered to be filed with the clerk.

THIS court having some time since dismissed a bill filed by the State of Georgia against Mr. Stanton, Secretary of War, General Grant, and others, on the ground that it called for a judgment on a question political in its nature,* Messrs. *Black and Sharkey, in behalf of the same State*, asked leave to file a bill by it against Generals Grant, Meade, and others; it being stated that the bill was not open to objection from the causes which it was decided made the one dismissed objectionable.

*Mr. Carpenter, in behalf of the persons named as defendants*, desired to know whether it would be regular for him to op-

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* See *supra, ante*, p. 50.

pose this motion for leave if he should, on seeing and considering the bill, desire to do so.

The CHIEF JUSTICE delivered the opinion of the court.

The court has adopted no rules governing suits in cases of original jurisdiction. In cases of equity, however, it has been the usual practice to hear a motion in behalf of the complainant for leave to file the bill, and, leave having been given, subsequent proceedings have been regulated by orders made from time to time as occasion required. The motion for leave has been usually heard *ex parte;* except at the last term, when leave was asked in behalf of the State of Mississippi to file a bill against the President of the United States.* Under the peculiar circumstances of that case it was thought proper that argument should be heard against the motion for leave. We perceive no reason for making such an exception in the case of the present motion. It will be heard, therefore, on the regular motion day, and only on the part of the complainant; and the court will require that ten printed copies of the bill be filed with the clerk before the hearing.

The practice now observed may be regarded as that which will hereafter be adopted in all cases of original equity jurisdiction.

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## THE SEA WITCH.

Restitution of a neutral vessel ordered, which had apparently set out on a lawful voyage, though she was captured out of the most direct and regular course of it, and in a position open to some question; there having been heavy weather which might have made her desirous to take the course she did,—one hugging a semicircular coast rather than a more direct one across its chord.

APPEAL from the District Court of the United States for the Eastern District of Louisiana.

The schooner Sea Witch was captured in the Gulf of

* 4 Wallace, 475.

Mexico on the 31st of December, 1864, by the United States war steamer Metacomet, for alleged breach of the blockade of the Texas coast, then established by our government.

The schooner was a neutral vessel, with a neutral cargo, coffee, drugs, &c., regularly cleared from Vera Cruz for New Orleans, under a license granted by the vice-consul of the United States, in pursuance of the proclamation of the President, opening the port of New Orleans to trade, and of the regulations of the Secretary of the Treasury. But at the time of the capture she was out of the ordinary and most direct line of a voyage from Vera Cruz to New Orleans, and somewhat along the coast and in a position to go to Galveston, Texas, then blockaded. She had encountered heavy weather before the capture and was somewhat damaged; and it was alleged by the master that he had abandoned the voyage to New Orleans, and was about returning to Vera Cruz. Having been brought into New Orleans and libelled as prize in the District Court, restitution was decreed and a certificate of reasonable cause given the captors. The United States appealed.

*Mr. Ashton, special counsel of the United States*, contended that the case exhibited but the ordinary sinuous devices of blockade-runners; simulating one voyage, purposing another. The vessel was just where she would have been had she been going to Galveston, and where she would not have been if going to New Orleans.

Moreover at this time, as is matter of public history, New Orleans had been but recently opened to trade, and of course was glutted with the articles which this vessel carried. Coffee was higher in Vera Cruz than in New Orleans; and as for drugs, it was shipping "coals to New Castle," to take them to the last-named port. Galveston, on the other hand, closely blockaded, was in extreme necessity of both.

*Mr. Marvin, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

The only ground of suspicion that a violation of the block-

ade was intended is the fact that the vessel, when captured, was out of the most direct regular course to New Orleans, and in a part of the gulf where she would very probably have been had her real destination been Galveston. But we think this is sufficiently accounted for by the weather, and by the probability that such a vessel, really bound for New Orleans, would prefer to keep at no greater distance from the shore than the blockade would require, rather than take the more direct course across the gulf.

It was stated in the argument that the cargo of the vessel would not command at New Orleans so good a price as at Vera Cruz; and this circumstance, if proved, would be entitled to great weight. But there is no evidence of that sort in the record.

On the whole, therefore, we think that the decree of the District Court was correct, and shall order that it be

AFFIRMED.

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## McCLANE v. BOON.

1. Where, pending a writ of error to this court, subsequently dismissed, the defendant in error dies and the other side wishes to take a new writ, application should be made to the court below for the purpose of reviving the suit in the name of the representatives of the deceased. A writ of error can then regularly issue. A motion in this court to revive the writ by suggesting the death and substituting the representatives as parties to the record is not regular.
2. If the court below should refuse an application such as that above contemplated, in the circumstances mentioned, then the writ may, from necessity, issue in the name of the representatives, in the usual way, serving on them the citation to appear at the next term.

ERROR to the Supreme Court of the State of Oregon.

On motion. Boon filed a bill in a State court of Oregon against McClane, to enjoin him from prosecuting an action at law to recover the possession of a lot of land, for which a patent had been issued to McClane by the United States, and praying that the same might be held by McClane as trustee for the benefit of him, Boon. The court dismissed

the bill. On an appeal to the Supreme Court, that court reversed the decree, and rendered one for the plaintiff. McClane, the defendant, sued out a writ of error from this court to the Supreme Court of Oregon, returnable December Term, 1863, which was dismissed at the December Term, 1866.

A second writ of error was issued July 29th, 1867, returnable at the next term of the Supreme Court of the United States. On the 15th June, 1864, pending the first writ of error, Boon, the defendant in error, died.

Mr. Lander now made a motion, having for its object to revive the writ of error, by suggesting the death of Boon, and substituting the widow and heirs-at-law as parties to the record.

The parties described in the present writ of error, it will be observed, were the parties to the original suit, and the writ, therefore, was issued in the name of a dead man.

*Mr. Lander, in support of his motion*, argued, that being a chancery suit, the death of the plaintiff had not abated but only suspended it;* that the writ of error was a continuation of the original litigation;† that this being so, the plaintiff in error had made the suggestion in the only court open to him.

*Mr. Williams, contra:* That the motion was against proper practice; that the remedy, if any, was in the court below.

Mr. Justice NELSON delivered the opinion of the court.

We think the counsel for the plaintiff in error has mistaken the proper practice under the peculiar circumstances of the case. Application should have been made to the court below for the purpose of reviving the suit in the name of the widow and heirs of the deceased; and then a writ of error could have regularly issued.

If the court should refuse, then it would become neces-

* Clarke *v.* Mathewson, 12 Peters, 168.

† Nations *v.* Johnson, 24 Howard, 195, 204.

sary to issue it in the name of these representatives, in the usual way, serving on them the citation to appear at the next term.

The case of *Kellogg et al.* v. *Forsyth*,* is an authority for issuing the writ in the name of the widow and heirs, and, also, for the appearance of these parties on the citation, and make objections to these proceedings if they see fit.

As the case now stands, the parties to the suit described in the writ, and in whose names it was issued, are McClane, plaintiff in error, and Boon, defendant, deceased, and the citation is issued and served on parties, not parties to the record, which, of itself, is error.†

WRIT OF ERROR DISMISSED.

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## AGRICULTURAL COMPANY *v.* PIERCE COUNTY.

A writ of error made returnable to a day different from the return day fixed by statute as the day on which the term commences, dismissed.

ERROR to the Supreme Court of Washington Territory.

The writ of error bore date January 20th, 1862. It was on its face made returnable on the second Monday of December next after its date, when it should have been the first Monday of that month, which is by law the day on which the terms of this court commence each year.

For this cause (Mr. Justice MILLER, announcing the order), the writ of error was dismissed under the authority of the cases of *Carroll* v. *Dorsey*,‡ *Insurance Company* v. *Mordecai*,§ and *Porter* v. *Foley*,‖ heretofore decided by this court.

*Messrs. Lander and Carlisle, for the plaintiff in error; no opposite counsel appearing* nor having entered their appearance of record.

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* 24 Howard, 186.

† Davenport *v.* Fletcher, 16 Id. 142.

‡ 20 Howard, 204.

§ 21 Id. 195.

‖ Id. 393.

## THE MAYOR *v.* COOPER.

1. Where a court has no jurisdiction of a case, it cannot award costs, or order execution for them to issue.
2. Where a party removes under a statute of the United States from a State court to the Circuit Court of the United States a case depending in point of merits on the right construction of such statute, the Circuit Court cannot dismiss and remand the case, upon motion, on the ground that it has no jurisdiction, because the statute is unconstitutional and void.
3. The validity of the defence which such statute may authorize to be made is a distinct subject, and to be passed on by the court when in due form before it.

ERROR to the Circuit Court for the Middle District of Tennessee; the case being thus:

The Constitution of the United States ordains, that "the judicial power of the United States shall be vested in one Supreme Court, *and in such inferior courts as Congress may from time to time ordain and establish*," and that this power "shall extend to *all cases*, in law and equity, arising under this Constitution and *the laws of the United States*."

With this provision in force as fundamental, Congress, having in 1789 established Circuit Courts, inferior to the Supreme Court, passed, during the late rebellion, to wit, March 3d, 1863, "An act in relation to *habeas corpus* and regulating judicial proceedings in certain cases," and on the 11th May, 1866, another amendatory of it.

The statutes provided, in respect to all acts done or omitted to be done, "under any law of Congress," or "by virtue of any order, written or verbal, general or special, issued by the President or Secretary of War, or any military officer of the United States holding command" of the place where such act or omission occurred, that such authority should be a defence in all courts for all concerned, to any civil action or criminal prosecution therefor.

And provided further for the removal, in a manner prescribed, of all such cases, before or after final judgment, from the State courts to the Circuit Courts of the United States.

In this state of law, constitutional and statutory, Cooper sued the mayor and aldermen of Nashville, and with them one Smith, in the Circuit Court of Davidson County, in that State; his declaration alleging trespasses upon real estate, and the asportation and conversion of chattels. The mayor and aldermen pleaded the general issue.

Both parties defendant presented petitions verified by affidavit to the court in which the suit was pending, praying for a removal, under the statutes of 1863 and 1866 just named, of the causes to the Circuit Court of the United States for that district.

The petition of Smith set forth that the trespasses complained of, if committed, were committed during the rebellion by authority of the President of the United States, under an order issued by General G. H. Thomas, an officer of the United States, holding command of the district within which the trespasses are alleged to have occurred, which order was approved by Andrew Johnson, then an officer of the United States, and the military governor of the State of Tennessee.

That of the mayor and aldermen alleged, that at the time of the commission of the alleged trespasses their co-defendant Smith was the acting mayor of Nashville, and that he and the persons acting with him as aldermen and councilmen held their positions as mayor, aldermen, and councilmen as the appointees and agents of the government of the United States, appointed under the authority of the President of the United States, by the then military governor of Tennessee, to serve the lawful military purposes of the said President of the United States, as the commander-in-chief of the forces thereof, in suppression of the rebellion, and that all the acts complained of, if done, were done under the authority and for the benefit of the United States and the army thereof; and that the said acting mayor and aldermen, at the time when the trespasses are alleged to have been committed, had received military orders from the said military governor, under the authority of the Secretary of War of the United States, and also orders from the military officers of the United

States having command of the district, to do all the things which were done, or are alleged to have been done by the defendants.

The cause was removed to the Circuit Court of the United States according to the prayer of the defendants.

A *motion* was made there to dismiss the suit *upon the ground that the court had no jurisdiction of the cause.* No allegation, apparently, was made against the regularity in point of form of the proceedings by which the case had been removed from the State court, or that the case was not within the acts of Congress of 1863 and 1866. The motion to dismiss was sustained by the court. The court held that the defence had "*failed to show that they are entitled* to have this cause removed from the Circuit Court of Davidson County, Tennessee, to this court for hearing under the provisions of the act of Congress of March 3d, 1863, and the act amendatory thereof, passed May 11th, 1866, *and that the said acts of Congress*, so far as they authorize and provide for the removal of causes from the State to the Federal courts in cases where the petitioner shall show that the acts complained of were done under the order of the President or Secretary of War, or of a military commander, or otherwise than under an act of Congress, *are unconstitutional and void.*" It was accordingly ordered and adjudged "that said cause be *dismissed and remanded* to the Circuit Court of Davidson County, *and that the defendants . . . pay all the costs incurred in this court, for which execution may issue.*"

This writ of error was prosecuted to reverse that judgment.

*Mr. R. L. Caruthers, by brief, for the plaintiff in error*, contended that the matter having arisen on motion to dismiss, presented a question of jurisdiction purely; that at such a stage of the case, no question could be raised as to the validity of the defence which the statutes authorized to be set up; that even if the defence authorized was invalid and unconstitutional, still that under the provisions of the Constitution which extended the jurisdiction of the Circuit Court—an "inferior court," undoubtedly ordained and established by

Congress—to *all* cases in law and equity, arising under the *laws of the United States*, that court was bound to entertain and in some way adjudge it; that the case should therefore be remanded.

*No opposing counsel appeared;* nor was any copy of the opinion of the court below contained in the record.

Mr. Justice SWAYNE delivered the opinion of the court.

It does not appear that any question was raised in the court below as to the regularity of the proceedings by which the case was removed from the Circuit Court of the State to the Circuit Court of the United States. Nor does it appear to have been denied that the acts of Congress referred to embraced the case, and if valid, gave the right to have the transfer made. We are therefore relieved from the necessity of considering those subjects. We have found nothing in the record, and nothing in the statutes which, as we think, authorizes a doubt or objection as to either point.

The judgment of the court proceeded entirely upon the ground of the constitutional invalidity of the provisions in the acts referred to, which relate to the subject.

We have not had an opportunity to see the opinion of the court, and no argument has been submitted to us in behalf of the defendant in error. We are therefore at a loss to imagine what train of reasoning conducted the learned judge to the conclusion announced in the order, and hence are constrained to examine the subject without reference to the particular views which controlled the decision.

Before adverting to the constitutional question, there is another feature of the order which calls for remark. The court held that it had no jurisdiction whatever of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject the matter was as much *coram non judice* as anything else could be, and the award of

costs and execution was consequently void. Such was the necessary result of the conclusions of the court.

This court has the power to declare an act of Congress to be repugnant to the Constitution, and therefore invalid. But the duty is one of great delicacy, and only to be performed where the repugnancy is clear, and the conflict irreconcilable. Every doubt is to be resolved in favor of the constitutionality of the law.

The question before us relates to the 4th and 5th sections of the statute of 1863, and the 1st, 3d, 4th, and 5th sections of the statute of 1866.

They provide, in respect to the acts specified, and all acts done or omitted to be done, "under any law of Congress," or "by virtue of any order, written or verbal, general or special, issued by the President or Secretary of War, or any military officer of the United States holding command" of the place where such act or omission occurred, that such authority shall be a defence in all courts for all concerned, to any civil action or criminal prosecution for the acts or omissions complained of.

They provide further for the removal, in the manner prescribed, of all such cases, before or after final judgment, from the State courts to the Circuit Courts of the United States.

The Constitution provides, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish," and that this power "shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States." The other particulars of the grant of power it is not necessary in this case to consider.

The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. "All cases" so arising are embraced. None are excluded. How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure

in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature.

The sixth article declares that "the Constitution and the laws of the United States, *which shall be made in pursuance thereof*," . . . "shall be the supreme law of the land." The grant of the judicial power contains no such qualification. It is declared to extend "to all cases arising under the Constitution *and laws of the United States*," without distinction or discrimination as to the latter; nor is there any restriction as to the tribunals—State or Federal—in which they may arise. Wherever found, they are within the reach of this authority, and subject, for its exercise, to the law-making power of the nation.

As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way. Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal causes. Both are within its scope. Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction. "A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the Constitution or a law of the

United States whenever its correct decision depends upon the right construction of either."

The rule applies with equal force where the plaintiff claims a right, and where the defendant claims protection, by virtue of one or the other.*

It is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, properly brought before it, this court is the final arbiter. The decisions of the courts of the United States within their sphere of action, are as conclusive as the laws of Congress made in pursuance of the Constitution. This is essential to the peace of the nation, and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. The courts of the several States might determine the same questions in different ways. There would be no uniformity of decisions. For every act of an officer, civil or military, of the United States, including alike the highest and the lowest, done under their authority, he would be liable to harassing litigation in the State courts. However regular his conduct, neither the Constitution nor laws of the United States could avail him, if the views of those tribunals and of the juries which sit in them, should be adverse. The authority which he had served and obeyed would be impotent to protect him. Such a government would be one of pitiable weakness, and would wholly fail to meet the ends which the framers of the Constitution had in view. They designed to make a government not only independent and self-sustained, but supreme in every function within the scope of its authority. The judgments of this court have uniformly held that it is so.†

The jurisdiction here in question involves the same principle, and rests upon the same foundation with that conferred by the twenty-fifth section of the Judiciary Act of 1789.

* Martin *v.* Hunter's Lessee, 1 Wheaton, 314; Cohens *v.* Virginia, 6 Id. 264; Osborn *v.* The Bank of the United States, 9 Id. 821.

† United States *v.* Peters, 5 Cranch, 115; Ableman *v.* Booth et al., 21 Howard, 506; Freeman *v.* Howe, 24 Id. 450.

The constitutionality of that provision has been uniformly sustained by the unanimous judgment of this court whenever the subject has been presented for adjudication. The twelfth section of the act of 1789, and the third section of the act of the 2d March, 1833, relating to revenue officers, present the same question. We are not aware that a doubt as to the validity of either has ever been expressed by any Federal court. The acquiescence is now universal.

The fourth and fifth sections of the act of 1863, are copied largely from the eighth section of the act of February 4th, 1815.* That act expired by its own limitation at the close of the then existing war. The section referred to, was continued in force for one year in the sixth section of the act of March 3d, 1815.† See also the third section of the act of March 3d, 1817.‡

We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen.

The validity of the defence authorized to be made is a distinct subject. It involves wholly different inquiries. We have not had occasion to consider it. It has no connection whatever with the question of jurisdiction.

The order of the court below is REVERSED. An order will be remitted that the cause be REINSTATED, and that the court proceed in it according to law.

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## ANDREWS v. HENSLER.

1. Under the code of Louisiana, which allows general and special pleas to be pleaded together, if consistent with each other, an amended answer or plea on a redhibitory action for diseased and useless slaves bought at auction, that the auctioneer, who sold the slaves for the defendant, declared at his request at the time, that they must be examined by the physician of the purchaser previous to their delivery, but that the plaintiff was in such haste to obtain possession of the slaves purchased, that he removed them without examination, before the act of sale was

* 3 Stat. at Large, 198. † Id. 233. ‡ Id. 396.

passed, is not contradictory of or inconsistent with a general denial of an allegation that the slaves were at the time of sale afflicted with various maladies that were known to the defendant, from which some of them had since died, and the others had been rendered useless. Such amended answer only specified a particular fact in aid of the general denial.

2. The fact that the code limited to one year the time in which actions could be brought for the rescission of sales of slaves on account of redhibitory defects, did not necessarily give to the purchaser the same term within which to offer to return them to the vendor. On the contrary, the purchaser was bound to use reasonable diligence to apprise his vendor of the defects alleged, and to make a tender back of the slaves; and what is reasonable diligence is a question of fact, to be decided by a jury according to the special circumstances of each case.

ERROR to the Circuit Court for the Eastern District of Louisiana.

In March, 1859, the plaintiff purchased four slaves of the defendant at New Orleans, giving a draft payable at a future day for the payment. The slaves proving, as was now alleged by the purchaser, to have been afflicted with various incurable diseases, &c., he brought suit for a rescission of the sale, the restitution of the price, and for damages; a sort of suit called, in the language of the code of Louisiana, a redhibitory action; *Redhibition*, by the code,* being defined to be "the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice."

The petition alleged that the plaintiff purchased the slaves, with full warranty against all the vices and maladies prescribed by law; that they were, however, at the time afflicted with various specified vices and maladies; that these were unknown to the plaintiff, but were known to the defendant; that they were of such a grave character as to render the slaves "absolutely useless, or their use so inconvenient and imperfect" that the plaintiff would not have purchased them had he known at the time of the defects; and that from the vices and maladies two of the slaves had died since the sale.

* Art. 2496.

Statement of the case.

It further alleged that after the sale the plaintiff tendered the slaves back to the defendant and demanded the return of the draft, and the avoidance of the sale, in consequence of the redhibitory defects, but that the defendant refused to receive the slaves, to cancel the sale, or to return to petitioner the draft, and to pay him his damages.

It concluded with a prayer that the sale might be annulled, and the defendant condemned to return the draft, and to pay the costs that the plaintiff had incurred for the care and medical treatment in consequence of the sale, and false representations.

The first answer of the defendant to the petition consisted of a general denial. An amended answer, filed by permission of the court, averred in substance that the auctioneer, who sold the slaves for the defendant, declared at the time, at his request, that they must be examined by the physician of the purchaser previous to their delivery, but that the plaintiff was in such haste to obtain possession of the slaves purchased, that he removed them without examination, before the act of sale was passed; and hence insisted that if any loss had occurred to the plaintiff it had been through his own negligence and disregard of the terms of sale, for which the defendant is not responsible.

On the trial, the plaintiff contended that the special defence set up in this amended answer, was a waiver of the general denial, and that it admitted the liability of the defendant to refund the price of the slaves for the defects stated in the petition, and placed his discharge from such liability upon the neglect or disregard by the plaintiff of the terms of the sale, and requested the court to instruct the jury to that effect. The court refused to give the instruction and the plaintiff excepted.

A question having arisen at the trial as to the term within which it was necessary for the plaintiff to tender or offer to return the slaves to enable him to avoid the sale, and maintain a suit for its rescission, the court charged "that in order to a complete rescission of the contract, the tender should have been made in a reasonable time; and if the jury found that

it was not made in a reasonable time, the plaintiff was only entitled to recover for the damages he had sustained by the slaves being defective."

To this instruction the plaintiff excepted, contending that he had a year in which to return them; the code of Louisiana, as it then existed, providing that actions for the rescission of contracts for the sale of slaves on account of redhibitory defects must be brought within one year from the date of the sale.

The correctness of the views of the court below was now the matter for examination here.

*Mr. Soulé, for the plaintiff in error; Mr. Stansbury, contra.*

Mr. Justice FIELD, after stating the case, delivered the opinion of the court as follows:

Treating the amended answer as an answer in addition to the general denial, we do not perceive any error in the refusal of the court below to instruct the jury, as requested, with respect to its effect. The rule which prevails in Louisiana on the subject of general and special pleas, as declared in the decisions of her courts, is that they may be presented together, if consistent with each other. Inconsistent or contradictory pleas alone are forbidden.*

The amended answer amounts only to the averment of a fact which, if established, would tend to show that the warranty alleged in the petition was not given in the absolute form there averred. It only specifies a particular fact in aid of the general denial.

The second exception is to that part of the charge which relates to the period within which it was necessary for the purchaser to tender back or offer to return the slaves. The court charged, "that in order to a complete rescission of the contract, the tender should have been made in a reasonable time; and if the jury found that it was not made in a reasonable time, the plaintiff was only entitled to recover for the damages he had sustained by the slaves being defective."

* Nagel v. Mignot, 7 Martin, 657.

The civil code of Louisiana, when the action was commenced, limited to one year the time in which actions could be brought for the rescission of sales of slaves on account of redhibitory defects, and hence it is contended, that the purchaser had the same period within which to offer to return the slaves to the vendor.

The rule that he who seeks to rescind a contract of sale, must first offer to return the property received, and place the other party in the position he formerly occupied, so far as practicable, prevails equally at the civil and the common law. It is a rule founded in natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the discovery of the defects for which the rescission is asked. The vendor may then receive back the property, and be able by proper care and attention to preserve it, or he may have recourse upon other parties, the remedies against whom might be lost by delay. He must be permitted to judge for himself what measures are necessary for his interest and protection, and if the purchaser by delay deprives him of the opportunity of thus protecting himself, he cannot demand a rescission of the contract.

The purchaser must use reasonable diligence to apprise his vendor of the defects alleged, and to make the tender; and what is reasonable diligence is a question of fact, to be decided by the jury according to the special circumstances of each case.*

JUDGMENT AFFIRMED.

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MILLINGAR *v.* HARTUPEE.

1. The twenty-fifth section of the Judiciary Act does not give jurisdiction to this court in cases of decisions by the courts of a State against mere *assertions* of an exercise of authority under the United States.

Hence, where a party claims authority under an order of a court of the United States, which, when rightly viewed, does not purport to confer any authority upon him, the writ will be dismissed.

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* Rider *v.* Wright & Marshall, 10 Louisiana Annual, 127.

2. And it will be dismissed on motion, and apart from a consideration of merits, when the single question is, not the validity of the authority, but its existence, and the court is fully satisfied that there was and could have been no decision by the State court against any authority under the United States existing in fact.

ERROR to the Supreme Court of the State of Pennsylvania.

On motion to dismiss the writ for want of jurisdiction.

Hartupee brought an action against Millingar as garnishee of Gearing, in one of the courts of Alleghany County, Pennsylvania; the object of the suit having been to subject certain moneys of Gearing, alleged to be in the hands of Millingar, to the satisfaction of a judgment recovered by Hartupee against Gearing in that court.

The controversy related to the ownership of certain cotton, captured for breach of blockade, and libelled as prize in the District Court for the Northern District of New York. This cotton, before the hearing of the cause of prize, had been released to Millingar by an order of the court upon the consent and application of the district attorney, and with the consent, also, of the counsel for the captors.

In the suit in the State court it was alleged on the part of the plaintiff, Hartupee, that the cotton when captured was the property of Gearing, and remained such when relieved by the release from liability to condemnation for violation of the blockade. He demanded, therefore, that the cotton or its proceeds in the hands of Millingar—the cotton having been sold by Millingar, and the question being upon the liability of the proceeds for the debts of Gearing—should be subjected to the satisfaction of his judgment against Gearing.

On the other hand, it was asserted by the defendant, Millingar, that the cotton at the time of capture belonged to him and not to Gearing, and if this were otherwise that the order of release transferred the title to him.

The controversy resulted in a judgment against Millingar in favor of Hartupee for the amount of the judgment of the latter against Gearing.

From this judgment a writ of error was taken to the Su-

preme Court of Pennsylvania, by which court the judgment of the District Court was affirmed.

One of the questions requiring the judgment of the Supreme Court was, whether the order of the District Court releasing a portion of the captured cotton from the custody of the marshal, and ordering that it be delivered to Millingar, vested in him any title of ownership; and the decision of the court was that it did not.

Millingar then brought the case here on error, assuming it to be one within the twenty-fifth section of the Judiciary Act, which provides "that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, *where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States*, and the decision is against their validity . . . may be re-examined and reversed or affirmed in this court upon a writ of error."

The correctness of this assumption was the point now raised, by the motion to dismiss.

*Messrs. N. P. Chipman and Thomas Wilson, in support of the motion:*

The District Court did not pass in any way upon Millingar's title. That court did no more than to except the cotton which constituted the cause of the action in the State court, from the operation of its decree, and to order its release upon the written consent of the district attorney of the United States, and of the counsel of the captors. It went no further than to decide that the United States and the captors had no right to the cotton.* Millingar thus held it with no less and no greater title than if there had been no capture; and of course open to any one to assert his own ownership to it.

*Mr. Black, contra:*

In the District Court Millingar asserted himself to be owner, and proved his title to the complete satisfaction of all opposing parties. The order or decree of the District Court

* Gelston *v.* Hoyt, 3 Wheaton, 318.

accordingly gave the cotton to him; no trust for Gearing nor the least reference to him being made in any way whatever. Under this "authority"—exercised, of course, under a court of the United States—he acted as owner. The Supreme Court of Pennsylvania says that the order gave him no authority to act as owner; in other words, decides "against the validity" of the authority set up. This brings the case within the twenty-fifth section.

At all events, in a case not clear this court will not dispose of the case on motion, apart from the question of merits, and in advance of regular hearing.

The CHIEF JUSTICE delivered the opinion of the court.

It is insisted in behalf of the defendant in error that the question raised and decided by the Supreme Court of Pennsylvania, does not bring the case within either of the classes of which this court has jurisdiction under the twenty-fifth section of the Judiciary Act; and this must be admitted unless it can be maintained that the question was upon the validity of an authority exercised under the United States, and that the decision was against its validity.

It is clear that the case does not come under any other of the descriptions of the twenty-fifth section.

It seems equally clear that the authority of the District Court to direct the release was not drawn in question.

Was, then, the authority of Millingar over the cotton an authority exercised under the United States in virtue of the release so directed?

Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States.

In respect to the question we are now considering, "authority" stands upon the same footing with "treaty" or

"statute." If a right were claimed under a treaty or statute, and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a State court, that the right claimed did not exist.

In the case before us Millingar claimed authority under an order of the District Court. On looking at the order, we find that it does not purport to confer any authority whatever upon him. It simply relieved the cotton from the claim of the government. He claimed to be owner of it, and the order allowed him to take possession. But the court did not pass on the question of ownership or right of possession.

It left him, in these respects, precisely where he would have been, if the cotton had come into his possession without capture, and without any proceeding on the part of the government to subject it to forfeiture.

In that case he would certainly have had no "authority under the United States." We think he had as little through the proceedings of the court.

In many cases the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where, as in this case, the single question is not of the validity but of the existence of an authority, and we are fully satisfied that there was, and could have been, no decision in the State court against any authority under the United States existing in fact, and that we have, therefore, no jurisdiction of the cause brought here by writ of error, we can perceive no reason for retaining it upon the docket.

The motion for dismissal must therefore be allowed.*

* Gill *v.* Oliver's Executors, 11 Howard, 546; Williams *v.* Oliver, 12 Id. 119; Lewis *v.* Campau, 3 Wallace, 106; Boggs *v.* Mining Co., 3 Id. 309.

## THE FLYING SCUD.

1. A cargo shipped from a neutral country by neutrals resident there, and destined ostensibly to a neutral port, restored with costs after capture in a suspicious region, and where the vessel on its outward voyage had violated a blockade; there having been nothing to fix on the neutrals themselves any connection with the ownership or outward voyage of the vessel (which was itself condemned), nor anything to prove that *their* purposes were not lawful.
2. A part of the cargo which had been shipped like the rest, except that the shipper was a merchant residing and doing business in the enemies' country, distinguished from such residue and condemned.

APPEAL from a decree of the District Court of the United States for the Eastern District of Louisiana.

The Scud and her cargo were captured during the late rebellion, by the United States Steamer Princess Royal, at the mouth of the Rio Grande, on the 12th August, 1863, and brought into New Orleans for condemnation.

The Rio Grande, as is known, separates Texas, then in rebellion against the United States, from Mexico, then a neutral country; the position of the stream between the neutral and rebel regions having allowed, of course, great opportunities to illicit trade with Texas, under the guise of lawful trade with Mexico.*

The proofs in the case showed that the vessel was a British vessel, and had left Nassau in January, 1863, laden with a cargo of timber, tin, iron, powder, and horseshoes, and was destined ostensibly for *Matamoras, Mexico* (a place separated from Texas and the commercial town of Brownsville in it only by the dividing river). She arrived at Matamoras, that is to say, at the mouth of the Rio Grande (where, on account of a bar, vessels of any size are obliged to anchor), on the 1st of March; after remaining there a week or ten days, she sailed for Brazos Santiago, a port of Texas about nine miles from the mouth of the Rio Grande, where her cargo was discharged, and carried to Point Isabel, also in Texas.

* See The Peterhoff, 5 Wallace, 28, where the matter is set forth.

The vessel remained at Santiago till some time in May, when she returned to the mouth of the Rio Grande. While here at anchor she was, on the 15th July, 1863, chartered by one B. Caymari, a subject of Spain, doing business at Matamoras, as a merchant there, to carry a cargo of cotton from Matamoras to Havana. She continued at anchor at the mouth of the Rio Grande till the cargo of cotton was put on board in July and August, with which she was laden when captured. All the cotton was purchased at Matamoras, that is to say, in Mexico, and was brought from storehouses from Bagdad, the port of entry of Matamoras, or Boca del Rio, in Mexico, not far off, down the river, in lighters, to the Scud, which was anchored outside of the bar, and there loaded. There were some fifty or sixty merchant vessels at the mouth of the river at the time of the capture, and had been from the time of the Scud's first arrival there.

Hart, the owner of the vessel, and who was a British subject, put in a claim for the vessel.

Caymari, already mentioned, put in a claim, as owner of one hundred and thirty-seven bales of the cotton; Jules Aldige, a subject of France, but, like Caymari, doing business as a merchant at Matamoras, a claim for thirty-eight bales; and Lopez and Santos Coy, citizens of Matamoras, in Mexico, but who, some years before the capture, had removed to Brownsville, in Texas, a claim for thirty bales.

The court below condemned the vessel and cargo as prize of war. There was no appeal by the owner of the vessel, so that the only question here was in regard to the cotton.

*Messrs. Dunning and Donohue, for the appellants, claimants of the cotton:*

All trade between neutral ports in time of war is valid except (1) to blockaded ports, and (2) with contraband. The mouth of the Rio Grande was not and could not be blockaded so as to prevent trade with Matamoras, which is in a neutral country.

All the cotton was purchased at Matamoras, in this neutral country. The only circumstance militating against our

claim is that the vessel did once land a cargo in Texas. But the case does not show that any one of the claimants had anything to do with that voyage or even ever heard of it. Neutrals themselves, they found a neutral vessel outside the bar ready to carry their cotton to a neutral port, and they chartered her. The vessel was lying at anchor for weeks, of course in sight of the blockading fleet; and the captors seize her only after she is loaded. The claimants of the cotton had a right to suppose that she would be unmolested. They were misled by this lying by of the captors; and even if guilty, their cargo ought to be restored.*

*Mr. Ashton, special counsel of the United States, contra:*

A person carrying on trade in time of war in a region so exceedingly suspicious as from its geographical character was the mouth and lower part of the *Rio Grande*, must show a case above all suspicion. The outward voyage, which undoubtedly was meant for Texas, and was criminal, involves the present one in grave suspicion.

As to the claim of Lopez and Santos, having been merchants in a hostile country, the fact that they shipped the cotton from a neutral one, can't save it. It was enemies' property, and as such confiscable.†

Mr. Justice NELSON delivered the opinion of the court.

The proofs are full and uncontradicted, that each of the claimants purchased the cotton in question from different houses in Matamoras, and were merchants doing business there, with the exception of Lopez and Santos, who had removed to Brownsville, Texas, some year before the capture, from Matamoras, and were established in business there. It further appears from the proofs that the cotton was in the warehouses at Boca del Rio, or Bagdad, which is the port of entry for Matamoras, was carried in lighters from thence to the schooner, and taken on board. These proofs, and the greater portion of those which make the case, were produced

* The Neptunus, 2 Robinson, 110.

† Mrs. Alexander's Cotton, 2 Wallace, 404.

on an order for further proofs. The transaction appears free from all doubt or obscurity. The claimants, for aught that is shown, had no connection whatever with the cargo shipped from Nassau, and discharged at Brazos, or with the voyage, or with the vessel, until it was chartered by Caymari to carry a cargo of cotton from Matamoras to Havana, which is dated the 15th day of July, 1863. The argument, therefore, founded on the suspicion that the claimants were connected with the breach of blockade at Brazos, in the cruise of the inward voyage, is without any foundation.

The decree below must be reversed, except as to the thirty bales claimed by Lopez and Santos. Although they are Mexican citizens, yet being established in business in the enemies' country, must be regarded according to settled principles of prize law, as enemies, and their cotton as enemies' property.

The decree below affirmed as to the thirty bales, and reversed as to the thirty-eight (38) and the one hundred and thirty-seven (137), and case remitted, with directions to enter decree for claimants, Jules Aldige and B. Caymari, restoring their cotton with costs.

DECREE ACCORDINGLY.

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## THE ADELA.

1. Neither an enemy nor a neutral acting the part of an enemy can demand restitution on the sole ground of capture in neutral waters. *The Sir W. Peel* (5 Wallace, 535), affirmed.
2. A vessel condemned for intended breach of the blockade established by the United States of her southern coast during the late rebellion; the vessel having been found near Great Abaco Island, with no destination sufficiently proved, without sufficient documents, with a cargo of which much the largest part consisted of contraband of war, and with many letters addressed to one of the blockaded ports, for which the chief officer stated distinctly that she meant to run.

APPEAL from a decree of the District Court for the Southern District of Florida, condemning the Adela and her cargo

as prize to the Quaker City, a war steamer of the United States during the blockade established by the Federal government of its southern coast during the late rebellion. The ship and cargo were apparently neutral property. The condemnation was for attempted breach of blockade.

*Mr. Ashton, special counsel for the United States; Mr. A. F. Smith, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

It is claimed that the capture took place in British waters. It was made, in fact, near Great Abaco Island, which belongs to Great Britain; but the evidence is by no means convincing that it was made within three miles from the land. On the contrary, while it is not, perhaps, certain that the Adela was without the line of neutral jurisdiction when first required to lay to by the Quaker City, it cannot be doubted that she had passed beyond it when she was actually captured. If, however, the capture had been actually made in neutral waters, that circumstance would not, of itself, prevent condemnation, especially in a case of capture made in good faith, without intent to violate neutral jurisdiction, or knowledge that any neutral jurisdiction was in fact infringed, and in the absence of all intervention or claim on the part of the neutral government.* "It might," as was observed in the case of *The Sir William Peel*,† "constitute a ground of claim by the neutral power whose territory had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution on the sole ground of capture in neutral waters."

We come, then, to the grounds of condemnation in the District Court.

The evidence of neutral destination in the preparatory proof was contradictory. The master and several other witnesses declared that her destination was Nassau, and that they knew of no ulterior destination. The credibility of

* The Etrusco, 3 Robinson, 31; Vrow Anna Catharina, 5 Id. 144.

† 5 Wallace, 535.

their statements was much impaired by their evasive character. The master, particularly, professed himself entirely ignorant of the nature or ownership of the cargo; declared that he had no bill of lading, or any other document relating to the merchandise on board, and knew nothing of the ownership of the vessel except what he derived from the ship's register. He was appointed master by one Burns, of Liverpool, who shipped the goods, whether for himself or as agent for other parties, and on whose real account, risk, and profit, he did not know.

On the other hand, the chief officer stated distinctly that the Adela was intended to run the blockade, and would have entered Nassau as her first port, and, as he believed, Charleston as her next.

The character of her cargo, of which much the largest part consisted of Enfield rifles and other goods clearly contraband of war, and the destination of the letters found on board, many of which were directed to Charleston, Savannah, and neighboring places, strongly confirm the testimony of the chief officer.

Upon the whole evidence we are satisfied that the Adela and her cargo were, in fact, destined for a blockaded port, and that the decree of the District Court was correct. It is therefore

AFFIRMED.

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## SLATER *v.* MAXWELL.

1. Where land is sold for taxes the inadequacy of the price given is not a valid objection to the sale.
2. Where a tract of land sold for taxes consists of several distinct parcels, the sale of the entire tract in one body does not vitiate the proceeding if bids could not have been obtained upon an offer of a part of the property.
3. Where a fact alleged in a bill in chancery is one within the defendant's own knowledge, the general rule of equity pleading is that the defendant must answer positively, and not merely to his remembrance or belief.

Accordingly, when a bill alleged, that at the time that a very large tract

of land—sold for taxes—was put up for public sale, a great many persons were present with a view to purchase small tracts for farming purposes, but that the defendant stated to them that the complainant would redeem his land from the purchasers, and in that way put down all competition, and had the entire property struck off to him for the amount of the taxes; and that this conduct was pursued to enable him to buy without competition, for a trifling amount, all the land of the complainant: *Held*, that an answer was evasive and insufficient, when answering that the defendant "has no *recollection* of making said statement, nor does he believe that he stated that W. S. would redeem his land," and that he "*believes* the charge that he stated to the bystanders attending that sale that he would do so, to be untrue."

4. It is essential to the validity of tax sales, that they be conducted in conformity with the requirements of the law, and with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be strictly exacted.

5. When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief.

APPEAL from the District Court for Western Virginia.

Slater filed a bill in that court to compel one Maxwell to release whatever apparent right he, Maxwell, might have acquired to a large tract of land (19,944 acres) in Virginia, under a sale of the same, made in October, 1845, by the sheriff of Ritchie County, for taxes amounting to $30.03, accrued for 1841–2–3–4, and the deeds executed upon such sale.

The grounds of relief set forth and relied on were—

1. That the sale had been made at a grossly inadequate price; the land having been worth $6000, and the sale having been made to the defendant for $30.03.

2. That, although the land was composed of parts, capable of being sold separately, and any one of which would have more than paid all the taxes claimed, the *whole* had been set up and sold.

3. That there were many persons at the sale, bystanders, desirous of purchasing different parts, but that the defend-

ant stated to them that the owner would redeem them all, and having thus prevented all competition, had the lands knocked down to himself for the paltry sum named.

As to the facts, it appeared to be true that the land had been sold at a price merely nominal, and wholly below its value, and also that the sheriff had sold the whole; but that in selling he had asked, "Who will pay the taxes and damages for the least quantity of acres?" and that getting no bid for a less quantity of acres, he had then sold the whole. The answer positively averred that no bid could be got for a part. It appeared, also, that in 1840, the complainant had sold 7955 acres of the original tract; but notwithstanding this sale, the entire tract was charged in his name on the books of the commissioner of the revenue of the county, with the taxes, and was returned delinquent for their non-payment, and was sold.

The main questions, accordingly, were: Had the defendant stated to the bystanders that the plaintiff would redeem the land from the tax sale with a view of preventing their bidding, and so of having the land knocked down to himself at a very low price; and if so, what was the effect in equity, upon the sale, of these statements of his?

As respected the matter of fact. In reply to a positive charge in the bill, that he had made statements of the sort above mentioned, the defendant in his answer said, "that he has *no recollection* of making said statement, nor does he *believe* that he stated that William Slater would redeem his land;" and that he "*believes* the charge that he stated to the bystanders attending said sale, that William Slater would redeem his land from the purchaser, to be untrue."

The testimony from witnesses was thus:

One Zinn stated, that "he was present when the sheriff was crying the land, and that Maxwell stepped up, and said he knew *the owners*, and *it was not worth while for any person to buy it*, that they would pay the taxes." Being asked, on cross-examination, by the defendant himself, whether he was certain and positive that those words were used, he answered, "*I am.*" And being asked, whether *he, the defendant*, "*might*

*not have alluded to some of the tracts lying in the Slater connection?*" his reply was: "The defendant might have alluded to those tracts, or he might not. *They were crying the Slater land* at the time he stepped up and made the observations."

One J. R. Jones, also at the sale, testified that Mr. Maxwell, S. T. Bukey, and Manly Zinn, were present; that Mr. Zinn "appeared like as if he wanted some of the land; that Maxwell said that he knew the men, *and that it was no use for them to bid*, that it would be redeemed"—as the witness understood Mr. Maxwell to mean—"by *the owner of the land.*"

In reply to a question, whether any other person would have bid on the Slater land, if the defendant had not made the representations he did, in relation to its being redeemed, Jones said: "It appeared to me that Mr. Bukey and Mr. Zinn were going to bid; *they said they were going to bid on the Slater land.*" Mr. Bukey was dead at the time when the evidence was taken.

Among the exhibits filed by the complainant was a certificate from the clerk of the Ritchie County Court, that the defendant was the purchaser at $31.53 of 19,944 acres in Ritchie County, returned delinquent and sold in the name of Slater, for taxes due in October, 1845 (the taxes which had accrued in 1841–2–3–4), amounting to $30.03. And also a certificate, that 9944 acres of land (evidently the same 19,944 which were sold in 1845, or a part thereof) were returned *delinquent in the name of Slater*, for taxes of 1846–7–8–9, amounting to $23.78; that *twenty-five acres* thereof were sold in September, 1850, to satisfy the said taxes; and were bought by *Maxwell* for $24.96. And then followed, under date of 30*th August*, 1852, a receipt from *the defendant* Maxwell to the plaintiff Slater, by the hand of Slater's attorney, for $30, in redemption "for twenty-five acres of land purchased by me in September, 1850, for taxes, and sold as land belonging to said Slater, by the sheriff of Ritchie County."

There was a general replication to the answer.

The court below dismissed the bill.

*Mr. Frick, for the appellant*, contended that the gross inadequacy of price—$\frac{1}{200}$th part of value—shocked the conscience, and amounted, in itself, to conclusive evidence of fraud;* that it was, moreover, plain that the sheriff had made no sufficient effort to get bidders for a part; and that above all, in preventing persons from bidding, as it was plain that he had done—the answer being evasive on this point—Maxwell had violated a rule of the highest obligation on persons attending auction sales,† and applicable especially to sales for tax-titles;‡ that his statements thus operated as a fraud on the sale, which was to be set aside accordingly; and that the case was one especially for relief through equity: made more plainly so by the certificate from the clerk of Ritchie County Court.

*Messrs. G. H. Lee and C. Boggs*, contended:

1. That the inadequacy of the price, in the absence of fraud, was without import. That the purchase was the purchase of a mere chance, and that in such a case values could not enter into consideration.§

2. That the allegation of breach of duty by the sheriff in selling the whole instead of part, was denied by the answer, and disproved.

3. That the allegation of what was said by Maxwell was sufficiently denied by him to put the complainant to full proof both under the Virginia statute and according to the rules of equity pleadings; that where a conversation alleged had occurred more than six years before, a denial on recollection or belief is sufficient,‖ even if the objection now set up to the sufficiency of the denial on belief only had

* Osgood *v.* Franklin, 2 Johnson's Chancery, 22.

† Doolin *v.* Ward, 6 Johnson, 194; Jones *v.* Caswell, 3 Johnson's Cases, 29; Phippen *v.* Stickney, 3 Metcalf, 386; Gardiner *v.* Morse, 25 Maine, 140; Brisbane *v.* Adams, 3 Comstock, 130.

‡ Dudley *v.* Little, 2 Hammond, 504.

§ Borell *v.* Dann, 2 Hare, 440, 450; Hansford *v.* Barbour, 3 A. K. Marshall, 515.

‖ Code of Virginia [ed. 1860], ch. 171, § 40, p. 713; Hall *v.* Wood, 1 Page, 404; Brooks *v.* Byam, 1 Story, 296; 1 Daniels's Chancery Practice, 254, 257.

not been, as it was here, waived by a general replication. That if true, the allegation was of an immaterial thing; of a mere impression or conjecture. At most it was a *gratuitous dictum* in respect of which Maxwell, who stood in no relation of confidence to Slater, was under no legal obligation to anybody for precise accuracy of statement or certainty of inference or conclusion; and if any one who heard what he said chose to give implicit credence to it, and forbear to bid, it was his own folly or indiscretion; especially as Maxwell, by bidding himself, showed that he knew he might be mistaken about the owners redeeming, and set the example of taking the chance that he might not redeem.*

4. That on the whole, the complainant had no remedy through a court of equity. The injury to the complainant resulted from his own gross laches and neglect of duty as a landholder, in failing to pay his taxes and redeem his land within the time allowed by law.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The relief sought by the bill in this case is put upon three grounds:

1st. That the sale was made at a grossly inadequate price;

2d. That the entire tract was sold in one body; and—

3d. That competition at the sale was prevented by the fraudulent declaration of the defendant, made to effect that purpose, that the complainant would redeem the land from the purchasers.

The inadequacy of the price given at the sale of land for unpaid taxes thereon, does not constitute a valid objection to the sale. The taxes levied upon property generally bear a very slight proportion to its value, and of necessity the

* Phillips *v.* Duke of Buckingham, 1 Vernon, 227; Neville *v.* Wilkinson, 1 Brown's Chancery, 546; Turner *v.* Harvey, Jacob, 178; Vernon *v.* Keys, 12 East, 637; Evans *v.* Bicknell, 6 Vesey, 173; Small *v.* Attwood, 1 Younge, 407, S. C. on appeal, 6 Clarke & Finelly, 292, 295; Trower *v.* Newcome, 3 Meriv. 704; Laidlaw *v.* Organ, 2 Wheat. 178, 195; Davis *v.* Meeker, 5 Johnson, 354.

whole property must be sold, if a sum equivalent to the amount of the taxes is not bid for a portion of the premises.

The sale of the entire tract in one body would have vitiated the proceeding, if bids could have been obtained upon an offer of a part of the property. In this case the answer avers, and the proof shows, that the sheriff offered to sell a part of each tract without receiving a bid, and it was only then that the entire tract was put up and struck off to the defendant.

The case must, therefore, turn upon the last ground, the alleged fraudulent declaration of the defendant at the sale, to prevent competition.

The allegation of the bill is, that at the time the land was offered for sale a great many persons were present with a view to purchase small tracts for farming purposes, but the defendant stated to them that the complainant would redeem his land from the purchasers, and in that way put down all competition, and had the entire property struck off to him for the amount of the taxes; and that this conduct was pursued to enable him to buy without competition, for a trifling amount, all the land of the complainant.

The answer of the defendant to the allegation is evasive and unsatisfactory. It is that he has no recollection of making the statement averred, nor does he believe he did, and that he believes the charge to be untrue. The charge is of conduct which would not readily be forgotten. It is hardly conceivable that a person could acquire so large a domain as 19,944 acres for so trifling a sum as thirty dollars without a distinct recollection of the attendant circumstances. If the property was acquired by unfair means the fact was one within the defendant's own knowledge, and in such cases the general rule of equity pleading is, that the defendant must answer positively and not merely to his remembrance or belief. The distinction which is generally made between recent and remote acts or declarations of the defendant would hardly seem applicable to a case like the present. It is not necessary, however, to attempt to draw any nice distinctions in this particular, for the answer was not

excepted to, and by the general replication the complainant has waived all objections to its sufficiency.* The difference, however, between a positive answer and an answer in the form of the present one, upon belief, is important to be considered with reference to the testimony required to overcome its denials. A clear and positive denial of an allegation of the bill can only be overcome by the testimony of two witnesses to the fact alleged, or by one witness and corroborative circumstances. But if a fact alleged be denied upon belief merely, or be denied equivocally or evasively, it may be sustained by the testimony of a single witness.†

Turning now to the testimony presented by the record, we find that the allegation of the bill is sufficiently established. One witness states that he was present at the sale of the land, and that the defendant "stepped up and said he knew the owners, and it was not worth while for any person to buy it; that they would pay the taxes." Another witness states, that certain parties were present at the sale, and that the defendant said "he knew the men, and it was no use for them to bid, that it (the land) would be redeemed." Some attempt was made to impeach the credibility of one of these witnesses, but it failed. On the other hand, there are some circumstances which tend to establish the truth of their statements. There were several persons present, some of whom were desirous of bidding at the sale—at least they so stated at the time. It is difficult to explain the fact that none of them made a bid on the property, but allowed the immense tract to be sold at a price less than two cents an acre, except upon the idea that they believed that a bid by them would be of no avail, because a redemption from the sale would be made by the owner.

Again, a portion of the property, amounting to 9944 acres, was returned delinquent for the taxes of 1846, 1847, 1848, and 1849, in the name of the complainant. Twenty-five of these acres were sold in September, 1850, for these taxes,

* Story's Equity Pleadings, § 877.

† Knickerbacker *v.* Harris, 1 Paige, 211; 3 Greenleaf's Evidence, § 289.

and were bid in by the defendant. In August, 1852, the complainant redeemed the property thus sold, and the receipt given by the defendant for the money paid on the redemption describes the land *as purchased by him in September, 1850, for taxes, and sold as belonging to the complainant.* This transaction is inexplicable except upon the hypothesis that the action of the defendant in bidding in the property in 1845 was taken for the benefit of the complainant, or that the sale then made was so far subject to objection for unfairness that he desired its concealment until, from lapse of time, it should become impossible to impeach it successfully.

Such being the case there is no doubt that relief should be granted the complainant. It is essential to the validity of tax sales, not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be in all such cases strictly exacted. The owner is seldom present, and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property, and thus a great temptation is presented to parties to exclude competition at the sale, and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness should be set aside, or the purchaser be required to hold the title in trust for the owner.

When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment, whether the deed be the ground upon which the recovery of the premises is sought by the purchaser, or be relied upon to defeat a recovery by the owner. In some instances equity will interpose in cases of this kind, as where the deed is by statute made evidence of title in the purchaser, or the preliminary proceedings are regular upon their face, and extrinsic evidence is required

to show their invalidity. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief. Thus in *Dudley* v. *Little*,* equity relieved against a tax sale and deed, where there had been a combination among several persons that one of them should buy in the land to prevent competition.†

It follows from the views expressed, that the complainant is entitled to a release from the defendant of all the right and interest acquired by him under the tax deeds in the property owned by the complainant at the time of the sale. The decree of the court below will therefore be REVERSED, and the cause remanded with directions to enter a decree in accordance with this opinion.

DECREE ACCORDINGLY.

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## LUM *v.* ROBERTSON.

1. Where a bank charter is forfeited on *quo warranto* and the corporation is dissolved, and a trustee appointed by judicial order made under statute to collect the debts due to it and apply them to the payment of debts which it owes, does so collect them and pay—any surplus, by the laws of Mississippi, and by general laws of equity, will belong to the stockholders. *Bacon* v. *Robertson* (18 Howard, 480), affirmed.
2. A delinquent debtor cannot in such case plead the judgment of forfeiture as against a trustee seeking to reduce his debt to money for the benefit of the stockholders.

ERROR to the District Court of the United States for Eastern Texas.

In July, 1851, Lum made two promissory notes at Natchez, Mississippi, in favor of Robertson, as trustee of the Commercial Bank of Natchez, or order. On these notes

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* 2 Hammond, 504.

† See also Yancey *v.* Hopkins, 1 Mumford, 419; Rowland *v.* Doty, Harrington's Chancery, 3; Bacon *v.* Conn, 1 Smedes & Marshall's do. 348.

suit was brought below in the name of Robertson, for the use of Alexander Ferguson.

The defendant pleaded substantially as follows:

That prior to the making of the notes, an information in the nature of a *quo warranto*, had been instituted by the State of Mississippi against the bank, under which its charter was declared forfeited, and the corporation was judicially dissolved, in pursuance of an act of the legislature of the State.

That under the provisions of the act, Robertson was, by an order of court, appointed trustee, for the purposes set forth in the act, viz., "to take charge of the assets and books of said Commercial Bank of Natchez, wherever the same might be found, either in the possession of said bank, or their officers, agents, trustees, or attorneys; to sue for and collect all debts due to the bank, and the proceeds of the debts when collected, and of the property when sold, to apply as might be thereafter directed by law, *to the payment of the debts* of the said Commercial Bank of Natchez."

That the foregoing, and no others, were the appointment, power and authority of the said Robertson, as trustee of said bank, and that he never had any other right, title or interest as said trustee; that the said notes were executed on account of a debt to the said bank, and that the consideration thereof wholly moved from, and was due to, the bank, and that the notes were executed to Robertson in his official character and right, as trustee as aforesaid, and in no other character or right.

That subsequently, it appearing to the satisfaction of the said court that Robertson had fully discharged all his duties as trustee, and had fully satisfied and paid all legal claims against the trust fund in his hands, it was ordered, that he be finally discharged from all the rights and duties conferred upon him, by virtue of his appointment as such trustee, &c.

That afterwards, to wit, in a suit by one Bacon and other stockholders against Robertson, *for the purpose of recovering and distributing the surplus assets among the stockholders*, Ferguson, to whose use the present suit was brought by a decree of court, duly appointed a receiver in said cause, "and that

Robertson was ordered to deliver to Ferguson all the moneys, bonds, notes and property of all kinds which the said Robertson had held as late trustee."

That at the time the notes were made and executed to Robertson, trustee as aforesaid, he had collected of the debts, effects and property of said bank, an amount of money sufficient to pay off all its debts, and all costs, charges and expenses incident to the performance of his said trust, and had, in fact, paid off the same, and thereby became *functus officio*, and was further expressly removed from his said office of trustee, as aforesaid.

To these pleas the plaintiff demurred. The court sustained the demurrer, and judgment went for the plaintiff.

The matter for determination on error here, was whether the pleas presented a valid defence to the action.

*Messrs. Green Adams and Leech, for the plaintiff in error; Messrs. Conway Robinson and W. G. Hale, contra.*

Mr. Justice DAVIS delivered the opinion of the court.

The decision of this court in *Bacon et al.* v. *Robertson*,* disposes of this case.

The Commercial Bank of Natchez, Mississippi, by judicial forfeiture, was deprived of its charter, and Robertson appointed a trustee to wind up its affairs. In discharge of his trust, having paid all the debts of the insolvent corporation, a large surplus remained. The object of the suit in *Bacon* v. *Robertson*, was to establish the title of the stockholders to this surplus. Robertson refused to distribute the effects in his hands, claiming that, since the dissolution of the corporation, the stockholders had no rights which this court could recognize. But the court, in an elaborate opinion, decide that the trustee cannot deny the title of the stockholders to a distribution, and that, by the laws of Mississippi and the general principles of equity jurisprudence, the surplus of the

* 18 Howard, 480.

assets which may remain after the payment of debts and expenses, belong to the stockholders of the bank.

After this decision, Ferguson was appointed receiver, and Robertson ordered to deliver to him the effects of the bank, which he held as trustee. In pursuance of this order, the two notes on which the suit is brought were delivered to Ferguson, and the name of Robertson, in whom the legal title rests, is used to enforce their collection.

Lum, a delinquent debtor of the bank, cannot plead the extinguishment of his debt by the judgment of forfeiture, for the court (in the case cited) say, the debt exists and can be recovered, and that it is the duty of the trustee to reduce the property of the bank to money, and distribute it among the stockholders. Nor can Lum be permitted to show (not having a meritorious defence to the suit) that Robertson, the nominal plaintiff, in whose name the suit is brought, is no longer the real party in interest.

Ferguson having the beneficial interest in the notes, has the right to use the name of Robertson to compel a recovery.

JUDGMENT AFFIRMED.

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## BARNEY *v.* BALTIMORE CITY.

1. Part owners or tenants in common in real estate of which partition is asked in equity have an interest in the subject-matter of the suit, and in the relief sought, so intimately connected with that of their co-tenants, that if these cannot be subjected to the jurisdiction of the court, the bill will be dismissed.
2. The act of February 28th, 1839 (set forth in the case), has no application to suits where the parties stand in this position, but has reference, among others, to suits at law against joint obligors in contract, verbal or written.
3. A citizen of the District of Columbia cannot be a party to a suit in the Federal courts, where the jurisdiction depends on the citizenship of the parties.
4. Although the simple fact that a transfer or conveyance of the subject of controversy is made for the purpose of vesting an interest in parties competent to litigate in the Federal courts, does not defeat the jurisdic-

tion, if the transaction vests the real interest in the grantee or assignee —yet, if the conveyance or assignment is colorable only, and the real interest remains in the grantor or assignor, the court cannot entertain jurisdiction of the case.

5. A decree in the Circuit Court dismissing a bill on the merits, will be reversed here if the Circuit Court had not jurisdiction, and a decree of dismissal without prejudice directed.

APPEAL from the Circuit Court for Maryland.

The Judiciary Act gives jurisdiction to the Circuit Court in controversies "between citizens of different *States*;" the District of Columbia, as it has been held, not coming within this term.

Another act—one of February 28th, 1839—enacts thus:

That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it. But the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no manner of abatement or other objection to said suit.*

In this state of statutory law, Mary Barney, a citizen of Delaware, and one of the heirs of Samuel Chase, filed a bill in the Circuit Court of the United States for Maryland against the City of Baltimore and several individuals, co-heirs with her, certain of them being citizens of Maryland, and certain others (William, Matilda, and Ann Ridgely), *citizens of the District of Columbia*, to have a partition of real estate of which it was alleged that the said Chase died intestate: and to have also an account of rents and profits, with other incidental relief.

In the progress of the suit, the bill was dismissed as to the

* 5 Stat. at Large, 321.

Argument for dismissal.

three Ridgelys, citizens of the *District*, and an amended bill filed, stating that they had conveyed their interest in the property in controversy to one Samuel Chase Ridgely (also a defendant in the case), and who was a citizen of Maryland; it being admitted by writing filed that this conveyance was made for the purpose of conferring jurisdiction of the case on the Federal court, that it was without consideration, and that the grantee would, on request of the grantors, reconvey, to them. This Samuel Chase Ridgely made his will soon after the conveyance, devising the property to his three grantors, the District Ridgelys, and having died during the pendency of the suit, it went back to them. They then conveyed to one Proud in the same way as they had previously conveyed to their co-defendant, S. C. Ridgely, it being admitted that the conveyance was executed to remove a difficulty in the way of the exercise of the jurisdiction of the Circuit Court.

The Circuit Court dismissed the bill by a decree which on its face appeared to be a dismissal on the merits. This appeal was then taken.

Coming here, the case was elaborately argued on the merits. But a point of jurisdiction was raised and discussed previously. On this latter point the case was disposed of by this court; the question of merits not being reached.

On the point of jurisdiction, *Messrs. W. Schley and W. H. Norris, for the City of Baltimore, appellees*, contended that the appeal ought to be dismissed. Confessedly, citizens of the *District* could not be made parties to a suit in a Circuit Court of a State. Yet the three parties who here were such citizens, co-heirs with the complainant, were material parties to any bill for account or bill for partition. No complete decree could be made in their absence. The difficulty was sought to be remedied by the conveyances to S. C. Ridgely and Proud; but the grants not being real grants, could not aid the case.*

* Russell *v.* Clark's Executors, 7 Cranch, 98; Shields *v.* Barrow, 17 Howard, 139; Smith *v.* Kernochen, 7 Id. 216.

*Messrs. Brent and Williams, contra:*

Mary Barney, as one of the co-heirs of her father, has a right to sue for her individual though undivided interest. A decree for a division merely *fixes* the territorial right of each tenant. A decree as between the present parties would work no prejudice to those absent, nor to those over whom the court has no jurisdiction. They could be subject to no other inconvenience than of a second suit in another tribunal, which is no reason to refuse to decree in this case; the established doctrine being that the Circuit Court will not be ousted of its jurisdiction by the absence of a substantial party over whom it can exercise no power, if the interest *be separable* from those before it. An estate in common is in its nature separable. As to the account for rents and profits, that, as an incident, would follow the wake of the land.

But if this be otherwise, still Samuel Chase Ridgely, a citizen of Maryland, had become seized of all the estate of the three District Ridgelys, and during his life all the parties and all the interests were properly before the court. The court having jurisdiction of all the parties, so far as their character in regard to citizenship was concerned, will not lose it because of a subsequent change of residence. The devisees of S. C. R. stand therefore in his shoes, although residents of the District.* In addition, the District Ridgelys having, since the death of S. C. R., conveyed to Proud, a citizen of Maryland, a party to these proceedings—the only parties now are a citizen of Delaware, complainant, with all the defendants, citizens of Maryland. Plainly the jurisdiction exists.

Finally, the act of 28th February, 1839, places the matter beyond doubt.

Mr. Justice MILLER delivered the opinion of the court.

The first question which the record before us presents is, whether the Circuit Court of the District of Maryland, sitting as a court of chancery, could entertain jurisdiction of

* Morgan *v.* Morgan, 2 Wheaton, 290.

the case. The difficulty arises in reference to the interest of William, Ann, and Matilda Ridgely, in the subject-matter of the litigation, and resolves itself into two distinct inquiries, namely:

1. Can a court of chancery render a decree upon a bill of this character without having before it, as parties to the suit, some person capable of representing their interest?

2. And secondly, if it cannot, did the contrivance resorted to, of conveying to S. C. Ridgely and Proud, taken in connection with the admitted facts on that subject, enable the court to take jurisdiction of the case?

The learning on the subject of parties to suits in chancery is copious, and within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.

This class cannot be better described than in the language of this court, in *Shields* v. *Barrow*,* in which a very able and satisfactory discussion of the whole subject is had. They are there said to be "persons who not only have an interest in the controversy, but an interest of such a nature, that a final decree cannot be made without either affecting that in-

* 17 Howard, 130.

terest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

This language aptly describes the character of the interest of the Ridgelys, in the land of which partition is sought in this suit, and in the account which is asked for, of rents and profits. If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties.

If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court, would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties. The same observations apply to any account stated by the court, of rents and profits, and to any decree settling the amount due on that score.

Nor does the act of February 28th, 1839, relieve the case of the difficulty. That act has been frequently construed in this court, and perhaps never more pertinently to the matter in hand, than in the case already cited, of *Shields* v. *Barrow*.

The court there says, in relation to this act, that "it does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction, and so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron* v. *McRoberts*,* *Osborn* v. *The Bank of the United States*,† and *Harding* v. *Handy*.‡ . . . . The act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court in *Mallow* v. *Hinde*,§ when speaking of a

* 3 Wheaton, 591. † 9 Id. 738. ‡ 11 Id. 132. § 12 Id. 198.

case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court;' so that while this act removed any difficulty as to jurisdiction between *competent* parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. . . . . It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit, without affecting those rights."*

These views do not render the act of 1839 either useless or ineffectual, for while it is true that in reference to parties in chancery proceedings, that act only pronounced the rule which this court had previously asserted, its beneficial influence in cases of common law cognizance are often called into exercise. It is a rule of the common law, that where one of several joint obligors in a contract, whether verbal or in writing, is sued alone, he can plead the non-joinder of the other obligors in abatement, and in cases where the joint obligors not sued were citizens of the same State with the plaintiff, or were residents of some other district than that where the suit was brought, the jurisdiction of the court was defeated. This very serious difficulty was remedied by the act of 1839; for in such cases the plaintiff can now prosecute his suit to judgment against any one of such joint obligors, in any district where he may be found. Of this class of cases are *Inbusch* v. *Farwell*,† and others which preceded it.

* See also Northern Ind. R. R. Co. *v.* Michigan Central R. R. Co., 15 Howard, 233.

† 1 Black, 566.

But this rule does not conflict with that under which the courts of chancery act in refusing to make a decree, where by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interest of the absent parties. In the class of cases just mentioned at common law, the plaintiff, by his judgment against one of his joint debtors, gets the relief he is entitled to, and no injustice is done to that debtor, because he is only made to perform an obligation which he was legally bound to perform before. The absent joint obligors are not injured, because their rights are in no sense affected, and they remain liable to contribution to their co-obligor who may pay the judgment by suit, as they would have been had he paid it without suit.

We are, therefore, of opinion that the Circuit Court could render no decree on the merits of this case, without having rightfully before it some person representing the interest of the Ridgelys.

This leads us to the second inquiry connected with the jurisdiction of the case, namely, whether the conveyances to Proud and S. C. Ridgely, who were citizens of Maryland, and were made defendants, removed the difficulty growing out of the residence of the Ridgelys in the District of Columbia?

In the case of *Hepburn* v. *Ellzey*,* it was decided by this court, speaking through Marshall, C. J., that a citizen of the District of Columbia was not a citizen of a State within the meaning of the Judiciary Act, and could not sue in a Federal court. The same principle was asserted in reference to a citizen of a territory, in the case of *New Orleans* v. *Winter*,† and it was there held to defeat the jurisdiction, although the citizen of the Territory of Mississippi was joined with a person who, if suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by

* 2 Cranch, 445.

† 1 Wheaton, 91.

the courts, when the point has arisen.* Indeed, the counsel for complainant seem to have conceded that the Ridgelys of the District could not become parties by their voluntary submission, and that their being parties deprived the court of jurisdiction, because they were dismissed from the suit after they had appeared and answered to the merits.

If the conveyance by the Ridgelys of the District to S. C. Ridgely of Maryland had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. *McDonald* v. *Smalley*,† and several cases since, have well established this rule. But in point of fact that conveyance did not transfer the real interest of the grantors. It was made without consideration, with a distinct understanding that the grantors retained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the court. And it is now equally well settled, that the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more. In the case of *Smith* v. *Kernochen*,‡ this court said, "The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then, in fact, a controversy between the former and the defendants, notwithstanding the conveyance." And the court cites *McDonald* v. *Smalley*, already mentioned; *Maxfield's Lessee* v. *Levy*,§ *Hurst's Lessee* v. *McNeil*,‖ and *Briggs* v. *French*.¶

It is not possible to see how the case before us can be taken out of the principle here laid down. We are therefore of opinion that the Circuit Court had no jurisdiction of the case.

It follows that the decree of that court which, on its face,

* Wescott *v.* Fairfield, Peters's Circuit Court, 45.
† 1 Peters, 620.
‡ 7 Howard, 216.
§ 4 Dallas, 330.
‖ 1 Washington Circuit Court, 70.
¶ 2 Sumner, 257.

appears to be a dismissal of the bill on the merits, must be reversed, and the case remanded, with directions to that court to enter a decree dismissing the bill for want of jurisdiction, and without prejudice to plaintiff's right to bring any suit she may be advised in the proper court.

Mr. Justice CLIFFORD, dissenting. Unable to concur in the opinion of the court, I will proceed to state very briefly the reasons of my dissent.

Consent, I agree, cannot give jurisdiction in a case where it is not conferred by the Constitution and the laws of Congress, but the judicial power as described in the Constitution, extends in express terms to controversies between citizens of different States.*

By the eleventh section of the Judiciary Act it is also provided that the Circuit Courts shall have exclusive 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, and the suit is between a citizen of the State where the suit is brought and a citizen of another State.†

Complainant is a citizen of Delaware, and the respondents are citizens of Maryland, which brings the case within the express words of the Judiciary Act and of the Constitution.

Express decision of this court in *Hagan* v. *Walker et al.*,‡ is that since the act of the twenty-eighth of February, 1839, it does not defeat the jurisdiction of the court in a suit in equity, that a person named as defendant is not an inhabitant of, or found within, the district where the suit is brought.§

The court may still adjudicate between the parties who are properly before it, and the rule is that the absent parties are not to be concluded or affected by the decree. Cases may arise, say the court, in which the court cannot adjudi-

* Art. 3, sec. 2.

† 1 Stat. at Large, 78.

‡ 14 Howard, 36.

§ 5 Stat. at Large, 321.

cate between the parties who are regularly before it, for the reason that it cannot bind those who are absent, as where relief cannot be given without taking an account between an absent party and one before the court. Defect of parties in such a case does not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant.

Non-joinder of an absent party in such a case, not only does not defeat the jurisdiction of the court, but it does not raise any such question under the Constitution and the law of Congress, because the parties before the court being citizens of different States the jurisdiction of the court is undeniable. Relief will not be granted in such a case where it appears that the interests of absent parties will be injuriously affected; but the question is not one whether a Federal court has jurisdiction to hear and determine the cause. On the contrary, it is a question of equity practice as to parties, common to all courts exercising equity powers.

Such an objection is never allowed to prevail if the court can protect the interest of the absent party, or where it appears in the record that due notice was given to him, and that he has formally waived the objection. The maxim *volenti non fit injuria* applies in such a case, and consequently, the difficulty may be remedied by a conveyance or stipulation appearing in the record. Courts of equity refuse to grant relief in such cases, not because they have not jurisdiction, but only because the right of absent parties interested in the subject-matter may be injuriously affected. Hence the rule is that, if the court can grant relief without affecting such rights, or can protect those rights in the decree, the court will not dismiss the suit, and the same rule is applicable if it appears in the record that the absent parties have full knowledge of the controversy and that they have in due form of law waived all objections to the prosecution of the suit. Unless these views are correct, then it is clear that the act of the twenty-eighth of February, 1839, is unconstitutional and void, as no one will pretend that Congress can extend the jurisdiction of the Federal courts

beyond the power conferred in the Constitution. Validity of that act of Congress is admitted in the opinion of the majority of the court, and it is also admitted that the decision of this court in the case of *Inbush* v. *Farwell** is correct. Direct decision in that case was, that the jurisdiction of the Federal courts in a common law suit is not defeated by the suggestion that other parties are jointly liable with the defendants, provided it appears that such other parties are out of the jurisdiction of the court.

Under the Constitution and the Judiciary Act the conditions of jurisdiction are the same in a suit in equity as at common law, and it is not possible to distinguish the one from the other without adding language to those provisions which neither the framers of the Constitution nor Congress ever employed.

For these reasons I am of the opinion that the Circuit Court had jurisdiction of the case, but the majority of the court are of a different opinion, which renders it unnecessary to enter upon the consideration of the merits.

The CHIEF JUSTICE and FIELD, J., also dissented.

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## UNITED STATES FOR THE USE OF CRAWFORD *v.* ADDISON.

1. C. being already duly in office as mayor, under a charter which prescribed that a mayor in office should "continue in office two years, and until a successor is duly elected," was returned by the judges of election as again elected. Upon the counting of the votes cast for the different candidates, the city councils (who had a power to elect where the candidates had an equal number of votes) declared that one A., a rival candidate, was elected; and A. was accordingly installed into office. In a proceeding by *quo warranto*, taken by the United States on the relation of C., judgment of ouster was rendered against A. *Held*, that C. thereupon became entitled to the office, either by virtue of the declaration of the judges who had returned him elected, or by virtue of that provision of the charter which enacted that the mayor shall hold over until his successor was elected.

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* 1 Black, 571.

Statement of the case.

2. Where an intruder, ousted by judgment on *quo warranto* from an office having a fixed salary,—and of personal confidence, as distinguished from one ministerial,—takes a writ of error, giving a bond to prosecute the same with effect and to *answer all costs and damages if he shall fail to make his plea good*—thus, by the force of a *supersedeas*, remaining in office and enjoying its salary—does not prosecute his writ with effect, and is, after his failure to do so, sued on his bond by the party who had the judgment of ouster in his favor—the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and consequent operation of the *supersedeas*.
3. The rule which measures damages upon a breach of contract for wages or for freight, or for the lease of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and where the damages which he is entitled to recover is the difference between the amount stipulated and the amount actually received or paid, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical.
4. A special verdict not received by the court, nor in any way made matter of record, and where, with the assent of the attorney of the party in whose favor it was given, the jury retired by the court's direction and considered further of their verdict, and returned another verdict upon which the judgment of ouster was entered, is of no weight as evidence for any purpose.

ERROR to the Supreme Court of the District of Columbia; the case being thus:

The charter of Georgetown provides that on the fourth Monday of February in each two years, the citizens shall elect a mayor, "to continue in office two years and until a successor is duly elected." The person having the greatest number of votes is to be declared elected; and in the event of an equal number of votes being given to two or more candidates, two council-boards, of which the corporation is composed, are to elect from the persons having such equal number.

With this charter in force, Crawford, being in 1859 mayor of the city, and then duly in office, was in that year a candidate for re-election. His opposing candidate was one Addison. The electors having voted on the election day, the judges of election returned Crawford as the person elected. He accordingly presented himself to the city councils, and offered to take the usual oath. They, however, on a count made by themselves of the vote, declared that Addison was

really elected. He and not Crawford was accordingly sworn into office and entered upon the duties of mayor. Crawford then proceeded by *quo warranto* in the Federal court of the District, to test Addison's right to the place; the proceeding being in the usual form of one by the United States at the relation of the party aggrieved; in this instance Crawford. On this proceeding the jury brought in a verdict that "the votes received by each candidate make the vote a tie." The court, with the assent of Addison's attorney, refused to receive the verdict, and having directed the jury to return to their room and again consider of their verdict, they brought in a new verdict, on which a judgment of ouster was given.* To review this judgment Addison took a writ of error from this court, giving a bond in $3000. The bond, which was to "the United States of America," recited that the Circuit Court for the District in a suit of the United States *at the relation of Crawford*, had lately adjudged that Addison should not intermeddle with the office, privileges, franchises, &c., of mayor, and that he "be taken to satisfy the United States for his usurpation thereof, and that the said Crawford, relator, recover against Addison the sum of $—— for his costs." And it bound Addison and his sureties, to "prosecute the said writ of error with effect, and to answer *all damages and costs if he shall fail to make his plea good.*"

The writ of error having been held by the Court of the District to be a *supersedeas* of the judgment of ouster, Crawford applied to this court in 1859 for a mandamus on the Circuit Court to enforce it, notwithstanding the writ of error.* The arguments of his counsel in this court were:

1st. That the matter in dispute being an office of personal confidence and trust, and not a thing capable of being bought, sold, or assigned,—it was not a thing which had a "value" within the act, which gave this court jurisdiction only when the matter in dispute was of the value of $1000 or more, and hence that the writ ought to be dismissed.

2d. That the two years—or term of office—for which

* See United States ex relatione Crawford *v.* Addison, 22 Howard, 174.

Crawford was elected, would run out before the case brought up by the writ of error could be passed on.

The court, however, considered that the office having a salary, the case did present a subject of "value," and that salary being $1000, of the requisite value. As to the other matter they said:

"The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an *indemnity to the defendant in error, should the plaintiff fail to prosecute with effect his writ.*"

The mandamus was accordingly refused, and the writ of error suffered to stand, Addison in the meantime enjoying the mayoralty.

In January, 1861, however, the writ of error was dismissed, and on the 21st of that month—*a large part of the term of office having at this time of course passed*—Crawford got that possession of the mayoralty from which the writ of error had till now deprived him. He now brought suit on the writ of error bond in the name of the United States against Addison, the purpose being to recover the amount ($1104) received by Addison as salary from the date of the bond to the time when Crawford got the benefit of the judgment of ouster, a term as it appeared of one year one month and seven days, which he claimed as damages chargeable to the bond. The costs Addison had himself paid. The *narr.* alleged that Addison had *not* prosecuted his writ of error with effect, and that he did *not* answer all damages and costs, in that he had not paid Crawford, at whose relation the suit recited in the bond was brought, $1000 a year, for the year and more in which he Addison was enjoying the office, and which sum he, Crawford, would have had for his own use but for the suing out of the writ of error aforesaid.

On the trial the plaintiff requested the court to instruct the jury as a second instruction, that if they should find that during the time in which Addison acted as mayor he received the salary, and that he did not prosecute his writ of error with effect, then that the plaintiff was entitled to re-

cover the amount so received, and interest on it—provided they should also find that Crawford was duly elected and qualified as mayor, and that he continued and was ready and willing to discharge his duties, and was only prevented from so doing by the interference of Addison, and by his assuming to exercise the functions of the office.

The court refused to give such instruction; assigning as a reason among others for the refusal, that there was no evidence in the case that the defendant by his interference had prevented the plaintiff from the exercise of the office.

*Messrs. Carlisle and Brent, for Crawford, plaintiff in error:*

Crawford's right to sue upon the bond in the way we now sue is settled by what was said by this court on the application for a mandamus. The court then settled also that the value of the mayoralty was its annual salary. All matter and question on it, then, are out of the way. As to the reason specified by the court below for refusing the second instruction asked, it is in the teeth of the evidence showing that the defendant, Addison, had interfered by exercising the duties of the relator's office, and by superseding the judgment of *ouster* by his writ of error bond.

*Messrs. Bradley and Wills, contra:*

1. The *quo warranto* was to try whether Addison had or had not usurped the office—*not whether Crawford was entitled.* The judgment was a judgment of ouster of Addison, not restoration of Crawford. Addison had therefore a right to his writ of error; and, if he failed on that writ, he was liable only for the costs. Those he has paid.

2. The councils had a right to look to the first finding of the jury, which indeed the court refused to receive *as a verdict* of a fact, but which, nevertheless, was a fact ascertained by the jury in a cause in which these two men were parties. This was one of the instruments of evidence upon which the duty of the councils to elect immediately arose.

3. From the day after the date of the bond, Addison held the office of mayor, not by the old, but by a *new title*, de-

rived under the charter of the corporation—that is, by virtue of a new election by the city councils, authorized by the charter in case of a failure to elect by the popular vote in consequence of a tie vote. On this new element of the case, the court in the *quo warranto* proceeding pronounced no judgment, and in regard to *it* the judgment of ouster is irrelevant.

4. The instructions asked were erroneous:

i. Because they assumed that the salary of the office had a pecuniary value *other* than as "a compensation *for labor and services* performed" in the discharge of the duties of that office, contrary to the law.*

ii. Because they assumed that the whole salary received by Addison after the date of the bond, was the measure of such damages; and not the actual damages to Crawford; that is, the profit of the office, if any; or the amount of the salary received by Addison, less the amount which Crawford did receive, or reasonably might have received for his services in some other branch of business during the same period of time. On this point the analogies of the law are decisive. In cases of breach of contract for wages, if the servant is illegally discharged, he is bound to seek other employment, so as to lessen the damages, and his right to recover the stipulated wages is subject to the right to deduct the wages which he could reasonably have earned during time asked by the remainder of the contract. In cases of breaches of contract for freight or lodgings, the claim is subject to be diminished by the amount of freight or rent received, or which might have been received by the exercise of reasonable diligence.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court as follows:

When the application was made to this court for a mandamus to the Circuit Court to compel the issue of process upon the judgment of ouster against the defendant, Addison,

* Ritchie *v.* Mauro, 2 Peters, 244.

in the *quo warranto* proceeding, notwithstanding the writ of error and bond, the counsel of the relator contended that the case was not one in which a writ of error would lie; that to authorize the writ the matter in dispute must have a pecuniary value of at least one thousand dollars; that the matter in dispute was a public office of personal trust and confidence, which was not the subject of pecuniary estimation; that the salary annexed was not to be considered as the value of the office, but as an equivalent for the services to be rendered, and even that was payable in monthly instalments; and that a mandamus should accordingly issue, especially as the term of office would expire about the commencement of the ensuing term of the court to which the writ of error was returnable.

The counsel of the defendant, on the other hand, insisted that the pecuniary value of the office was determined by the salary annexed, and as it amounted to a thousand dollars a year the court had jurisdiction to review the judgment on writ of error, and that the bond stayed process on the judgment. And so the court held, and refused the mandamus.*

When in January, 1861, the writ of error was dismissed, and the judgment of ouster against the defendant, Addison, was enforced, the relator was installed into office. He then brought the present suit on the bond.

By the judgment of ouster against Addison, his right to the office of mayor was determined. The relator thereupon became entitled to the office, either by virtue of the declaration of the judges who had returned him elected, or by virtue of that provision of the charter which enacts that the mayor shall hold over until his successor is elected. By the writ of error and the suspension bond the enforcement of the judgment was prevented, and until the writ was dismissed the relator was excluded from the office and deprived of the salary annexed to it. The amount of the salary received by the defendant, Addison, during the period of such deprivation, constitutes, under the decision in the mandamus case,

* The United States ex relatione Crawford *v.* Addison, 22 Howard, 174.

the measure of the damages which the plaintiff is entitled to recover upon the suspension bond.

The second instruction to the jury which the plaintiff requested correctly presents the law of the case, and should have been given.

The rule which measures the damages upon a breach of contract for wages or for freight, or for the lease of buildings, has no application. In these cases the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and the damages recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical.*

An attempt is made to avoid the liability of the defendant, Addison, by showing that on the trial of the *quo warranto* the jury in the first instance returned a special verdict to the effect that there was a tie in the votes cast for him and the relator respectively. This verdict is not evidence of the fact, for it was not received by the court, or in any way made matter of record. With the assent of the attorney of the defendant the court directed the jury to retire to their room and consider of their verdict. They did retire, as directed, and returned the verdict upon which the judgment of ouster was entered. The original verdict was, therefore, of no weight as evidence for any purpose, and constituted no basis for the action of the councils of the city in the proceeding to elect the defendant, Addison, as upon a tie in the votes cast by the electors. That the members of the councils did not themselves place any reliance upon the validity of their action in this respect is evident from the subsequent installation of the plaintiff after the enforcement of the judgment of ouster.

We are of opinion that the judgment should be REVERSED, and the cause remanded for a new trial, and it is

SO ORDERED.

* See Costigan *v.* The Mohawk and Hudson River Railroad Co., 2 Denio, 609.

Syllabus.

## CLEMENTS *v.* MOORE.

## MOORE *v.* CLEMENTS.

1. An objection to an amended bill in chancery because not filed with the leave of the court below (as it is contemplated by Rule 45 of the equity rules that such bills should be), or the objection that a replication is not in a sufficient form, under Rule 66 of the same rules, cannot be first made in this court. The objection if not made below is waived.
2. A paper put in after the answer filed and after part of the testimony has been taken, stating that the "plaintiffs in the cause hereby join issue with the defendants (naming them), and will hear the cause on bill, answer and proofs against the defendants," is a sufficient replication.
3. A purchaser of a stock of goods from a debtor confessedly insolvent, where the purchaser knows that the debtor's purpose is to hinder and delay a particular creditor, and also that if the debtor intended a fraud on his creditors generally, the purchase would necessarily be giving him facilities in that direction, is not responsible in equity (the sale being an open one, for a fair price, and followed by change of possession) for any part of the consideration-money which the debtor had applied to payment of his debts; but is responsible for any part which he has diverted from such payment.
4. Statements either oral or written made by the vendor after such a sale, are incompetent evidence against the purchaser on a suit by the particular creditor to set the sale aside.
5. A complainant in chancery cannot, by waiving a verification on oath to the defendant's answer, deprive such answer, when made with such verification, of its ordinary effect.
6. In chancery, when an answer which is put in issue admits a fact and insists on a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved, otherwise the admission stands as if the fact set up in avoidance had not been averred.
7. Where a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it; his estate being insolvent.
8. In this case, three answers in chancery denying allegations made in a bill, of fraud on creditors by an admitted conveyance of real property on the part of an insolvent debtor to his wife through a third person, *held* not to disprove the allegations; the answers being discrepant in striking particulars from each other, and, as respected the consideration, with the deeds themselves; no proof being given of the mode of payment by the third person (who, it was set up, had purchased the property from the husband for himself, and afterwards sold it to the wife on payment from her separate property), nor any proof beyond the answers of her husband and herself and a previous statement of the

husband, then arranging the transaction, that the wife ever had any separate property.

9. In this case the court states the different modes in which law and equity respectively deal with fraudulent conveyances.

THESE were cross-appeals in equity from the District Court for the Western District of Texas.

Clements and Sheldon, judgment creditors of James Nicholson, filed in that court their original and amended bill (the last apparently without leave of court, as required by Rule 45*) against Nicholson, his wife, and a certain Moore, to set aside on the ground of fraud—

1. A sale by Nicholson of his entire stock of merchandise (dry goods); and

2. A conveyance by him to Moore, and by Moore to Mrs. Nicholson, of certain lots in Bastrop, Texas.

The bill charged that in November, 1852, the defendants obtained judgment against Nicholson for a debt contracted in March, 1851; that on the 5th July, 1851, Nicholson, having then on hand a large stock of goods, worth $12,000, but being in failing circumstances, sold them to Moore for $7000, this sum being paid only in notes of Moore, due at different times; that Moore knew Nicholson's condition; that the sale was collusive, and meant to defraud Nicholson's creditors;—a secret arrangement having existed between the parties to share any profits that Moore might make on a sale of the goods.

*As to the real estate*, the charge was, that at the same time with this pretended sale Nicholson had transferred to Moore five lots in Bastrop; to wit, three lots known in the plan of the town as Nos. 62, 65, and 70; and also two others, to wit, No. 95 and fractional lot No. 4, both east of Main Street; that this transfer was without consideration or with a nominal one only; and that the lots were now claimed by Mrs.

* This rule—one of the rules prescribed for courts of equity of the United States—says: "If any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have *leave* to amend the same with or without the payment of costs, *as the court or a judge thereof may in his discretion direct.*"

Nicholson,—a redemption or repurchase by her being fraudulently set up with a view of furthering the plan of Moore and Nicholson to defraud the creditors of the latter.

Each defendant filed an answer.

NICHOLSON, admitting the debt charged, denied every allegation of collusion or fraud.

*As to the goods*, he averred that the allegation of an understanding that he and Moore were to share profits on a sale of the goods transferred, was "absolutely untrue and false:" and in answer to special interrogatories, stated that the goods cost in New York $8556; that they were sold to Moore at 20 per cent. discount on that cost,—the sale amounting thus to $6310, which he declared was their full worth.

*As to the lots*, that the sale of these had nothing whatever to do with the sale of the merchandise; that Moore purchased them in good faith, paying therefor the sum of *eight* hundred and sixty dollars; that subsequently to this sale it was agreed that they might be repurchased at the same price at which they were sold, with interest; that they were accordingly repurchased by his wife, Rebecca Nicholson; that the intervention of his wife was not for the purpose of defrauding the complainants or the other creditors. On the contrary, that it was for the purpose of securing the separate property of his wife, so purchased in good faith by her from Moore with her own means. The answer alleged that when he married the said Rebecca, "she was a widow, having a considerable amount of separate means and money, belonging to herself and to her child by a former husband; that from time to time she lent him these means to aid in carrying on his business, until the amount exceeded $500; that after the sale of said goods this defendant, in payment of said borrowed money, transferred *one* of Moore's notes for $500 to her; and that with it *and other* of her separate means, she purchased the lots from Moore;" that in fact, the lots had been purchased for the father of the defendant; and that the only reason why the defendant did not take the deed in his father's name was because he was an alien; that his father had ever since that time occupied them as a homestead, under an

arrangement with the defendant's wife that she should repurchase the property from Moore, and permit her father-in-law, now old, to occupy it during his lifetime; that the arrangement between Moore and the defendant's wife was not a mortgage, but a purchase in good faith; that his wife, having paid Moore, had, in the spring of 1853, filed a bill in the District Court of Bastrop County, to force him to reconvey the lots to her; and that the court had decreed a reconveyance, except as to No. 4, and also one lot, No. 95, "which was redeemed and sold to pay a debt due from defendant;" that Moore was ready to convey; and that in this arrangement some creditors who had levied upon the property concurred.

MOORE, admitting that it might be true that Nicholson was in failing circumstances (though of their extent he, Moore, knew nothing), denied all knowledge of the debt to the complainants.

*As to the goods*, he admitted the purchase at the price stated by Nicholson, for which price he alleged that he had given notes, which he had since paid; that the purchase was made by him in good faith, reluctantly on his part, and only after Nicholson had offered his goods to others, without their purchasing; that the goods at New York invoice prices amounted to $7887.75; that they were originally invoiced at high rates, and, being a broken and culled stock, were not worth New York cost in Bastrop. He denied all collusion with Nicholson, and all partnership in profits; and alleged that the profits which he made, if any, on the goods were so inconsiderable as not to be worth naming.

*As to the lots*, that on the 12th June, 1851, anterior, therefore, to the purchase of the goods, he, Moore, purchased them for *eight* hundred and sixty dollars, which he *paid* in good faith; that it was agreed with Nicholson "that the lots might be repurchased for the same sum, with interest at ten per cent."

The answer of Moore made the same statement as to the decree in the District Court of Bastrop as was contained in the answer of Nicholson; adding, that in the matter of the decree "this defendant had not intended collusion with any

one;" that the lots were "not redeemed but repurchased by Mrs. Nicholson;" though whether out of her own funds the respondent did not know, except as he was assured by Nicholson that they were so purchased.

MRS. NICHOLSON'S answer (which the complainants offered to receive without oath, but to which nevertheless she swore), was confined to the lots; the matter which was the subject of the bills so far as respected her. Denying all fraud, her answer stated that when she married Nicholson, she had in ready money the sum of about $1000, her own separate property; that her husband informed her that he was much pressed for some ready money, and agreed with her to give her in pledge two promissory notes of Moore, not then due, for about $500 each, for the use of this money; that she did give to her said husband the use of her said money, and took in lieu thereof the notes. She did not remember distinctly when she made the arrangement, but thought that it was some time during the year 1849 or 1850, and "that it was some time afterwards that she surrendered to the said Moore the said notes in discharge of a mortgage, which said Nicholson had before that time executed to him on the lots."

*A part of the testimony having been taken*, the complainants filed a paper thus:

"The plaintiffs in this cause hereby join issue with the defendants [naming them all], and will hear the cause, on bill, answer, and proofs, against the defendants."

The sixty-sixth rule of practice prescribed by this court for courts of equity of the United States, orders that—

"Whenever the answer of the defendant shall not be excepted to, &c., the plaintiff shall file the general replication thereto on or before, &c. [The rule makes the cause then at issue.] If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for the dismissal of the suit."

THE FACTS, so far as proved by testimony, seemed to be thus: Nicholson was a trader at Bastrop, and in the spring

and summer of 1851 was, in fact, embarrassed, and generally reputed so to be in his affairs.

*As to the goods.* After the sale of the merchandise, it appeared—on the one hand—that a short time previously to the sale of them—one House then pressing him through Mr. Larkins, an attorney in Bastrop, for payment of a debt due *him*, and the attorney and Nicholson entering, somewhat confidentially, into consideration of the latter's affairs—Nicholson stated that he could pay House's claim, but that doing so would leave him so much embarrassed that he was afraid that a certain New York firm, which was named (and which was, in fact, the complainants in this suit), would "come down on him and appropriate his effects to the exclusion of a large amount of home and other debts, which he thought ought to be preferred under the circumstances." The debt of House having, through the efforts of Mr. Larkins, been satisfied, that person suggested to him the propriety of making to some one an assignment, by which provision could be made for any creditors whom he might wish to favor; and suggested the name of Moore as "a suitable man to close up the business." While Nicholson and Larkins were thus conversing, Moore happened to pass along in the street, and they, seeing him through the window, called him in. Nicholson then proposed to him to accept an assignment such as above mentioned. Moore said that he would take the matter under advisement; and the next day Larkins was desired to draw up such an assignment as had been contemplated. Becoming indisposed, however, the drawing of the deed was deferred. On getting to his office again, several days after the original conversation, Moore called to tell him, that he had decided not to take an assignment, but had purchased the goods absolutely.

As to what passed between Nicholson and Moore at the immediate time of the sale itself, little was shown by proofs, except that it was made on the 7th July, 1851; Moore, who had been confidentially asked to take the assignment, knowing, of course, that Nicholson was insolvent, and probably being informed, as well, of the motive of the assignment,

viz., to protect the "home creditors" against Clements and Sheldon. It was shown, however, that Moore took immediate possession of the store where the goods were and proceeded to retail them; that they were not worth more than he gave for them, and that after a fair sale, time and expenses being considered, he had lost rather than made money. It appeared also that all the notes which he had given as the consideration of the sale, had been applied by Nicholson to the payment of his *un*questioned debts, with the exception of three; one of $500, which he sold for $375 cash; and two of the same sum, each, which it was alleged that he had handed over to his wife under circumstances hereafter mentioned.

On the other hand, as respected the sale of the goods, it was testified by one Hall, that some time after it, Nicholson wanting money, offered to sell one of the notes, given on account of it (the note for $500 just spoken of), to him; that he, Hall, went to Moore to see if the validity of the note without offset was acknowledged; taking at the same time an open letter from Nicholson to Moore, requesting him to execute a new note to the purchaser of the old one. That the note being admitted, Hall did execute a new one. That after doing so he said, referring to the letter: "I will keep this letter, for I don't know what might happen. Jemmy Nicholson is a little rascally, and it is well enough to have it to show. But somebody would have made something out of the transaction, and I don't know why it should not be me as well as anybody else."

So also it was testified that on a friend's remarking to Nicholson that he had made an imprudent sale, and that he could have turned the goods over to his creditors at cost and charges, Nicholson replied, that "if Moore realized a good profit, he, Nicholson, was to have a portion." In addition, two original papers of Nicholson were produced, one a document, thus:

MEMORANDUM.

"At the time of my difficulties, I was informed that I might be closed up by any one holding a small foreign claim, the

goods sold at a sacrifice to liquidate it, and nothing left for other creditors. Sick, and partly crazy with study, I knew not how to act, but threw myself on friends for advice; was advised to sell my stock and make an assignment; that M—— would be a good person to sell to; spoke to him, he was willing; but said that I should sell them for something less than cost; offered them at New York prices, which would be ten per cent. less than actual cost here; he said he would consider of it; afterwards came and said I ought sell them for less. I then considered myself; he then told me he had been speaking to some of my friends, and they advised me to let them go at 30 per cent. below N. Y. cost, and that I had better do it, and *if he made anything he would share it with me, or perhaps he first said he would give me something handsome, but afterwards said he would share it.* During last court week, he told me he was going to make something out of the goods; that he would share it with me, as it was always his intention."

The other paper was a letter, dated July 18th, 1853, accompanying this document, to the attorney of the complainant, in which he stated that Moore had said that if he would sell at 30 per cent. below New York cost, "*he would share with me the profits, as it was necessary for every man to protect himself and family.*"

*As to the lots.* No testimony was given beyond the fact that they were conveyed by Nicholson and wife, June 13th, 1851, that is to say, twenty-one days previously to the sale of the merchandise; that the deeds themselves, as given in the printed record, stated the consideration to have been *five* hundred and fifty dollars (not *eight* hundred and fifty, as stated in the answers of Nicholson and Moore); that at the time they were conveyed, Moore stated in Nicholson's presence to one Dunbar, the magistrate before whom the acknowledgment was taken, that they were all conveyed in consideration of a *debt* which Nicholson owed him, asking the magistrate to take notice of the facts; and that the District Court of Bastrop County, on a bill filed by Nicholson and wife against one Scott, Moore, and others (in order, apparently, to prevent Scott, an execution creditor, from sell-

ing the lots), had, *by a decree entered by agreement of attorney*, enjoined a sale of those; and ordered "that Moore should make a complete title to Mrs. Nicholson for lots Nos. 62, 65, and 70, in accordance with his agreement," and that the undivided fractional half of No. 4 should be sold by the sheriff to satisfy the claim of Scott against Nicholson. About the remaining lot No. 95, the decree said nothing.

For the rest, the matter, as respected these lots, rested on the pleadings, in which the answers of Nicholson and wife, it will be remembered, stated that they were repurchased with separate money of Mrs. Nicholson, owned by her before her marriage with Nicholson; and that lot No. 95 had been resold to *him* and applied by him to pay one of his debts.

The court below dismissed the bill as to Mrs. Nicholson, and set aside the sale of the goods, as intended to defraud creditors, and therefore void.

The creditors appealed from this dismissal, and Moore from the other part of the decree.

*Messrs. G. W. Paschall, Senior and Junior, for Moore:*

1. The amended bill was filed without leave asked, and contrary to the forty-fifth rule of court. But even if rightly filed, still the cause stands but upon the pleadings. The sixty-sixth rule of court requires the complainant to file a general replication; that is to say, as that term is defined, "a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill."* The paper filed in this case does not amount to any such denial. It only asserts that "the plaintiffs join issue with defendants, and will hear the cause on bill, answer, and proofs." This is not a mere irregularity in form; it is a failure to put the cause at issue. Moreover it was filed after testimony was taken.

* Cooper's Equity Pleading, 329, 330; Mitford's do., by Jeremy, 321, 322; Story's do., § 878

2. The answers deny all the equity of the bill; and as there was no replication, the bill should have been dismissed as to all parties.

3. But if the proofs be consulted, they do not make such a case as overcomes the answer.

*As to the goods.* The most that can be deduced from the statements of all the witnesses is, that when the sale was made, Nicholson was in failing circumstances; and there may be some evidence conducing to prove that Moore knew it, or might have known it by diligent inquiry. They do not establish any intention to defraud, delay or hinder creditors; but, on the contrary, that the object of Nicholson was to pay his debts, giving a preference to his home creditors. The assets were in fact used for that purpose.

The only tendency of proof in an opposite direction is the statements of Nicholson after the assignment, which are no evidence as against Moore, and cannot overcome Nicholson's own sworn answer.

The facts that Nicholson had creditors, and that his means were insufficient to pay them, and that he apprehended suits, and preferred to pay his home creditors, would not, in themselves, prove the fraudulent intention. The man in debt may sell to pay his debts, and he may prefer creditors.*

The case does not come at all within the principles of *Twyne's Case*,† the leading case on fraudulent conveyance, and which has been followed in Texas.‡ Possession was taken by Moore; the sale was open; and as we have said, there is no proof that Nicholson retained any interest.

*As respects the lots*, the bill was rightly dismissed. The account given by both Nicholson and his wife is so perfectly natural, that being sworn to by both as it is (and by the wife voluntarily, though verification by oath was dispensed with

* Baldwin *v.* Peet, 22 Texas, 710–724; S. C. 26th February, 1860; Paschal's Digest, 652; 25th Texas.

† 1 Smith's Leading Cases, 1; reported from 3 Reports, 80.

‡ Bryant *v.* Kelton, 1 Texas, 418–433; Edrington *v.* Rogers, 15 Id. 188; Mosely *v.* Gainer, 10 Id. 393; Mills *v.* Howeth, 19 Id. 259; Humphries *v.* Freeman, 22 Id. 50.

by the other side), no reasonable doubt can be had as to its truth. It is a natural, probable, and consistent story, and the slight discrepancies to be found between the narratives of the different parties, and between oral statements and written documents, is the best proof of truth. In an invented story, such things would not be seen any more than a forged will would appear to be informally acknowledged, which Lord Mansfield said such a will never was. The case presents truth under its most convincing aspect; that is to say, it presents substantial truth narrated with circumstantial variety. The substantial truth has already been established by judicial decree in Bastrop County.

*Mr. C. Robinson, contra, for the Creditors:*

1. *As to the goods.* The preliminary objections as to want of leave of court to file the amended bill, and of want of replication, and the effect of such want, are too technical. There was a replication in substance; and if not, the objection comes too late when it comes for the first time here, the complainant never having asked below to have the bill dismissed, *sec. reg.*

We pass to the question of merits. The evidence of fraudulent intent appears strongly by Nicholson's own statements, orally and in writing. His letter of July 18th, 1851, and his "memorandum," are conclusive. Moore's participation in the fraud is proved by Hall. The decree setting it aside was right.*

2. *As to the lots.* It is stated in Nicholson's answer, that Moore purchased the same, "*paying therefor* the sum of $860;" and in Moore's answer, that he purchased the lots for the sum of $860, all of which was "*paid* in like good faith." Yet it is stated by Dunbar, that when he, as an officer, was taking

* Briscoe *v.* Bronaugh, 1 Texas 326; Thompson *v.* Shannon, 9 Id. 538; Mosely *v.* Gainer, 10 Id. 393; Walcott *v.* Brander, Id. 424; Edrington *v.* Rogers, &c., 15 Id. 188; Hancock *v.* Horan, Id. 507; Linn *v.* Wright, &c., 18 Id. 317; Mills, &c., *v.* Howeth, 19 Id. 257; Humphries *v.* Freeman, 22 Id. 45; Castro *v.* Illies, Id. 480; Weisiger *v.* Chisholm, &c., Id. 670; Baldwin *v.* Peet, &c., Id. 708; Howerton *v.* Holt, 23 Id. 52; Gibson *v.* Hill, Id. 77; Green *v.* Banks, 24 Id. 508.

the acknowledgment of Nicholson and wife to the execution of the deed of conveyance for the lots, Moore, in the presence of Nicholson and wife, went through the form of saying that they were in consideration of debts owing from Nicholson to Moore for property sold and money lent; asking the magistrate to take notice of the fact.

The answers mention an agreement for repurchase of the lots, and a decree as to the title. That decree was entered by consent of parties, and is impeached as fraudulent. The transaction, even as stated by Mrs. Nicholson, was in substance and effect a post-nuptial gift by a husband who was insolvent; the manifest object of the gift being to hinder and defraud his creditors.*

Mr. Justice SWAYNE delivered the opinion of the court.

These are cross-appeals, in equity, from the District Court of the United States for the Western District of Texas.

The appellants, Clements and Sheldon, are judgment creditors of the defendant, James Nicholson, and filed the original and amended bills, found in the record, to set aside, upon the ground of fraud, the sale by Nicholson to the defendant, Moore, of Nicholson's entire stock of merchandise, and the conveyance by Nicholson to Moore, and by Moore to Rebecca H. Nicholson, James Nicholson's wife, of certain lots in the town of Bastrop—described in the proceedings.

The District Court adjudged the sale of the merchandise to be fraudulent and void; and dismissed the bill as to Mrs. Nicholson and the lots.

We are met at the threshold of the investigation by the objections that leave was not given to file the amended bills, and that there is no replication in the case. Hence it is insisted that our examination is to be confined to the original bill and answer, and that we cannot look beyond them. We find in the record a sufficient replication, though it was not filed until after a part of the testimony had been taken. But if there were none, there are two sufficient answers to both

* Parish, &c., *v.* Murphree, &c., 13 Howard, 93.

of the objections. They were not made in the court below. They were thereby waived, and cannot be taken here. They are also within the provisions of the statute of 1789, upon the subject of jeofails.*

The goods were sold on the 7th of July, 1851. After satisfying a debt due to House out of the stock, Nicholson determined, under the advice of Larkins, to assign the residue to Moore for the benefit of his creditors. Moore was applied to accordingly. He was told by Nicholson that his object was to secure his creditors, and that unless the assignment was made his entire means would be absorbed by a few of his creditors in New York, to whom he was most largely indebted, to the exclusion of his home and other debts. Moore promised to consider the subject. An assignment was subsequently drawn. Before it was executed Moore made the purchase. The terms were the cost in New York, less 20 per cent. The goods amounted to $6310.35. Moore gave his notes, amounting in the aggregate to that sum. At what times they were payable respectively, and whether they bore interest, does not appear in the case.

The laws of Texas permitted a failing debtor to prefer creditors according to his election.

We find here none of the badges of fraud mentioned in Twyne's case.

The sale was openly made; there was an immediate change of possession; the price agreed to be paid was fully as much as the goods were worth. Moore lost upon them. All the notes given by Moore, except three of $500 each, were applied in payment of Nicholson's debts.

On the other hand, Nicholson was insolvent, and Moore knew it. He knew also that it was Nicholson's purpose to hinder and delay the complainants. It was easy to convert the notes and place the proceeds beyond the reach of his creditors. The same process as to the goods was more difficult. If Nicholson intended a fraud, Moore must have known he was giving him facilities in that direction. One

* Brightly's Digest, 41.

of the three notes mentioned was sold by Nicholson at a large discount. The other two were delivered by Mrs. Nicholson to Moore in payment for the lots in controversy.

It remains to consider the law applicable to this state of facts.

The statute of the 13th Elizabeth has been substantially enacted in Texas. The same legal principles apply there in this class of cases as in the other States where similar statutory provisions exist. As was remarked by Lord Mansfield, in *Cadogan* v. *Kennett*,* the common law, without the statute, would have worked out the same results. A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not

* 2 Cowper, 432.

be diverted from the payment of his debts to the injury of his creditors, by means of the fraud.* In the case before us, we think that Moore should be held liable for the note sold by Nicholson, and the two delivered by his wife to Moore in payment for the lots, amounting in the aggregate to $1500, with interest from the date of the sale. We have not adverted to the letter of Nicholson of the 18th of July, 1853, and the accompanying document, nor to his declarations made after the sale. Besides being in direct conflict with his answers under oath, they are inadmissible against Moore, and can in nowise affect the conclusions as to this branch of the case at which we have arrived.

The real estate in controversy is thus described:

"A block of lots in the town of Bastrop, in said State of Texas, known in the plan of said town as block No. 95 (ninety-five), east of Main Street; fractional lot or block No. 4 (four), east of Main Street, and lots No. 65 (sixty-five), No. 62 (sixty-two), and 70 (seventy) in block 11."

The property was conveyed by Nicholson and wife to Moore by deeds bearing date on the 13th of June, 1853. The considerations expressed amount in the aggregate to $560. The bill and amended bills charge that the deeds to Moore, and the sale by Moore to Mrs. Nicholson, were without consideration, and made to defraud the creditors of Nicholson.

The answer of Moore alleges that he bought the lots in good faith, and paid $860 for them; afterwards he agreed they might be repurchased for what he gave, with interest at the rate of ten per cent. Except block 95 and fractional lot 4 he sold them to Mrs. Nicholson; she paid him, as he understood, out of her own separate means, and she subsequently procured a decree of the District Court of Bastrop County that he should convey a good title to her, which he

* Sands and others *v.* Codwise and others, 4 Johnson, 536; Boyd and Suydam *v.* Dunlap and others, 1 Johnson's Chancery, 478; Webb *v.* Brown and others, 3 Ohio State, 246; Sexton *v.* Wheaton, 1 American Lead. Cases, 50, note; Twyne's case, 1 Smith's Leading Cases, 34, notes; Roberts on Fraudulent Conveyances, 520, 527.

was ready to do. He alleges further that block 95 had been sold to pay a debt of Nicholson.

The answer of Nicholson is the same as the answer of Moore, in regard to the sale of the lots to Moore and the subsequent agreement. In regard to the sale to Mrs. Nicholson, he states that when he married her, she had a considerable amount of money belonging to her and to a child by a former husband; he borrowed from her from time to time until the amount exceeded $500; he transferred to her one of the notes of Moore for that amount; she bought the lots from Moore and paid for them with that note and other separate means belonging to her. He makes the same statement as Moore in regard to the decree of the District Court of Bastrop County, and the sale of block 95. He says the premises are in possession of his father under an arrangement with Mrs. Nicholson.

Mrs. Nicholson answers that when she married Nicholson she had about $1000 in money, which she lent to him, taking in lieu two notes of Moore of $500 each; some time afterwards she delivered the notes to Moore in discharge of a mortgage upon the premises, which Nicholson had given to him; that Nicholson has never repaid to her any part of the money which he borrowed; she has realized nothing from the loan but the lots in question; Nicholson is utterly insolvent; she has no hope of getting any other indemnity, and that the value of the lots does not exceed the amount of the loan. She insists upon the good faith of the transaction, and denies that any wrong or fraud was intended upon the complainants or any other creditor of Nicholson.

The complainants waived an answer, under oath, by this defendant. Her answer is nevertheless verified by an affidavit. This was proper. It was her right so to answer, and the complainants could not deprive her of it. Such is the settled rule of equity practice where there is no regulation to the contrary.*

The decree of the District Court of Bastrop County is

* Armstrong et al. v. Scott et al., 3 Greene, 433

found in the record. It was entered by the agreement of counsel. It required Moore to execute to Mrs. Nicholson a full and complete title to lots 62, 65, and 70. It is silent as to block 95, and ordered lot 4 to be sold to satisfy the claim of Scott, a defendant in that proceeding. Neither party took any testimony touching this part of the case. It stands upon the bills and answers.

No attempt is made to explain the contradiction of the answers of Moore and Nicholson by the deeds as to the amount of the consideration alleged to have been paid by Moore for the lots. The answers of both are silent as to the mode of payment. This rendered disproof of the allegation of the amount difficult, if not impossible. The facts disclosed create a strong doubt of the integrity of the transaction between Moore and Nicholson, and threw on Moore the duty of making a full explanation, and the burden of proof to sustain it.* We feel constrained to resolve the doubt against the validity of the sale. The striking discrepancies between the answers of Mr. and Mrs. Nicholson need no remark. She admits that she paid for the lots by delivering up to Moore notes which he had executed to Nicholson. This makes a *primâ facie* case against her. She adds that the notes were transferred to her by Nicholson in consideration of money she had lent to him. Of this there is no proof. It is an established rule of evidence in equity, that where an answer which is put in issue, admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred.† The application here of this principle is decisive. There is nothing to neutralize the effect of the admitted fact, that the property was paid for with notes which had belonged to Nicholson. There is not the slightest proof of any consideration for the transfer of those notes by

* Piddock *v.* Brown et al., 3 Peere Williams, 289; Wharton *v.* May, 5 Vesey, 49.

† Gresley's Evidence, 13; Hart *v.* Tenyke and others, 2 Johnson's Chancery, 60.

him to her. The complainants have a right to follow the fund into any property in which it was invested as far as it can be traced.*

The decree of the court below is silent as to lots 4 and 95. There is no competent proof in the record sufficient to exempt them from the claim of the complainants. If others have acquired paramount rights, it must be shown elsewhere in another proceeding.

The decree as to both branches of the case is, in our judgment, erroneous. It is therefore reversed. The case will be remanded to the District Court with instructions to enter a decree

IN CONFORMITY WITH THIS OPINION.

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## THOMPSON ET AL. *v.* BOWMAN.

1. The fact that real property is held in the joint names of several owners, or in the name of one for the benefit of all, is no evidence of partnership between the parties with respect to it. In the absence of proof of its purchase with partnership funds for partnership purposes, such property is deemed to be held by them as joint tenants, or as tenants in common; and none of the several owners possesses authority to sell or bind the interest of his co-owners.
2. If persons are copartners in *the ownership* of land, such land being the only subject-matter of the partnership, the partnership will be terminated by a sale of the land. Hence the declarations of one of the partners made subsequently to the sale are not evidence to bind the other owners.

ERROR to the District Court for the Northern District of Mississippi.

Thompson, Ford, and Powell, being owners of real estate in Texas, Powell agreed with one Bowman, that if he would find a purchaser, he should have a commission of ten per cent. on a sale. Bowman found a purchaser, and the com-

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* Oliver *v.* Piatt and others, 3 Howard, 401.

mission not being paid, he brought suit for it, the suit in the court below.

In charging the jury, the court assumed, without any proof upon the point, that the defendants were partners in the ownership of the property, and instructed them that each partner was the agent of all the partners composing the firm of which he is a member; and had a right to sell all the partnership property, real or personal, and to employ agents to sell it and to bind the firm by an agreement to give such agent a commission for selling it. It allowed a witness produced for that purpose to prove "that it was admitted by the defendant Powell, *after the lands belonging to the defendants, in respect of which the commissions sued for in this cause are claimed, had all been sold*, that he, the said Powell, had agreed, prior to the said sale, to pay the plaintiff ten per cent. upon the amount of the proceeds of the sale of the said lands, if he, the plaintiff, would find or introduce a purchaser for them; to the introduction of which testimony, the defendant Thompson, by his counsel, objected, but the court overruled the objection."

The case was here on exception to the admission of this testimony and to the charge.

*Messrs. Carlisle, Ashton, and Black, for the plaintiff in error; Mr. Reverdy Johnson, contra.*

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

There is no doubt that a copartnership may exist in the purchase and sale of real property, equally as in any other lawful business. Nor is there any doubt that each member of such copartnership possesses full authority to contract for the sale or other disposition of its entire property, though for technical reasons the legal title vested in all the copartners can only be transferred by their joint act. But the fact that real property is held in the joint names of several owners, or in the name of one for the benefit of all, is no evidence of copartnership between them with respect to it. In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names

of several persons is deemed to be held by them as joint tenants, or as tenants in common; and none of the several owners possesses authority to sell or bind the interest of his co-owners.

But if the position assumed by the court were justified by the evidence, and the defendants were in fact copartners, in the ownership of the property, such copartnership was terminated by the sale made. The land was the only subject of the assumed copartnership; no pretence is made that it held any other property. With the sale, therefore, the business was completed, for which the supposed copartnership was formed; and this completion necessarily dissolved the relation of partners between the parties.*

The subsequent declarations of Powell as to the agreement made by him with the plaintiff were not admissible as evidence against his late copartners. His authority to bind them ceased with the dissolution of the copartnership. His admission of liability, or of an agreement upon which liability might follow, possessed no greater efficacy to bind his former copartners than a similar admission of any other agent of the copartnership after his agency had terminated.†

It follows that the court below erred both in its assumption and its rulings, and its judgment must therefore BE REVERSED, and the cause remanded for a new trial; and it is so ordered.

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## EX PARTE MCCARDLE.

(MOTION.)

Under the act of February 5th, 1867 (14 Stat. at Large, 385), to amend the Judiciary Act of 1789, an appeal lies to this court on judgments in *habeas corpus* cases rendered by Circuit Courts in the exercise of original jurisdiction.

MOTION to dismiss an appeal from the Circuit Court for the District of Mississippi; the case being thus:

* 3 Kent, 53; Story on Partnership, sec. 280.

† Baker *v.* Stackpole, 9 Cowen, 420; Van Keuren *v.* Parmelee, 2 Comstock, 530; Story on Partnership, § 323.

The Judiciary Act of 1789,* enacts:

"That either of the justices of the Supreme Court as well as judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment; *Provided*, That writs of *habeas corpus*, shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

A subsequent act, one of February 5th, 1867,† to amend the Judiciary Act of 1789, enacts:

"SEC. 1. That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, *in addition to the authority already conferred by law*, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."

After providing for the awarding, direction, serving and return of the writ, and for the hearing, &c., the act proceeds:

"From the final decision of any judge, justice, or court *inferior to the Circuit Court*, appeal may be taken *to the Circuit Court* of the United States for the district in which said cause is heard, and *from the judgment of said Circuit Court to the Supreme Court of the United States*."

"And pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any *State* court, or under the authority of any *State*, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be deemed null and void."

* § 14; 1 Stat. at Large, 82.

† 14 Id. 385.

The act further declares:

"SEC. 2. . . . . This act shall not apply to any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence."

In this state of statutory law, a writ of *habeas corpus* was issued from the Circuit Court of the United States for the District of Mississippi, on the 12th of November, 1867, upon the petition of William H. McCardle, directed to Alvin C. Gillem and E. O. C. Ord, requiring them to produce the body of the petitioner, together with the cause of his imprisonment, and to abide the order of the court in respect to the legality of such imprisonment.

At the time of issuing the writ, E. O. C. Ord was brevet Major-General commanding the Fourth Military District, and Alvin C. Gillem was brevet Major-General commanding the sub-district of Mississippi, under the Reconstruction Acts of Congress.

In obedience to the writ, Major-General Gillem, on the 21st of November, made a return of the cause of imprisonment, from which it appeared that McCardle had been arrested, and was held in custody for trial by a military commission, under the alleged authority of the Reconstruction Acts, for charges, (1) of disturbance of the public peace; (2) of inciting to insurrection, disorder, and violence; (3) of libel; and (4) of impeding reconstruction.

On making this return Major-General Gillem surrendered McCardle to the court, and he was ordered into the custody of the marshal.

Subsequently, on the 25th of November, 1867, the Circuit Court adjudged that the petitioner be remanded to the custody of Major-General Gillem, from which judgment the petitioner prayed an appeal to this court, which was allowed, and a bond for costs given according to the order of the court.

On the same 25th of November, on the motion of the petitioner, he was admitted to bail on his own recognizance, with sufficient sureties, in the sum of one thousand dollars,

conditioned for his appearance to abide by and perform the final judgment of this court.

The legal consequence of this admission to bail was the discharge of the prisoner, both from the custody of the marshal and of Major-General Gillem, with a continuing liability, however, under the recognizance, to be returned, first to the civil court, and then to military custody, in case of affirmance by this court of the judgment of the Circuit Court.

The ground assigned for the motion to dismiss the appeal was a want of jurisdiction in this court to take cognizance of it.

*Mr. Trumbull* (*with whom was Mr. Hughes*), *in support of the motion:*

1. Unless Congress have given appellate jurisdiction to this court, it will be conceded that none can exist.* Under the Judiciary Act of 1789 assuredly no appeal lies, for none was given then or since.† Until now, eighty years since the government was formed, no such thing as an *appeal* or writ of error in a case like this has been known.

To determine whether the appeal lies, it is first necessary to ascertain whether the Circuit Court of Mississippi took jurisdiction of the case under the act of 1789, or 1867; if under the former, then, as we have said, and as will be admitted, no appeal lies.

Under the act of 1789, power was given to issue writs of *habeas corpus* for the relief of persons in custody "under or by color of the authority of the United States." McCardle was in prison exactly under such authority. Here, then, is a case coming within the very terms of the act of 1789, authorizing the issuing of the writ of *habeas corpus*, and not excepted from its provisions by the proviso. Had the act of February 5th, 1867, never been passed, the Circuit Court of Mississippi had authority to issue the writ of *habeas corpus* in this case.

* Wiscart *v.* Dauchy, 3 Dallas, 321; Ex parte Kearney, 7 Wheaton, 38.

† In the matter of Metzger, 5 Howard, 188.

On the other hand the act of 1867 does not properly apply to this case. What was the purpose of that act? We all know. It is matter of legislative, nay, of public history. It was to relieve persons from a deprivation of their liberty under State laws; to protect loyal men in the rebel States from oppression under color of State laws administered by rebel officers; to protect especially those who had formerly been slaves, and who, under color of vagrant and apprentice laws in some of the States, were being reduced to a bondage more intolerable than that from which they had been recently delivered. It was to protect such persons and for such a purpose that the law of 1867 was passed, and not to relieve any one from imprisonment under laws of the United States, a matter which had already been provided for by the act of 1789.

This is apparent from the terms of the act of 1867 itself. Observe the opening part of its first section. The sole object, as declared, is to confer *additional authority* on the United States courts and judges to issue writs of *habeas corpus;* and it would be absurd to say that a grant to the courts of what they already possessed was giving them something additional.

The concluding part of the same section is equally expressive. It is all aimed at *State* action.

2. That the Circuit Court of Mississippi had no jurisdiction of this case under the act of February 5th, 1867, is further apparent from the second paragraph of the act.

That McCardle was in the custody of the military authorities of the United States his petition admits, and the record shows that he was charged with disturbance of the public peace, with inciting insurrection, disorder, and violence, in violation of the laws of Congress, known as the Reconstruction Acts.

The State of Mississippi, where McCardle was arrested, was at the time under military control; General Ord was, as appears by the record, in *command* of the military district embracing Mississippi, and McCardle was arrested by him, charged with being a disturber of the public peace, and with inciting "insurrection, disorder, and violence," which was

clearly a military offence. If so, this court has no jurisdiction of this case, because it gets its jurisdiction, if at all, by appeal under the act of February 5th, 1867, and that act expressly exempts from its operation persons in the custody of the military authority charged with a military offence.

3. But if it were admitted that the Circuit Court properly took jurisdiction of this case under the act of February 5th, 1867, still no appeal from its decision would be to this court, for the reason that it was an original proceeding in the Circuit Court, and no appeal is given in such cases. The jurisdiction exists only when an appeal comes from the Circuit Court, itself acting as an appellate court, and from the decision of any judge, justice, or court, "*inferior*" to it.

The language of the statute is plain. Of course, this being an original case in the Circuit Court, and not one taken to that court by appeal from an inferior tribunal, is not within the statute. A rule for appeals "being provided, this court cannot depart from it."

*Messrs. Black and Sharkey, contra*, contended that the statute of 1867 was a remedial one, and should therefore receive a liberal construction; that the clause which gave an appeal from the District Court to the Circuit Court, and from the Circuit Court to the Supreme Court of the United States, did not intend to confine the appeal to the Supreme Court to cases which merely commenced in the District Court, but to give the appeal to cases which commenced originally in the District or Circuit Court; that the language of the opening part of the first section was most comprehensive; that there was no reason for Congress to make the distinction between the two cases. The exception in the second section, as to persons charged with military offences, did not apply to the case, for no military offence was charged against the party. The offences charged were all civil offences. By putting the district under military rule they did not become military offences any more than they would have been ecclesiastical offences if the same district had been put under the government of a body of clergy. The

offences had a specific well-known nature; and so tested, they were civil offences.

The CHIEF JUSTICE delivered the opinion of the court.

The motion to dismiss the appeal has been thoroughly argued, and we are now to dispose of it.

The ground assigned for the motion is want of jurisdiction, in this court, of appeals from the judgments of inferior courts in cases of *habeas corpus*.

Whether this objection is sound or otherwise depends upon the construction of the act of 1867.

Prior to the passage of that act this court exercised appellate jurisdiction over the action of inferior courts by *habeas corpus*. In the case of *Burford* * this court, by *habeas corpus*, aided by a writ of *certiorari*, reviewed and reversed the judgment of the Circuit Court of the District of Columbia. In that case a prisoner brought before the Circuit Court by the writ had been remanded, but was discharged upon the *habeas corpus* issued out of this court.

By the writ of *habeas corpus* also, aided by a *certiorari*, this court, in the case of *Bollman and Swartwout*,† again revised a commitment of the Circuit Court of the District. The prisoners had been committed on a charge of treason by order of the Circuit Court, and on their petition this court issued the two writs, and, the prisoners having been produced, it was ordered that they should be discharged on the ground that the commitment of the Circuit Court was not warranted in law.

But, though the exercise of appellate jurisdiction over judgments of inferior tribunals was not unknown to the practice of this court before the act of 1867, it was attended by some inconvenience and embarrassment. It was necessary to use the writ of *certiorari* in addition to the writ of *habeas corpus*, and there was no regulated and established practice for the guidance of parties invoking the jurisdiction.

* 3 Cranch, 449, 453. See also Ex parte Dugan, 2 Wallace, 134.

† 4 Cranch, 75.

This inconvenience and embarrassment was remedied in a small class of cases arising from commitments for acts done or omitted under alleged authority of foreign governments, by the act of August 29th, 1842,* which authorized a direct appeal from any judgment upon *habeas corpus* of a justice of this court or judge of a District Court to the Circuit Court of the proper district, and from the judgment of the Circuit Court to this court.

This provision for appeal was transferred, with some modification, from the act of 1842 to the act of 1867; and the first question we are to consider, upon the construction of that act, is whether this right of appeal extends to all cases of *habeas corpus*, or only to a particular class.

It was insisted on argument that appeals to this court are given by the act only from the judgments of the Circuit Court rendered upon appeals to that court from decisions of a single judge, or of a District Court.

The words of the act are these: "From the final decision of any judge, justice, or court inferior to the Circuit Court, an appeal may be taken to the Circuit Courts of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States."

These words, considered without reference to the other provisions of the act, are not unsusceptible of the construction put upon them at the bar; but that construction can hardly be reconciled with other parts of the act.

The first section gives to the several courts of the United States, and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of *habeas corpus* in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court

* 5 Stat. at Large, 539.

and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

And it is to this jurisdiction that the system of appeals is applied. From decisions of a judge or of a District Court appeals lie to the Circuit Court, and from the judgment of the Circuit Court to this court. But each Circuit Court, as well as each District Court, and each judge, may exercise the original jurisdiction; and no satisfactory reason can be assigned for giving appeals to this court from the judgments of the Circuit Court rendered on appeal, and not giving like appeals from judgments of Circuit Courts rendered in the exercise of original jurisdiction. If any class of cases was to be excluded from the right of appeal, the exclusion would naturally apply to cases brought into the Circuit Court by appeal rather than to cases originating there. In the former description of cases the petitioner for the writ, without appeal to this court, would have the advantage of at least two hearings, while in the latter, upon the hypothesis of no appeal, the petitioner could have but one.

These considerations seem to require the construction that the right of appeal attaches equally to all judgments of the Circuit Court, unless there be something in the clause defining the appellate jurisdiction which demands the restricted interpretation. The mere words of that clause may admit either, but the spirit and purpose of the law can only be satisfied by the former.

We entertain no doubt, therefore, that an appeal lies to this court from the judgment of the Circuit Court in the case before us.

Another objection to the jurisdiction of this court on appeal was drawn from the clause of the first section, which declares that the jurisdiction defined by it is "in addition to the authority already conferred by law."

This objection seems to be an objection to the jurisdiction of the Circuit Court over the cause rather than to the jurisdiction of this court on appeal.

The latter jurisdiction, as has just been shown, is coexten-

sive with the former. Every question of substance which the Circuit Court could decide upon the return of the *habeas corpus*, including the question of its own jurisdiction, may be revised here on appeal from its final judgment.

But an inquiry on this motion into the jurisdiction of the Circuit Court would be premature. It would extend to the merits of the cause in that court; while the question before us upon this motion to dismiss must be necessarily limited to our jurisdiction on appeal.

The same observations apply to the argument of counsel that the acts of McCardle constituted a military offence, for which he might be tried under the Reconstruction Acts by military commission. This argument, if intended to convince us that the Circuit Court had no jurisdiction of the cause, applies to the main question which might arise upon the hearing of the appeal. If intended to convince us that this court has no appellate jurisdiction of the cause, it is only necessary to refer to the considerations already adduced on this point.

We are satisfied, as we have already said, that we have such jurisdiction under the act of 1867, and the motion to dismiss must therefore be

DENIED.

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## SELZ *v.* UNNA.

1. Equity will not grant relief where the allegations of the complainant show that he has no title nor interest in the subject-matter of the dispute.
2. Nor, in an action where all are liable (as *ex. gr.* an action of trespass against tort-feasors), enforce a secret agreement made by the plaintiff with certain of the defendants, that if *they* will desist from resistance to his suit, he will, if he recovers judgment, not levy execution on *their* property; litigants being bound to act fairly to each other, and such an agreement operating as a fraud.
3. Although the assignee of a judgment takes it subject to all defences that existed against it in the hands of the assignor, yet such an agreement as that above mentioned constitutes no defence as against an assignee in good faith, and without knowledge of the secret agreement; the verdict and judgment having been regularly entered against *all* the defendants.

4. Equal contribution among tort-feasors is not inequitable, although the law will not support an action to enforce contribution where the payments have been unequal.

Hence, where a marshal has received three-fourths of the amount of a judgment from three of four defendants, tort-feasors, he does nothing inequitable in collecting, under agreement with them that he shall do so, the residue from a fourth.

APPEAL from the Circuit Court for the Northern District of Illinois.

Unna sued four different parties, of whom Selz and Leopold were one, for a tortious levy which they had made on his property, assuming it to be the property of one of their debtors. When the suit was about to be tried a second time—the jury having once been unable to settle upon a verdict—Unna agreed with Selz and Leopold (as they alleged) that if *they* would desist and abstain from *all participation in the preparation and conduct of the defence thereof*, he would protect and save them harmless from all loss and damage, under whatever judgment he might recover, and would so control and direct the collection thereof that no part of the same should be paid by or collected from *them* under any execution issued thereon. In pursuance of the agreement, Selz and Leopold and their counsel did withdraw from the defence of the suit. Judgment having gone in favor of Unna and against all four parties,—and all four standing on the record as convict alike,—Unna after a certain time assigned the judgment to two persons whom this court regarded, upon the evidence, as purchasers in good faith, and without knowledge of the secret agreement; his assignment covenanting "that he had neither made, done or suffered any act or thing by which the said judgment is in any manner impaired or lessened in value." The assignees having issued execution, proceeded to levy on property of some of the three defendants. The whole three then agreed to pay him three-fourths of the judgment, it being understood that for the remaining fourth the assignees should look to Selz and Leopold. For that fourth the assignees accordingly resorted to them, levying upon and selling certain real estate as the

property of Leopold. Thereupon Selz and Leopold filed bills in equity against Unna and the three other defendants and the assignees, setting up the agreement with Unna; alleging that the three other defendants had paid the *whole* amount of the judgment, which was therefore satisfied; that the assignees were but covers for these other defendants who had had the assignment made in order to obtain contribution from them, Selz and Leopold. It was alleged as well that the real estate levied on, though once Leopold's, was not so now, it having been sold by his assignees for creditors some time ago. The prayer was for an injunction against the marshal's making any deed for *Leopold's interest in the real estate*, and from *further* proceedings to collect the judgment, and that it should be declared satisfied of record, as it was alleged to be in fact.

The answers denied the equities of the bill generally, and especially all knowledge of "the fraudulent agreement;" denied that the judgment had been paid, on the contrary asserted that it was unpaid; and asserted also that the assignment was *bonâ fide*. The court below dismissed the bills. Appeal accordingly.

*Messrs. Gookins and Roberts, for the plaintiff in error:*

Even assuming, as opposite counsel does, that the assignment was *bonâ fide*, and without knowledge of the agreement of Unna with Selz and Leopold, which is assuming what *we* regard as against the evidence, still the decree below was wrong. Surely, Unna cannot, in a *court of equity*, say that this agreement is not binding on *him*. His assignees are in no better situation than himself.*

Then, as to the matter of contribution. Since the well-known case of *Merryweather* v. *Nixan*,† in the time of Lord Kenyon, C. J., the authorities bearing upon the question of

* Row *v.* Dawson, 2 Leading Cases in Equity, part 2, p. 236, and cases there cited; and see McJilton *v.* Love, 13 Illinois, 495, citing Himes *v.* Barnitz, 8 Watts, 39; Chamberlin *v* Day, 3 Cowen, 353.

† 2 Smith's Leading Cases, 6th ed. 527; reported from 8 Term, 186.

contribution in like cases to this, are almost uniform that it will not be enforced at law, or in equity.*

*Mr. McKinnon, contra:*

It may be remarked, primarily (though this matter was not relied on below), that the complainants have no right, title or interest in or to the real estate, in respect to which they seek to enjoin the marshal from making a deed. The bill states that it was sold long ago. But passing to other matters:

1. The consideration whereon the complainants found their claims to the relief prayed, is inequitable. Look at the case: Honest creditors engaged in a common defence against a suit for a levy which they *believed* that they had a right to make, and where they have been so far successful that one jury has failed to agree on a verdict. These complainants, Selz and Leopold, just as the case was called for trial a second time, secretly, and without the knowledge of their co-defendants, by agreement with the common prosecutor, Unna, desist and abstain from all further participation in the defence, and with their counsel retire from the court-room, leaving their confederates to suffer, while they went free. "*Equality is equity.*" That is one maxim of equity, old as equity itself. Another is, "*He that hath committed iniquity shall not have equity.*"

2. Are these assignees within the meaning of the rule that the assignee of a chose in action takes it subject to all the equities existing between the original parties? In no just sense. We here rely on what was said in the court below (Drummond, J.):

"Admit the general rule, that the assignee of a judgment takes it with all the equities that there may be, and that these equities can be set up as well against the assignees as against the assignor. Yet such an agreement as this, which is not an equitable, *but an inequitable agreement*, so far as the other defend-

* See Farebrother *v.* Ansley, 1 Campbell, 343; Wilson *v.* Milner, 2 Id. 452; Nelson *v.* Cook, 17 Illinois, 443.

ants are concerned, cannot be set up in a case like this, to protect them from a liability which, when the judgment was obtained, was as binding on them as on the other parties, defendants in the case."

So too as to the question of contribution, we adopt its remarks:

"The general rule undoubtedly is, that there can be no contribution between wrongdoers, and this was an action of trespass against these parties. This rule has been qualified considerably; many exceptions already exist under it,* and it is doubtful whether the rule could be said to operate in a case like this. At any rate, I am not disposed to grant these plaintiffs relief until I am satisfied that they have done equity as to the other defendants."

Mr. Justice CLIFFORD delivered the opinion of the court.

Material facts are that David Sternberg and Edward Isidor, doing business at Chicago under the firm name and style of Sternberg & Isidor, became largely indebted, and being unable to make payments as promptly as certain of their creditors desired, they confessed judgments in their favor. Judgments were thus obtained by Morris Selz and Abraham Cohen, doing business under the name and style of Selz & Cohen; by Henry A. Kohn and Joseph Kohn, under the name and style of H. A. Kohn & Brother; by William M. Ross and John H. Ross, under the name and style of William M. Ross & Company; and by Leonard B. Shearer, William W. Strong, and John S. Paine, doing business under the name and style of Shearer, Paine & Strong.

Executions were issued on these several judgments, and they were placed in the hands of the sheriff of the county, with directions to levy the same on certain goods and chattels, as the property of the judgment debtors.

Doubts being entertained by the sheriff as to the owner-

* See 1 Parsons on Contracts, 37, and authorities there cited, particularly Bailey *v.* Bussing, 28 Connecticut, 455.

ship of the property, the judgment creditors gave him a bond to save him harmless, and the complainant, Henry Leopold, became the surety of Selz & Cohen in that bond. Indemnified against loss, the sheriff, by the direction of John M. Huntington, attorney of Selz & Cohen, seized and sold the goods and chattels, as the property of the junior member of the firm of Sternberg & Isidor, the judgment debtors.

The property sold was subsequently claimed by Levi J. Unna, and he brought trespass in the Circuit Court against those who signed the bond of indemnity, and the attorney who gave the directions to make the sale.

Defendants appeared at the October term of the court, 1858, and went to trial, but the jury being unable to agree, they were discharged, and the case was continued. Before the next trial the plaintiff agreed with the complainants in this suit, that if they would make no further defence in that action, he, the plaintiff, would save them harmless from all loss or damage, and that no part of the judgment he might recover in the suit should be collected of them or be levied on their property. Complainants admit that they accepted the proposition, and that their attorney withdrew from the defence, and it appears that the plaintiff, on the fifth day of March, 1859, recovered judgment in the suit against all the defendants in the sum of six thousand three hundred and seven dollars and eighty-nine cents, and costs of suit.

Four of the defendants, to wit, William Ross, John H. Ross, Leonard B. Shearer, and William W. Strong, sued out a writ of error to this court. Pending the writ of error, Daniel L. Shearer and William Clark purchased the judgment for the sum of six thousand five hundred and forty-six dollars and twenty-eight cents, and took an assignment of the same from the judgment creditor. Covenants of the assignor were in substance and effect that the judgment was wholly unsatisfied, and that he had done no act to impair, in any way or manner, its force and effect, and he added the unusual stipulation that he intended to make the representations so full and explicit, that if false they would bring him

within certain provisions of the Crimes' Acts passed by the State legislature.

By the advice of counsel the writ of error was not prosecuted, and for that reason was dismissed under the rules of this court. Danger from the writ of error being removed, the assignees of the judgment caused execution to be issued on the same, and placed the execution in the hands of the marshal for the purpose of having the money collected. Pursuant to the commands of the writ, the marshal proceeded to levy the same on the property of Kohn & Brother, when they proposed a compromise as a means of saving their property from sacrifice. Substance of the proposition was, that they would pay one-fourth of the amount, and that Ross & Company, and Shearer, Strong & Paine, should each pay one-fourth, and that the marshal should levy the remaining one-fourth on certain real estate formerly belonging to Henry Leopold, who was the surety of Selz & Cohen. They accepted the proposition, and the payments were made as proposed.

Levy was accordingly made by the marshal on that real estate to satisfy the balance of the execution which belonged to Selz & Cohen, or their surety to pay, but before the sale was completed the complainants filed their bill of complaint.

In the bill they set up the suit in trespass, the agreement made by them with the plaintiff, their withdrawal from the defence, the recovery of the judgment by the plaintiff, and the assignment of the judgment, and charge that Ross & Co. and Shearer and Strong paid the whole amount of the judgment, and that the assignment was not *bona fide*, but that it was made with intent to enforce contribution against the complainants. Prayer of the bill of complaint was, that the other judgment defendants, and the plaintiff in the trespass suit, and the assignees of the judgment, might be made parties, and that they might be enjoined from completing the sale of the real estate, and from all proceedings to collect the judgment.

Answers were filed by William Clark, William M. Ross, John H. Ross, and William Strong, denying the entire equity

of the bill of complaint, whereupon the complainants moved the court for an injunction to stay the sale, which was denied by the court, and the marshal sold the premises to Henry A. Kohn, and gave him the proper certificate of sale. Subsequently the complainants filed a supplemental bill, in which they alleged that these respondents had agreed that the lot in question should be sold, that Henry A. Kohn should bid it off for the purpose of compelling the complainants to pay their proportion of the judgment, and prayed that the purchaser might be enjoined from receiving any deed of the lot, or from interfering in any manner with the premises. Statement of the original bill of complaint was, that the premises formerly belonged to the complainant, Henry Leopold, and his copartner in business, and that the owners thereof became embarrassed, and made an assignment of all their property and effects for the benefit of their creditors, and that the assignee sold and conveyed the premises to a third person for the sum of three thousand dollars.

Suppose the allegations of the bill of complaint are true, then it is clear that the decision of the Circuit Court was correct, as the complainants have no title or interest in the land sold by the marshal, and described in the certificate which he gave to the purchaser. They, under such a state of the case, have no such standing in the pleadings as will enable them to ask the interposition of a court of equity to enjoin the respondents or any other parties, as their own allegations show that they have no title in the premises.

Interposition of a court of equity cannot be successfully invoked in a case like the present unless the party asking relief is able to show that he has a legal or equitable right or title in the subject-matter of the controversy. But the want of title in the complainants was not the ground assumed by the Circuit Court; and inasmuch as the marshal sold the land as the property of Leopold, we are inclined to examine some of the other issues between the parties as disclosed in the pleadings.

Principal charge in the bill of complaint is, that the assignment of the judgment was procured as the means to compel

the complainants to pay their proper proportion of the amount therein recovered. Proofs in the suit do not establish that proposition, but if they did it would not benefit the complainants in this case, because the judgment had been recovered against the complainants as well as the respondents, and the former, as well as the latter, were liable for the whole amount recovered. Pending the suit in which the judgment was recovered, it is true the plaintiff had agreed that, if these complainants would make no further defence to his action of trespass, his judgment, in case he prevailed, should be levied on the property of the other defendants, and the record shows that they accepted that secret proposition, and gave their associates no aid in conducting the defence at the second trial. But they were not discharged from their joint liability, and the verdict and judgment were against them as well as against the other parties. Conceded intention of the plaintiff was to collect his whole claim, but he was willing to agree secretly with the complainants to collect the whole amount of the other parties to facilitate his recovery in the suit. Theory of the suit was, that the defendants were joint trespassers, and if such was the fact the plaintiff must have known that he could not release one without discharging all the rest, who were jointly liable for the same wrongful act.*

Present complainants were defendants in that judgment, and became liable with the other defendants to pay the whole amount. Prior to the rendition of the judgment any agreement between the plaintiff in the suit and these complainants, such as is now alleged in the bill of complaint, would, if construed to be a discharge, have been a good defence for all the other joint wrongdoers. Such a secret agreement entered into between a plaintiff and a part of the defendants in a suit is inequitable, as tending to promote injustice both as between the plaintiff and the other defendants, and as be-

* Dufresne *v.* Hutchinson, 3 Taunton, 117; Ruble *v.* Turner, 2 Henning & Munford, 38; Strang *v.* Holmes, 7 Cowen, 224; 2 Greenleaf on Evidence, § 30.

tween those who were jointly liable for an error committed in an attempt to enforce their legal rights.

Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons.*

Better opinion from the evidence is, that the purchase of the judgment by the assignees was made in good faith, and that they had no knowledge of the secret agreement between the judgment creditor and the complainants. Grant that the fact is so, still the complainants contend that the assignees of the judgment acquired no greater rights by the assignment than the assignor possessed at the time the assignment was made. General rule undoubtedly is, that the assignee of a judgment takes it subject to all defences which existed against it in the hands of the assignors at the time the instrument of assignment was executed.†

When the assignees took the judgment in this case the complainants were legally liable, with the other defendants, and they were without any defence against the same, other than what arises from the agreement made by them in the trespass suit. Inequitable as that agreement was, it constituted no legal obstacle to the purchase of the judgment, and cannot be made the foundation for relief in this case. Payment of one-fourth of the judgment, as between the defendants in that suit, belonged to the complainants, and they having failed to pay their just proportion of the same, cannot complain that the assignees of the judgment have seen fit to levy that proportion of the same upon their property. Equal contribution to discharge a joint liability is not inequitable, even as between wrongdoers, although the law will not, in general, support an action to enforce it where the payments have been unequal.‡ Where the liability is

* 1 Story's Equity Jurisprudence, § 333.

† Himes *v.* Barnitz, 8 Watts, 39; Chamberlin *v.* Day, 3 Cowen, 353.

‡ Merryweather *v.* Nixan, 8 Term, 186; Bailey *v.* Bussing, 28 Connecticut, 455.

joint equal contribution is just, and it would afford the complainants no ground of relief if it appeared that the arrangement with the marshal was such as is alleged in the bill of complaint. Having collected three-fourths of the amount of the other defendants, it was quite right that he should, if possible, levy the balance so as to effect equal justice between the parties.

DECREE AFFIRMED WITH COSTS.

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## LORINGS *v.* MARSH.

1. Where a testatrix having children, and grandchildren the issue of one of them, makes a will, in form, leaving the income of her property in trust equally between the children *for life* (saying nothing about the grandchildren), and afterwards to charities; and on the death of one of the children issueless, makes a codicil, distributing the income again among the surviving children *for life* (again saying nothing about the grandchildren), and the child having issue dies in the lifetime of the testatrix, leaving these, the grandchildren of the testatrix,—and the testatrix then dies,—the omission of such testatrix to provide for her grandchildren is to be taken (especially if parol proofs, admissible by the law of the State, aid such conclusion) to have been intentional and not to have been occasioned by any accident or mistake. Hence, the case will not come within the 25th section of chapter 92 of the Revised Statutes of Massachusetts (A.D. 1860), which provides for the issue of any deceased child or children, as in cases of intestacy, "unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake."
2. Where two persons, as trustees, are invested by last will with the whole of a legal estate, and are to hold it in trust to "manage, invest and reinvest the same according to their best discretion," and pay over income during certain lives; and, on their efflux, these persons, or *their successors*, as trustees, are to select and appoint persons, who are to be informed of the facts by the trustees, and who are to distribute the capital among permanently established and incorporated institutions, for the benefit of the poor,—the power given to such two persons to select and appoint, is a power which will survive, and on the death of one in the lifetime of the testator, it may be properly executed by the other.
3. By the law of Massachusetts, as administered by her courts, in a devise to charitable institutions, in form such as just above indicated, the objects of the charity are made sufficiently certain. And, as the question of such certainty is to be determined by the local law of the State, any objection of uncertainty cannot be heard here

Statement of the case.

APPEAL from the Circuit Court for the District of Massachusetts.

The 25th section of chapter 92, of the Revised Statutes of Massachusetts, A. D. 1860,—a re-enactment, essentially of earlier statutes,—thus enacts:

"When any testator shall omit to provide in his will for any of his children, *or for the issue of any deceased child*, they shall take the same share of his estate, both real and personal, that they would have been entitled to, if he had died intestate, unless it shall have been provided for by the testator in his lifetime, or, *unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake.*"

With this statute in force, Mrs. Loring made her last will. She had, living at this time, a son (Josiah), who had, living, three children, Mrs. Loring's grandchildren, of course; and two daughters, one married (Mrs. Cornelia Thompson), but not having issue, and the other single, Miss Abby Loring. By her last will, Mrs. Loring left the bulk of her estate to two persons, Marsh and Guild, of Boston—

"To have and to hold the same to them *and the survivor of them*, and their and *his* heirs and assigns forever, to their own use, but in trust, &c.; to hold, manage, invest and re-invest the same according to their best discretion; and to pay over one-third of the net income therefrom to my daughter, Abby, *during her life;* to pay over another third of said income to my daughter, Cornelia Thompson, *during her life;* and to pay over another third of said income to my son, Josiah, *during his life;* so that the said income shall go to *them personally*, and shall not be liable for their debts, or to the control of any other person; and upon the decease of my said children, severally, the shares of said income which they would continue to take if living shall be retained and invested by the trustees *until the decease of my last surviving child*, and shall then, with the principal, or trust fund, be disposed of for the benefit of the poor, in the manner hereinafter provided."

The will proceeded:

"It is my will that when, upon the decease of all my chil-

dren, the trust fund is to be disposed of as aforesaid, the said Marsh *and* Guild, or *their successors, as trustees*, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect, and my gift may be made most productive of benefit to the poor; and that thereupon the said trust fund shall be disposed of and paid over, in accordance with the determination of the said gentlemen, certified by them in writing, to the trustees."

The daughter, Mrs. Thompson, having died during the life of the testatrix, Mrs. Loring made a codicil to her will, which, after reciting the former disposition of the income, proceeded:

"I revoke so much of my will as provides for the said division of the said income, and its payment in three parts; and order and direct that the said income be paid, under the conditions and provisions in my said will contained, to my daughter, Abby, and my son, Josiah, they me surviving, in equal shares during their joint *lives*, and one-half thereof to the survivor of them, during his or her *life*, it being my intention that my said two children shall have the whole of the said income in equal shares during their joint *lives*, if they shall both survive me, and the survivor of them one-half of the said income *during his or her life*."

*After* this codicil was made (the testatrix, however, yet living), the son, Josiah, died, leaving three children. Soon afterwards, July 16th, 1862, Guild, one of the trustees named in the will, died; and, last of all, about four months after this, Mrs. Loring herself. Guild, having thus died in the lifetime of the testatrix, Marsh, the surviving trustee, appointed the committee of three persons whom the testatrix had designated as the persons to determine the charitable institutions among whom her estate should go, and the committee named them.

Miss Abby Loring, the single daughter of the testatrix, having died soon after her mother, unmarried and intestate,

the three children of Josiah Loring, these being the sole heirs-at-law of Mrs. Loring, the testatrix, now filed their bill against Marsh and others, to have the estate, or their share of it.

The grounds of the claim as made here, and in the court below, were:

1. That the omission of Mrs. Loring was "unintentional, and occasioned by accident or mistake;" and the case so within the statute.

2. That the power conferred by the will upon the trustees, Marsh and Guild, to appoint persons to designate the objects of the testatrix's charity, had not been and could not, owing to the death of Guild, in Mrs. Loring's lifetime, be legally executed.

3. That the devise to the charitable uses was void, because, from defect of capacity to appoint, they were now uncertain and incapable of being ascertained.

In accordance with the law of Massachusetts,* oral evidence was taken on both sides as to the intention of Mrs. Loring to exclude her son's children. On the one hand there was the positive testimony of a girl or young woman, named Pratt, who stated that she had lived in Mrs. Loring's family for over seven years, as a "companion" to Mrs. Loring, but whose services, Mr. Thompson, the son-in-law of Mrs. Loring, testified were purely servile. This person, who the record showed had been called by Mrs. Loring as a witness to her will, testified that she had often, very often, heard Mrs. Loring say that her son's children should not derive any benefit from her estate after her death; that this was said both when the will and after the will and codicil were made; the cause being a dislike which she had of her son's wife's family. On the other hand there was testimony by the same son-in-law, that Mrs. Loring exhibited no dislike to her grandchildren, the complainants, and never expressed to him any intention of the sort above mentioned. But beyond this there was no attempt to impeach the testi-

* Wilson *v.* Fosket, 6 Metcalf, 400; Converse *v.* Wales, 4 Allen, 512.

mony of the first witness, and her character appeared to be fair.

The court below dismissed the bill.

*Messrs. B. R. Curtis and Cushing, with Hutchins and Wheeler, for the appellants:*

I. The first question is, whether the grandchildren are not entitled, by force of the statute, to the same share of Mrs. Loring's estate as they would have been had Mrs. Loring died intestate.

1. The *time* to which the question of omission applies is the time of Mrs. Loring's death. Not having then made any provision by her will, or any codicil for the issue of her deceased son, the case of the statute arises. She had made a will and left issue of a deceased child without having made any provision for them. *Bancroft* v. *Ives*,* is in point. That was the case of a son born after the making of the will, but it cannot be distinguished from the case of grandchildren, who became the issue of a deceased son, and so within the statute, by the death of their father after the making of the will.

2. It does not appear that such omission *was* intentional, and *was not* occasioned by accident or mistake.

(*a*) The evidence of intention to disinherit an heir should be such as to leave no reasonable doubt of the existence of a formed and settled intention. The common law always favors the heir, and one of its well-known rules is that an heir cannot be disinherited, even by a will, unless there are express words or a necessary implication to that effect. *A fortiori*, where the disherison is to be effected by parol evidence of mere declarations of the testator.

(*b*) It is the office of such evidence to supply the omission of *a clause in the will* declaring the intention of the testator to disinherit the heir.† It is like the proof of the contents of a lost will by parol evidence, and the courts have held that this requires "the clearest and most stringent evidence."‡

* 3 Gray, 367.

† Wilson *v.* Fosket, 6 Metcalf, 400.

‡ Davis *v.* Sigourney, 8 Id. 487.

If what was actually written, in a duly executed will, cannot be proved to disinherit the heir but by "*the clearest and most stringent evidence*," *à fortiori*, the heir cannot be disinherited by an intention never written at all, unless such intention shall be made out by this same evidence.

3. The true inquiry is this: Does it appear, by the clearest and most stringent evidence, that the testatrix had a formed and settled intention to disinherit the children *of her deceased son;* and that by reason of such intention they were not named in her will or its codicil?

(*a*) Looking at the will and codicil. The will was made plainly on the assumption that the son would survive the testatrix, and on no other. And the conduct of the testatrix when Mrs. Thompson died is in accordance with this; for when *she* died an alteration was made. But none when the son died: yet by the death of the father his children stood in a new position, and it is obligatory on the other side to show that in making her will the testatrix foresaw and meant to act in regard to this new position; a thing which cannot be shown.

(*b*) Then the oral testimony is insufficient to make a case for respondents.

The false account which the only important witness gives of her relation to Mrs. Loring; the great improbability that that lady would make a young servant girl the confidant of her settled intentions respecting her only grandchildren, which she imparted to no one else; the lapse of time; the infirmity and treachery of the human memory, even under favorable circumstances, as to mere casual declarations,—which so many rules of law are framed to guard against, and judicial experience recognizes,—all combine not only to deprive the testimony of this witness of the character of "the clearest and most stringent evidence," but to place it below the level of ordinary credibility. No member or connection of the family, no person standing in such a relation to the testatrix as to be likely to be the depositary of her serious and settled intentions respecting her only grandchildren, has been produced by the respondents. Her

son-in-law had no knowledge of an intention to disinherit them.

The testatrix executed a will and a codicil before the decease of her son. These were ambulatory, and whether she intentionally omitted the complainants from them is not material, as no case under the statute then existed. And an intention to disinherit either children born after the making of a will, or the issue of a child dying after the making of a will, cannot be proved by parol. It can be manifested only by making another will or codicil, *from which* the person is intentionally omitted.*

II. *As to the execution of the power.* Marsh alone could not execute it. This was not a power to appoint or select the donees of the property, nor to appoint the uses of the property. It was not a power over property. It was a naked authority, to nominate and appoint *persons*, who were to act for the testatrix in choosing the objects of her bounty, and to make known to them such facts as the two trustees should judge to be proper to guide or influence their judgment in the selection. From the nature of the case it must be a mere naked power, in contradistinction to a power coupled with an interest. A power coupled with an interest, means coupled with *an interest in the property which is the subject of the power;*† and where, as in this case, property is not the subject of the power, the power cannot be coupled with an interest.

A naked power to two persons by name, cannot be executed by one.‡

The intention of the testatrix to give this property to charitable institutions, was never perfected. She intended to speak only through persons selected and informed by both Marsh and Guild. There being no such persons, there is no expressed will of the testatrix in behalf of the institutions who are respondents.§

* Tucker *v.* Boston, 18 Pickering, 162.

† Hunt *v.* Rousmanier, 8 Wheaton, 174.

‡ Peter *v.* Beverly, 10 Peters, 564; 1 Sugden on Powers, 144.

§ Fontain *v.* Ravenel, 17 Howard, 369.

III. The devise is void for uncertainty. There being no mode, consistent with the will of the testatrix, of ascertaining the objects of her bounty, there is necessarily a resulting trust in favor of the complainants who are her heirs-at-law. The case will be rested on the other side on the power of acting *cy pres;* the power exercised by the Lord High Chancellor in England to make a will for a testator, simply because his will manifests some intention to make charitable bequests. But this is not a *judicial* power, and does not exist in any court of Massachusetts.* *Cy pres* is not a doctrine of jurisprudence at all; it is an exercise of sovereign power; and with us, where the three powers of government are kept distinct, cannot be exercised by courts.

*Messrs. S. Bartlett, F. C. Loring, and C. W. Loring, contra:*

I. The statute under which the first question in this case arises is, it is well known in Massachusetts, but a re-enactment of earlier statutes, and by an unbroken series of decisions the Supreme Court of the State has given a uniform exposition of the true intent of those earlier statutes. This exposition is stated in *Wilder* v. *Goss*,† thus:

"Whenever it appears that the testator has, through forgetfulness or mistake, omitted to bestow anything upon his child or grandchild, the legislature wisely intended to effect that which it is highly reasonable to believe the testator, but for such forgetfulness, would himself have done. To go further than this would be in its measure to defeat the principal intention of the legislature in the first section of the statute, which authorizes every person seized of an estate . . . . to devise the same as he shall think fit. *Whenever, then, it may fairly be presumed from the tenor of the will, or any clause in it, that the testator intentionally omitted to give a legacy or make a devise to his child or grandchild* (whose parent is dead) *the court will not interfere.*"

This doctrine is reiterated down to the latest decision. From the tenor of this will may it "fairly be presumed"

* Ommanney *v.* Butcher, 1 Turner & Russell, 260; Wheeler *v.* Smith, 9 Howard, 55; 17 Id. 386.

† 14 Massachusetts, 357.

that the testatrix intentionally omitted to give a legacy to her grandchildren?

1. These grandchildren were *in esse* at the execution of the will and codicil, as was also their father, for whom provision is made. It is not, therefore, the case of grandchildren born after the making of the will and before the death of testator, and so "forgotten" by her.

2. The cases are clear that where the gift is to grandchildren, omitting their parent, the mere statement that the grandchildren are the children of the son or daughter omitted, is conclusive that such son or daughter was not forgotten.* So here; the father is named and provided for by the will for life, to the exclusion of his *living* children.

3. The studied exclusion of these grandchildren, then alive, by the provision that the gift to the father should, upon his death, go over to charity, and this again repeated in the codicil executed the year following, would seem conclusive of the intent of the testatrix. *She must have anticipated the very event which has happened*, viz., that, in the course of nature, the appellants or some of them would survive their father; but, notwithstanding this, she bequeaths the remainder of the estate, given for life to their father, to charity. To use the language of Sedgwick, J., in *Terry* v. *Foster*,† "He had not forgotten them (grandchildren), he makes complete disposition of his property. This shows he did not intend they should come in for their portion."

The attempted answer of the appellants to this course of judicial decisions upon the statute is, that an intention to omit these grandchildren, in order to be legally effective, must be shown to have existed after the death of their father,—because it was only upon the happening of that event in the lifetime of testatrix that they become heirs apparent of the testatrix.

This proposition assumes that it is not possible by even express terms to manifest in a will an intention to exclude

* Wild *v.* Brewer, 2 Massachusetts, 570; Church *v.* Crocker, 3 Id. 17; Wilder *v.* Goss, 14 Id. 347.

† 1 Massachusetts, 146.

persons who may in future contingencies fill the relation of heirs of a testator. For if it be possible to manifest such intention in terms, then it is possible to do so by clear and just implication, and we thus come back to the question of what upon the authorities is to be deemed such just implication. Now in *Prentiss* v. *Prentiss*,* a recent case, it is settled that a testator may by will exclude parties who in future contingencies will become his heirs. The will there excluded after-born children, and the plaintiff was subsequently born in the lifetime of his father, the testator. The court say:

"The sole inquiry is, whether it is sufficiently made to appear that such omission was intended and not occasioned by accident or mistake; all that is necessary to be shown is that the matter was in the mind of testator, and by him deliberately acted on."

The appellants' theory being thus unsound, the question again recurs, whether, having regard to the judicial decisions of Massachusetts, a will and a subsequent codicil giving to a son an estate for life, *excluding his then living children* from taking the remainder, but devising it over to charities, presents, as to such children, a case in which, because their father died before testator, to use the language of the court in *Goss* v. *Wilder*, "it is highly reasonable to believe that the testator but for forgetfulness" would have given them the inheritance, or a case of intended exclusion?—and it is submitted by us that it leaves nothing for doubt.

Some reliance is placed on that which is but a *dictum* of Shaw, C. J., in *Bancroft* v. *Ives*, that the "time to which the *question of omission* applies is the time of testator's decease." This was said in a case where the sole question was, whether children born after the making of a will should inherit, there being children alive when the will was made; and it was in answer to the argument that intention to omit should be construed to apply only to children in existence. Doubtless it is true that *actual omission* is only determined by the state of things at testator's death, but the *intention to omit*,

* 11 Allen, 47.

as to parties alive, may be expressed by a will whensoever made.

The oral evidence of the actual intent of testatrix that these grandchildren should in no event share in her estate, is too strong to be disposed of in the way attempted on the other side. That evidence is unimpeached.

But the appellants object that the oral evidence, to be admissible, must be confined to declarations of testatrix after they become, by the death of their father, her heirs apparent; that the intention of testatrix must be shown as it existed after this change of condition, and that this subsequent intention can only be shown by a new will and not by oral declarations. The error of this position is, that it assumes that the testatrix could not by law, at the time she made her will, have foreseen this most natural and probable event, and have intended to provide for it by omitting these grandchildren and giving her estate to charities, and that, having this intention, as she may not have explained in her will the purpose of omitting them, her declarations of its being intentional is inadmissible. It proceeds on the ground that testatrix could by law have no such intent until after the event happened which made the grandchildren heirs apparent, for if she could, then her oral declarations of such intention are clearly admissible within the settled rule.

In view of the case of *Prentiss* v. *Prentiss*, it is unnecessary to again discuss the question whether the testatrix might not by law foresee and provide for the exclusion of future heirs, and, if this be lawful, then her oral declarations of intent to do so are as admissible as they would be in any case where the omission in a will to provide for an heir is, by the settled rule, open to explanation by such testimony. The principle, as stated in that case, shows that the intent to exclude future heirs needs no express provision in a will.

It is said by appellants that the oral testimony, if not confined to declarations after the death of the father, must be restricted to declarations of intention existing when the will was made. This is hardly accurate, since testimony of de-

clared intention before the will was made, as well as after, is clearly admissible.*

II. *As to the execution of the power.* If this were a case of a naked power (which it is not), and if the object of this gift were not (as it is) a public charity, but the property had been directed to be distributed among individuals to be selected from the public at large in the mode provided by the will, yet the power might be well executed by the surviving trustee, since the gift in trust is to "Marsh and Guild, and the survivor of them." And although this phraseology is not repeated in the clause as to the selection "of three or more gentlemen," yet such is the necessary legal implication. Again, the terms are, "said Marsh and Guild, or their successors as trustees, shall select," and this settles conclusively that it is not a "personal trust" in the parties named, but a trust *virtute officii*, and then, by the terms of the trust and by law, the power remains to the survivor.

Again (aside from the fact that this is a gift to charity), if its purpose was to benefit individuals, and if there were no words of survivorship, and the power was joint and personal to Marsh and Guild, it is submitted that it *is a power in nature of a trust*, and the court would require its execution by the survivor.† But here the trustees were seized and possessed of the property, and the power to be exercised was not a naked one, but incident to and coupled with the disposition by them of their title in the trust property. It was a power coupled with an interest, and that disposes of the question.‡

It is said by the appellants, that the power in question was not to dispose of property, but to select others according to whose direction the property was to be disposed of, and that such a power cannot be one coupled with an interest, but must be a mere naked power. If the title had not been vested in these trustees, but had remained in the heirs-at-law, perhaps the appellants' position would be true. But the fact

* Bancroft *v.* Ives; Converse *v.* Wales.

† 2 Sugden on Powers, 3d Am. Ed., 158 (143); Fontain *v.* Ravenel, 17 Howard, 369, 386.

‡ Peter *v.* Beverly, 10 Peters, 532.

that it was thus vested, brings the case directly within the definition of a power coupled with an interest, and it is none the less so by reason of the fact that the power coupled with this interest is to select others to designate the object, as well as to convey the estate to the objects thus designated.

III. But if this were otherwise, yet this is a gift to charity, which is never allowed to fail.

"Where there is a general intention shown by the donor to give to charity, the failure of the particular mode in which the charity is to be effectuated will not destroy the charity. The law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished. *This principle of construction, it will be observed, differs entirely from that applicable to a bequest to individuals, when on failure of the mode the gift fails altogether.*"*

Again:

"The same will follow when a testator, after making a bequest to such charitable uses as his executor shall appoint, revokes the appointment of the executor, or the executor himself renounces probate, or when the testator, after making a bequest to said charitable uses as A. shall appoint, A. *dies in the lifetime of the testator* or neglects or refuses to make an appointment."†

The above are the settled doctrines of courts of equity in England, in carrying into effect the statute of Elizabeth. This statute *is fully administered* as part of the common law of Massachusetts,‡ and it has been recently decided by its highest tribunal, that where the charitable gift is devised to trustees, the court will not allow it to fail, but apply, if necessary, the *cy pres* doctrine.§

* Tudor on Charities, 212. † Id. 216.

‡ Hadley *v.* Hopkins Academy, 14 Pickering, 253, 262; Going *v.* Emery, 16 Id. 114; Sanderson *v.* White, 18 Id. 328; Burbank *v.* Whitney, 24 Id. 146; Bartlett *v.* Nye, 4 Metcalf, 378; Washburn *v.* Sewall, 9 Id. 280; Sohier *v.* St. Paul's Church, 12 Id. 250; Brown *v.* Kelsey, 2 Cushing, 243; Winslow *v.* Cummings, 3 Id. 358; Bliss *v.* Am. Bible Society, 2 Allen, 334.

§ Jackson's Executors *v.* Phillips et al., Jan., 1867.

Mr. Justice NELSON delivered the opinion of the court.

The first question in the case arises on the following provision of a statute of the State of Massachusetts: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to, if he had died intestate, unless it shall have been provided for by the testator in his lifetime, or, *unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake.*" As it is admitted that no provision was made by the testatrix in her lifetime for the issue of the deceased son, the question turns on the remaining clause of the statute; and, so far as regards an examination of it with reference to the terms of the will, depends on facts, which may be stated as follows: At the date of the will, in which a life estate was given to the son, his children were living, but were not noticed therein by the testatrix, nor in the codicil of the 14th July, the year following, in which the life income of the son was increased.

There is, therefore, an entire omission to make any provision for the issue, or, even to notice them in the will, which brings the complainants directly within the enacting clause of this statute, and entitles them to a share of the estate the same as if the testatrix had died intestate, unless, in the language of the act, "it shall appear that such omission was intentional, and not occasioned by any accident or mistake." Whether or not the omission was intentional, or by mistake, may be ascertained from a careful perusal of the terms of the will, or by parol. This is the settled construction of the statute by several decisions in the courts of Massachusetts, where, it is said, that whenever it appears the testator has, through forgetfulness or mistake, omitted to bestow anything upon the child or grandchild, the legislature intended to effect that which it is highly reasonable to believe, but for such forgetfulness, he would, himself, have done. And, speaking of an examination of the will as bearing upon the subject, it is observed, that whenever it may fairly be pre-

sumed from the tenor of the will, or from any clause in it, that the testator intentionally omitted to give a legacy, or make a devise to a child or grandchild (whose parent is dead), the court will not interfere.

In the present case it is claimed, that by a perusal of the will, or by the parol proof, or both, it satisfactorily appears, that the omission by the testatrix was intentional, so as to cut off the grandchildren, the complainants.

The grounds upon which this is urged on the part of defendants are—

(1) That the grandchildren were living at the time of the execution of the will, and of the codicil, as was also their father, for whom particular provision was made out of the estate. It is insisted that the testatrix, in settling upon the portion thus devised to the father on both of these occasions, must have had present to her mind the grandchildren; that it is not natural, or reasonable to suppose, she could, on each of them, have deliberately and solemnly made provision for the father, without taking into consideration the state and condition of his family, which then consisted of his wife and the three grandchildren, and, in confirmation of this view, cases are referred to where the gift was to the grandchildren, omitting the parent, and the mere statement in the will that the grandchildren were the children of the son or daughter omitted, was held conclusive that the son or daughter was not forgotten, but intentionally omitted—such as a gift "to the children of her son Edward"—or "to grandchildren of his daughter Sarah."*

(2) The studied exclusion of the grandchildren, then living, by limiting the provision made for the father to a life estate, and, at his death, giving it over to charitable uses—and repeating the same limitation in the following year on the execution of the codicil. In view of these circumstances, and this posture of the case, it is insisted that the testatrix must have had called to her mind the children of the son, and also the further fact, that, in the ordinary course of

* Church v. Crocker, 3 Massachusetts, 17; Wild v. Brewer, 2 Id 570; Wilder v. Goss, 14 Id. 357.

nature, the children, or some of them, would survive the father; notwithstanding all which, she limited the provision for the father to a life estate, and devised the remainder over from the children.

It has been argued that the time to which the question of omission has reference, is the time of Mrs. Loring's decease. This, in a general sense, may be true, because, till then, it was possible for her to make provision in a codicil, or by a new will, for the grandchildren. It could not, therefore, be absolutely known before her decease that such provision would not be made. But, whether the omission was intentional, or by mistake, is not confined to this period; on the contrary, when the question is answered from a perusal of the will, it is necessarily limited to the time of its execution. And, even when it depends on oral proof, that proof is received for the purpose of ascertaining the mind of the testatrix at the same period. For, it is the state of her mind at the time of the execution, generally speaking, that is to be looked to, in the contemplation of the statute, with a view to determine whether the omission was intentional, or by mistake.

This case has been likened, in the argument, to that of a child born after the making of the will, because the grandchildren only became the issue of a deceased son after the death of their father, and which occurred subsequent to the execution of the will and codicil. Whether this be so or not, cannot change the aspect of the case, or the principles that must govern it.

Undoubtedly, in the case of a son born after the making of the will, and before the death of the father, the omission to provide for him cannot be known till the death of the father, for, till then, it was competent for him to make the suitable provision. This was the case of *Bancroft* v. *Ives.** But, even in that case, it was conceded to be competent for the adverse party to prove that the omission was intentional, and evidence was received and examined on the point. It

* 3 Gray, 367.

was held to be insufficient for the purpose. But, in the case of *Prentiss* v. *Prentiss*,* it was held, that a child born after the will, and before the decease of the father, was intentionally omitted, as appeared plainly on the face of the instrument. It is, doubtless, more difficult to establish that the omission was intentional, in the case of children born after the will, than if born before, and living at its date. But it would seem from the course of decisions that this is the only distinction, if it be one, in the statute.

Our conclusion on this branch of the case is, that upon a perusal of the provisions of the will, regard being had to the course of decision under the statute in the courts of the State, it sufficiently appears, especially in connection with the oral proof, that the omission to provide for the issue of the deceased son in the will was intentional, and not by accident or mistake.

The next question in the case is, whether or not the power conferred by the testatrix upon the trustees, L. H. Marsh and S. E. Guild, to appoint three or more persons to designate the objects of her charities under the will, has been legally executed.

It is insisted, on the part of the complainants, that the power of appointment is a naked authority to appoint persons who were to act for the testatrix in choosing the objects of her bounty, and to make known to them such facts as the two trustees should deem proper to guide or influence them in the selection; that it was a personal power which looked to the merit and qualification of the individuals for the discharge of the particular duty; and, that being a naked power, the survivor was incompetent to execute it.

If the premises are well founded the conclusion is undeniable.†

We are satisfied, however, that this is a mistaken view of the authority conferred on the trustees. They were in-

* 11 Allen, 47.

† Peter *v.* Beverly, 10 Peters, 564; 2 Story's Equity, § 1062, and cases.

vested with the whole of the legal estate, and were to hold the same in trust to "manage, invest and reinvest the same according to their best discretion," and pay over the income to the three children of the testatrix during their lives; and, on their decease, the said Marsh and Guild, or *their successors*, as trustees, shall select and appoint the three persons, &c., and thereupon the said trust fund shall be disposed of and paid over in accordance with the determination of the said persons, as certified by them in writing. And then direction is given in the will to the trustees to sell and convey any and all the real estate which may be in their hands, at their discretion, for the benefit of the charities.

Now, it is quite clear, from this reference to the will, that the trust conferred upon Marsh and Guild could not have been intended as a personal trust looking to the fitness of the donees of the power, as it is conferred upon them and their successors; and, as the execution of the trust for charitable uses was postponed by the terms of the will until after the decease of the three children of the testatrix, it was natural and reasonable to have supposed that it would not take place in the lifetime of the trustees named, but would descend to their successors.

But what is more decisive of the question is, that inasmuch as the trustees are invested with the legal estate, in order to enable them to discharge the various trusts declared, it is well settled that the power conferred is a power coupled with an interest, which survives, on the death of one of them, and may be executed by the survivor. (See the authorities above referred to.) It is not necessary that the trustees should have a personal interest in the trust; it is the possession of the legal estate, or a right *virtute officii* in the subject over which the power is to be exercised, that makes an interest, which, when coupled with the power, the latter survives. A trust, therefore, will survive when in no way beneficial to the trustee.

We have said the trustees were invested with the legal estate for the purpose of enabling them to perform the various trusts devolved, such as managing the estate, investing

and reinvesting the funds belonging to it, paying over the income to the children during their lives, converting the real estate into personal, and, among others, the selection and appointment of the committee of gentlemen who were to designate the donees of the charity. This was one of the incidental trusts or duties devolved upon them by the testatrix, as trustees of the estate, upon whom she had conferred such large powers over it, and which, on the death of Guild, survived with the other trusts to the co-trustee. No well-grounded distinction can be made between these trusts. If the power survives as to one of them it survives as to all, as it is apparent on the face of the will that the trustees were to act in the same capacity in the execution of all of them.

As it respects this devise to charitable institutions there can be no doubt upon the law of Massachusetts, as habitually administered in her courts, but that the objects of the bounty are made sufficiently certain by the mode pointed out in the will; and as the question is to be determined by the local law of the State there is an end of the objection.

DECREE AFFIRMED.

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## MUSSINA *v.* CAVAZOS.

1. The writ of error by which a case is transferred from a Circuit Court to this court is the writ of the Supreme Court, although it may be issued by the clerk of the Circuit Court; and the original writ should always be sent to this court with the transcript.
2. The writ is served by depositing it with the clerk of the Circuit Court, and if he makes return by sending here a transcript in due time, this court has jurisdiction to decide the case, although the original writ may be lost or destroyed before it reaches the Supreme Court.
3. The cases of *Castro* v. *United States* (3 Wallace, 46), and *Villabolos* v. *Same* (6 Howard, 81), commented on and explained.
4. It is not a fatal defect in a writ of error that it describes the parties as plaintiffs and defendants in error, as they appear in this court, instead of describing them as plaintiffs and defendants, as they stood in the court below, if the names of all the parties are given correctly.

5. Where a bill of exceptions is neither signed or sealed by the judge, so that there is nothing to show that it was submitted to him, or in any way received his sanction, the judgment below will be affirmed. (See page 363.)

MOTION to dismiss a writ of error to the District Court for the Eastern District of Texas; the case being thus:

The twenty-second section of the Judiciary Act provides that—

"Judgments and decrees of the District Courts may be re-examined, and affirmed or reversed in a Circuit Court, upon *a writ of error*, whereto shall be annexed *and returned therewith*, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal; with a citation, &c. And upon like process may judgment in the Circuit Courts be re-examined in the Supreme Court."

In this case there was only a *copy* of the writ annexed to the transcript; but the plaintiff in error had filed an affidavit by which it appeared that during the late civil war, the records of the court had been almost entirely burnt up, and he swore that, as he verily believed, there were none of the original papers of the cause now in existence. Assuming the copy of the writ of error thus returned with the transcript to have been a true copy, then the clerk had made his writ to run thus:

"Because in the record and proceedings, as also in the rendition of judgment of a plea which is in said District Court before you, in which *Simon Mussina is plaintiff in error and Maria Josefa Cavazos and Estefana Goascochea de Cortina are defendants in error*, manifest error hath happened to the great damage of the said Simon Mussina," &c.

The writ, it will be observed, did not say who was plaintiff *below* and who there defendants; though the description of the parties, as they appeared in *this* court, was correct. The petition for the writ of error, as contained in the transcript of the record, describes the parties thus:

"In a certain cause wherein Maria Josefa Cavazos and Este-

fana Goascochea de Cortina were plaintiffs and Simon Mussina defendant, a final judgment was rendered," &c.

The bond given by plaintiff in error described the parties in the same manner.

*Messrs. Robinson and Hale* rested their motion to dismiss on the ground, 1st, that the twenty-second section of the Judiciary Act above quoted made it indispensable to the jurisdiction of this court that the writ of error itself annexed to the transcript, should be "*returned therewith;*" that here the *writ of error* was not returned, relying in support of their view on this point upon *Castro* v. *United States*,* and the previous case of *Villabolos* v. *Same*;† and 2d, that admitting that a copy might be substituted for the writ, and that the copy here was a true one, the parties to the suit had been fatally misdescribed in the original.

*Messrs. Sherwood and Edmunds, contra.*

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that the original writ should always be returned to this court with the transcript of the record. The writ of error is the writ of this court, and not of the Circuit Court, whose clerk may actually issue it. The early practice was, that it could only issue from the office of the clerk of the Supreme Court, and in the case of *West* v. *Barnes*,‡ at the August term, 1791, it was so decided. This decision led to the enactment of the ninth section of the act of 1792,§ by which it was provided that the clerk of the Supreme Court, assisted by any two justices of said court, should prescribe the form of a writ of error, copies of which should be forwarded to the clerks of the Circuit Courts; and that such writs might be issued by these clerks, under the seals of their respective courts. The form of the writ provided under this act has been in use ever since. It runs in the name of the President, and bears the *teste* of the chief justice of

* 3 Wallace, 46.

† 6 Howard, 81.

‡ 2 Dallas, 401.

§ 1 Stat. at Large, 278.

this court. It is in form and in fact, the process of this court, directed to the judges of the Circuit Court, commanding them to return with said writ, into this court, a transcript of the record of the case mentioned in the writ.

When deposited with the clerk of the court, to whose judges it is directed, it is served; and the transcript which the clerk sends here, is the return to the writ, and should be accompanied by it.

In the case before us, the plaintiff in error, by way of substitute for a writ of *certiorari*, has filed an affidavit, from which it appears, that, without his fault, the writ has been destroyed by burning, during the late civil war. Taking the copy of the writ found in the record to be a true copy, it may be considered as established, that a writ of error was issued and served, and that a transcript of the record, with a copy of the writ, was returned and filed in this court, before the first day of the next term after it was issued, and that the original writ is destroyed.

We have repeatedly held that the writ of error in cases at law is essential to the exercise of the appellate jurisdiction of this court. And it is undoubtedly true that this court has gone very far in requiring strict compliance with the acts of Congress under which cases are transferred from inferior tribunals to this court.

In the case of *Castro* v. *United States*, we held, on consideration of the previous cases, and on principle, that unless the transcript from the court below was returned before the end of the term next succeeding the allowance of the appeal, this court had no jurisdiction. Although the question there arose on an appeal, the principle decided is equally applicable to a writ of error; for the act of 1803, which first authorized appeals, subjects them to the rules and regulations which govern writs of error. The ground of that decision, and also of the case of *Villabolos* v. *United States*, which preceded it, is the general principle, that all writs, which have not been served, and under which nothing has been done, expire on the day to which they are made returnable. They no longer confer any authority; an attempt to act

under them is a nullity, and new writs are necessary, if the party wishes to proceed. Hence we have the alias writ, and others in numerical succession indefinitely.

It is now insisted, upon the authority of these cases, and of the language of the twenty-second section of the Judiciary Act, that the absence of the original writ in the case deprives this court of the power to decide it. It is said that, by force of the words "returned therewith," contained in this twenty-second section, it is made essential to our jurisdiction that the original writ and the transcript must both be returned.

If this be a sound construction, then it is equally necessary that there shall be returned, at the same time, an assignment of errors, a prayer for the reversal of the judgment, and a citation to the adverse party. But an examination of all the records of cases decided in this court will show that, in four cases out of five, there has been neither an assignment of errors, nor any prayer for reversal. We have also held, frequently, that if the appeal is taken in the open court, during the term at which it was rendered, in the presence of the appellee, no citation is necessary, and that a general appearance in this court for defendant in error, or in appeal, waives the necessity of a citation.

The act referred to also says, that all these things must be returned together at the "time and place mentioned in the writ," that is to say, on the first day of the term next after the issuing of the writ. Yet we have repeatedly held, that if returned on any day during that term, we will hear and decide the cause. It cannot, therefore, be maintained, that a rigid and literal fulfilment of everything prescribed in that section, is an absolute and indispensable requisite to the appellate jurisdiction of this court.

Nor does the case come within the principle which we have already stated as governing the cases of *Villabolos* v. *United States*, and *Castro* v. *United States*. In these cases the appeals were dismissed, because no returns of the transcripts to this court were made, until by analogy to the writ of error, the time for making such returns had passed;

and the writs, if writs had been issued, would have become *functus officio*. In the case before us, on the contrary, it fully appears that during the life of the writ, a good and sufficient return to it was made, by sending to this court an authenticated transcript of the record. Shall we now hold, because with this return there did not come the writ itself, that what has been done under it is void, and we are without jurisdiction? This would be contrary to the uniform practice of other courts in regard to their writs. For it is believed to be well settled, that rights acquired under a valid writ or process, while it was in force, cannot be defeated by the loss or destruction of the writ; if its existence, and the acts done under it, can be substantiated by other testimony. It is as reasonable to hold that a judge of this court would lose his right to sit in this place, if his commission was burned up, as to hold that the court loses the right to hear a case, because the writ was burned before it reached the court, but after it had effected its purpose, by bringing here the transcript.

In the case of *Brooks* v. *Norris*,* the court, in speaking of bringing a writ of error within the time allowed by the statute of limitation, says: "The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period prescribed by the act of Congress must be calculated accordingly." In *Ableman* v. *Booth*,† the writ of error, which issued from this court, was filed with the clerk below. No return being made to it, a rule from this court was served on him by the marshal, to which he paid no attention. This court then, on motion of the Attorney-General, permitted him to file a copy of the record, duly authenticated, which had been secured for his private use; "to have the same effect and legal operation as if returned by the clerk with the writ of error;" and on this record the case was heard and decided, although the original writ of error was never returned.

* 11 Howard, 204. † 21 Id. 506.

We are, therefore, of opinion, both on principle and authority, that the case should not be dismissed for the non-production of the writ of error. The cases dismissed under rule nine of this court, are governed by the rule, and raise no question of jurisdiction.

But it is said, that conceding the copy of the writ of error in the record to be a true copy, and to be rightfully substituted for the original, it is fatally defective, because it does not correctly describe the parties to the suit. The parties are correctly described in the writ as they must appear and be styled in this court, but we are not told by the writ who was plaintiff and who was defendant below. The full names of all the parties to the judgment below are given, and their relations to the suit as it stands in this court are given. We are also told, that the error (if any) committed by the District Court, was to the manifest injury of Simon Mussina, plaintiff in error. Is the writ then void because it does not say which of these parties was plaintiff in that court and which defendant?

We think that the description, although not in the usual or even the most appropriate form, is sufficient. If there is any doubt about the relation of the parties to the suit below, it can be solved by the record. Having that before us, we see that Mussina was defendant below, and is properly described as plaintiff in error in the new proceedings instituted by the writ, and that the others were plaintiffs below, and are also properly described as to their relations to the new proceeding which that writ commences.

But many cases have been dismissed by this court, because the writ of error described either plaintiff or defendant as "A. B., and others," or "A. B. & Co.," or other partnership style, or as "Heirs of C. D.," and such other descriptions as did not give the names of all the persons who were supposed to be brought before the court by the writ. Of late years these cases have simply been dismissed upon the authority of previously adjudged cases, without giving other reasons for so doing.

It is claimed that the case before us falls within this class, in the matter we are now considering. To determine if this be so, we must go back to the earlier of these cases to discover the principle on which they were decided.

Early in the history of the court it was ruled that unless all the parties in the court below, to a joint judgment or decree, were made parties in this court by the writ of error or by the appeal, the cause would not be entertained. This was first held as to judgment at law, in the case of *Williams* v. *Bank of United States*,* and as to decrees in chancery, in the case of *Owings* v. *Kincannon*.† At the next term of the court after this last decision, we have the first of the class of cases to which we have alluded. It is the case of *Deneale* v. *Stump's Executors*.‡ The writ described the plaintiffs in error as "Mary Deneale and others," and the reasons given for dismissing it are two: 1st, that all the parties against whom the judgment was rendered must join in the writ, which is not done by naming some of them merely as "others;" and, 2d, that the names should be set forth, that this court might render the proper judgment in the case. The opinions in the three cases last cited were delivered by C. J. Marshall.

The next of this class of cases is that of *Wilson's Heirs* v. *The Insurance Company*,§ in which the court holds that a writ in the name of the "Heirs of Nicholas Wilson," must be dismissed. The court simply says, that this is done on the authority of *Owings* v. *Kincannon*, and of *Deneale* v. *Stump's Executors*. The subsequent cases are all based on the authority of these decisions. In all of them it appeared by the writ that there were parties to the judgment below, not personally named in the writ. But an examination of this writ of error raises no such presumption. Nor can the court be at any loss from this writ, to properly name the party or parties for and against whom it will render its judgment, when it has decided the merits of the controversy.

The present case, therefore, does not fall within the prin-

* 11 Wheaton, 414. † 7 Peters, 399. ‡ 8 Id. 526. § 12 Id. 140.

ciple of any of the numerous cases cited by counsel, or of others examined by the court.

MOTION OVERRULED.

NOTE.

This case came on afterwards to be argued on its merits, and was elaborately so argued by the same counsel who had argued the motion to dismiss; but it being discovered by the court that the bill of exceptions, which occupied seven-tenths of a closely-printed record of 522 pages, had not been either signed or sealed by the judge below—

Mr. Justice SWAYNE delivered the following opinion of the court.

Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed nor sealed by the judge who tried the case; and there is nothing which shows that it was submitted to him or in any way received his sanction.

We are therefore constrained to affirm the judgment, and it is AFFIRMED ACCORDINGLY.

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## GRISAR *v.* MCDOWELL.

1. By the laws of Mexico, which prevailed in California at the date of the conquest, pueblos or towns, when once established and officially recognized, were entitled, for their benefit and the benefit of their inhabitants, to the use of lands, embracing the site of such pueblos or towns, and of adjoining lands within certain prescribed limits. These laws provided for an assignment to the pueblos of such lands, which were not to exceed in extent four square leagues. The assignment was to be made by the public authorities; and the land was to be measured off in a square or prolonged form, according to the nature and condition of the country. All lands within the general limits stated, which were required for public purposes, were reserved from the assignment.
2. Until the lands were definitely assigned, the right of the pueblo was an imperfect one. The government might refuse to recognize it at all, or might recognize it in a qualified form, and it might be restricted to less limits than the four square leagues. After the assignment, the right of

use and disposition (a limited one) was subject to the control of the government of the country.

3. Though historical evidence and judicial decision show that there was a Mexican pueblo of some kind, on the conquest of California, at what is now the site of San Francisco, one entitled to the usual rights of pueblos, no assignment of lands was ever made to it under the former government. Its right to any lands required, accordingly, recognition from the United States before it could be turned into an indefeasible estate; and until the land claimed under the pueblo right was set off and measured by its authority, the government could set apart and appropriate any portion of it which might be required for public uses.
4. The necessity of such recognition by the new government is not dispensed with by the presumption raised by the fourteenth section of the act of March 3d, 1851, of a grant of land to a town which was proved to have been in existence on the 7th of July, 1846.
5. The proceeding in the District Court of the United States in a California land case, on an appeal from the board of land commissioners, is an original suit, and the whole case is open.
6. An appeal from a decree of the District Court to the Supreme Court, in California land cases, suspends the operation and effect of the decree only when, by a judgment of the Supreme Court, the claim of the confirmee in the premises in controversy may be defeated.
7. In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may, if it please, act by legislation directly upon a claim preferred, withdrawing it from further consideration of the courts under the provisions of a general act. Accordingly, an act by which all the right and title of the United States to the land within the corporate limits of San Francisco confirmed to the city by a decree of the Circuit Court, were relinquished and granted to that city, and the *claim of the city was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain specified trusts*, disposed of the city claim, and determined the conditions upon which it should be recognized and finally confirmed.
8. The decree of the board of land commissioners in California land cases, or of the courts of the United States, where it becomes final, takes effect by relation as of the day when the claim was presented to the board of land commissioners.
9. According to the practice of the government, as recognized by Congress, the President may reserve from sale and set apart for public use, parcels of land belonging to the United States. And he may modify, by reducing or enlarging it, a reservation previously made. That he has made the modification on a compromise of an opposing private claim, does not invalidate the reservation.

ERROR to the Circuit Court for California; the action there having been to recover possession of a tract of land within the city of San Francisco.

Statement of the case.

The plaintiff claimed as seized in fee under title from the city of San Francisco. The defendant claimed possession as an officer of the United States; setting up that the property was public property of the United States reserved for military purposes.

The city's title was thus: It seemed to be sufficiently plain, from historical evidences and from adjudicated cases, that at the time of the conquest of California by the United States, there was at the present site of San Francisco a pueblo of some kind; that is to say, that there was a settlement or collection of individuals there having an ayuntamiento composed of alcaldes, regidores, and other municipal officers.*

It seemed sufficiently plain also that there were general Mexican laws governing the subject, which authorized territory to an extent not exceeding four square leagues to be marked out and dedicated to the use of pueblos and of their inhabitants for certain purposes.

What, however, was the precise nature of this pueblo at San Francisco, or what the nature of its rights or of pueblo rights generally in any four leagues, and by what lines these particular four leagues were to be defined, was not so clear, nor at all conceded: though it was asserted by the plaintiff that the four leagues in immediate connection with San Francisco, were to be measured from the presidio of the old pueblo, the place occupied by the garrison of the town; and hence were to be bounded of necessity on three sides by waters of the ocean, the bay, and the Golden Gate. And it was shown that a line drawn from water to water, east and west, would segregate in the easiest manner the four leagues to which, as successor of the former pueblo, the city was entitled.

If such a line had ever been drawn, the tract now in controversy would have been included within it. But there was no evidence that any assignment of land had ever in any

* See Dwinelle's Colonial History of the City of San Francisco; Hart *v.* Burnett, 15 California, 540; where the general character of the documentary evidence of the existence of the pueblo, and of the rights it possessed, is set forth and considered.

way been made to the pueblo where San Francisco now stands, under the former government.

On the 3d of March, 1851, Congress passed the act to ascertain and settle private land claims in California. This act by its eighth section makes it the duty of every person having claims to lands there, to present them for investigation and the evidence in support of them, to a board of commissioners, which was created by the act. The fourteenth section declared, however, that the general requirements of this eighth section should not extend to "any town lot, farm lot or pasture lot held under any grant from any corporation to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, town, or village lot, which city, town, or village, existed on the 7th day of July, 1846, but that the claim for the same shall be presented by the corporate authorities of said town," and that "the fact of the existence of the said city, town, or village, on the said 7th of July, 1846, being duly proved, shall be *primâ facie* evidence of a grant to such corporation."

In July, 1852, the city presented to this board a claim for the four leagues, praying a confirmation; and in December, 1854, the board confirmed the claim to a portion of the land, in which portion were embraced the premises now in controversy.

In June, 1855, in virtue of an ordinance known as the Van Ness Ordinance, passed by the common council of the city of San Francisco, and subsequently, in 1868, ratified and confirmed by the legislature of California, whatever right the city had to the premises in controversy, on the 1st January, 1855, passed to a party under whom the plaintiff claimed.

Such was the plaintiff's case.

By the defendant's, it appeared, that in November, 1850, the President of the United States made, through the War Department, and in a usual way, an order that a certain parcel of land described by him, situated on the bay of San

Francisco, California, and which, it was said by one side here, did, in point of fact, embrace the premises in controversy, and by the other that it did not—should be exempted from sale and reserved for public purposes. A private claimant to this tract proposing subsequently that certain other bounds should be substituted, with the understanding that if this was agreed to by the government he would resign all pretensions to title within the reservation, as fixed by the modified boundary proposed, the President, in December, 1851, in compliance with a recommendation to that effect from the Engineer Department, made in October, 1851, modified and reduced the reservation, describing it more particularly, and in such a way as to divide the tract originally reserved into two separate tracts, and, as it was said on one side here, to include also, land *not* included in the original order. In one of these tracts, the premises in controversy were embraced.

The fact, therefore, that the President had reserved the tract for the purposes of the Federal government, was one part of the defendant's case. Another was this:

In stating the city's title it has been said that the board of land commissioners, in December, 1854, confirmed the claim of the city to a part of the four leagues claimed by it as a pueblo, which part included these premises. If the matter had stopped there, the case of the plaintiff might have been free from question. But it did not stop there. The sequel was thus:

In March, 1856, a transcript of the proceedings and decision of the board was filed in the District Court of the United States; this operating under the statute of August 31st, 1852, as an appeal by the party against whom the decision was given. Both City and United States in this case considered the decision as against them, and both gave notice of their intention to appeal. The appeal of the United States was, however, on notice of the Attorney-General and the stipulation of the district attorney, dismissed, and the city alone prosecuted its appeal. While the appeal was thus pending in the District Court, Congress passed an

act* by virtue of which the case became transferred to the Circuit Court of the United States. That court, in May, 1865, confirmed the claim of the city to the four leagues, excepting, among others, such parcels of land as had been previously "reserved or dedicated to public uses by the United States;" meaning by this, the tracts reserved as above mentioned by the then President, Mr. Fillmore. From this decree of the Circuit Court, the United States appealed to the Supreme Court at Washington.

After the appeal taken (but previous to the trial in the present case), Congress relinquished all right of the United States to land situated within the city of San Francisco, and confirmed to it by the decree just mentioned, to the city, and confirmed the city's claim; subject, however, to the reservations and exceptions designated in that decree,† and also subject to certain specified trusts. The appeal of the United States to the Supreme Court was accordingly dismissed.

On the trial of the present case the plaintiff objected to the admission of the evidence of the first reservation of the President, on account of its indefiniteness of description, and because the President could not make a reservation out of pueblo lands; and of the second one among other reasons because it was the result of a *compromise* between the government and an adverse claimant.

He objected also, to the admission of the decree mentioned as having been made in the Circuit Court, it being admitted on the other side that an appeal was taken to it by the United States and was still pending.

The objections were all overruled; and judgment having been given for the defendant, the case was now here on error.

The case, it will be seen, involved essentially the question of the nature of the title and ownership of lands held by Mexican pueblos under the laws of Mexico in force in Cal-

* Act of 1st July, 1864; 13 Stat. at Large, 332.

† Act of March 8th, 1866; 14 Stat. at Large, 4.

ifornia, at the date of the conquest of that country, and, to some extent, of the nature of a pueblo itself.

*Messrs. Cushing, Cole, and Reverdy Johnson, for the plaintiff in error*, contended that, at the time of and long before the American occupation, San Francisco was an organized pueblo; that as such she was by the Mexican law proprietor in fee of four square leagues of land; that the limits of the land were certain; that the title was not an inchoate or imperfect title, but that the entire fee and use—the dominion both direct and useful—was in the pueblo; a matter on which they cited the *Partidas* and other Spanish authorities; that being private property, the President had no power to make a reservation out of it; that the fourteenth section of the act of March 3d, 1851, was a recognition by the United States of the pre-existing title of the city, and estopped them from pretending to title after that; that the decree of the Circuit Court of the United States in the case of *United States* v. *The City of San Francisco*, was not admissible in evidence, an appeal having been taken therefrom, which destroyed its effect as evidence of title; that the decree entered by consent in the United States District Court, on motion of the United States District Attorney, that the United States would not prosecute an appeal from the decree of the board of land commissioners, and that the city should have leave to proceed upon that decree as upon a final decree, was a final adjudication of the title to the land embraced within it, and vested the title absolutely in the city.

*Mr. Stanbery, A. G., and Mr. Lake, contra.*

Mr. Justice FIELD delivered the opinion of the court.

The premises, for the possession of which this action is brought, are situated within the city of San Francisco, in the State of California. The plaintiff claims to be seized in fee of them, and derives his title from the city of San Francisco under an ordinance of the common council for the settlement of land titles in the city, passed on the 20th of June, 1855, commonly known as the Van Ness ordinance, and the

act of the legislature of the State ratifying and confirming the same.

The defendant is an officer in the army of the United States, commanding the military department of California, and as such officer entered upon the possession of the premises previous to the commencement of this action, and has ever since held them under the order of the Secretary of War, as part of the public property of the United States reserved for military purposes.

At the time the ordinance named was passed the city of San Francisco asserted title, as successor of a Mexican pueblo in existence on the acquisition of the country, to four square leagues of land, embracing the site of the present city, and had presented her claim for the same to the board of land commissioners created under the act of March 3d, 1851, and the board had confirmed the claim to a portion of the land, including the premises in question, and rejected her claim for the residue. Dissatisfied with the limitation of her claim, the city prosecuted an appeal from the decision of the board to the United States District Court, and this appeal was then pending and undetermined. By the second section of the ordinance the city relinquished and granted all the title and claim, which she thus held to the land within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process. In March, 1858, the legislature of the State ratified and confirmed this ordinance. The party, through whom the plaintiff traces his title, was in such actual possession of the premises in controversy both at the time designated by the ordinance and also on the passage of the confirmatory act of the legislature, and therefore acquired whatever right or title the city possessed; and he improved and cultivated the premises, and erected a building thereon, which was occupied by the

plaintiff as his residence when he was ousted by the defendant.

On the other hand, the authorities of the United States, at the date of the ordinance, and long previous to that date, claimed the right to hold the premises as property of the United States, and as being a portion of a tract set apart for public purposes. As early as the 5th of November, 1850, President Fillmore made an order that certain parcels of land situated "on the bay of San Francisco," should be exempted and reserved from sale for such purposes. Notice of this order was soon afterwards communicated to the commissioner of the general land office, and in June following was transmitted by him to the surveyor-general of the United States for California, in whose office it has ever since remained on file.

On the 31st of December, 1851, this order was modified by the President in some particulars, and the first parcel reserved, or supposed to have been reserved by it, was divided into two separate tracts, each of which was described with precision. We do not deem it, therefore, of any consequence whether the description of the first parcel in the original order was defective and indefinite, as contended by counsel, or whether or not it included the premises in controversy. Nor is it of any consequence that the modification was made, as asserted, to avoid a possible contest with an adverse claimant to a portion of the original reservation. The reasons which may have governed the President cannot affect the validity of his action. He possessed the same authority in 1851 to modify the reservation of 1850, by enlarging or reducing it, that he possessed to make the reservation in the first instance. It is sufficient, in the view we take of this case, that one of the tracts described in the last order embraces the premises in controversy.

The question presented for determination is, therefore, between the title of the city of San Francisco, as it existed on the 1st day of January, 1855, and the title on that day of the United States.

It must be conceded that there was a pueblo of some kind

at the site of the city of San Francisco upon the conquest of the country by the United States on the 7th of July, 1846. We say a pueblo *of some kind*, for the term, which answers generally to the English word *town*, may designate a collection of individuals residing at a particular place, a settlement or a village, or may be applied to a regular organized municipality. The historical evidence, to which we have been directed in the argument, shows that there was a pueblo at that site under the government of an ayuntamiento, composed of an alcalde, regidores, and other officers, as early as 1835, and that it continued in existence for some years under that government, and subsequently until, and for some time after the conquest, under the government of justices of the peace or alcaldes.

It must be conceded, also, that the pueblo, which thus existed, possessed some claim legal, or equitable to, or some interest in lands within the limits of four square leagues, to be assigned and measured off from the northern portion of the peninsula, upon which the city of San Francisco is situated, and that the city has succeeded to such claim or interest. This has been held by the Supreme Court of the State after the most elaborate and extended consideration. But what is of more consequence, and is conclusive upon this court, it has been so adjudged by the Circuit Court of the United States, and that adjudication has been made final, as we shall hereafter see, by the legislation of Congress, and the dismissal of the appeal to this court, which followed that legislation.

By the laws of Mexico, which prevailed in California at the date of the conquest, pueblos or towns, when once established and officially recognized, were entitled, for their benefit and the benefit of their inhabitants, to the use of lands, embracing the site of such pueblos or towns, and of adjoining lands within certain prescribed limits. This right, as we observed in *Townsend* v. *Greeley*,* appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordi-

* 5 Wallace, 336.

nances for the settlement and government of her colonies on this continent. The same general system of laws for the establishment and government of pueblos, and the assignment to them of lands that prevailed under Spain, was continued in Mexico, with but little variation, after her separation from the mother country. These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues. Such assignment was to be made by the public authorities of the government upon the original establishment of the pueblo, or afterwards upon the petition of its officers or inhabitants; and the land was to be measured off in a square or prolonged form, according to the nature and condition of the country. All lands within the general limits stated, which had previously become private property, or were required for public purposes, were reserved and excepted from the assignment.

Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one. It was a right which the government might refuse to recognize at all, or might recognize in a qualified form; it might be burdened with conditions, and it might be restricted to less limits than the four square leagues, which was the usual quantity assigned. Even after the assignment the interest acquired by the pueblo was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. The interest, as we had occasion to observe in the case already cited, amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. And this limited right of disposition and use was in all particulars subject to the control of the government of the country.

It is not pretended that any assignment of lands was ever made to the pueblo of San Francisco under the former government. Her claim or right to any lands being therefore

an imperfect one, required the recognition and action of the new government before it could be turned into an absolute and indefeasible estate. Nor did it any the less require such recognition and action by reason of the presumption raised by the fourteenth section of the act of March 3d, 1851, of a grant of land to a city, town, or village, which was proved to have been in existence on the 7th of July, 1846. That section does not specify the extent of the grant which, for the purpose of determining the claim of the lot-holders, and of the city, was to be presumed to have been made; nor does it furnish any measure by which the limits of such grant could be fixed. The claim of the city had, therefore, as the law then stood, to undergo judicial investigation before the board of land commissioners created under the act of March 3d, 1851, and to depend for its validity and extent upon the determination of the board, and of the tribunals of the United States to which it could be carried. The authorities of the city so regarded the claim, and by their direction it was presented to the board in July, 1852. In December, 1854, the board confirmed the claim, as we have already stated, to a portion of the four square leagues, embracing the premises in suit, and rejected it for the residue. From the decision an appeal was taken by the filing of a transcript of the proceedings and decision of the board with the clerk of the District Court. The appeal was by statute for the benefit of the party against whom the decision was rendered; in this case of both parties—of the United States, which contested the entire claim, and of the city, which asserted a claim to a greater quantity than that confirmed—and both parties gave notice of their intention to prosecute the appeal. Subsequently, in February, 1857, the Attorney-General withdrew the appeal on the part of the United States, and in March following, the District Court, upon the stipulation of the district attorney, ordered that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the board as upon a final decree. The counsel of the plaintiff contend that this decree closed the controversy between the city and the United States as to the lands to which the claim was con-

firmed. But in this view they are mistaken. Had the city accepted the leave granted, withdrawn her appeal, and proceeded under the decree as final, such result would have followed. But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. This kept open the whole issue with the United States. The proceeding in the District Court, though called in the statute an appeal, was not in fact such. It was essentially an original suit, in which new evidence was given and in which the entire case was open. That this was the character of the proceeding in the District Court follows from the decision in the case of *United States* v. *Ritchie.** In that case it was contended that the act of Congress, in prescribing an appeal from the board of commissioners to the District Court, was unconstitutional, as the board was not a court under the Constitution, and could not be invested with any portion of the judicial power conferred upon the general government; but this court—Mr. Justice Nelson delivering the opinion—held that the suit was to be regarded as an original proceeding, and that the removal of the transcript papers and evidence into it from the board of commissioners was the mode provided for its institution in that court.

"The transfer, it is true," said the court, "is called an appeal. We must not, however, be misled by a name, but look to the substance and intent of the proceeding. The District Court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo* upon the papers and testimony which had been used before the board, they being made evidence in the District Court, and also upon such further evidence as either party may see fit to produce."

The dismissal of the appeal on the part of the United States did not, therefore, preclude the government from the introduction of new evidence in the District Court, or bind it to the terms of the original decree.

The authorities cited by counsel to show that when only

* 17 Howard, 533.

one party appeals from a decree in a California land case, the other party cannot urge objections to the decree, or insist upon its modification, have no application. They are adjudications made in cases of appeal from the District Court to the Supreme Court, where the case is heard on the record from the court below, and where error upon the record alleged by the appellant is alone considered, or in cases where an attempt has been made upon supplementary proceedings on a survey of the land confirmed to deviate from the terms of the original decree. Thus, in *Malarin* v. *United States*,* the District Court had affirmed the validity of the grant to the claimant, but had limited it to one square league. The claimant insisted that he was entitled under the grant to a confirmation of two square leagues, and therefore prosecuted an appeal. The United States were satisfied with the decree and did not appeal. The case, therefore, necessarily stood in this court upon the simple question whether the confirmation should have been for one or for two leagues; and the court said, that as the government had declined to appeal, the validity of the grant was not open for consideration. There is no analogy between this case and the so-called appeal from the board of commissioners to the District Court, which is only a mode, as we have said, for the institution of a new suit in that court.

In the case of *United States* v. *Halleck*,† the decree of the board of commissioners described the land confirmed by specific boundaries. This decree became final by the withdrawal by the United States of the appeal taken on their behalf. But in the survey of the land an attempt was made to change the meaning of the language of the decree, by showing that the commissioners were ignorant of the course and direction of the American River, one of the boundaries prescribed, and, therefore, intended different lines from those specifically declared. To this the court said, that the decree was a finality, not only on the question of title, but as to the boundaries which it specified; that if it were erroneous in

* 1 Wallace, 282.

† 1 Wallace, 439.

either particular the remedy was by appeal; but that the appeal having been withdrawn by the government, the question of its correctness was forever closed. In other words, the court held that a decree which had become final, could not be disregarded or deviated from in the subsequent proceedings taken for its execution. Between the doctrine here asserted and the doctrine contended for by the counsel of the plaintiff there is no analogy.

The case of the city remained in the District Court on her appeal until 1864. On the 1st of July of that year, Congress passed an act "to expedite the settlement of titles to land in the State of California." By the fourth section of this act the District Courts of California were authorized to transfer cases for the determination of claims to land under the act of March 3d, 1851, pending before them on appeal, to the Circuit Court of the United States, when they affected the titles of lands within the corporate limits of any city or town. Under this act, the District Court, in September following, transferred the city case to the Circuit Court, and in October, that court confirmed the claim of the city to four square leagues, subject to certain exceptions, among which were all such parcels of land as had been previously "reserved or dedicated to public uses by the United States." The decree upon this adjudication was finally settled and entered on the 18th of May, 1865. An appeal from it was taken by the United States to the Supreme Court; and the pendency of this appeal was made the ground of objection to the admissibility of the decree when it was offered in evidence. The appeal, it was contended, suspended the operation of the decree and took from it all efficacy as evidence of title. Such undoubtedly is the general effect of an appeal in these land cases; that is to say, the decrees rendered by the District Court cannot support the title of the confirmees or of parties claiming under them pending appeals therefrom, when by the judgment of the appellate court the claims of the confirmees in the premises in controversy may be defeated. But in this case no such result could have followed from any judgment of the Supreme Court. The objection

of the plaintiff was prompted by the fact that the defendant contended, and, as we shall show, contended correctly, that the lands reserved by the decree from the confirmation to the city included the premises in controversy. Assuming that to have been the fact, the judgment of the Supreme Court could not have affected in any respect the title of the plaintiff. That court would have heard the case upon the record, and if it had not affirmed the decree, would have reversed it, or have modified it only in the particulars in which error was alleged by the appellant. A judgment in favor of the United States could only have had the effect either of defeating the entire claim of the city or of restricting its extent in a still greater degree: it could not have removed the exception made in it of the lands reserved for public uses.

But there is another and conclusive answer to the objection to the admissibility of the decree. By the action of Congress it had become, with some modifications, final. On the 8th of March, 1866, which was previous to the trial of this action, Congress passed an act "to quiet the title to certain lands within the corporate limits of the city of San Francisco."* By this act all the right and title of the United States to the land situated within the corporate limits of San Francisco, confirmed to the city by the decree of the Circuit Court, were relinquished and granted to the city, and the claim of the city was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon the trust that all the land, not previously granted to the city, should be disposed of and conveyed by the city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of the act, in such quantities and upon such terms and conditions as the legislature of the State of California might prescribe, except such parcels thereof as might be reserved and set apart by ordinance of the city for public uses.

By this act the government has expressed its precise will with respect to the claim of the city of San Francisco to her

* Statutes of 1865–6, p. 4.

lands, as it was then recognized by the Circuit Court of the United States. In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of board or courts at any stage.

The act of March 3d, 1851, is a general act applying to all cases, but the act of March 8th, 1866, referring specially to the confirmation of the claim to lands in San Francisco, withdrew that claim, as it then stood, from further consideration of the courts under the provisions of the general act. It disposed of the city claim, and determined the conditions upon which it should be recognized and confirmed. The title of the city, therefore, rests upon the decree of the Circuit Court as modified by the act of Congress. The subsequent dismissal of the appeal, referred to in the case of *Townsend* v. *Greeley*,* though made upon consent of parties, necessarily followed.

The decree thus modified excepts from confirmation to the city, as we have already observed, such parcels of land as had been previously "reserved or dedicated to public uses by the United States." By the parcels thus named, reference is had to the tracts reserved by the orders of President Fillmore. One of these tracts, as we have said, contains the premises in controversy. The decree therefore settles the title to them against the plaintiff. Whoever obtained conveyances from the city, or asserted title under the

* 5 Wallace, 337.

Van Ness ordinance, whilst the claim of the city to the land thus conveyed, or to which title was thus asserted, was pending before the tribunals of the United States, necessarily took whatever they acquired subject to the final determination of the claim. Their title stood or fell with the claim, for the decree took effect by relation as of the day when the petition of the city was presented to the board of land commissioners. It is to be treated in legal effect as if entered on that day.*

It only remains to notice the objection taken to the authority of the President to make the reservations in question. The objection is twofold—first, that the lands reserved did not constitute any part of the public domain, but were the property of the city, and were not therefore the subject of appropriation, by order of the President, for public purposes; and second, if they did constitute a part of the public domain, they could only be reserved from sale and set apart for public purposes under the direct sanction of an act of Congress.

The first objection has been sufficiently answered in considering the nature of the claim of the city. It was not a claim to a tract which had been specifically defined; it was a claim only to a specific quantity, embracing, it is true, the site of the pueblo and adjoining lands, but which had yet to receive its precise limits and bounds from the officers of the government. Until this was done, the government was not precluded from setting apart and appropriating any portions of the lands claimed, which might be necessary for public uses. Until then the claim of the city was subservient to the right of the government in this respect.

On the other hand, if the lands were at the time a part of the public domain, as they must be considered to be, because they have been excluded from the lands confirmed to the city in satisfaction of the claim, it is of no consequence to the plaintiff whether or not the President possessed sufficient authority to make the reservations in question. It is enough

* Landes v. Brant, 10 Howard, 373.

that the title had not passed to the plaintiff, but remained in the United States. But further than this: from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

The authority of the President in this respect is recognized in numerous acts of Congress. Thus, in the Pre-emption Act of May 29th, 1830, it is provided that the right of pre-emption contemplated by the act shall not "extend to any land which is reserved from sale by act of Congress, or *by order of the President*, or which may have been appropriated for any purpose whatever."* Again, in the Pre-emption Act of September 4th, 1841, "Lands included in any reservation by any treaty, law, *or proclamation of the President* of the United States, or reserved for salines or for other purposes," are exempted from entry under the act.† So by the act of March 3d, 1853, providing for the survey of the public lands in California, and extending the pre-emption system to them, it is declared that all public lands in that State shall be subject to pre-emption, and offered at public sale, with certain specific exceptions, and among others "of lands appropriated under the authority of this act, or *reserved by competent authority.*"‡ The provisions in the acts of 1830 and 1841 show very clearly that by "competent authority," is meant the authority of the President, and officers acting under his direction.§

The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them. The reservations made at the same time embraced seven distinct tracts of land, and upon several of them extensive and costly fortifications and barracks and other public buildings have been erected.

* 4 Stat. at Large, 421. † 5 Id. 456. ‡ 10 Id. 246.
§ Wolcott *v.* Des Moines Co., 5 Wallace, 688.

Statement of the case.

But it is sufficient, as we have already said, that the lands remained the property of the United States, whether or not they were by sufficient authority appropriated to public uses.

JUDGMENT AFFIRMED.

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## THE VICTORY.

Before this court can entertain jurisdiction to review a judgment of the State court, it must appear that one of the questions mentioned in the twenty-fifth section of the Judiciary Act was raised in the State court, and *actually* decided by it; that is to say, the question must have received the consideration or attention of the court. It is not sufficient that this court can see that it *ought* to have been raised, and that it might have been decided.

ERROR to the Supreme Court of the State of Missouri.

The twenty-fifth section of the Judiciary Act provides that a final judgment in the highest court of a State where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision *is in favor* of such validity, may be re-examined in this court.

With this law in force, and under a statute of the State of Missouri, which authorized apparently a proceeding *in rem* against vessels for supplies furnished to them, Boylan filed a petition in one of the State courts of Missouri against the Steamboat Victory (which was made defendant to the suit), for supplies furnished in her home port at the request of her owner, and for which he claimed a lien on the vessel to the amount of $4214. The items of the account were set forth in a bill of particulars accompanying the petition, and the plaintiffs prayed for a warrant of seizure, on judgment, and for sale of the boat to satisfy their claim.

The owner of the vessel appeared and filed an answer, in which he admitted $500 of the claim to be due, and to be a lien on the boat, but denied that any other items or amounts

were due or owing by the boat, or that they were a lien thereon. Testimony was also taken which showed that the contest was about the amount due, and the date at which some of it ceased to be a lien. But there was apparently nothing in the answer, or in the testimony, or in the instructions asked or given to the jury, from which an inference could be drawn, that it was denied that supplies of the character set forth were a lien on the vessel to which they were furnished, or that the statute which gave the lien was asserted to be void, or that the jurisdiction of the court to enforce it was controverted.

The State court ordered the vessel to be sold; and this judgment having been affirmed in the Supreme Court of the State, the case was brought here as within the twenty-fifth section of the Judiciary Act above quoted, and with a view of reversing that judgment; the ground of the expected reversal being, of course, that the case was one of admiralty cognizance, and was therefore exclusively within the jurisdiction of the District Courts of the United States; and because the statute of Missouri, which authorized the proceeding in the State court, was for that reason unconstitutional.

*Mr. Wills* now moved to dismiss the writ, on the ground that the record did not show that the question mentioned in the twenty-fifth section of the Judiciary Act was presented to, or decided by, the State court.

*Mr. Dick* opposed the motion, citing the cases of *Craig* v. *The State of Missouri*,* and of *The Bridge Proprietors* v. *The Hoboken Company*,† to show that it was not necessary that it should appear by express intendment that the question was decided, and arguing that as the authority of the State court rested wholly on the State statute, the validity of the statute was of necessity a point in judgment, and of course was passed on favorably to such validity.

The question of admiralty jurisdiction, and of the consequent validity of the State statute, he argued, was therefore

* 4 Peters, 410.

† 1 Wallace, 116.

completely before this court, and he asked that this court would decide it.

Mr. Justice MILLER delivered the opinion of the court.

The question which we are asked to decide—viz., whether such a case as this is one of admiralty cognizance, and is therefore exclusively within the jurisdiction of the courts of the United States, and whether the statute of Missouri, which authorized the proceeding, is for that reason void,—is an interesting one, and if it had been raised and decided in the court from which the record comes, we would be bound to decide it here. But we do not think it is a fair inference, from that record, that the question was presented to the court or was decided by it.

It has been repeatedly held by this court, that before it can entertain jurisdiction to revise the judgment of a State court, the point which we are called upon to review must have been raised, and must have been decided adversely to the plaintiff in error. This is so well established that it would be a useless labor to cite authorities to sustain it.

It is true we have said this need not appear by express averment, but if the record shows by necessary intendment that the point was decided, it is sufficient, and the cases of *Craig* v. *The State of Missouri*, and *The Bridge Proprietors* v. *The Hoboken Company*, are cited to sustain the proposition. It is one which does not need support. It is fully conceded.

But we are of opinion that it must appear that the point mentioned in the Judiciary Act was *actually* decided in the State court, that it received the consideration of the court, and it is not sufficient, that now, on fuller examination, with the aid of counsel here, we can see that it was a point which ought to have been raised, and which might have been decided. In the case of *The Bridge Proprietors* v. *The Hoboken Company*, cited by counsel for plaintiff, the court recites with approbation the following language from the previous case of *Crowell* v. *Randell*:* "It is not sufficient to show that the question might have arisen or been applicable to the case,

* 10 Peters, 368.

unless it is further shown by the record that it did arise, and was applied by the State court to the case."

It is insisted that inasmuch as the authority of the State court rests solely on the State statute, the validity of that statute was necessarily a point in its judgment, but it would contradict the experience of all who are familiar with courts to assume that every time a court acts under a statute, the validity of the statute or the jurisdiction of the court, receives its consideration. This is rarely so, unless the question is raised by one of the parties and called to the attention of the court.

The presumption from this record is entirely the other way. The defendant in his pleading admits impliedly the jurisdiction of the court, the validity of the statute, and the existence of the lien. He only denies that the full amount claimed is due, and no other question is raised or suggested by the bill of exceptions. Nor does it appear that any other question was raised in the Supreme Court of the State than that which was considered by the inferior court. There was, therefore, no occasion for the court to consider the question raised here by counsel.

WRIT OF ERROR DISMISSED.

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## UNITED STATES *v.* HARTWELL.

1. An office is a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument, and duties.

   Accordingly, a person in the public service of the United States appointed pursuant to statute authorizing an Assistant Treasurer of the United States to appoint a *clerk*, with a salary prescribed, whose tenure of place will not be affected by the vacation of office by his superior, and whose duties (though such as his superior in office should prescribe), are continuing and permanent—is an officer within the meaning of the Sub-Treasury Act of August 6th, 1846 (9 Stat. at Large, 59), and, as such, subject to the penalties prescribed in it for the misconduct of officers.

2. The terms employed in the sixteenth section of that act to designate the persons made liable under it, are not restrained and limited to principal officers.

3. The admitted rule that penal statutes are to be strictly construed, is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature.
4. The penal sanctions of the third section of the act of June 14th, 1866, "to regulate and secure the safe-keeping of public money," &c. (14 Stat. at Large, 65), is confined to officers of banks and banking associations.

ON certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts.

The defendant was indicted in that court at Boston, for embezzlement. The indictment contained ten counts. The first three were founded upon the sixteenth section of the act of August 6th, 1846, known as the Sub-Treasury Act.* This act in its fifth section provides for the appointment of "four *officers*," to be denominated assistant treasurers, at Boston and three other places named. It had already in a third section—after referring to certain buildings, rooms and safes in New York and Boston which had by a prior act been ordered to be prepared for other persons described—enacted, that "the assistant treasurers from time to time appointed at those points, shall have the custody and care of the said rooms, vaults and safes respectively, and of all the moneys deposited within the same, and shall perform all the duties required to be performed by them in reference to the receipt, safe-keeping, transfer and disbursement of all moneys according to the provisions of this act." Sections seven and eight provide for bonds, with sufficient surety, from assistant treasurers as often as the Secretary of the Treasury may require, and in sums as large as he may deem proper.

The sixth section declares that the "Treasurer of the United States," "Treasurer of the Mint," and "all assistant treasurers," &c., &c., "and all public officers of whatever grade, be, and they are hereby, required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all public money collected by them, *or otherwise at any time placed in their pos-*

* 9 Stat. at Large, 59.

*session and custody*, till the same is ordered by the proper department or officer of the government to be transferred or paid out."

The thirteenth section provides that "the said *officers*, whose duty it is made by this act to receive, keep and disburse the public moneys, *as the fiscal agents of the government*, may be allowed any necessary additional expenses for *clerks*, fire-proof chests or vaults, or *other necessary expenses* of safe-keeping, transferring and disbursing said moneys," &c.

The sixteenth section—a long section, and the one on which the first three counts were founded—ran, in its important parts, as follows:

"That all officers and *other persons* charged by this act or any other act with the safe-keeping, transfer and disbursement of the public moneys, are hereby required to keep an accurate entry of each sum received, and of each payment or transfer; and that if any one of *the said officers* shall loan any portion of the public moneys intrusted to him for safe-keeping, every such act shall be deemed an embezzlement; and if any *officer* charged with the disbursement of public moneys shall transmit to the Treasury Department to be allowed in his favor any receipt or voucher from a creditor of the United States, without having paid to such creditor in such funds as he may have received for disbursement the full amount specified in the same, every such act shall be deemed a conversion by such *officer* to his own use of the amount specified in such voucher; and any *officer or agent* of the United States, *and all persons advising or participating in such act*, being convicted thereof before any court of competent jurisdiction, shall be sentenced to imprisonment for a term not less than six months, nor more than ten years, and to a fine equal to the amount of the money so embezzled. And upon the trial of any indictment against any person for embezzling public money under the provisions of this act, it shall be sufficient to produce a transcript, &c., as required in civil cases under the provisions of the act entitled, 'An act to provide,' &c., approved March 3d, 1797; and the provisions of this act shall be so construed as to apply *to all persons charged with the safe-keeping, transfer or disbursement of public money*, whether such persons be indicted as receivers or depositaries of the same," &c.

So far as respects the act of 1846, on which the first three counts were founded.

The act of 1866* (June 14th), upon the third section of which the remaining seven counts of the indictment were founded, runs, in that section, thus:

"If any banker, broker, or any person, not an authorized depositary of public moneys, shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate or apply any portion of the public money for any purpose not prescribed by law, or shall counsel, aid or abet any disbursing officer or collector of internal revenue or other agent of the United States in so doing, every such act shall be deemed and adjudged an embezzlement of the money so deposited, loaned, transferred, used, converted, appropriated, or applied; [*and any president, cashier, teller, director, or other officer of any bank or banking association who shall violate any of the provisions of this act shall be deemed and adjudged guilty of embezzlement of public money,*] and punished as provided in section two of this act."

It was admitted that the defendant was not a president or other officer of a bank.

The counts upon the act of 1846 alleged that the defendant, being *an officer* of the United States, to wit, *a clerk* in the office of the assistant treasurer of the United States, at Boston, appointed by the assistant treasurer, with the approbation of the Secretary of the Treasury, and *as such charged with the safe-keeping of the public moneys* of the United States, did loan a large amount of said moneys with the safe-keeping whereof he was intrusted in his capacity aforesaid. The names of the borrowers, and the amount and description of the moneys loaned, were set forth.

The succeeding counts—those namely on the act of 1866—

* 14 Stat. at Large, 65.

alleged that the defendant, being a person, not an authorized depositary of the public moneys of the United States, to wit, *a clerk* in *the office* of the assistant treasurer of the United States, at Boston, appointed by him, with the approbation of the Secretary of the Treasury, *having the care and subject to the duty to keep safely the public moneys of the United States*, did knowingly and unlawfully appropriate and apply another portion of said public moneys, of which he had the care, and was subject to the duty safely to keep as aforesaid, for a purpose not prescribed by law, to wit, did loan the same. The particulars with reference to the loans were given as in the preceding counts.

The indictment averred the appointment of the defendant under the General Appropriation Act of July 23d, 1866, which authorized the assistant treasurer at Boston, with the approbation of the Secretary of the Treasury, to appoint a *clerk* at a salary of $2500.

The testimony being closed, the opinions of the judges were opposed upon the points:

(1) Whether the defendant was liable to indictment under the sixteenth section of the act of August 6th, 1846; and

(2) Whether there is any offence charged in the last seven counts under the third section of the act of June 14th, 1866, of which the court had jurisdiction.

*Mr. Stanbery, A. G., and Mr. Ashton, special counsel for the United States:*

1. *As to the first question certified.* No doubt the act of 1846 is applicable to officers alone, or to those charged with safe-keeping, transfer or disbursement of the public moneys. But the clerkship, in this case, is clearly an office. The duties are not temporary, but permanent. The person who fills the place does not act under contract, but under official obligation, and the office remains although the incumbent may die or resign. He does not stand in the relation of a deputy with a tenure of office depending on the principal who appointed him; but he remains in office notwithstanding his principal may retire. It is not possible to hold that

such a clerkship is not an office, or that the incumbent is not an officer, unless it be held that he has not been legally clothed with the official duties, that he has not been legally appointed to such office.* The statute which provides for the office, authorizes the assistant treasurer to appoint to the office with the approbation of the Secretary of the Treasury.

2. *As to the second question.* Of course, if such a construction is put upon the third section of the act of June 14th, 1866 (on which the question arises), as limits its operation to bank officers, then the question certified must be answered in the negative. Otherwise, it must be answered in the affirmative. The section is very loosely drawn, and, as to grammatical construction, is subject to criticism. The confusion arises from the awkward introduction of a clause near the end of it.† If we read the section without that clause, or read it parenthetically, there will be no confusion. But this is mere verbal criticism. When we inquire what is the intent of this section; whether that intent is merely to punish bank officers, or to punish them *and* a larger class besides, there can be no difficulty in giving the answer.

*Messrs. H. W. Paine and R. M. Morse, contra:*

1. *Was the defendant an* officer *or* person "*charged with the safe-keeping of the public money*" *within the intent of the act of* 1846? We submit that he was not.

Penal statutes are confessedly to be construed with strictness, and from an examination of all the sections of the statute of 1846, it appears that the assistant treasurer alone is designated as an "officer," while watchmen, messengers, *clerks* and fire-proof safes are classed together among the necessary expenses, which the assistant treasurer, with the approval of the Secretary of the Treasury, is authorized to incur. The defendant was a "clerk." No specific duties

* United States *v.* Maurice, 2 Brockenbrough, 103; Same *v.* Sears, 1 Gallison, 221; Same *v.* Bachelder, 2 Id. 15; Sanford *v.* Boyd, 2 Cranch's Circuit Court, 78; Ex parte Smith, Id. 693; Jackson *v.* Healy, 20 Johnson, 495; Vaughn *v.* English, 8 California, 39.

† Italicized, and within brackets, in the statement of the case.—REP.

are imposed upon the clerk; he gives no bond to the government; he is merely a subordinate and assistant to the officer, and performs such service as he directs. The terms of the sixteenth section thus apply to principal officers alone; not to subordinates appointed by them. The cases cited on the other side, if applicable, are mostly *nisi prius* rulings; no "authority" with this court. *United States* v. *Hutchinson** is directly opposed to them.

2. *As to the second question.* Is any penalty provided in the act of 1866 for the offence with which the defendant is charged, in the last seven counts of the indictment? We think that there is not, and therefore that the court has no jurisdiction of the case. *If*, indeed, the act were changed as Mr. Attorney would alter it, parts left out or read parenthetically, the indictment might possibly be sustained. But this court has recently said† that it cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. It is unnecessary to speculate on the reasons which led Congress to omit to affix a penalty to the acts charged upon the defendant. It may have been that they believed that there was some general statute punishing embezzlement, or that it was punishable at common law, and specified the particular penalties in the act for the particularly serious cases of embezzlement therein stated.

Whatever may have been the reason, it is clear upon the well-established principles of construction, that they omitted to affix a penalty.

Mr. Justice SWAYNE delivered the opinion of the court.

This case comes before us upon a certificate of division in opinion of the judges of the Circuit Court of the United States for the District of Massachusetts.

As disclosed in the record the case is as follows:

The defendant was indicted for embezzlement. The in-

* District Court, Eastern District of Pennsylvania, 7 Pennsylvania Law Journal, June, 1848, p. 365.

† License Tax Cases, 5 Wallace, 469.

dictment contains ten counts. The first three are founded upon the sixteenth section of the act of August 6th, 1846, the remaining seven upon the third section of the act of June 14th, 1866.

The counts upon the act of 1846 allege that the defendant, being an officer of the United States, to wit, a clerk in the office of the assistant treasurer of the United States, at Boston, appointed by the assistant treasurer with the approbation of the Secretary of the Treasury, and as such charged with the safe-keeping of the public moneys of the United States, did loan a large amount of said moneys, with the safe-keeping whereof he was intrusted in his capacity aforesaid. The names of the borrowers, and the amount and description of the moneys loaned, are set forth.

The succeeding counts allege that the defendant, being a person, not an authorized depositary of the public moneys of the United States, to wit, a clerk in the office of the assistant treasurer of the United States, at Boston, appointed by him with the approbation of the Secretary of the Treasury, having the care and subject to the duty, to keep safely the public moneys of the United States, did knowingly and unlawfully appropriate and apply another portion of said public moneys, of which he had the care, and was subject to the duty, safely to keep as aforesaid, for a purpose not prescribed by law, to wit, did loan the same. The particulars with reference to the loans are given as in the preceding counts.

The testimony being closed, the opinions of the judges were opposed upon the points:

1. Whether the defendant was liable to indictment under the sixteenth section of the act of August 6th, 1846; and

2. Whether there is any offence charged in the last seven counts under the third section of the act of June 14th, 1866, of which the court had jurisdiction.

The section referred to in the act of 1846 describes in three places the persons intended to be brought within its scope. The language used in that connection is:

"All officers and other persons charged by this act, or any

other act, with the safe-keeping, transfer and disbursement of the public money, are hereby required," &c.

"If any officer charged with the disbursement of the public moneys shall accept or receive," &c.

"The provisions of this act shall be so construed as to apply to all persons charged with the safe-keeping, transfer or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same."

Was the defendant an *officer* or *person* "charged with the safe-keeping of the public money" within the meaning of the act? We think he was both.

He was a public officer. The General Appropriation Act of July 23d, 1866,* authorized the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks, who were to receive, respectively, the salaries thereby prescribed. The indictment avers the appointment of the defendant in the manner provided in the act.

An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.†

The defendant was appointed by the head of a depart-

* 14 Stat. at Large, 200.

† United States *v* Maurice, 2 Brockenbrough, 103; Jackson *v.* Healy, 20 Johnson, 493; Vaughn *v.* English, 8 California, 39; Sanford *v.* Boyd, 2 Cranch's Circuit Court, 78; Ex parte Smith, Id. 693.

ment within the meaning of the constitutional provision upon the subject of the appointing power.*

The sixth section of the act of 1846, after naming certain public officers specifically, proceeds:

"And all public officers, of whatever grade, be, and they are hereby required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all public money collected by them, *or otherwise at any time placed in their possession and custody*, till the same is ordered by the proper department or officer of the government to be transferred or paid out."

This clearly embraces the class of subordinate officers to which the defendant belonged.

We are also of the opinion that the act prescribes punishment for the offence with which the defendant is charged.

The first part of the sixteenth section declares, that if any officer to whom it applies shall convert to his own use, loan, deposit in bank, or exchange for other funds, except as permitted by the act, any of the public money intrusted to him, "*every such act* shall be deemed and adjudged to be an embezzlement," and is made a felony.

It next enacts that if any officer charged with the disbursement of public moneys shall take a false voucher, "every such act shall be a conversion to his own use of the amount specified" in such voucher.

This clause then follows: "And any officer or agent of the United States, *and all persons participating in such act*, being convicted thereof before any court of the United States of competent jurisdiction, shall be sentenced to imprisonment for a term of not less than six months nor more than ten years, and to a fine equal to the amount of the money embezzled."

This clause is to be taken distributively. It applies, and was clearly intended to apply, to all the acts of embezzlement specified in the section—to those relating to moneys, in the first category, as well as to those relating to vouchers

* Const., Art. II, § 2.

in the second. The context of the section and the language of the clause both sustain this view of the subject. If this be not the proper construction, then the consequence would follow that in this elaborate section, obviously intended to cover the whole ground of frauds by receivers, custodians, and disbursers of the public moneys, of every grade of office, punishment is provided for only one of the offences which the act designates. There is no principle, which, properly applied, requires or would warrant such a conclusion.

It is urged that the terms used in the sixteenth section to designate the persons made liable under it, are restrained and limited to principal officers, by requirements and provisions which are applicable to them, and are inapplicable to all those holding subordinate places under them. To this there are several answers. We think the only effect of these provisions is to operate, according to their terms, where such higher officers are concerned. They are without effect as to the subordinates, to whom they are *inapplicable*. They do not take offenders of that class out of the penal and other provisions of the statute, which must be conceded otherwise to embrace them. The broad language of the provision in the preceding sixth section, which has been referred to, is coupled with no qualification whatever, expressed or implied.

If the subordinates are not within the act, there is no provision in the laws of the United States for their punishment in such cases. So far as those laws are concerned they may commit any of the crimes specified with impunity. We think it clear that it was not the intention of Congress to leave an omission so wide and important in the act, and our minds have been brought satisfactorily to the conclusion that they have not done so.

We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal,

as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.*

We think we have not transcended these principles in coming to the conclusions we have announced.

The determination of the second question certified depends upon the construction of the third section of the act to which it refers.

That section provides, "that if any banker, broker, or other person not an authorized depositary of the public moneys," shall do either of the acts therein specified, every such act shall be held to be an embezzlement.

* United States *v.* Wiltberger, 5 Wheaton, 96; Same *v.* Morris, 14 Peters, 475; Same *v.* Winn, 3 Sumner, 211; 1 Bishop's Criminal Law, § 123; Bacon's Abridgment, tit. Statute I.

The penal sanction with which the section concludes is as follows: "And any president, cashier, teller, director, or other officer of any bank or banking association, who shall violate any of the provisions of this act, shall be deemed and adjudged guilty of an embezzlement of public money, and punished as provided in section two of this act."

This clause is limited in its terms to the officers named in it. There is nothing which extends it beyond them. It cannot, by construction, be made to include any others. It is confined to officers of banks and banking associations. The defendant is not brought within the act by the averments contained in the counts of the indictment, which are founded upon it. They describe him only as a clerk in the office of the assistant treasurer, at Boston. As such, the act does not affect him, and the court has no jurisdiction of the offences charged. These counts are, therefore, fatally defective.

The first point certified up will be answered in the affirmative and the second in the negative.

ANSWERS ACCORDINGLY.

Mr. Justice MILLER, dissenting. Mr. Justice Grier, Mr. Justice Field, and myself, being unable to concur with the majority of the court in the answer given to the first of the questions certified to us, I proceed to state the reasons for our dissent.

The question is thus stated in the certificate from the Circuit Court: Is the defendant liable to indictment under the sixteenth section of the act of Congress of August 6th, 1846?

The statute here referred to is that commonly known as the Sub-Treasury Act, establishing a system for the safe-keeping, transfer and disbursement of the public moneys. The sixteenth section commences by providing, "that all officers and other persons charged by this act, or by any other act, with the safe-keeping, transfer and disbursement of the public moneys, other than those connected with the Post-office Department, are hereby required to keep an accurate entry of each sum received, and of each payment or trans-

fer," and certain uses of those moneys by such officers are then defined, each of which shall constitute an act of embezzlement, and shall be a felony. It is then declared that when any officer shall pay out other funds than such as he has received, such payment shall be held to be a conversion to his own use of the amount specified in the receipt or voucher which he may take at the time. Then follows this language: "And any officer or agent of the United States, and all persons advising or participating in such act, being convicted thereof before any court of competent jurisdiction, shall be sentenced to imprisonment for a term not less than six months nor more than ten years, and to a fine equal to the amount of money so embezzled."

What we have here attempted to state is all contained in a single sentence, very loosely drawn, leaving it extremely doubtful whether the punishment prescribed in the words last quoted is intended to apply to any other act than the conversion mentioned in the clause just preceding them. There are also other provisions in the same section which we will notice hereafter; but the first inquiry that arises is, whether the defendant stands in such relation to the custody of the public moneys that he is liable to be punished under this statute.

It is conceded by the Attorney-General, we think very properly, that the act is only applicable to officers or other persons charged by law with the safe-keeping, transfer or disbursement of the public moneys. It may be also conceded that the defendant's position as clerk is an office provided for by the statute, the salary of which is also fixed by a subsequent act of Congress. The section of the act of 1846, which we are now considering, in describing the class of persons who may become guilty of embezzlement, speaks of them as "officers and other persons charged by this act, or any other act, with the safe-keeping, transfer and disbursement of the public moneys." Admitting that the words "safe-keeping, transfer, and disbursement," are to be taken distributively, and that one charged with either of those duties may become liable under the statute, the question

still remains, Is a clerk in the office of the assistant treasurer, charged by this act, or any other act of Congress, with either of those duties? It is not sufficient that he may, by order of the assistant treasurer, by whom he is appointed, be placed in such a position that it is his moral duty to safely keep or to disburse the public money. If reliance is placed upon the language just cited, this duty must be imposed on him by some act of Congress.

This unavoidable construction of the act is not a mere technical adherence to its verbiage, but is founded in obvious consistency with the other provisions of the statute.

The clerks in the office of the assistant treasurer are, by the terms of this act, appointed by him alone, although by an act passed long since, and which can have no effect on the construction of this one, the assent of the Secretary of the Treasury is required. But they still derive their appointment from the assistant treasurer, and are removable at his pleasure. Their duties are prescribed by him, and he assigns each clerk to the performance of such functions as he may think proper. No act of Congress, nor any other law, confers upon these clerks any power or control over the public money. If they exercise such control, they get it from the assistant treasurer alone. They give no bond to the government, but the assistant treasurer may require them to indemnify him by bond, as is the rule in many large establishments. Their direct responsibility is to him.

On the other hand, the assistant treasurer is the person, and the only person in his office, charged by act of Congress with the custody or control of the public moneys. The third section of the act, after describing the buildings, rooms and safes in New York and Boston, in which the money is to be kept, says that "the assistant treasurers from time to time appointed at those points, shall have the custody and care of the said rooms, vaults and safes respectively, and of all the moneys deposited within the same, and shall perform all the duties required to be performed by them in reference to the receipt, safe-keeping, transfer and disbursement of all moneys according to the provisions of this act." To secure

the performance of the duties thus imposed, sections seven and eight provide for bonds, with sufficient surety, as often as the Secretary of the Treasury may require, and in sums as large as he may deem proper.

The assistant treasurers are not, however, the only officers charged by the act with the safe-keeping, transfer or disbursement of the public moneys, and we are referred to section six for an enumeration of the classes of persons thus charged. By that section it is enacted "that the Treasurer of the United States, the treasurer of the mint of the United States, the treasurers and those acting as such of the various branch mints, all collectors of customs, all surveyors of customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters, and all public officers of whatever character, be, and they are hereby, required to keep safely, without loaning, using, or depositing in banks, or exchanging for other funds than as allowed by this act, all the public moneys collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered by the proper department or officer of the government to be transferred or paid out."

All the classes of persons here *specifically* described are officers who are charged by some act of Congress with the duty of collecting, receiving or holding public money. Was the general phrase, "all public officers of whatever character," intended to include only other public officers charged by law with the custody of public money, or was it intended to include any clerk, or other employé of such officer, who might, by his permission or order, have the occasional custody of the money under that officer's supervision or control?

We think the latter would be a loose and unjustifiable construction, at variance with the spirit of the context, and with the rules of construing penal statutes. The word public, used here as qualifying the word officer, is not without significance, as indicating officers whose duties are fixed by public law and not by the individual discretion of their employers. Undoubtedly there are other public officers, not in

the list of those specifically mentioned in this section, who by law are charged with the collection, holding and paying out of public moneys. Among those which occur readily to the mind are marshals, district attorneys, commissaries, quartermasters, paymasters. Many others of the same class could probably be enumerated. It seems to us that the phrase is used to include all such officers. Persons whose duties are prescribed by statute, who are directly and primarily liable to the government, who give bond for the safety of the money in their hands, and not to subordinate clerks whom they may employ.

In fact, looking to the general tenor of the act as well as to its most minute provisions, we are impressed with the conviction that they apply exclusively to the legal custodians of the public money and not to their clerks. In a clause of this sixteenth section, intended to include in the most sweeping terms all who are liable to its denunciations, they are described as "all who are charged with the safe-keeping, transfer and disbursement of the public money, whether such person be indicted as receiver or depositary." The Treasurer of the United States, the assistant treasurers, and the treasurers of the mint and branch mints, are by the act called depositaries. All the other officers so charged are persons who receive or collect public money, but not being authorized to hold it, pay over to these depositaries. It is strongly implied by this section that to be liable to indictment the person must belong to one or the other of these classes. All those mentioned in the statute as coming within its provision are required to keep and transmit to the proper department correct accounts. A false voucher is made a felony. A treasury transcript showing a balance against such officer or agent is made evidence of money, for which he is liable. A draft on one of them not paid on presentation is *prima facie* evidence of embezzlement. None of these provisions can apply to clerks, who have no such accounts with the government, against whom no treasury balance can be shown, who have no vouchers to return, and against whom no drafts are ever drawn.

Statement of the case.

We think the defendant is not liable to indictment under that statute.

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## STARK *v.* STARRS.

1. Under the statute of Oregon which provides, that any person *in possession* of real property may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest, a bill will not lie on a possession without some right, legal or equitable, first shown.
2. Under the act of Congress, of September 27th, 1850, "to create the office of surveyor-general of the public lands of Oregon" (the act commonly known as "The Oregon Donation Act," and stated fully in the case), the right of the claimant to a patent became perfected when the certificate of the surveyor-general, and accompanying proofs, were received by the commissioner of the general land office, and he found no valid objection thereto.
3. The act of August 14th, 1848, organizing the Territory of Oregon, which declared that all laws of the United States should be in force in the Territory, "*so far as the same, or any provision thereof, may be applicable*," did not extend over the country any portion either of the general Pre-emption Act of September, 1841, or of the act of May 23d, 1844, commonly known as the "Town Site Act."
4. The right to a patent once vested is equivalent, as respects the government dealing with the public lands, to a patent issued. When issued, the patent, so far as may be necessary to cut off intervening claimants, relates back to the inception of the right of the patentee.
5. A patent issued to the corporate authorities of the city of Portland, in Oregon, in December, 1860, upon an entry made under the Town Site Act of May 23d, 1844, passed no title to the land covered by the donation claim of a person whose right to a patent was perfected previously to such entry, and whose claim was surveyed previously to the act of July 17th, 1854; by which the Town Site Act was extended, though with qualifications, to Oregon Territory.

ERROR to the Supreme Court of Oregon.

A. and L. Starr, asserting themselves to be owners in possession of certain parcels of land *in the city of Portland*, Oregon, and derived by title from that city, filed a bill in equity in one of the State courts of Oregon, to quiet their title to the land against an ownership set up to it by one Stark, and to have a patent for it which had issued to Stark surren-

dered. The bill was founded on a statute of Oregon, which provides that "any person in possession of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest."

The title which the bill asserted to be void, and which it sought to have declared so, arose as follows:

Previously to the treaty with Great Britain, of June 15th, 1846, by which the boundary line between the possessions of that country and the United States, west of the Rocky Mountains, was established, the region known as Oregon was claimed by both countries; and the emigrants there from the United States and from Great Britain held joint possession of the country under the treaty between the two nations, of October 20th, 1818, which was continued in force by the convention of August 6th, 1827.

In 1845, the inhabitants of this Territory established a provisional government for purposes of mutual protection, and to secure peace and prosperity among themselves; and they adopted laws and regulations for their government until such time as the United States should extend their jurisdiction over them.

Under the provisional government each settler was entitled to claim 640 acres of land, upon complying with certain conditions of improvement, &c.

In 1848, Congress established the territorial government of Oregon.* The fourteenth section of the act which did this, recognized and continued in force the laws adopted by the provisional government, and declared that the laws of the United States were extended over the Territory, "*so far as the same, or any provision thereof, may be applicable;*" but all laws granting or affecting lands were declared to be void. And Congress itself soon afterwards passed an act on the subject of titles. The act of September 27th, 1850, commonly called the Donation Act of Oregon,† provided (§ 4), that there should be granted to settlers or occupants of the

* 9 Stat. at Large, 323.

† 9 Id. 496.

public lands, then residing in the said Territory, or who should become residents thereof on or before the first day of December, 1850, and who should have resided upon and cultivated the same for four consecutive years, and should otherwise conform to the provisions of the act, one-half section, or 320 acres of land, if a single man, and if married, or becoming married within one year from December 1st, 1850, one section, or 640 acres; *provided*, however, the donation should embrace the land actually occupied and cultivated by the settler on it.

The sixth section of this act required that the settler should notify to the surveyor-general the tract claimed under the law within three months after the survey had been made; and the seventh section provided, that within twelve months after the surveys had been made each person claiming a donation right under the act should *prove to the satisfaction of the surveyor-general*, the commencement of the settlement and cultivation required; and after the expiration of the four years from the date of such settlement, should prove, *in like manner*, by two disinterested witnesses, the continued residence and cultivation required by the fourth section of this act. The act went on:

"Upon such proof being made, the surveyor-general, or other officer appointed by law for that purpose, shall issue certificates, under such regulations as may be prescribed by the commissioner of the general land office, setting forth the facts in the case, and specifying the land. . . And the surveyor-general shall return the proof so taken, to the office of the commissioner of the general land office, and if the said commissioner shall find no valid objection thereto, patents shall issue for the land, according to the certificates aforesaid, upon the surrender thereof."

In professed accordance with these provisions, and the regulations made by the general land office, the defendant, in May, 1852, within three months after the survey of the land had been made, gave to the surveyor-general notice of the tract claimed by him, and within twelve months after the

survey proved, *to the satisfaction of the surveyor-general*, that the settlement and cultivation had been commenced on the 1st of September, 1849, and afterwards on the 10th of September, 1853, proved, in like manner, by two disinterested witnesses, the fact of his continued residence and cultivation for four years, which had previously expired; this having been done in the form and manner usual in the department.

In September, 1853, the surveyor-general issued to the party a donation certificate, reciting the claim of a donation right made by him to a tract of land described; that proof had been made to his satisfaction that the settlement was commenced on the 1st of September, 1849, four years previous to the date thereof, and that the fact of his continued residence and cultivation since that period had been established by two disinterested witnesses; and he forwarded the certificate to the commissioner of the general land office, accompanied by the proof of the facts recited, in order that a patent might issue to the claimant for the tract described, provided he found no valid objection thereto. No objection was found by the commissioner except a supposed application to the tract in question of an act of Congress of May 23d, 1844, commonly known as the Town Site Act, the nature of which will appear further on in stating the title on the other side, and which was relied on as in part making that title. The evidence of settlement, &c., was by him considered ample, and the certificate satisfactory; and a patent was issued thereon to Stark, the defendant.

Such was the title—a documentary one—sought to be put aside.

The documentary title of the Starrs, alleged by their bill to be superior to it, will be stated directly. Their bill not only, however, set up title in themselves, alleging it superior to the documentary title as presented by the other side, but it alleged that Stark had not made in point of fact any such settlement and cultivation as he had brought persons to swear to before the commissioner, and that the certificate on which he got this patent, was false, and his patent

consequently void. This was a question of fact on which evidence was taken. The answer denied the allegations thus made.

The documentary case of the Starrs was thus:

An act of Congress passed September 4th, 1841,* provides that every person who shall have made a settlement on the public lands "which have been or shall have been *surveyed* prior thereto," shall be authorized to enter any number of acres, not exceeding one hundred and sixty, upon paying the minimum price.

An act of May 23d, 1844, entitled "An act for the relief of the citizens of *towns* upon the lands of the United States under certain circumstances"† (the act already mentioned as the Town Site Act), provides as follows:

"Whenever any portion of the *surveyed* public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities . . . to enter at the proper land office and at the minimum price, the land so settled and occupied," &c.

On the 17th of July, 1854, Congress enacted that donations *thereafter to be surveyed in Oregon Territory*, claimed under the Donation Act of September 27th, 1850, should in no case include a town site or lands settled upon for purposes of business or trade and not for agriculture, and that all legal subdivisions included in whole or in part in such town sites or settled upon for purposes of business or trade and not for agriculture, should be subject to the operations of the Town Site Act of May 23d, 1844; whether such settlements were made before or after the surveys.

On the 1st of February, 1858, and while the claim of Stark was pending before the commissioner, the corporate authorities of the city of Portland made an entry under the Town Site Act of May 23d, 1844, of lands within the city limits to the extent of $307\frac{49}{100}$ acres, which included the premises in

* § 10; 5 Stat. at Large, 455.

† 5 Id. 657.

controversy, in trust for the several use and benefit of the occupants thereof, and presented to the commissioner a certificate of the register of the land office, in Oregon, of their having made full payment for the same. The commissioner accordingly issued a patent to *them*.

The patent to the city authorities was dated 7th December, 1860; that to Stark the day following; it having been intended that they should be issued on the same day. Each contained reciprocal reservations in favor of the rights conveyed by the other.

The court in which the bill was filed, granted the relief prayed for, and the Supreme Court of the State of Oregon having affirmed their decree, the case was now here under the twenty-fifth section of the Judiciary Act.

*Messrs. M. Blair and F. A. Dick, for Stark, plaintiff in error:*

1. The patent to the city was absolutely void—the act of 1844, under which it issued, not being in force in Oregon until after July 17th, 1854. The act of 1844 is but amendatory of the pre-emption law of 1841, which contains the provision upon which the act of 1844 operates. It applies only to *surveyed* lands, which are excepted from operation of the pre-emption law. But the pre-emption law was not in force in Oregon in 1850. There were not only no *surveyed* lands there at that date, but Congress had, in the donation law of 1850, made more liberal provision for settlers than even by the pre-emption act. The law of 1844 was inapplicable, from the condition of things in Oregon when the act of 1848, establishing the territorial government, or when the donation law of 1850, was passed.

2. If the Town Site Act was not in force in Oregon in 1853, the patent to the authorities of Portland is a nullity, and the defendants in error have no title of any description of which a court of justice can take cognizance. Mere possession of public land will not enable the party to maintain a suit against any one, especially not against persons holding possession under title derived from the proper officers of the government. The patent to Stark and the regularity of pro-

ceedings preliminary to it cannot, therefore, be here called in question.*

3. In this view we need not discuss the issue of fact.

*Mr. Wills, contra:*

1. This is a suit *in equity* to quiet title, brought under a statute which allows any person *in possession* to maintain such a suit. Under any circumstances of *title*, the Starrs being in possession may maintain it.

2. Was the Town Site Act of 1844 in force in Oregon prior to the enactment of the donation law of 1850, by virtue of the fourteenth section of the act of August 14th, 1848, organizing the Territory of Oregon?

Unless the land laws of the United States, including the Town Site Act, were extended by the act to the Territory of Oregon, we have this anomaly, that by this law all land titles then existing were made null, and in a law organizing that Territory and providing for its settlement no means were provided whereby incipient title to lands could be acquired from the United States, their sole proprietor. The land laws of the United States in themselves, were as applicable to Oregon as to any other Territory of the United States; and that they were *needed* is demonstrated by the fact, that no other means was provided whereby title to land could be acquired in the Territory.

3. But if the Town Site Act was not extended to Oregon before the passage of the act of July 17th, 1854, certainly it was in force *after* the date of that law. Both patents were issued *after* the passage of that act, and at a time when the operation of the Town Site Act in that Territory cannot be disputed. If, then, Stark had not complied with the terms of the Donation Act, under which his patent was issued, it was void as against the prior patent issued to the city of Portland, under the act of 1844, at a time when the latter

* Burgess *v.* Gray, 16 Howard, 65; Wilcox *v.* Jackson, 13 Peters, 511; Miller *v.* Kerr, 7 Wheaton, 1; Patterson *v.* Winn, 11 Id. 384; Polk's Lessee *v.* Wendell, 9 Cranch, 99; Bodley *v.* Taylor, 5 Id. 191; Easton *v.* Salisbury, 21 Howard, 426.

act was in force. This leads to the question of fact in the case. Our right in an equity proceeding, to go behind the patent and make the inquiry, is settled by numerous cases, especially by *Garland* v. *Wynn*,* and *Lindsey* v. *Hawes*.†

[The counsel then argued the point of fact on the evidence; a matter, however, which the court did not reach in its opinion, the case being decided on the other ground.]

Mr. Justice FIELD delivered the opinion of the court.

This is a suit in equity to quiet the title of the plaintiff to certain parcels of land situated in the city of Portland, in the State of Oregon. It is founded upon a statute of that State which provides that "any person in possession of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest." This statute confers a jurisdiction beyond that ordinarily exercised by courts of equity, to afford relief in the quieting of title and possession of real property. By the ordinary jurisdiction of those courts a suit would not lie for that purpose, unless the possession of the plaintiff had been previously disturbed by legal proceedings on the part of the defendant, and the right of the plaintiff had been sustained by successive judgments in his favor.‡

The equity asserted in such cases had its origin in the prolonged litigation which the action of ejectment permitted. That action being founded upon a fictitious demise between fictitious parties, a recovery therein constituted no bar to a second similar action, or to any number of similar actions for the same premises. With slight changes in these fictions a new action might be instituted and conducted as though no previous action had ever been commenced. Thus the party in possession, though successful in every case, might

* 20 Howard, 6.

† 2 Black, 554; and see State of Minnesota *v.* Bachelder, 1 Wallace, 111, 115.

‡ Shepley *v.* Rangely, Davies, 242; Devonsher *v.* Newenham, 2 Schoales & Lefroy, 208; Curtis *v.* Sutter, 15 California, 257.

be harassed if not ruined by the continued litigation. To prevent such litigation, after one or more trials, and to secure peace to the party in possession, courts of equity interposed upon proper application and terminated the controversy.

By the statute in question it is unnecessary in order to obtain this interposition of equity for the party in possession to delay his suit until his possession has been disturbed by legal proceedings, and judgment in those proceedings has passed in his favor. It is sufficient that a party out of possession claims an estate or interest in the property adverse to him. He can then at once commence his suit, and require the nature and character of such adverse estate or interest to be set forth and subjected to judicial investigation and determination, and that the right of possession as between him and the claimant shall be forever quieted.

We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that "any person in possession, by himself or his tenant, may maintain" the suit. His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest.

In this case the plaintiff asserts title to the premises in dispute under a patent of the United States, bearing date on the 7th day of December, 1860, purporting to be issued to the corporate authorities of the city of Portland, under the Town Site Act of Congress of May 23d, 1844, entitled "An act for the relief of the citizens of towns upon the lands of the United States under certain circumstances;"* and the defendant claims title to the premises under a patent of the United States, bearing date on the 8th day of December, 1860, purporting to be issued to him under the Donation Act

* 5 Stat. at Large, 657

of September 27th, 1850, entitled "An act to create the office of surveyor-general of the public lands of Oregon, and to provide for the survey and to make donations to the settlers of the said public lands."*

By the fourth section of this Donation Act, a grant was made to every white settler or occupant of public land in Oregon, above the age of eighteen years—who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or should make such declaration on or before the 1st day of December, 1851, and who was at the time a resident of the territory, or might become a resident on or before the 1st of December, 1850, and who should reside upon and cultivate the land for four consecutive years, and otherwise conform to the provisions of the act—of three hundred and twenty acres of land, if a single man, or if a married man, or if he should become married within a year from the 1st of said December, then six hundred and forty acres, one-half to himself and the other half to his wife, to be held by her in her own right; the donation in all cases to embrace the land actually occupied and cultivated by the settler.

By the sixth section, the settler was required, within three months after the survey of the land was made, to notify to the surveyor-general of the United States the tract claimed by him under the act. By the seventh section any person claiming a donation right was required, within twelve months after the survey was made, or where the survey was made before the settlement, then within that period after the settlement commenced, "to prove to the satisfaction of the surveyor-general," or of such other officer as might be appointed by law for that purpose, the commencement of the settlement and cultivation required by the act, and after the expiration of four years from the date of such settlement, to prove in like manner, by two disinterested witnesses, the continued residence and cultivation required by the fourth section. And the act declared that upon such proof being made the

* 9 Stat. at Large, 496.

surveyor-general, or other officer appointed by law for that purpose, should issue certificates, under such rules and regulations as might be prescribed by the commissioner of the general land office, setting forth the facts and specifying the land to which the parties were entitled; and that the surveyor-general should return the proof thus taken to the office of the commissioner of the general land office, and if the commissioner should find no valid objection thereto, patents should issue for the land according to the certificates, upon their surrender.

In pursuance of these provisions, and the regulations made by the general land office to carry the act into effect, the defendant, in May, 1852, within three months after the survey of the land had been made, gave to the surveyor-general notice of the tract claimed by him, and within twelve months after the survey proved, to the satisfaction of the surveyor-general, that the settlement and cultivation had been commenced on the 1st of September, 1849, and afterwards on the 10th of September, 1853, proved by two disinterested witnesses the fact of his continued residence upon and cultivation of the same for four consecutive years, which had then expired.

On the completion of this latter proof, on the 10th of September, 1853, the surveyor-general issued the required certificate, reciting therein the claim of a donation right made by Stark to a certain described tract of land; that proof had been made to his satisfaction that the settlement of Stark was commenced on the 1st of September, 1849, four years previous to the date thereof, and that the fact of his continued residence and cultivation since that period had been established by two disinterested witnesses; and he forwarded the certificate to the commissioner of the general land office, accompanied by the proof of the facts recited, in order that a patent might issue to the claimant for the tract described, if he found no valid objection thereto. No objection was found by him except such as arose from the supposed application to the tract in question of the Town Site Act of May 23d, 1844, which we shall presently examine. The evidence was con-

sidered ample and the certificate satisfactory; and on the 8th of December, 1860, a patent was issued thereon to the defendant.

At the outset, however, the commissioner objected to the issue of this patent upon the ground that the land was brought under the operation of the Town Site Act by the organic law of August 14th, 1848, establishing the territorial government of Oregon, and was not subject to disposition under the Donation Act of 1850. And whilst the claim of Stark for a patent was pending before him, the corporate authorities of the city of Portland made an entry of the lands within the city limits to the extent of three hundred and seven acres and forty-nine hundredths of an acre, which included the premises in controversy, in trust for the several use and benefit of the occupants thereof, and presented to the commissioner a certificate of the register of the land office, in Oregon, of their having made full payment for the same. The commissioner accordingly issued a patent to them bearing date on the 7th of December, 1860, reserving, however, from its operation, any valid claims which might exist in virtue of the several donations to Stark and others.

The patent to Stark bearing date on the following day contains a reservation of a similar character in favor of the city of Portland. It grants the land subject to such rights as might exist in virtue of the entry by the city.

It was the intention of the commissioner of the general land office, and it was so directed by him, that the two patents should bear even date and be issued simultaneously. The omission to comply with his direction in this particular is, however, immaterial, for if the Town Site Act was not in force in Oregon before the right of Stark to a patent of his donation claim became perfected, the reservation of the patent was inoperative and void. That right became perfected when the certificate of the surveyor-general and accompanying proofs were received by the commissioner of the general land office, and he found no valid objection to them. That is to say, if the Donation Act of 1850 was applicable to the lands, his right to a patent became perfect

when the certificate of the surveyor and accompanying proof showed, in the judgment of the commissioner, a compliance with its requirements. That they were satisfactory to his judgment in this respect follows from the subsequent issue by him of the patent. His objection to the patent, as we have already said, arose, not from any defect in the certificate or proof, but from an opinion that the lands were subject to the provisions of the Town Site Act of 1844. That he was mistaken in this opinion we are entirely satisfied. The act of 1844 is only a part of the general land system of the United States, and is supplementary to the General Pre-emption Act of September, 1841. The act of 1841 confers the right of pre-emption upon individual settlers, reserving, however, from entry by them all lands selected as town sites; the act of 1844 allows the entry of lands thus selected to be made, if the town is incorporated, by the corporate authorities, and if not incorporated, by the judges of the county in which the town is situated; the entry to be made in trust for the several use and benefit of the occupants. Both acts limit the right of entry to *surveyed* lands. Neither individual nor city could claim this right with respect to any lands until they had been surveyed by the officers of the government. Every person, says the act of 1841, who shall make a settlement on the public lands "which have been, or shall have been *surveyed* prior thereto," shall be authorized to enter any number of acres, not exceeding one hundred and sixty, upon paying the minimum price.

"Whenever any portion of the *surveyed* public lands," reads the act of 1844, "has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities, and if not incorporated, for the judges of the county in which such town may be situated, to enter at the proper land office and at the minimum price, the land so settled and occupied," &c.

It is not pretended that any public surveys had been extended over Oregon previous to the act of 1850, or were ever

authorized by the government. There were, therefore, no surveyed lands of which any entry could be made either by an individual or by any corporate authorities. The laws of Congress relating to pre-emption by individuals or entries by municipal authorities had, therefore, no application to the condition of things in Oregon at that time. The act of August 14th, 1848, organizing the Territory of Oregon, which declared that all laws of the United States should be in force in the territory, "*so far as the same, or any provision thereof, may be applicable*," did not extend over the country any portion either of the act of 1841 or of the act of 1844.*

"It is well known," says Mr. Justice Deady of the United States District Court of Oregon, in considering this subject, in *Lownsdale* v. *The City of Portland*, "that at the time of the organization of Oregon Territory an anomalous state of things existed here. The country was extensively settled, and the people were living under an independent government, established by themselves. They were a community, in the full sense of the word, engaged in agriculture, trade, commerce, and the mechanic arts; had built towns, opened and improved farms, established highways, passed revenue laws and collected taxes, made war and concluded peace. As a necessity of their condition, and the corner-stone of their government and social fabric, they had established a 'land law' regulating the possession and occupation of the soil among themselves. That all this was well known to Congress at the time of the passage of the act of 1848, would be highly probable from its historic importance, and is certain to have been so from the language of the act itself."†

"The leading feature of the land law of the provisional government was that which provided that every male inhabitant of the country, over a certain age, should hold and possess 640 acres of land. The uses that the land might be put to were immaterial. The occupant might cultivate, pasture it, or, if he possessed a good site, and had the thrift and

* 9 Stat. at Large, 323, § 14.

† See sections 14 and 17 of the act of 1848.

enterprise, he might build a town upon it. In the disposition of the public lands this state of things called for peculiar legislation different *in toto* from that required in an unsettled country. Under these circumstances is it to be presumed that the act of 1844—an obscure and special provision of the then existing land system of the United States—was extended over this country, and the general provisions of the same contained in the Pre-emption Act of 1841 left behind? Nothing can be more unreasonable. It would tax the ingenuity of man to find a provision in the land system of the United States, as it stood in 1848, less applicable to the condition of the country, or that would have worked greater hardship, confusion and injustice than the act of 1844."*

The act of Congress of September 28th, 1850, "to provide for extending the laws and the judicial system of the United States to the State of California," declared, "that all the laws of the United States, *not locally inapplicable*," should have the same force and effect within that State as elsewhere in the United States, yet it was never supposed that this provision had the effect of extending over the State any portion of the land system of the United States in advance of the public surveys, upon which that system rested, and without which, as the law then stood, that system was inoperative.† But, on the contrary, on the 3d of March, 1853, Congress, by special act, provided for the survey of the public lands in that State, and made them, so far as individual pre-emption was concerned, with some exceptions, subject to the act of 1841; and when occupied as towns or villages, except when located on or near mineral lands, subject to the provisions of the act of 1844.‡ This special legislation, with the exception of a few particulars, would have been unnecessary had those laws been extended over the State by force of the act of September 28th, 1850. So, too, the acts organizing the Territories of New Mexico, Kansas, and Nebraska, contained similar provisions, and extended the laws of the United States over them, so far as

* 1 Oregon, 391. † 9 Stat. at Large, 521. ‡ 10 Id. 244.

they were not locally inapplicable; yet subsequent special legislation was deemed necessary to extend any portion of the public land system over them.*

The Donation Act of 1850 is of itself evidence that Congress did not then consider the acts of 1841 or 1844 applicable to Oregon. That law established no system of preemption, nor recognized any such system as having been previously in existence in the Territory. It substantially gave to every settler, upon certain conditions, the land which he occupied, excepting only mineral and saline lands, and such parcels as might be reserved by the President for forts, arsenals, and other public uses. The law, as well observes Mr. Justice Deady, in the able opinion from which we have already cited, "was a system complete within itself, and admirably adapted to the condition of the people and the country as it found them," and was "a practical recognition and confirmation of the land law of the provisional government."

A similar view of the subject was taken by the Supreme Court of the State, after full examination, in the case of *Marlin* v. *T' Vault.*† That court concludes a well-considered opinion by stating that the people of the State had universally acted upon the belief that the act of 1844 was not in force there, and that the effect of a contrary rule would be to unsettle rights, and strike a blow at the prosperity of nearly every town in Oregon.

We are clear that the Town Site Act of 1844 was not extended to Oregon until the 17th of July, 1854; and even then that it only operated to exclude lands occupied as town sites, or settled upon for purposes of business or trade, from a donation claim, which had not been previously surveyed.‡ Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent.

* 9 Stat. at Large, 452, § 17; 10 Id. 277, § 32.

† 1 Oregon, 77.

‡ 10 Stat. at Large, 305, § 1.

The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.

It follows, from the views expressed, that the plaintiff derived no title or estate in the premises in dispute by force of the patent to the corporate authorities of the city of Portland. Although there was at the commencement of this suit no legislation by the State of Oregon for the execution of the trust, to which the act of 1844 contemplates that municipal authorities in receiving a patent shall be subjected, we have considered the case as though the trust had been executed, and the plaintiff, as one of the beneficiaries, had become invested with all the estate and right the authorities could possibly impart. Those authorities not having received any title or estate in the premises in controversy, could, of course, impart none to the plaintiff. His position is, therefore, reduced to that of a mere possessor without title. Such possession is entirely insufficient to justify the interposition of equity for the determination of the defendant's title, even under the very liberal act of Oregon. The plaintiff must first show in himself some right, legal or equitable, in the premises before he can call in question the validity of the title of the defendant.

This case differs very materially from that of *Garland* v. *Wynn*,* or that of *Lindsay* v. *Hawes*,† and other cases to which the counsel of the plaintiff has referred. In *Garland* v. *Wynn* there had been a conflict between two claimants of a right of pre-emption to the same land under different statutes. The register and receiver of the local land office decided in favor of the assignor of Garland, and gave him a patent certificate. The commissioner of the general land

* 20 Howard, 6.

† 2 Black, 554.

office approved of the decision, and issued the patent to Garland. Wynn, the other claimant, whose entry was the oldest, and had been once allowed, thereupon filed his bill in equity, asserting his prior right to the land and his equitable title to the patent. The Supreme Court of Arkansas sustained the bill, and ordered the patentee to execute a conveyance of the land to the complainant, and on appeal this court affirmed the decision.

In *Lindsay* v. *Hawes*, the ancestor of the complainant had obtained a pre-emption right to the land in dispute, and received a patent certificate for the same. Some years afterwards the defendant, Hawes, claimed a like pre-emption right to the land, and received a similar certificate, upon which a patent was issued to him. The suit was brought by the heirs of the first pre-emptor to compel a conveyance of the legal title acquired by the patent from the patentee, and parties claiming under him with notice. This court held that the first pre-emptor had acquired the better right to the land, and was therefore entitled to a conveyance of the legal title.

These are only applications of the well-established doctrine that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. The same observation will apply to the other cases cited by counsel. They have no pertinency to the case at bar, for here no prior or better right to the land in dispute is shown in the plaintiff.

The view we have taken has rendered it unnecessary to look into the evidence embodied in the record respecting the original settlement and residence of the defendant, or to consider how far it impeaches the proof presented by him to the surveyor-general in support of his donation claim.

The decree of the Supreme Court of Oregon must be REVERSED, and that court instructed to enter a decree directing the Circuit Court to dismiss the suit; and it is

SO ORDERED.

## TURTON *v.* DUFIEF.

A gratuitous bailee of money to whom it is given for the purpose of lending it on good and sufficient security, and who, lending it to a person on property worth much more than the sum, and taking a properly executed mortgage, delivers the papers to his principal without having placed them on record, is not responsible for a loss occurring after the efflux of the term for which the money was lent, by non-recording of the papers; the owner of the security having had abundant opportunity to have them recorded himself.

ERROR to the Circuit Court for the District of Maryland.

Dufief, acting without compensation and merely as a friend of a certain Mrs. Fowler, then a widow, in July, 1851, lent for her $2000 (money belonging to her) to Wheeler, taking from him a note payable in *one* year, and a deed of trust or mortgage security amply sufficient to secure the sum lent. These were delivered to Mrs. Fowler some time previously to October, 1851. Mrs. Fowler received interest in three different payments, up to January, 1853, and in March of that year, $500 of the principal. Some time between this last date and August of the same year, 1853, she was married to one Turton, and in August and December, *he*, as her husband, received two payments of interest. Wheeler was a man in good credit and solvent when the money was lent, and continued so till 1855. In that year he executed another mortgage, or deed of trust, to one Linthicum, dated 20th December, 1854, which was put on record, May 4th, 1855. The mortgage of the plaintiff had never been put on record, and the security was cut out and lost on that account.

Turton, the husband, now sued Dufief for this loss.

The substance of the *narr.*, when eliminated from various epithets which tended to give it the character of an action for deceit and not of one on contract, and which, as such, the court observed "would be wholly unsupported by the evidence," was as follows:

"That the defendant, having for the use of a certain M. R. Fowler (who hath since intermarried with the plaintiff) the sum

of $2000, in consideration that she, the said M. R. F., would consent and agree that he, the said defendant, should lend the money to some person on good and sufficient security for the repayment thereof, and in consideration of the authority given by the said M. R. F., undertook and faithfully promised that he would diligently and carefully lend the said money to some person on good and sufficient security for the repayment thereof," &c. "Yet, that the said defendant contriving, &c., did not perform or regard his said promise, and did not diligently lend and invest the said sum of money to some person on good and sufficient security for the repayment thereof; but, on the contrary, lent the same to a certain Wheeler, and did not take good and sufficient security from him for the repayment of the same, whereby the same was wholly lost."

The court below charged that if the jury should find that the note was given by the drawer to the defendant as agent of Mrs. Fowler, and that the defendant, with her consent, had lent the amount for which the note was given, from funds in his hands belonging to her, and that the defendant, shortly after the making of the note, and before it reached maturity, indorsed the same to Mrs. Fowler, and at the same time delivered to her the note so indorsed, with the deed of trust executed to secure its payment; and further, that at that time, and when the note became due, the drawer, Wheeler, was solvent, and fully able to pay the same, and that the security for its payment was at that time free from the incumbrance of any subsequent deed from Wheeler, and sufficient for the payment of the said note—then that the plaintiff could not recover, although the jury might find that the debt was lost by the failure to place the deed on record before the recording of the subsequent deed to Linthicum.

The case was now here on exception by Turton to that charge.

*Messrs. Brent and Phillips*, citing *Coggs* v. *Bernard*,* contended that the bailee having entered upon the performance

* 1 Smith's Leading Cases, 346; reported from 2 Lord Raymond, 913.

of his contract, had become liable for its discharge with diligence and correctness; that the contract here had been attended to with gross negligence; the recording of the papers having been *obviously* and indispensably essential to any "good and sufficient security" for the money lent.

*Mr. Bradley, Senior, contra*, citing "The American Jurist," vol. xvi, p. 254,* as containing true views of the liability of gratuitous as distinguished from paid bailees, contended, *first*, that there was no such consideration set forth in the declaration here as made a "contract;" the act having been wholly for the ease and benefit of the bailor, and a mere burden to the bailee; that there was accordingly no "contract" in legal sense in the case; that the defendant could be liable for nothing but fraud, of which there was none in the case; contending, *secondly*, that whatever engagement Dufief had entered into had been fully performed with due diligence, and as exactly as it was agreed to be.

Mr. Justice GRIER delivered the opinion of the court.

We do not consider it necessary to vindicate our opinion in affirming the charge of the court below, to enter into a discussion of the law of bailment in general from *Coggs and Bernard* down to this time, or clearly to define the difference between negligence and *gross* negligence. The evidence clearly establishes the fact that the defendant "did diligently and carefully lend and invest the sum of money intrusted to him on good and sufficient security for the repayment thereof." It is the gravamen of the charge in the plaintiff's *narr.* that he did *not* do so.

The mortgage was a sufficient security without being recorded, and continued to be so for three years. It was in the possession of the plaintiff and his wife. The plaintiff himself had it in his possession near four months before the second mortgage was put on record. The neglect to put it

* And see the American note to Coggs *v.* Bernard, 6th American edition, 419; "Unpaid Agents."

on record may more properly be imputed to himself than to the defendant.

We are asked to decide that the gentleman who did Mrs. Fowler the kindness to make the investment for her should have anticipated her negligence, and that also of her husband, and have anticipated the insolvency, also, of the mortgagor, and that he has been guilty of negligence, either simple or gross, which should make him liable in the present action.

We do not take this view of the case, and find no error in the charge of the court. JUDGMENT AFFIRMED.

The CHIEF JUSTICE did not sit in this case.

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## MUMFORD v. WARDWELL.

1. Where a paper in the form of a special verdict—except that after stating the facts, it did not refer the decision on them to the court in the conditional and alternative way usual in such verdicts, but found "a general verdict for the plaintiff subject to the opinion of the court upon the foregoing recited facts"—was "*agreed to as* a special verdict" by counsel in the cause, filed of record and passed on as an agreed case by the court below, this court—remarking that as a special verdict the paper was defective, because not ending with the usual conclusion—in view of the facts just mentioned considered it as a special verdict or agreed case, and on error to a judgment given on it below adjudged the case presented by it.
2. Where a statute gave to a city named, certain lands of the State, excepting such as had been sold or granted by a certain body or certain officers in accordance with terms specified, or had been sold or granted by a certain officer and confirmed by a certain body, but declared also that the deed by which any of the excepted lands were conveyed by such body or officer should be "*prima facie* evidence of *title* and possession, to enable the plaintiff to recover possession of the land so granted:" *Held*, that the deed made under the statute being in evidence, a compliance with the terms upon which sales were to be made (such as sufficient notice) was, under its terms, primarily to be presumed, and that it was cast upon any one alleging *non*-compliance to prove it.
3. Where a statute of California, passed in 1851, granted certain lands, excepting from the grant such as had been granted by a particular officer,

and "registered or recorded on or before April 3d, 1850, in some *book* of record now in the office, &c., of the recorder of the county:" *Held*, that the term "book" was satisfied, within the meaning of the act, by copies of the deeds on sheets not bound or fastened together in any manner, but folded, the name of the purchaser and number and designation of the class of the lot sold being indorsed thereon, each distinct class being kept in a separate bundle, and the sheets not being bound up in the form of books, until 1856, when they were so bound; each class forming a separate volume.

ERROR to the Circuit Court for the Northern District of California.

Mumford—plaintiff both below and in error here—brought ejectment against Wardwell for a "one *hundred*-vara lot," No. 186 on the official map of San Francisco. Plea, possession as owner under a good title. The record showed that the case was set down on that issue for trial August 26th, 1863, when the jury found a verdict in these words:

*J. E. Mumford* v. *C. Otis Wardwell, United States Circuit Court, Northern District of California.*

We, the jury, find a verdict for the plaintiff, subject to the opin ion of the court.

GEORGE AMERAGE,
Foreman.

SAN FRANCISCO, August 26th, 1863.

The finding set forth no case, nor had any been previously stated. This verdict was entered of record; but no notice apparently taken afterwards of it. Subsequently, on the 29th August, *by consent of counsel*, it was ordered that the further hearing of the cause should be set down for September 5th. The record went on:

"And afterwards, to wit, on the 5th day of September, A. D. 1863, the following special verdict, by stipulation of counsel, was duly entered of record in said cause, to wit:

SPECIAL VERDICT.

In the Circuit Court of the United States for the Northern District of California.

JAMES E. MUMFORD, Plaintiff, *v.* CHAS. O. WARDWELL, Defendant.

AT COMMON LAW.

And now, on this 26th day of August, A. D. 1863, come the parties aforesaid by their respective attorneys, and thereupon come a jury, to wit: [the names of the jurors were here given], twelve good and lawful men, who, being duly elected, tried, and sworn, the issues herein joined between said parties well and truly to try, and a true verdict to render according to the evidence, after hearing the evidence of said parties respectively, the jurors aforesaid upon their oaths aforesaid do say;"

Following this was set forth the titles of the respective parties to the lot in controversy. The document ended thus, the signatures of the respective counsel being appended at the end:

"And the jurors aforesaid, upon their oaths aforesaid, do further say that they find *a general verdict for the plaintiff, subject to the opinion of the court upon the foregoing recited facts.*

"The above is *agreed to as a special verdict in this cause.*"

It will be observed that in what was here agreed to "as a special verdict," there was no such conclusion as is technically usual in special verdict actually found by a jury; that is to say, the finding did not, after presenting the case, refer the decision of it to the court, with the conditional and alternative conclusion, that if the court should be of the opinion, in view of the facts, that the plaintiff was entitled to recover, then they found for the plaintiff, but if otherwise, they found for the defendant.

But this matter was not the subject of remark either by counsel here or apparently by them in the court below; and the paper agreed to was treated everywhere as a case agreed on and stated for the opinion of the court.

The title of the respective parties as set forth in the case as settled was as follows, that of the defendant, for more clearness, being here stated first:

1. *Defendant's title.* The lot was what was called a water-

lot; that is to say, formed part of certain flats, situated below the high-water mark of San Francisco Bay. The conquest of Mexico, in 1846, having put the whole region about San Francisco into the control of the military authorities of the United States, General Kearney, then acting as Military Governor of California, by deed reciting that he was acting in virtue of authority vested in him by the President of the United States, conveyed these flats (with some unimportant reservations) to the town of San Francisco; a proviso being attached to the grant that they should be divided into lots, and after three months' notice sold at auction to the highest bidder for the benefit of the town. On the *1st day of December*, 1849, the ayuntamiento or town council of San Francisco ordained:

"That two hundred *fifty*-vara town lots be sold at public auction on *Friday, the 10th instant.*"

On the same 10th of December, 1849, General J. W. Geary, then acting as alcalde of San Francisco (under which title the municipal authority of that city was exercised by officers, either appointed by the military commandant or elected by the people)—by deed reciting that the ayuntamiento or town council of San Francisco, by resolution passed on the *1st day of December*, 1849, had ordered that certain town lots should be exposed to public sale and sold to the highest bidder, and that after *due public notice*, &c., one of the said lots, No. 186, so ordered to be sold, was sold to D. O'Brien, &c.—granted and conveyed the said lot, No. 186, to O'Brien aforesaid.

This deed, like every other deed made by Alcalde Geary during his term of office, consisted of a printed blank on one sheet, filled up at the time it was issued; and like them was not registered or recorded except in the following manner, that is to say: Copies of the deeds consisting of similar blanks, filled up in like manner by the clerk of Alcalde Geary, were retained in the office of the alcalde. These copies were *folded up*, the name of the purchaser and num-

ber of the lot and designation of the class to which it belonged—(that is to say, whether one hundred-vara, fifty-vara, or water-lot)—being indorsed thereon, and those of each distinct class were kept in said alcalde's office in a separate *bundle;* but these several copies were not *bound or fastened together in any manner.* In that state they passed into the office of the county recorder, on its organization in 1850, where they continued to remain until 1856, *when they were bound up in the form of books*, each class forming a separate volume. The grant to O'Brien was filled up in the manner above stated, and a copy of it also, made as above stated, was kept in like manner in the bundle composed of copies of grants of one-hundred-vara lots, and so continued until the time it with the other copies was bound up as above-said, in 1856.

Whether General Kearney had authority to make a grant such as he did make to the town of San Francisco, or whether the ayuntamiento or town council of San Francisco ever directed a sale of the lot in question,—which it will be remembered was a hundred-vara lot, not a fifty-vara one,—the case agreed on as a special verdict did not state.

Some time after the sale, that is to say, on the 26th of March, 1851, the legislature of California granted these flats, including this lot, to the city of San Francisco for ninety-nine years. But the statute contained (§ 2) two exceptions. It excepted from its operation those portions of the flats which had been either,

*First*, "Sold by authority of the ayuntamiento, or town or city council, or by any alcalde of the said town or city, at public auction, *in accordance with the terms of the grant known as Kearney's Grant to the City of San Francisco*," or

*Second*, "Sold or granted by any alcalde of the said city of San Francisco, and *confirmed* by the ayuntamiento or town or city council thereof, and also *registered* or *recorded* on or before the 3d day of April, A. D. 1850, in some *book of record*, now [that is, on the 26th day of March, A. D. 1851] in the office, or custody, or control of the recorder of the county of San Francisco."

It contained also (§ 3) this enactment as to the effect, viewed as evidence, of any deed, by which any of the lands excepted were conveyed or granted by any ayuntamiento, common council, or alcalde; declaring that it

"Shall be *primâ facie* evidence of *title* and possession to enable the plaintiff to recover possession of the land so granted."

Such was the title of Wardwell; defendant below and here.

2. *The plaintiff's* was a sheriff's deed for the lot, on execution upon a judgment against the city of San Francisco, all confessedly regular, but all subsequent to the statute above quoted.

On this case the court below entered judgment for the defendant, Wardwell.

*Mr. T. Ewing, Jr., for the plaintiff in error, Mumford:*

It will be conceded by opposing counsel, that General Kearney, as military commandant, had no power to make such a grant as he did. The grant was void. The flats or ground under a navigable bay, remained the property of the United States. On the admission of California into the Union, they became hers. She granted them to the city of San Francisco, and under the sheriff's deed the title is in the plaintiff, unless the defendant brings himself within one of the two exceptions of the statute of 1851. The burden of doing this is on him. *Prima facie* the case is with the plaintiff.

Plainly the defendant cannot bring himself within the first exception. General Kearney's grant required in terms *three months'* notice of the sale to be given. Of this sale but ten days' notice, at most, was given. The defendant would therefore bring himself doubtless within the second exception. Admitting then—which we do not admit—that the particular lot described in Geary's deed was ever in fact sold or granted by that alcalde; still the sale does not come within the second exception, and is inoperative, because—

Argument for the defendant in error.

1. It was never "confirmed" in any manner by the ayuntamiento or town or city council of San Francisco. Indeed, no "confirmation"—that is, no approval subsequent to the sale—was ever perhaps thought of. Alcalde Geary plainly supposed that he was selling under the authority previously given in the ordinance of 1st December, 1849—which ordinance indeed he recites as the authority for his act. But this was a mistake. The ordinance authorized sales of *fifty*-vara lots alone. The record, which appears, of an ordinance, passed 1st December, to sell fifty-vara lots, is convincing proof that there was no ordinance of the same day to sell hundred-vara lots. Both would have been recorded as certainly as the one was. The sale of hundred-vara lots was therefore *supra vires;* and void as in excess of the power given.

2. In no sense in which the words in question could have been used by the legislature, does the case stated show a registering or recording of the deed in a "*book* of record." The word "book" has always signified a number of sheets of paper or parchment, if not bound, yet at least sewed or attached together in some manner, so as to constitute a volume; something that can be opened, turned over, and read. It has never signified, nor been applied to a bundle of folded papers; still less to a single sheet in such bundle.*

*Messrs. Botts, Dwinelle, and Lake, contra:*

We concede that the attempt of General Kearney to bestow these lands upon the town of San Francisco was ineffectual.† We concede, too, that the State of California, when admitted into the Union, succeeded the United States as sovereign proprietor of all lands situate below ordinary high-water mark and within its borders; including, of course, these flats.‡ The only question then is whether the defendant is

* Chapin *v.* Bourne, 8 California, 296.

† Wilcox *v.* Jackson, 13 Peters, 512, 513; United States *v.* Fitzgerald, 15 Id. 421; United States *v.* Hare, Circuit Court of the United States for California, October, 1867; MS.

‡ Pollard's Lessee *v.* Hagan, 3 Howard, 212.

included within either of the exceptions of the statute of 1851. . . We submit that he is within both; or if not, certainly that he is within the second.

1. The State of California, who owned the land, had a right to grant the lots to the city—the grant being a pure bounty—on what terms she pleased. She does so grant them. She declares that the deed itself "*shall* be *prima facie* evidence of *title*." The effect of this enactment is, that confirmation by the ayuntamiento is primarily to be presumed. The plaintiff must show, affirmatively, that there was no such confirmation. The deed itself, which is of a *hundred-vara* lot, recites a resolution of the town council, passed December 1st, A. D. 1849, ordering a sale of the lot in question. That a resolution was passed by the council on the same day, ordering a sale of *fifty-vara* lots, is unimportant. That resolution shows that *fifty-vara* lots were ordered to be sold, but does not exclude the idea of a resolution being passed at the same meeting ordering *hundred-vara* lots to be sold.

2. Was the deed "registered or recorded in some *book* of record?" We submit that it was so; at least was so within the design of the act. Binding does not constitute a book. A book *may* be a bound book, but it may also be one not bound; a book stitched or even yet in sheets. The sheets in the recorder's office furnished materials ready to assume the form of *bound* books, which they did assume under the binder's hands in 1856. The thing to be attained was the preservation of record evidence of the grant in an authentic, permanent, and accessible form; and the purpose evidently was, not to give constructive notice of the existence of such grants, but to prevent the fabrication of spurious titles. They were already "records," whether bound or not.* Interpreting, then, the statute according to its spirit and intent, these two "separate bundles" of official copies of official grants, constituted two separate "books of record." Suppose a book of records falling to decay, and the sheets becoming loose during the period between the destruction

* Kyburg *v.* Perkins, 6 California, 674.

of the old binding and the rebinding, would there be no "book of records?"

*Reply:* 1. Whatever might be reasonably argued under the *prima facie* effect given by the statute to the deed, if there was no evidence of *any* order of sale by the ayuntamiento on the 1st December, 1849, we submit that by the admitted order to sell fifty-vara lots—the only order in the case—the *prima facies* of an order to sell one-hundred vara lots on that same day *is* rebutted. In other words, when we showed a resolution of a public body like the ayuntamiento, passed December 1st, 1849, ordering a sale of town lots of one sort to take place December 10th, 1849, corresponding exactly with the resolution recited by the alcalde, as his authority for making a sale of another and different kind, the presumptions made it incumbent on defendant to put in evidence a resolution of the same date authorizing a sale of the different kind. It is a case where the *expressio unius* infers the *exclusio alterius.*

2. A bundle of copies of deeds is a very important part of the "materials" by the aid of which a book of copies of deeds may be made; but bundled up and "not fastened together in *any* manner," they are not, in that condition, a "book" in any sense.

Mr. Justice CLIFFORD delivered the opinion of the court.

Plaintiff brought ejectment against the defendant to recover possession of a certain tract of land situated in the city of San Francisco, describing it by metes and bounds, and as the one hundred-vara lot numbered one hundred and eighty-six, as laid down and represented on the official map of the city. Defendant pleaded that he was in the possession of the lot as owner under a good title, which the plaintiff in his replication denied. Parties went to trial upon that issue, and the jury impanelled to try the issue returned the following verdict, as appears by the record: We, the jury, find a verdict for the plaintiff, subject to the opinion of the court.

I. 1. Such a verdict is certainly irregular in form, and it does not appear that it was ever made the subject of any

further action. Instead of affirming or amending it, or setting it aside, the parties and the court seem to have treated it as a nullity. No notice whatever was taken of it except that the cause was set for hearing at a subsequent day, but when the time for the hearing came, the parties, by stipulation, entered of record the paper called the special verdict.

Statement of the introductory allegation of the paper is, that a jury came, and that they were duly impanelled and sworn, and that, having heard the parties, they found the facts as therein recited, but it is not signed by the foreman, and the statement in the conclusion is, that the jury return a general verdict for the plaintiff, subject to the opinion of the court upon the recited facts.

Irrespective of the agreement of the parties, it would be difficult to regard the document as the proper foundation of a judgment, because the alleged finding of the jury is not in the alternative, as it should be in a special verdict.

2. Correct practice in such cases is, that the jury find the facts of the case and refer the decision of the cause upon those facts to the court, with a conditional conclusion that if the court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff, but if otherwise, then they find for the defendant. By leave of the court such a verdict may be prepared by the parties, subject to the correction of the court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the court for hearing as in case of a demurrer.

3. Verdicts should be general or special, as the jury, in the absence of directions from the court, have nothing to do in respect to a special case. Principal purpose of a special case is, that the court may have time to hear the parties and give the questions of law arising at the trial a more deliberate consideration.

4. Such being the understanding between the court and the bar, the entry is made in the minutes that the verdict is

subject to the opinion of the court, but the entry follows the verdict and is no part of the finding of the jury.

5. Where the verdict is general the court may enter judgment on the verdict, or may set it aside and grant a new trial, but the rulings of the court during the trial cannot be revised on writ of error save by a regular bill of exceptions. Judgment also may be rendered on the verdict in a special case, or a new trial may be granted because the verdict is general, and is for plaintiff or defendant.

6. Exceptibns to the order of the court in granting a new trial do not lie in any case, and the losing party in case of judgment in a special case cannot except to the rulings of the court during the trial, unless he seasonably reserved the right to turn the special case into a bill of exceptions, because the court has no power, unless otherwise agreed, to render any judgment except upon the verdict of the jury.

7. Special verdicts having a conditional or alternative finding are the proper foundation of a judgment for either party, as the law of the case on the facts found may require, and consequently the judgment of the subordinate court on such a verdict, whether for plaintiff or defendant, may be re-examined in the appellate tribunal without any bill of exceptions.*

Viewed strictly as a special verdict, it is evident that the paper under consideration is defective, because it does not contain the conditional or alternative finding of the jury, and in that respect it is irregular.

But the parties intended to agree, and did agree, that the facts as found were correct, and entered the paper of record at the time under the leave of the court as a correct statement of the facts in the case. They do not appear to have taken any distinction between a special verdict and a special case, or an agreed statement of facts, and the record shows that the judgment of the court was rendered wholly irrespective of any such distinction. Both parties appear to have

* Suydam *v.* Williamson et al., 20 Howard, 432; 3 Blackstone's Commentaries, 378; Seward *v.* Jackson, 8 Cowen, 406; State *v.* Wallace, 3 Iredell, 195.

treated the paper as an agreed statement in the court below, and it has been treated in the same way in this court. Undoubtedly the general verdict was superseded when the paper in question was entered of record, as that was done under the sanction of the court and by the consent of both parties, and it is certain that the parties intended that the controversy should be finally decided upon the facts as therein agreed.

8. Doubt cannot be entertained upon that subject, and yet such a result cannot follow if the paper is held to be a special verdict, unless the opinion of the court is in favor of the plaintiff, as there is no proper conclusion in it to warrant a judgment for the defendant. Regarded as an agreed statement, the paper is in due form, and inasmuch as no objections are made to the proceedings, the court here adopts that view of the subject as the correct one in the case.

II. Reference will first be made to the title of the plaintiff as shown in the agreed statement. He claims title under a sheriff's deed of the lot, bearing date October 17th, 1859, which is in due form, and was duly executed and recorded. Prior to that time judgment had been recovered against the city of San Francisco by one of her creditors, in the sum of one thousand and seventy dollars and twenty-five cents, and the city failed to pay the amount. Execution was duly issued on the judgment and delivered to the sheriff of the county for legal service, and the sheriff, in obedience to the command of the process, sold the lot in question to the purchaser as the highest bidder.

Title of the plaintiff is deraigned through various mesne conveyances from the grantee of that deed, as fully explained in the agreed statement. Parties agree that the lot is below what was, prior to any improvements, the natural high-water mark of the bay, and that prior to March 26th, 1851, it was at all ordinary high tides wholly covered with the tide-waters.

III. 1. Source of the title of the defendant is a deed from the alcalde of the town, dated December 10th, 1849, to Daniel O'Brien, as set forth in the transcript, and as confirmed by the second section of the Water-lot Act. He holds that title,

whatever it may be, as deraigned through a regular chain of mesne conveyances from the original grantee. Possession of the premises was in the defendant at the commencement of the suit, and it appears that he had been in the actual possession of the same for the period of three years.

2. Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities.* Municipal authority also was exercised for a time by subordinate officers appointed by our military commanders. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the department. By virtue of that supposed authority, General S. N. Kearney, March 10th, 1847, as military governor of the territory, granted to the town of San Francisco all the right, title and interest of the United States to the beach and water-lots on the east front of the town, included between certain described points, excepting such lots as might be selected for government use.

Requirement of the grant was, that the land granted should be divided into lots, and that the lots should be sold after three months' notice, at public auction, for the benefit of the town. Pursuant to that requirement, numerous lots were surveyed and laid out, and public sales of the same took place at various times as recited in the agreed statement. Lot one hundred and eighty-six was subsequently sold at public auction by the alcalde of the town, and the same was conveyed by deed or grant in due form to the original grantee, under whom the defendant deraigned his title.

3. But the power to grant lands or confirm titles was never vested in our military governors; and it follows as a necessary consequence that the grant as originally made was void and of no effect. Nothing passed to the town by the grant, and, of course, the doings of the alcalde in selling the lot in question was a mere nullity.

4. California was admitted into the Union, September 9th,

* United States v. Castillero, 2 Black, 149; Romero v. United States, 1 Wallace, 743.

1850, and the act of Congress admitting her declares that she is so admitted on equal footing, in all respects, with the original States.* Settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.†

When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution.‡

5. Necessary conclusion is, that the ownership of the lot in question, when the State was admitted into the Union, became vested in the State as the absolute owner, subject only to the paramount right of navigation. Corporate powers were exercised by the city of San Francisco prior to the time when the State was admitted into the Union, but she was reincorporated April 15th, 1851, and the agreed statement shows that the lot described in the complaint is within the corporate limits of the city.

6. Certain lots of land situated in the city and within certain described boundaries were designated in the first section of the act of the 26th of March, 1851, as the beach and water-lots of the city.§ Second section of the act granted the use and occupation of all the land so described to the city for the term of ninety-nine years, with certain exceptions as therein provided. First, exception was made of all lands so described which had been previously sold by authority of the ayuntamiento, or town or city council, or by any alcalde of the town or city, at public auction, in accordance with the Kearney grant. Secondly, same exception

* 9 Stat. at Large, 452.

† Pollard's Lessee *v.* Hagan et al., 3 Howard, 212.

‡ Martin et al. *v.* Waddell, 16 Peters, 410.

§ Wood's Digest, 519.

was also made of all lands so described which had been granted or sold by any alcalde of the city, and confirmed by the ayuntamiento, or town or city council, and registered or recorded on or before April 3d, 1850, in some book of record now in the office or custody or control of the recorder of the county, and the provision is that all such excepted lands shall be, and the same are hereby, granted and confirmed to the purchasers or grantees or the persons holding under them, for the term of ninety-nine years. The lot in question is included within the boundaries described in the first section of that act, and it appears that it is not any part of the lands reserved for public use.

7. Based on these facts, the proposition of the defendant is, that his title is a good one, and that the judgment of the Circuit Court should be affirmed. First, because it appears that the lot being within the first exception, never passed to the city, as it had been previously sold to the original grantee, under whom he claims, at public auction, by an alcalde of the town, in accordance with the terms of the Kearney grant. Secondly, because the lot being within the first section of the Water-lot Act, and having been sold, confirmed, and registered or recorded as required in the third clause of the second section of that act, the title to the same under that sale was ratified to the purchaser by the succeeding clause of that section. Express admission of the parties is, that the lot in question is included within the boundaries described in the first section of the Water-lot Act, and the third section of the same act provides that the original deed by which any of those lands were conveyed by any ayuntamiento, alcalde, or common council, shall be *prima facie* evidence of the title and possession.*

8. Conveyance of the lot in question was previously made by an alcalde, and the deed of conveyance contains the recital that due public notice of the intended sale was given before it was exposed to sale, and sold to the original grantee. Order of sale was passed by the ayuntamiento only ten days

* Wood's Digest, 520.

before the sale, but there is nothing in the agreed statement to prove that the full notice as specified in the grant to the town had not been previously given as required. Clear inference from the recitals of the deed is, that it had been previously given, and the burden of disproving the presumption is, by the express words of the third section of the act, cast upon the party alleging the contrary.

IV. 1. Suppose, however, it were otherwise, still the judgment of the Circuit Court is correct, because the agreed statement shows that the lot in question was sold by an alcalde, and confirmed by the ayuntamiento, and registered or recorded within the time required, in a book of record in the office, custody or control of the recorder of the county. Confirmation of the sale by the ayuntamiento is clearly shown, but it is insisted by the plaintiff that the deed was never registered or recorded within the meaning of that requirement. Like the military governor, Alcalde Geary claimed to exercise powers vested in the alcaldes under the Mexican rule, and following the usages of some of his predecessors in office, he made his grants in duplicates, and delivered the original to the grantee, and filed the duplicate copy in his office.

2. Duplicate copies retained in the office were labelled with the name of the purchaser, number of the lot, and the class to which the grant belonged. Such duplicates, although regularly classified and indorsed, were not bound in the form of a book, but each class was kept in a separate bundle, and in that state they were passed into the office of the recorder of the county at its organization. They remained there till 1856, when they were bound into the form of books, each class forming a separate volume.

3. Those books are the only registry ever made of the original titles to these beach and water-lots. Unless it be held that the grant in this case was registered or recorded within the meaning of that act, then all the titles are defective, as none of them were registered in any other way.*

* United States *v.* Osio, 23 Howard, 279.

Evidently the legislature assumed that some of the lots were duly registered as required, because the act proceeds to grant and confirm all such land to purchasers or grantees and persons holding under them, for the same term as the other lands are granted to the city.

4. Jurisdiction under the Mexican rule had come to an end more than three years when the Water-lot Act was passed, and it is a reasonable presumption that the legislature knew what the course of proceeding had been in making those grants, and in what condition the evidences of the title were, as they existed in the recorder's office. All the act required was, that it should appear, if the land had been sold by an alcalde, that it had been confirmed by the ayuntamiento, and that it had been registered or recorded in some book of record now in the office, custody or control of the recorder.

5. Most or all of the grants were made before the office of recorder of the county was created, and of course it cannot be held that the act required that the grants should have been recorded by that officer at the time they were issued. No such registry was in existence at the time, and the better opinion is, that the grants of lands so sold and confirmed are duly registered or recorded within the meaning of the requirement in all cases where the duplicate copy of the grant was, at the date of the Water-lot Act, regularly deposited in the office of the county recorder. Although not bound at that date, they had been classified and have since been bound into volumes. Looking at the case in any point of view consistent with the agreed facts, our conclusion is, that the plaintiff shows no title, and that the decision of the Circuit Court was correct.

JUDGMENT AFFIRMED, WITH COSTS.

## SILVER *v.* LADD.

1. Where a title under a settlement certificate issued under an act of Congress is set up by a party in the highest court of a State, and the decision of such court is against the title so set up, a writ of error lies from this court under the twenty-fifth section of the Judiciary Act.
2. Approval by the judge of a bond for prosecution of a writ of error may be inferred from the facts of the transaction. And where the record showed that the bond had been duly executed, that the sureties had been sworn to their sufficiency by the judge who signed the citation, and that all was done on the same day: *Held*, that it might be inferred that the bond was approved by the judge.

THIS cause came before the court on a motion by *Mr. Lander*, to dismiss writ of error to the Supreme Court of Oregon.

The CHIEF JUSTICE delivered the opinion.

The record shows a suit in equity to quiet title to a certain tract of land, which belonged to the complainant's intestate, against the alleged inequitable claims of the defendants.

The complainant claimed title under a settlement certificate issued under the act of Congress of September 27th, 1850, relating to donations to settlers upon the public lands, and the decision of the court was against the title claimed under the authority of that act. There is no doubt, therefore, that the complainant was entitled to his writ of error to bring the judgment of the State court under the review of this court.

Another ground of dismissal more relied upon was, that the bond for prosecution was not taken as required by law. It appears from the record that the writ of error was duly issued; that a bond for prosecution of the writ was executed; that the sureties made oath to their sufficiency before E. D. Shattuck, chief justice of Oregon; that the citation in error was signed by the same judge; and that all these things were done on the same day, namely, the 8th of October, 1866. The law requires that the judge signing the citation shall take good and sufficient security. This, doubtless, is equiva-

lent to a provision that the judge shall approve the bond. But no particular form of approval is required. Approval may be inferred from the facts of the transaction. And we think it a fair, and, indeed, almost necessary inference, from the fact of the sureties being sworn to their sufficiency by the judge who signed the citation, that the security was taken by him as required by law.

MOTION DENIED.

Mr. Justice CLIFFORD: I dissent from the views expressed by the court in the second ground assumed in favor of dismissing the writ of error.

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## THE GRACE GIRDLER.

In an appeal in admiralty, where the record has failed to show that the sum necessary to give this court jurisdiction of such an appeal was in controversy below, the court, in a proper case, and where it is asserted by the appellant that such sum was really in controversy, will allow him a limited time to make proof of the fact.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This was a motion made by *Mr. Donohue* to dismiss an appeal from the Circuit Court of the Northern District of New York.

Lockwood, the appellant, with several others, had filed a joint libel against the schooner Grace Girdler, claiming damages occasioned by her collision with the schooner Ariel. The aggregate damages sustained by the libellants amounted, according to the libel, to $2754. The libel was dismissed in the District Court, and the dismissal was affirmed on appeal in the Circuit Court. None of the libellants appealed to this court except Lockwood; and while it was apparently obvious that as owner of the vessel much the greater part of the loss had fallen upon him, the record did not aver that the damage which he had suffered exceeded $2000; as a statute requires that it should be, in order to give the court jurisdiction.

It was stated, however, in a brief filed by the appellant, on the motion to dismiss, and stated also by the appellant's counsel at this bar, *Mr. Carlisle*, that while it had been supposed by the appellant that the fact that his damage did exceed $2000 might be sufficiently inferred by comparison of different parts of the record, yet that the fact would clearly appear by affidavits; and he therefore opposed the motion to dismiss.

The CHIEF JUSTICE delivered the opinion of the court.

While it is true that the greater part of the loss fell upon Lockwood as owner of the Ariel, and her belongings, there is nothing in the record which shows that the damage sustained exceeded two thousand dollars. And this is essential to jurisdiction.

It is suggested, however, that, in point of fact, his share of the loss exceeded the jurisdictional sum. And it is the practice of this court in proper cases,* when it is claimed that the value in controversy gives jurisdiction, to allow an opportunity to make proof of the fact. And in admiralty cases, where the pleadings may be amended, and new evidence taken in the appellate court, a liberal practice in relation to appeals is specially warranted.†

An order will be made, therefore, allowing the appellants to make proof of jurisdictional value, by affidavits, and to file such proof with the clerk of the court within twenty days; in default of which, the cause will stand dismissed.

NOTE.

It subsequently appeared that the affidavits of value were actually on file at the time of the argument of the motion, though not before the court when the leave was given as above. The court thinking them sufficient, treated them on the discovery as if filed in pursuance of the leave. The motion to dismiss was therefore ultimately denied.

* Rush *v.* Parker, 5 Cranch, 287; Ex parte Bradstreet, 7 Peters, 634; but see Richmond *v.* Milwaukee, 21 Howard, 391.

† Rice *v.* M. and N. Railroad Co., 21 Howard, 85.

Statement of the case.

## WHITE *v.* CANNON.

1. A patent of the United States relinquishing to the patentee their right to certain land, but providing that it shall in no manner affect the rights of third persons, nor preclude a judicial decision between private claimants for the same land—this reservation being inserted in accordance with a statute which authorized the patent to issue,—allows a judicial inquiry into the merits of opposing claims to the land.
2. The ordinance of secession passed by the State of Louisiana, on the 26th of January, 1861, was a nullity, and did not affect the previous jurisdiction of the Supreme Court of that State, or its relation to the appellate power of the Supreme Court of the United States.

ERROR to the Supreme Court of Louisiana.

Cannon, holding an imperfect claim to a tract of land in that part of Louisiana which, in times when the sovereignty of the region was disputed between Spain and the United States, was called the "Neutral Territory," brought a petitory suit, under the civil law of Louisiana, against White, the possessor of a legal title under a patent of the United States.

The facts were these: By statutes of 1823 and 1824,* Congress provided for the examination of titles to lands in the district where this one lay. Persons having claims to lands situated in that district were authorized to present the evidence of their claims to the register and receiver of the local land office.

These officers were required to receive and record the evidence and to transmit to the Secretary of the Treasury, who then had charge of the land department of the government, a complete record of all the claims thus presented, with the evidence appertaining to each claim, and an abstract of the whole number of claims, dividing them into four classes; the *third* class consisting of claims founded upon *habitation, occupation or cultivation previous to the 22d of February*, 1819. The act of 1823 provided that nothing contained in it should be considered as a pledge by the United States to confirm any claim reported by the register and receiver.

* 3 Stat. at Large, 756; 4 Id. 65.

Under these acts, one Dyson, as assignee of *Edward* McLaughlin, presented to the register and receiver of the land office a claim, by virtue of habitation, occupation, and cultivation, to a tract of land lying within the so-called "neutral territory," containing 640 acres, and proved by the testimony of two witnesses the habitation and cultivation of the tract by McLaughlin previous to February 22d, 1819. In their report to the Secretary of the Treasury, made on the 1st of November, 1824, the register and receiver recommended that this claim, together with many other claims, which were included in the third class, should be confirmed; and by the act of Congress of the 24th of March, 1828,* the claims thus recommended were confirmed, excepting a certain number, among which were the claims of Dyson, including the one above mentioned. These excepted claims, said the act, "are suspended until it is ascertained whether they are situated within the limits of the lands claimed by the Caddoe Indians." It was subsequently ascertained that the claim was not situated within the limits of the lands claimed by these Indians.†

Dyson, and parties claiming under him, were in continued and undisturbed possession of the premises for many years. The petitioner derived whatever estate he had through various mesne conveyances from him.

The title of the defendant arose in this wise: In February, 1835, Congress passed "an act for the final adjustment of claims to lands in the State of Louisiana,"‡ which authorized any persons having claims to land in that State, that had been recognized by previous laws as valid, but which had not been confirmed, to present them to the register and receiver of the local land office, within two years from the passage of the act, together with testimony in support of the same, and required those officers to record in a book kept for that purpose the notice of every claim thus preferred,

* 6 Stat. at Large, 382.

† Treaty between the United States and the Caddoe nation, dated July 1st, 1835, and promulgated February 2d, 1836; 7 Id. 470.

‡ 4 Id. 749.

together with the evidence in its support. It also authorized them to receive evidence for other individuals who might resist the confirmation of a claim on their own behalf or that of the United States. And it provided that those officers should, at or before the commencement of each session of Congress, make a report to the Secretary of the Treasury of the claims presented before them, together with the testimony, accompanied by their opinion of the validity of each claim, and that the report should be laid before Congress by the Secretary, together with the opinion of the commissioner of the general land office touching the validity of the respective claims. Under this act, *John* McLaughlin, son of Edward McLaughlin, presented to the register and receiver a claim for the same tract of 640 acres which had been claimed by his father, and produced the testimony of two witnesses by which he proved the habitation and cultivation of the land by him previous to the 22d of February, 1819. The testimony produced appeared to have been taken in 1834, for some reason not disclosed by the record, perhaps, as suggested by counsel, in anticipation of the passage of the act or some act of a similar kind. In 1840, the register and receiver reported this claim and recommended its confirmation. The report was laid before Congress, and the claim was confirmed by the seventh section of the act of July 6th, 1842.* The act provided, however, that the confirmation should operate only as a relinquishment of the right of the United States, and should not affect the rights of third parties nor preclude a judicial decision between private claimants for the same land.

In September, 1844, a patent was issued to John McLaughlin pursuant to this act of confirmation, but with the same reservation as contained in the act itself. In June, 1848, he transferred his interest to the defendant, who, two years before he purchased, knew that persons holding under Dyson—the presentation of whose claim as assignee of Edward McLaughlin was well known in the vicinity of the land—were in possession of it.

* 5 Stat. at Large, 491.

Statement of the case.

The petitioner prayed a judgment decreeing that he was the rightful and legal owner of the land, and that he recover the same with damages and mesne profits specified.

It was shown conclusively that John McLaughlin never occupied or cultivated the land claimed by him previous to February 22d, 1819, or at any other time, and that the testimony presented by him to the receiver and register was false. In May, 1843, before the patent issued, he made an affidavit, and placed it on record in the land office of the district, that he never had at any time previous to the 22d of February, 1819, resided upon the tract, but that it was within his knowledge that his father, Edward McLaughlin, had resided upon it and cultivated it on that day and for several years previous, and that his father had transferred his claim by sale to Leonard Dyson, who, as his assignee, made entry of the same. The residence upon and cultivation of the land claimed by the father was also abundantly established by other testimony.

The District Court of Louisiana gave judgment for the defendant. On appeal, the Supreme Court of that State reversed the judgment and decreed that the plaintiff be recognized as owner, and have possession, and have judgment for $\$3833\frac{33}{100}$, and that the defendant pay at the rate of $3 per acre on 480 acres from April 30th, 1859, and that the plaintiff elect, within thirty days after the judgment should become final, whether he would keep the improvements erected on the land on paying for the same $5250 to the defendant, and on his so electing or making default, execution to issue on this part of the judgment against the plaintiff; but on his refusal to retain the said improvements, the defendant to be permitted to remove the same within a reasonable time.

This judgment was rendered on the 31st of January, 1861. A convention of the State of Louisiana had passed an ordinance of secession, purporting to take the State from the Federal Union, on the 26th day of the same month.

This case was now here under the twenty-fifth section of the Judiciary Act.

*Hughes, Denver, and Peck, for plaintiffs in error*, contended that, upon the facts of the case, namely, that a patent had been issued to the plaintiff in error, White, and that the claim under which the defendant in error holds had never been confirmed by Congress, the judgment of the court below ought to have been in favor of the plaintiff in error. And they suggested for the consideration of this court, that the judgment of the Supreme Court of Louisiana, rendered after the passage of the ordinance of secession, was void.

*Mr. Louis Janin, contra.*

Mr. Justice FIELD, after stating the case, delivered the opinion of the court as follows:

Aside from the affidavit of John McLaughlin, which appears to have been made as if he were troubled with a consciousness of his guilt, the evidence establishes beyond question that he never cultivated any portion of the land claimed by him, and, as stated by the Supreme Court of the State of Louisiana in its opinion, never lived upon it otherwise than under the roof of his father; that Edward McLaughlin, his father, resided upon the land and cultivated it prior to February 22d, 1819, and had no neighbors within the distance of several miles; and that the register and receiver were grossly imposed upon by false and fraudulent testimony.

The defendant purchased with ample means of knowledge, and, we are of opinion, with full knowledge of all the circumstances; of the father's residence and cultivation, and of the son's false and fraudulent representations to secure the land to himself. He knew, two years before he purchased, that occupants of the land held as lessees under the vendor of the plaintiff. The presentation of a claim to the land by Dyson, as assignee of Edward McLaughlin, was a matter of general notoriety in the neighborhood. And the affidavit of John McLaughlin was on record in the land office of the district, where the defendant obtained his knowledge respecting the claim before making his purchase, and

where he was informed, according to his own statement as given by one of the witnesses, "that the claim being fraudulent made no difference, as the government had given a patent," and consequently if he "lost the land the government would be bound to remunerate him, which would be better for him than the land."

The case is therefore disembarrassed from all questions of the rights of third parties as purchasers of the legal title without notice of alleged outstanding equities. The act of July 6th, 1842, confirming the claim of John McLaughlin, provides that the confirmation "shall only operate as a relinquishment of the right of the United States, and shall not affect the rights of third parties, nor preclude a judicial decision between private claimants for the same land."

The patent which followed contained a reservation of similar import, and would, in fact, be subject to a similar reservation by force of the statute, even if it were not expressed.

The reservation allows a judicial inquiry into the merits of opposing claims to the land. Now there could be no opposing claims to land situated like the premises in suit, the legal title of which was in the United States, and with reference to which no promise of title had been made to others by the government, unless such claims arose from conflicting evidence respecting the residence and cultivation of different parties.

The purpose of all the legislation of Congress, with respect to titles in the "neutral territory," so-called, of Louisiana, was, among other things, to secure to parties the land which they had resided upon and cultivated during the period when the sovereignty of the country was disputed. It, in truth, invited the occupants to present the evidences of their habitation and cultivation; not indeed promising a title when such habitation and cultivation were established, but naturally exciting expectation that a title would follow, unless grave reasons of public policy intervened and prevented. In some instances there were conflicting claims to the same land, and this was known to Congress. The act of 1835 provided for taking and preserving the evidence offered by

parties resisting a confirmation, whether such contest was made on their account, or on behalf of the government.

We are, therefore, of opinion that it was for the benefit of parties thus situated—of claimants who might contest the fact of habitation, occupation, or cultivation—that the reservation was made. The United States, in effect, said: We part with the legal title by our patent, but we intend that it shall enure to the party who actually inhabited and cultivated the land previous to February 22d, 1819, and we allow this matter to be litigated before the judicial tribunals of the country, and to be determined by them.

Such being, in our judgment, the true intent and meaning of the reservation, the case presented can be readily disposed of. It becomes then the ordinary case of a party acquiring, by false and fraudulent means, a legal title to property to which another has the better right, and which he would have obtained, had the facts, as they existed, been truly represented. In such case equity will compel the holder of the legal title to transfer it to the party who was justly entitled thereto.

We admit that, independent of the reservation and of the construction which we have given to it, in the light of attending circumstances and the history of claims of this character, there would be no equitable title in the plaintiff, which could be the foundation of a suit. The act of 1823 did not confer any rights, for that expressly provided that nothing contained in it should be considered as a pledge on the part of the United States to confirm any claim reported by the register and receiver. The act of 1828 did not confirm any claim, or make its confirmation dependent upon any future contingency; it only suspended the action of Congress upon the claim until a particular fact could be ascertained. Nor can the position of the claimant, Edward McLaughlin, or of the plaintiff claiming under him, be assimilated to that of a person who has acquired a pre-emptive right to the land, or any other inchoate right, which entitles him, under the law, to be preferred by the government in the disposition of the legal title, and upon the equity of

which he can compel any person, subsequently acquiring that title, to hold it for his benefit. Congress could have bestowed the land in question upon any other party without giving ground for just complaint to Edward McLaughlin, or parties claiming under him. We place the entire right of the plaintiff to maintain the present suit upon the effect of the reservation in the act of July 6th, 1842.

The judgment of the Supreme Court of Louisiana adjudges and decrees that the plaintiff be recognized as the lawful owner of the land, and that a writ of possession issue. Treating this as substantially equivalent to a decree that the defendant convey the legal title acquired by the patent to the plaintiff, and surrender possession to him, we affirm the judgment. As to that portion of the judgment which awards damages to the plaintiff for the use of the premises, and compensation to the defendant for improvements, we are not called upon to express an opinion, as they are matters not brought under our supervision by the twenty-fifth section of the Judiciary Act. They are provisions made under the local laws of the State.

The objection that the judgment of the Supreme Court of Louisiana is to be treated as void, because rendered some days after the passage of the ordinance of secession of that State, is not tenable. That ordinance was an absolute nullity, and of itself alone, neither affected the jurisdiction of that court or its relation to the appellate power of this court.

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD dissented.

[See Walker *v.* Villavaso, *supra*, 124.

## KAIL ET AL. *v.* WETMORE.
## SAME *v.* DOUGLASS.

Writs of error dismissed in two cases; in one of which were but three plaintiffs in error, while the citation presented four; and in the other where the names in the citation were different from those in the writ of error; bonds, moreover, in both cases reciting but one person as plaintiff in error, when there were in fact three.

ERROR to the Circuit Court for the Northern District of Illinois.

On motion of *Mr. Goudy*, *opposed by Mr. Peck*, to dismiss the writ.

Mr. Justice NELSON stated the facts and delivered the opinion of the court.

The judgment was rendered on the 10th of November, 1867. The writ of error was sued out the 19th, returnable the first day of the next term, which was the 2d day of December, a supersedeas bond given on the 29th of the same month, which was in time, excluding Sunday. The case thus far is within the cases of *Villabolos* v. *United States*, and *United States* v. *Curry*,* except the signing and service of the citation.

But the decisive objections to the regularity of the proceedings are as it respects the description of the parties. There are but three persons plaintiffs in error. In one of the cases the citation contains four. In the other the names in the citation are altogether different from those in the writ of error,† and the bond given in each case to stay the execution misdescribes the parties to the judgment, reciting but one person as plaintiff in error, when there are three. The numerous errors in the proceedings are remarkable, and for which both cases must be

DISMISSED.

* 6 Howard, 89, 90; Id. 106–12.

† The writ described Samuel Kail, *Sebert* Larson, and Erick *Enwell*, plaintiffs in error; but the citation described them as Samuel Kail, *Seford* Larson, and Erick *Envil*.—REP.

## VOSE v. BRONSON.

Where a mortgage for a certain sum, as $4,000,000, was given to trustees to secure railroad bonds to be issued to a like amount, and many of the bonds having been issued at a large discount, were, on a claim made against the company, judicially decreed entitled to no more than what had been actually given for them—so that a margin remained of the mortgage security,—a party, who had sold to the company materials used in making the *road*, and who took in payment some of the bonds at 80 per cent., with an agreement that if the company should at any time sell other bonds at a less rate, he should have as many additional bonds as would pay him for materials in full,—estimating the bonds already given and those to be given at the lowest rate at which any had been sold,—was *held* not entitled—the company (which was now insolvent) having sold bonds at 40 per cent.,—to have his outstanding equity adjusted on a foreclosure of the mortgage, and his demand attached to the mortgage; bonds to the whole extent of $4,000,000 having been actually issued.

APPEAL from the Circuit Court for Wisconsin.

In December, 1856, the La Crosse and Milwaukee Railroad Company, to secure ten millions of dollars in bonds, to be issued by them, executed a mortgage to Bronson, Soutter, and Knapp, as trustees for the bondholders. This mortgage was amended in 1858, so as to limit the issue to four millions. Bonds to that amount were issued, and became a lien on the road. In consequence of the failure of the company to provide for the payment of interest, the trustees, in 1859, instituted proceedings in the Federal court of Wisconsin, to foreclose the mortgage; which proceedings, in 1862, passed to a decree. The road in 1863, was sold. After the decree, but before the sale, one Vose (the appellant), who had not been made a party defendant to the suit of foreclosure, filed a bill against the trustees just named, asking to come in and share in the proceeds of the sale of the mortgaged property in their hands.

The bill set forth that before the execution of the mortgage, but in immediate contemplation of it, the La Crosse Company had agreed to buy a large quantity of railroad iron of a firm to whose rights the complainant had succeeded,

giving to them bonds to the extent of about $714,000 in payment, at the rate of eighty cents on the dollar; that it was well understood between the parties that the firm, which was one dealing extensively in railroad iron, took the bonds, not to hold as investments, but for commercial and immediate use; that to guard against loss to the firm by a depreciation in the markets of the bonds thus to be assigned to it, by the company's selling any of those which they yet retained at a less rate than the 80 per cent., it was agreed that if the company should sell any of their bonds to any one during a certain term named, at a less rate than this one, *then*, that the company should deliver to the firm so many additional bonds as would pay the firm for the iron in full, estimating the bonds already given and those to be given at the lowest rate at which any bonds had been sold. The bill further set forth that the iron (10,474 tons) was delivered to the company, and by them used in making their road, and now formed a material ingredient in the value of the property sold.

Admitting that the company *had issued, sold and delivered the whole four million dollars of bonds* (so that on the face of the bill it appeared that the company had the control of no more *bonds*), the bill set forth that it had sold a large amount of them as low as forty cents on the dollar; that the firm, needing to "realize" on the bonds assigned to them, had been compelled to sell at that same rate, and that the effect of the company's thus selling at 40 per cent. was, that the firm had been paid but half the stipulated price for their iron. It set forth, moreover, that in fixing the claims which the respective bondholders had upon the proceeds of the sale of the mortgaged premises, a portion of the bonds were, by the final decree of foreclosure, cut down from the value apparent on their face to 40 per cent., on account of their having been sold at a discount; and that

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|---|---|
| The decree of foreclosure having been entered for . | $2,794,600 |
| There remained as balance an unappropriated lien of . | 1,205,400 |
| Part of the original mortgage for . . . | $4,000,000 |

That he, Vose, had not been made by the trustees, in their

suit for foreclosure, a party defendant as he ought to have been, so that he might have been enabled to set up and insist upon his claim under their bill of complaint; that *his* claim was accordingly not foreclosed or impeached, and that the decree ought to be so modified as to let it in. The insolvency of the La Crosse Company was alleged, and notice of the contract and of its breach to all the parties in the principal cause. The bill accordingly prayed that as the firm was to be paid only in bonds, and did not receive enough to pay them, that the requisite amount of bonds, that is to say, another $714,000, might be executed and delivered to them, or at any rate that they might stand in the same position as if such requisite number had been executed and delivered to them; and that the decree might be opened and the complainant let in so as that his equities might be provided for out of the unappropriated lien in the mortgage, which it was stated was sufficient to provide for them.

The bill, on demurrer to it, was dismissed by the Circuit Court. Appeal here.

*Mr. E. G. Ryan, for the appellant:*

The appellant having delivered his property and received his bonds, finds their value depreciated one-half, by the railroad company's action—fraudulent without doubt—in selling *all* their bonds of the same issue, at half the price at which he took his, without reserving any whatever to fulfil their contract to him arising in case of a sale of any at such a price. The effect in law (and in fact, also, as the thing proved), was to pay him but half the stipulated price for his iron. The bill seeks payment of the unpaid half.

Will it be urged that our bill is in prejudice of subsequent encumbrancers? It cannot be rightly so urged. Under the mortgages, each bondholder was entitled to his *pro rata* share of four millions of dollars. But, beyond that, the mortgage gave him no right. And it is unimportant to any bondholder how the rights of other bondholders accrue, provided that the whole principal sum is not swelled beyond four millions of dollars. The mortgage has that capacity. Four

millions of bonds were issued. But the decree of the court finds less than three millions due upon the whole issue. And there remains an undisposed principal of upwards of a million of dollars, which the mortgage can cover without wrong to any bondholder under it.

Had the railroad company issued in fact, but $2,794,600 of bonds (the principal sum found due by the decree), the complainant would clearly have had a right to satisfaction until the mortgage was charged with the full principal sum of four millions of dollars. Yet practically, and as judicially decided, that is all that they have issued.

The case is strong in natural equity. In 1857, the complainant furnished all the iron, constituting the track of this railroad, at a cash price of $605,000. In 1863, when, as is matter of common knowledge, the value of such iron had nearly doubled, the road was sold as the fact is for about $2,800,000. It will be hard indeed, if the complainant is to be left remediless for the great loss which he has sustained, and of which the defendants have the whole profit. Yet if the decree be affirmed he will be so left.

*Messrs. Cary and Carlisle, contra.*

Mr. Justice DAVIS delivered the opinion of the court.

The question presented by this record is of easy solution. If Vose had brought suit against the La Crosse and Milwaukee Railroad Company for a breach of their contract, the interpretation of it would have been a proper subject of inquiry, but the decision of this case does not depend on the disposition of that question. The appellant places his claim for relief, on his right to have an outstanding equity with the La Crosse Company adjusted in the foreclosure suit, and his demand attached to the foot of the mortgage. To do this, there must be a power somewhere to enlarge the mortgage, and where is it lodged? Certainly not with the trustees, for their duty is to see that the security held by them for their *cestui que trusts* is enforced according to the terms of the deed. They could neither enlarge the mortgage, nor

consent to its enlargement. The court could not do it, nor the La Crosse Company, as it had covenanted with the trustees in behalf of the bondholders, that it would only issue four millions of dollars in bonds. The rights of the bondholders were fixed by the terms of the mortgage. The value of the bonds as an investment, depended in a great measure on the number to be issued, and doubtless, each purchaser before he bought, had information of the character of the security on which he relied. The property might be very well a safe security for four millions of dollars, and very unsafe for any additional amount.

The doctrine contended for would utterly destroy the marketable value of all corporate securities. No prudent man would ever buy a bond in the market, if the provisions made for its ultimate redemption could be altered without his consent.

But it is said, as the court rendered a decree for less than the face of the bonds, equity will step in and allow the appellant to apply the vacuum of principal secured by the mortgage, to liquidate his claim. The answer to this is, that it does not concern the appellant whether the court rightfully or otherwise reduced a portion of the bonds. The bondholders, whose bonds were thus reduced, are the only parties in interest, who could have any just cause of complaint against the action of the court, and if they did not feel aggrieved, no other person has any right to complain. The security of the mortgage extended to four millions of bonds only, and whatever amount the court should ascertain was due on those four millions, was the amount secured, and no more.

If Vose had been made a party defendant to the foreclosure suit, the decree would have been the same. But he was not a necessary party to that suit. The trustees, as the representatives of all the bondholders, acted for him, as well as the others. It would be impracticable to make the bondholders parties in a suit to foreclose a railroad mortgage, and there is no rule in equity which requires it to be done.

DECREE AFFIRMED.

## ALVISO *v.* UNITED STATES.

An appeal from California dismissed at the last term for apparent want of a citation, now reinstated, it appearing that a citation had in fact been signed, served and filed in the clerk's office, and that the building in which his office was kept had been afterwards partially destroyed by fire, and a great confusion and some loss of records occasioned in consequence.

THIS was a motion to reinstate on the docket an appeal from the District Court for the Northern District of California, that had been dismissed at the last term.*

The decree was rendered in the United States District Court for California, in favor of the United States, on the 8th September, 1863, and an appeal taken on the 23d February, 1864, returnable at the next term of the court, and the record brought up to this court and filed on the 11th November, 1864, which was in time. At the December Term, 1866, the cause was dismissed for want of a citation. The counsel for the appellant now produced evidence to show that a citation was, in fact, signed by the judge at the time of the allowance of the appeal, and duly served on the district attorney representing the United States, on the same day, and afterwards filed in the clerk's office. In July, 1866, the building in which the clerk's office was kept was partially destroyed by fire, which occasioned great confusion, and some loss of the records, and which embarrassed and delayed the appellant in procuring the evidence of the above facts, and in connection with the distance from the place where this court is held, sufficiently accounted, as the court said, for not making the motion at the last term.

*Mr. J. H. Bradley, in support of the motion; Mr. Wills, contra.*

Mr. Justice NELSON delivered the opinion of the court.

As the omission to return the citation appears to have arisen from the neglect of the clerk, if it had been shown

* 5 Wallace, 824.

that it remained in the office, a *certiorari* would have been sent down on a prayer of diminution; but as it has been satisfactorily proved to have been lost or destroyed, it is not a case for a *certiorari*.

*The Palmyra** is an authority for granting the relief sought at the succeeding term of the court in a case like the present. In that case, when the cause was called at the February Term, 1825, upon an inspection of the record, it did not appear from the transcript that there had been a final decree rendered in the court below, and for this reason the appeal was dismissed. At the next term, it having been shown the omission was the error of the clerk in making out the transcript, the cause was reinstated on the docket. Mr. Justice Story says, "The reinstatement of the cause was founded, in the opinion of the court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases."

MOTION GRANTED.

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## DOE, LESSEE OF POOR, *v.* CONSIDINE.

1. Though a devise to trustees "and their heirs," passes, as a general thing, the fee, yet where the purposes of a trust and the power and duties of the trustees are limited to objects terminating with lives in being,—where the duties of the trustees are wholly passive, and the trust thus perfectly dry,—the trust estate may be considered as terminating on the efflux of the lives. The language used in creating the estate will be limited to the purposes of its creation.
2. Estates in remainder vest at the earliest period possible, unless there be a clear manifestation of the intention of the testator to the contrary. And in furtherance of this principle, the expression "*upon* the decease of A., I give and devise the remainder," construed to relate to the time of the enjoyment of the estate, and not the time of the vesting in interest.
3. Where the language of a statute, read in the order of clauses as passed, presents no ambiguity, courts will not attempt by transposition of clauses, and from what it can be ingeniously argued was a general intent, to qualify, by construction, the meaning.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

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* 12 Wheaton, 10.

Statement of the case.

The lessors of the plaintiff in error brought an action of ejectment in that court to recover certain real estate now here in controversy. The parties agreed upon the facts. Under the instructions given to the jury, they found for the defendants, and judgment was rendered accordingly.

The plaintiff excepted to the instructions, and this writ was prosecuted upon the ground that they were erroneous.

The facts, as agreed on, were as follows:

William Barr, Senior, died on the 15th of May, 1816, leaving a will duly admitted to probate in Hamilton County, Ohio. It was out of the will that the controversy arose.

The testator left three daughters: Mary, the wife of William Barr; Susan, the wife of John B. Enness; and Mary B., the wife of James Keys. He left also one son, John M. Barr, who, at the time of his father's death, had living, a wife, Maria Barr, and an infant daughter, Mary Jane Barr.

John M. Barr, the son of the testator, died on the 10th of August, 1820.

Mary Jane Barr, the daughter of John M. Barr, died on the 27th of November, 1821. Maria Barr, her mother, died on the 3d of August, 1860.

The sons-in-law and daughters of the testator were all dead, each one leaving children born in lawful wedlock.

The testator also left living at the time of his death four brothers and two sisters. They are all dead. Two of them left no lineal heirs.

The will contained among others the following provisions:

"I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati aforesaid, *and to their heirs*, all and singular, that certain farm, tract or parcel of land, situate, lying, and being in the county of Hamilton, State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and *their heirs in trust*, (first) for the use of my son, John M. Barr, during his natural life; but, nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr,

should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during her natural life. And *upon the decease of the said Maria Barr*, wife of the said John M. Barr, in case she survive him; if not, *then upon the decease of the said John M. Barr*, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But, if he leave two or more children, then I give and devise the said farm unto such children and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever.

* * * * * * * *

"Also, I do further give, devise, and bequeath the remainder of my estate, both real and personal, to my sons-in-law, William Barr, James Keys, and John B. Enness."

John M. Barr having died, leaving no issue but Mary Jane Barr, and she having died in infancy, unmarried, and the life estate of her mother, Maria Barr, having terminated by the death of that person, the question was presented, In whom is vested the title to the premises in controversy?

The lessors of the plaintiffs claimed title under the three sons-in-law of the testator, or their wives, who were his daughters.

The defendants claimed through the heirs of the brothers and sisters of the testator, under the statute of descents of Ohio, of the 30th of December, 1815, which was as follows:

§ I. That when any person shall die intestate, having title to any real estate of inheritance lying and being in this State, which

title shall have come to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred, in the following course:

1. To the children of such intestate or their legal representatives.

2. If there be no children, or their legal representatives, the estate shall pass to the brothers and sisters of the intestate, who may be of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or of the half blood of the intestate.

3. If there be no brothers and sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the estate came by deed of gift from an ancestor who may be living, the estate shall *ascend* to such ancestor.

4. If there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the *brothers and sisters* of the ancestor from whom the estate came, or their legal representatives; and for want of such brothers and sisters, or their legal representatives, to the brothers and sisters of the intestate of the half blood, or their legal representatives, though such brothers and sisters be not of the blood of the ancestor from whom the estate came.

5. If there be no brothers or sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came.

The court instructed the jury—

1. That at the death of the said Mary Jane Barr, the granddaughter of the testator and daughter of said John M. Barr, she was seized of a vested remainder.

2. That at the death of the said Mary Jane Barr, her said estate in said farm descended to the brothers and sisters of the said testator then alive, and the legal representatives of such of them as were then deceased.

3. That the trust estate to the sons-in-law was only an estate *par autre vie* and terminated at the death of Maria Barr; but

whether that trust estate continued or not after her death the result is the same, for if the estate so vested in Mary Jane Barr were only an equitable estate, no recovery could be had against the parties in possession under her title, in favor of the trustees or their heirs; and in no event, except the death of John M. Barr without issue, did the will give to the sons-in-law any interest in the property in controversy, other than the temporary trust estate.

The correctness of these instructions was the matter before the court.

*Messrs. T. Ewing and H. H. Hunter, for the plaintiffs in error:*

Two controlling questions are presented, the determination of either of which, in favor of the plaintiff, must result in a reversal, namely:

*First.* Whether the devise over, of the remainder in fee, to the sons-in-law, took effect on the death of Maria Barr, in favor of their heirs, they being dead, the issue of *John M. Barr* having failed by the death of his daughter *Mary Jane*, without issue, in the lifetime of the said Maria?

*Second.* Whether, assuming that the remainder in fee did not vest in the heirs of said sons-in-law, on the death of the said Maria, in virtue of the devise to them, the said heirs-at-law, being also heirs-at-law of their deceased mothers—the daughters of the testator—did not *inherit* the said remainder under the statute of descents, from the said *Mary Jane*, as *her next of kin, of the blood of the testator*, the ancestor, from whom the estate came?

*A legal estate in fee* passed to the trustees, and continued in them during the life of John M. Barr, and during the life of his wife—each of them holding only *an equitable use* during their respective lives. During the life of the father—and after his death, during the life of the mother—no *fee* vested in the issue of the marriage. If *the fee* continued in the trustees till the death of the wife, the remainder to the issue, which was *a fee* also, could not vest till that time. Two distinct fees in the same tenements, cannot, under any circumstances, be made to coexist. The remainder given is a

remainder *in fee;* it can, therefore, never vest until the *fee* given to the trustees ceases, and as *the fee* given to them must continue until both the parents die, *the fee* given to the child cannot vest until both parents are dead.

We need not inquire whether, up to the time of the termination of the life estate, under the circumstances, active duties might not have been devolved upon the trustees. There would have been, if the widow had been ousted by a wrongdoer. But be that as it may, the legal title was vested in them, in trust, and it cannot be pretended, that, so long as the life estate continued, they could have been required, by anybody interested, to convey to them the legal title.

What was the testator's intent in placing the legal title pending the estate for life, in the hands of his sons-in-law, his residuary legatees? Plainly that, if the *issue* of his son should fail in the meantime, the title should then be in the possession of those, in whose behalf was included in his will the alternative devise of the remainder.

Did the remainder devised to the child or children of John M. Barr, "*upon the decease of Maria Barr*," vest in Mary Jane and her heirs forty years before it was expressed to be devised to her?

The time of the remainder vesting could not be more distinctly and definitely fixed than it is in this will. The devisor does not say that the *issue* of John M. Barr shall come *into possession* on the decease of Maria Barr, but he says, "*upon the decease* of Maria Barr, *I give and devise the remainder.*" The estate commences at the time of the happening of the event named in the devise—that is, "*upon the decease.*" We use this term habitually in this sense. "A. inherited upon the decease of his father." A gift "*upon*" a day is not a gift forty years before the day; or a gift "*upon*" the happening of an event, a gift before the event happens.

Children and heirs, and *issue* in this devise, all mean the same thing. This is but in accordance with settled rule.*

* Gale *v.* Bennet, Ambler, 681; Wythe *v.* Thureston, Id. 555; S. C. 1 Vesey, 196; Ellicombe *v.* Gompertz, 3 Mylne & Craig, 154; Stevenson *v.*

*Issue* is the only term which will represent the will of the testator in every situation. Thus, in the trust to support and educate the *children* of John M. Barr charged on Maria Barr's life estate, grandchildren were doubtless also intended, and *issue* in its strict sense would embrace them.

Now, when is the failure of issue contemplated by the testator when he says, "Should my said son John M. Barr die without leaving any issue of his body, then and in that case I do give and devise the remainder of my estate in the said farm to my said sons-in-law, &c., and their heirs forever"—to take place? Is it at the instant of the death of John M. Barr? Is it an indefinite failure of issue? Or is it a failure of issue at the falling in of the last life estate? The last would best conform to legal rules, and also much the best to the general intent of the testator. There can be no rational object in fixing it at any other time or the happening of any other event, and the court habitually moulds adverbs of time, and phrases implying time, to meet the intent of testators, and subserve the ends of justice.* Such adverbs and such phrases *generally* relate to the taking effect in *possession*, not in *estate*, in case of a devise in remainder, so as to make it vested rather than contingent. But this adverbial rule is merely ancillary to the great rule of carrying out the intent, and where it does not aid and support *that*, it is not to be regarded. The words and phrases must be understood in their popularly accepted meaning wherever that meaning will best carry out the intent. It would be a monstrous perversion to accept and sustain a rule, no matter by whom devised, or by whom or how many adopted, the obvious effect of which would be to defeat the intention of the devisor. The rule, as it is called, that holds a remainder *vested* even by forcing the language, has its origin in a purpose to *save*, not to *defeat*, the intent of the grantor or devisor by saving the remainder from many of the accidents which destroy it

Evans, 10 Ohio State, 315; King *v.* Beck, 15 Id. 564; Collier *v.* Collier, 3 Id. 375; Malcolm *v.* Taylor, 2 Russell & Mylne, 416.

* Brewster *v.* Benedict, 14 Ohio, 384.

if contingent.* Yet, even in these cases, the early vesting of a remainder is not an *end*, but a *means;* and if it do not tend to carry out and effect the true *end*—the transfer of the estate in accordance with the will of the devisor—it is not to be respected as a rule. If it tend to defeat the paramount *end*—that *end* for the effecting of which all rules were adopted—it must be rejected as an error and a mischief.

This case is subject to none of the casualties attending remote remainders against which early vesting was intended to guard. It would not be subject to them in England, being protected against them by the attendant trust estate in the sons-in-law. But destroy the effect of the phrase "*upon the decease of Maria Barr*," and make the estate *vest* in the issue of John M. Barr one life or two lives sooner than the devisor intended, you defeat the general intent of the devisor; and the clause so construed passes the estate out of the issue of the devisor and out of his devisees, and vests it in collaterals. *Olney* v. *Hull*† is in point. In that case the devise was of the testator's lands to his wife while she remained his widow; but, in case of her death or marriage, the land *then* to be divided among his surviving sons. It was held that the devise over was to such of his sons as should be survivors at the termination of the wife's estate for life, and that the remainder was contingent upon the uncertainty which of the sons should then be living. "Until the death of the mother it was uncertain which of the sons would be alive to take?" The court treated the language used as it would be treated in the every-day business of life. It understood the devisor's plain language without resorting to cases and digests to find out what somebody else said or meant; and which, when found and applied to his devise, would have defeated the estate which he intended to create.

It will be argued that the *intent* of the devisor will be best carried out by making the remainder to the children of John M. Barr vest at once, so that the estate will pass to their heirs, inasmuch as they are the first objects of the testator's

* Cruise's Digest, tit. 16, chap. 6, *passim*, ch. 7, sec. 1.

† 21 Pickering, 314.

bounty, and he intended the estate for them. Certainly, he intended it for them, *if living*, and our construction takes nothing from the devise to the living issue of John M. Barr. But, when all were dead—a state of things contemplated and provided for—who were the next objects of the testator's bounty, his own descendants or collateral relatives? The devise over to the sons-in-law answers the question. The testator provides for his daughters by implication through them.

But, assuming that Mary Jane had, at the time of her death, a vested estate descendible through her under the devise from her ancestor, William Barr, to whom does that estate pass under the statute of descents?

The *first*, *second* and *third* classes provided for in that statute are in our case wanting; but the *next of kin* of the *intestate* of the blood of the *ancestor* from whom the estate came, living at the death of the *intestate*, were the *three daughters* of the said *ancestor;* and the plaintiff's lessors are their heirs-at-law, or claim under such heirs. They are clearly entitled to the inheritance under the *fifth* clause of the section, unless, upon a proper construction, the *brothers and sisters* of the *ancestor* from whom the estate came, are, by the *first* part of the *fourth* clause of the section, to be preferred to his *children*.

That construction is unnatural; and no other reason can be assigned in favor of it than that the *fourth* clause is inserted *before* the *fifth*, in successive order, in framing the section. This, however, is merely a mechanical arrangement. Now, although the mechanical structure of the different parts of the act is such that the successive priorities in favor of one class of legal representatives of an intestate over another, is generally indicated by the successive order observed in the structure of the act, yet that is not, upon any sound principle, such a circumstance as should have a controlling effect, or subvert a manifest intention otherwise apparent.

We would read the fourth clause before the fifth.

This arrangement will not in the least impair the effect

of each of the clauses of the section in their proper application to facts as they may arise in cases. Full effect will be given to the *fifth* clause by applying it to the facts of this case; and this may be done without changing a word or a letter, and without any transposition or displacement of any of the clauses, or parts of the section; and without preventing the due application of the *fourth* clause to the facts of cases in which it is properly applicable.

Here, the general intent in regard to estates in lands of which an intestate died seized, the title to which came to him by devise, descent, or deed of gift, from an ancestor, is, that if the *intestate* leave no child, or brother or sister, or their legal representatives, the estate shall pass to such of the legal representatives of the *intestate*, according to the statutory canons of descent, as are of the blood of the ancestor from whom the estate came; and surely the general intent in regard to the order of succession amongst those who shall take by reason of their being of the blood of the ancestor, must be taken to be according to the same statutory canons of descent. No arbitrary departure from this obvious general intent can be recognized, unless required by very express and vigorous language.

Authorities show that a mechanical order may be departed from, to reach by construction a general intent.

In an Ohio case,* the court in construing an act of the legislature so as to make it conform to the legislative intent, held that a clause which was included in the *second* section of the act, should be read as if included in the *first* section, and as qualifying the provisions of that section. Other cases† indicate the same superior value of a general intent over mere mechanical structure.

If this argument be rejected, it will be only because of a supposed conflict between the *fourth* and *fifth* clauses. The facts of the case are fitted to the terms of the *fifth* clause, and

* The State ex rel. Commissioners of Ross Co. *v.* The Z. & M. Turnpike Co., 16 Ohio State, 308.

† Fosdick *v.* Perrysburg, 14 Ohio State, 472; Slater *v.* Cave, 3 Id. 80; Tracy *v.* Card, 2 Id. 431; Burgett *v.* Burgett, 1 Ohio, 469–79–80.

by force of that clause, abstractly considered, carried the remainder in fee, on the death of *Mary Jane*, to her aunts, the daughters of the testator, as her heirs-at-law. Now if this result is in any way doubtful, it can only be because the *first* part of the *fourth* clause conflicts with the *fifth* clause, and seems to admit of being so applied as to sustain the claim asserted by the defendants, that the brothers and sisters of the testator, and not his daughters, were the heirs-at-law of said *Mary Jane*. Admitting (what we do not concede) that there is such conflict between the provisions, which shall give place to the other? The rule applicable to the construction of conflicting statutory provisions is, that the last in order of time, or in the order of their being set down in the enactment, must take effect; the same rule, both of reason and necessity, as in the familiar case of conflicting provisions in a will.*

*Messrs. Stanbery and H. H. Lincoln*, *contra*, argued the case elaborately on principle and on authorities,† contending—

1. That the devise to the trustees carried the legal estate after the death of John M. Barr, to the *cestui que trusts;* there having been no duty imposed on the trustees which required that estate to be longer in the trustees; a point, however, which the counsel did not consider important; equitable estates being subject as to devises and descents to the same rule as legal ones.

2. That the remainder to Maria Jane Barr was at no time a *contingent* remainder, she being *in esse* at the death of the testator.

3. That it was from the first a vested remainder, but during the life of the father was subject to be devested in the event of her not surviving her father and by force of the devise over to the sons-in-law on that event.

* The Attorney-General *v.* The Governor and Company of Chelsea Waterworks, Fitzgibbon, 195; Townsend *v.* Brown, 4 Zabriskie, 80; Ham *v.* The State, &c., 7 Blackford, 314; Doe *v.* Leicester, 2 Taunton, 109.

† For most of the authorities, relied on also in the opinion, see *infra*, pp. 475–7.

Opinion of the court.

4. That at the death of the father this vested remainder became absolute—and fully vested *in right*, though postponed as to *enjoyment* until the death of the mother—but not defeasible, as before, on her death during the life of her mother.

5. That Maria Jane Barr having been vested with this remainder at the date of her death, and she dying intestate, the estate descended, under the statute of descents of 1815, and on the plain meaning of that statute if read in its declared order—the only allowable order—to the brothers and sisters of the testator.

The counsel in support of their views submitted the opinions of eminent lawyers of Ohio, including those of Messrs. Timothy Walker, J. C. Wright, Tappan Wright, Nathan Wright, and J. A. Pugh, given many years ago, on this same title, to persons as was said about to purchase, and in accordance with the view assumed by the court below. They referred also to an act of the Ohio legislature, passed in 1835,* changing the provisions of the act of 1815, which confessedly governed this case, to the extent, but no further, of carrying the estate to the children of the ancestor from whom the same came, and next after them to his brothers and sisters; that which the opposite counsel contended was already the rule under the act of 1815; but which if it had been as was now argued, would have rendered the act of 1835 useless.

Mr. Justice SWAYNE delivered the opinion of the court.

I. At the threshold of the subject before us, the inquiry arises as to the extent of the trust estate vested by the will in the three sons-in-law of the testator.

The determination of this point is not vital in the case; for whether they took the legal fee or not, and whether the estate of Mary Jane Barr was legal or equitable in its character, the result must be the same. The same rules of law apply to descents and devises of both classes of estates; and

* 1 Curwen, 199.

if in this case an equitable fee in remainder was vested in Mary Jane Barr at the time of her death, while the legal fee as a dry trust was held by the sons-in-law, those holding the latter title could not recover in this action against parties clothed with the equitable estate, and entitled to the entire beneficial use of the property.* But we entertain no doubt upon the subject.

The devise contains words of inheritance. It is to the trustees "*and to their heirs.*" This language, if unqualified by anything else in the clause, would pass the fee. But when we look to the purposes of the trust, and the power and duties of the trustees, we find them limited to two objects:

1. The trustees were to permit John M. Barr to enjoy the premises and receive the rents, issues and profits during his life.

2. If John M. Barr should die, leaving issue, and his wife Maria should survive him, then they were to permit her, during her life, to enjoy the possession and profits of the property.

A drier trust could not have been created. The duties of the trustees were wholly passive. They were authorized to do no act. They were simply to hold the estate committed to them until one or both the events defining the boundary of its existence had occurred. It was to subsist in any event during the life of John M. Barr, and if he died, leaving issue, and his wife survived him, it was to subsist also during her life. The executors were directed, in any event, to make an expenditure upon the property, and to take the fund from the personal estate. This duty had no connection with the trust, and its bearing upon the case is in nowise affected by the fact that the executors and trustees happened to be the same persons. Whether John M. Barr died with or without issue, the entire object of the trust was fulfilled, and its functions were exhausted when the persons for whose benefit it

* 4 Kent's Com. 334, 335; Brydges *v.* Brydges, 3 Vesey, Jr., 127; Cholmondeley *v.* Clinton, 2 Jacob & Walker, 148; Brydges *v.* Duchess of Chandos, 2 Vesey, Jr., 417, 426; Walton *v.* Walton, 7 Johnson's Chancery, 270; The City of Cincinnati *v.* Lessee of White, 6 Peters, 441.

was created ceased to live. "The remainder of the estate in said farm," in the language of the testator, thereupon passed according to the provisions of the will. It is neither expressed nor implied that the trust estate should exist any longer, and no imaginable purpose could be subserved by its longer continuance. When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

Jarman says:* "Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what, less estate."

Chancellor Kent says: "The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and notwithstanding the devise to the trustees *and their heirs*, they take only a chattel interest where the trust does not require an estate of higher quality."†

This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the statute of uses. The consequences in this case of the absence of such a statute in Ohio, it is therefore not necessary to consider.

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* 2 Jarman on Wills, 156.

† 4 Kent's Commentaries, 233; see also Webster *v.* Cooper, 14 Howard, 499; Neilson *v.* Lagow et al., 12 Id. 110; Doe ex dem. Compere *v.* Hicks, 7 Term, 437; Curtis *v.* Price, 12 Vesey, Jr., 99; Morrant *v.* Gough, 7 Barnewall & Cresswell, 206; 1 Greenleaf's Cruise, 359, note.

We are of opinion that the trust estate of the sons-in-law of the testator was only an estate *par autre vie*, and that it terminated at the death of Maria Barr.

II. This brings us to the consideration of the question, what was the estate, in quantity and quality, of Mary Jane Barr at the time of her decease?

The hinge upon which turns this part of the controversy is the following language of the will:

"*And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr, and their heirs forever.* If my said son leave but one child, as aforesaid, then I give the said farm to him or her, *or his or her heirs forever. But*, if he leave two or more children, then I give and devise the said farm unto such children, *and their heirs*, to be equally divided between them. *But* should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise *the remainder of my estate in the said farm* unto my said sons-in-law, William Barr, James Keys, and John B. Enness, *and their heirs forever.*"

The plaintiff in error claims that this clause is an executory devise, and that it gave to Mary Jane Barr a contingent estate, to take effect upon the event of her outliving both her parents, *and not otherwise;* and that as she died before her mother, no title or interest ever vested in her.

The defendants claim that upon the death of the testator, Mary Jane Barr took under the will a vested remainder, subject to open and let in after-born children, if any there were, and deferred as to the period of enjoyment until the death of the one parent who should survive the other, but liable to no other contingency, and limited by no other qualification.

This point of the will must be examined by its own light, and also in the light of the adjudications in like cases.

Considering it without the aid of authority, we have no

difficulty in coming to a conclusion as to its proper construction.

We think that it gives:

1. A legal estate *par autre vie*, to three sons-in-law in trust.

2. An equitable life estate, with the usufruct of the property to John M. Barr.

3. In case he should die, leaving issue, and his wife Maria should survive him, then an equitable estate for life to her with the usufruct of the property, for the benefit of herself and the surviving child or children of John M. Barr.

4. A vested remainder in fee simple to the child of John M. Barr, living at the time of the death of the testator, subject to open and let in the participation of after-born children, and liable to be devested by their dying before their father, but *not* liable to be defeated by any other event.

5. The devise over to the three sons-in-law was an alternate or collateral contingent remainder; and if John M. Barr had died leaving no children surviving him, that remainder would thereupon at once have vested and been converted into an absolute fee simple estate.*

In no event, except the death of John M. Barr without issue, did the will give them any interest in the property other than the temporary trust estate.

By the vesting of the remainder in Mary Jane Barr, at the death of the testator and the death of her father, this provision in behalf of the sons-in-law became as if it were not. It was utterly annulled, and could not thereafter take effect either as a contingent remainder or as an executory devise. We are satisfied the testator did not extend his vision or seek to control this property beyond the period of the death of his son, John M. Barr. With a view to that event he made two provisions equally absolute, emphatic, and final in their terms. In that respect there is no difference. The result, whether the one or the other should take

* Luddington *v.* Kime, 1 Lord Raymond, 203; Dunwoodie *v.* Reed, 3 Sergeant & Rawle, 452; C. J. Gibson's opinion.

effect, was to depend upon the single fact whether John M. Barr died with or without surviving children.

The language used carried the entire estate of the testator in the premises alike in both cases, and we can no more hold the word "heirs" to be the synonym of "issue," or otherwise qualify the estate intended to be given in the one case than in the other.

The theory of the counsel for the plaintiff derives no support from the principle of human nature, which not unfrequently impels a testator to transmit his property, as far as possible, in the line of his descendants. Here Barr, Keys and Enness were not of the blood of the testator. He could not but be aware that if they took the property it might pass from them, by descent or purchase, to those who were strangers to his blood, and in nowise connected with his family.

Having disposed of the property absolutely at the death of his son, he left the future, beyond that boundary, with its undeveloped phases, whatever they might be, to take care of itself.

III. We will now examine the case in the light of principle and authority.

A vested remainder is where a *present* interest passes to *a certain and definite* person, but to be enjoyed *in futuro*. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate, or *eo instanti* that it determines.

A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event.

A contingent remainder, if it amount to a freehold, cannot be limited on an estate for years, nor any estate less than freehold. A contingent remainder may be defeated by the determination or destruction of the particular estate before the contingency happens. Hence, trustees are appointed to preserve such remainders.

An executory devise is such a disposition of real property

by will that no estate vests thereby at the death of the devisor, but only on a future contingency. It differs from a remainder in three material points:

1. It needs no particular estate to support it.

2. A fee simple or other less estate may be limited by it —after a fee simple.

3. A remainder may be limited, of a chattel interest, after a particular estate for life in the same property.*

The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.

It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary.†

Adverbs of time—as *where*, *there*, *after*, *from*, &c.—in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest.‡

Where there is a devise to a class of persons to take effect in enjoyment at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others as they are born afterward.§

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* 2 Blackstone's Commentaries, chap. 12.

† Johnson *v.* Valentine, 4 Sandford, 43; Wrightson *v.* Macaulay, 14 Meeson & Welsby, 214; Chew's Appeal, 37 Penn. 28; Moore *v.* Lyons, 25 Wend. 126; Phipps *v.* Williams, 5 Simons, 44; Gold *v.* Judson, 21 Conn. 622; Redfield on Wills, 379; Finlay *v.* King, 3 Pet. 374, 5 Barr, 28; Carver *v.* Jackson, 4 Pet. 92; Purefoy *v.* Rogers, 2 Saunders, 388; Doe *v.* Morgan, 3 Term, 765, 766; Nightingale *v.* Burrell, 15 Pick. 110.

‡ Johnson *v.* Valentine, 4 Sandford, 43; Moore *v.* Lyons, 25 Wendell, 119; Boraston's Case, 3 Coke, 20; Minnig *v.* Batdorff, 5 Barr, 506; Rives *v.* Frizzle, 8 Iredell's Equity, 239.

§ Johnson *v.* Valentine, 4 Sandford, 45; Doe *v.* Provoost, 4 Johnson, 61; Chew's Appeal, 37 Penn. 28; Doe *v.* Ward, 9 Adolphus & Ellis, 582, 607, 4 Dow, 203; Doe *v.* Nowell, 1 Maule & Selwyn, 334; Bromfield *v.* Crowder, 1 New Reports, 326; Phipps *v.* Ackers, 9 Clark & Finelly, 583; Doe *v.* Prigg, 8 Barnewall & Cresswell, 235; Minnig *v.* Batdorff, 5 Barr, 505; Gold *v.* Judson, 21 Conn. 623.

An estate once vested will not be devested unless the intent to devest clearly appears.*

The law does not favor the abeyance of estates, and never allows it to arise by construction or implication.†

"When a remainder is limited to a person *in esse and ascertained*, to take effect by *express limitation*, on the termination of the preceding particular estate, *the remainder is unquestionably vested.*"‡

This rule is thus stated with more fulness by the Supreme Court of Massachusetts. "Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event *that must unavoidably happen by the efflux of time*, the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainder-man before the determination of the particular estate, his vested estate will be subject to be devested by that event, and the interest of the substituted remainder-man which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder."§

In 4th Kent's Commentaries, 282, it is said: "This has now become the settled technical construction of the language and the established English rule of construction."‖ It is added: "It is the uncertainty of *the right* of enjoyment, and not the uncertainty of *its actual enjoyment*, which renders a remainder *contingent*. The present capacity of taking effect in possession—if the possession were to become vacant—distinguishes a vested from a contingent remainder, and not the

* Chew's Appeal, 45 Penn. 232; Harrison *v.* Foreman, 5 Vesey, 208; Doe *v.* Perryn, 3 Term, 493; Smither *v.* Willock, 9 Vesey, 234.

† Comyn's Dig., Abeyance, A. E.; Catlin *v.* Jackson, 8 Johnson, 549; Ekins *v.* Dormer, 3 Atkyns, 534.

‡ Preston on Estates, 70.

§ Blanchard *v.* Blanchard, 1 Allen, 227.

‖ Doe *v.* Prigg, 8 Barnewall & Cresswell, 231.

certainty that the possession will ever become vacant while the remainder continues."*

It is further said in the same volume:† "A. devises to B. for life, remainder to his children, but if he dies without leaving children remainder over, both the remainders are *contingent*, but if B. afterward marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over *are gone forever*. The remainder becomes a *vested* remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs."‡

We have quoted this language because of its appositeness to the case under consideration. The propositions stated are fully sustained by the authorities referred to. Other authorities, too numerous to be named, to the same effect, might be cited. We content ourselves with referring to a part of those to which our attention has been called in the briefs in this case.§

This doctrine received the sanction of the Supreme Court of Ohio in *Jeefers* v. *Lampson*,‖ where it was adopted and applied. The leading authorities relied upon by the counsel for defendants in error in this case were cited by the court and control the result. We are bound by this decision as a local rule of property.

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* Williamson *v.* Field, 2 Sandford's Chancery, 533. † Page 284.

‡ Doe *v.* Perryn, 3 Term, 484 (Buller's opinion); Right *v.* Creber, 5 Barnewall & Cresswell, 866; Story, J., in Sisson *v.* Seabury, 1 Sumner, 243; Hannan *v.* Osborn, 4 Paige, 336; Marsellis *v.* Thalhimer, 2 Id. 35.

§ Harrison *v.* Foreman, 5 Vesey, 208; Belk *v.* Slack, 1 Keen, 238; Bromfield *v.* Crowder, 1 New Reports, 325; Danforth *v.* Talbot, 7 B. Monroe, 624; Goodtitle *v.* Whitby, 1 Burrow, 234; Moore *v.* Lyons, 25 Wendell, 119; Randoll *v.* Doe, 5 Dow, 202; Edwards *v.* Symons, 6 Taunton, 214; Phipps *v.* Ackers, 9 Clark & Finelly, 583; Stanley *v.* Stanley, 16 Vesey, 506; Doe *v.* Nowell, 1 Maule & Selwyn, 334; Boraston's Case, 3 Coke, 52; Doe *v.* Ewart, 7 Adolphus & Ellis, 636; Minnig *v.* Batdorff, 5 Barr, Pennsylvania State, 503.

‖ 10 Ohio State Rep. 101.

The same doctrine has been sanctioned by this court.*

According to the theory of the plaintiff's counsel, if Mary Jane Barr had married and had died before her mother, leaving children, they would have been cut off from the estate. Surely the testator could not have intended such a result.

In three of the cases, substantially like this as to the point under consideration, brought to our attention by the counsel for the defendants in error, this consequence of such a construction was adverted to by the court.

In *Carver* v. *Jackson*,† the court say: "It is also the manifest intention of the settlement, that if there is any issue, *or the issue of any issue*, such issue shall take the estate, which can only be by construing the prior limitation in the manner in which it is construed by this court."

In *Goodtitle* v. *Whitby*,‡ Lord Mansfield said: "Here, upon the reason of the thing, the infant is the object of the testator's bounty, and the testator does not mean to deprive him of it in any event. Now, suppose that the object of the testator's bounty marries and dies before his age of twenty-one, *leaving children*, could the testator *intend in such an event to disinherit them?* Certainly he could not."

In *Doe* v. *Perryn*,§ Buller, Justice, said: "But if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren; for if a child were born who died in the lifetime of his parents, leaving issue, such grandchild could not take; which could not be supposed to be the intention of the devisor."

Mary Jane Barr was, at the death of the testator, within every particular of the category, which, according to the authorities referred to, creates a vested remainder.

1. The person to take was *in esse*.

* Finlay et al. *v.* King's Lessee, 3 Peters, 376; Carver *v.* Jackson, 4 Id. 1; Williamson et al. *v.* Berry, 8 Howard, 495; Croxall *v.* Shererd, 5 Wallace, 280; see also Washburn on Real Property, 229, and 1 Greenleaf's Cruise, tit. Remainder.

† 4 Peters, 1. ‡ 1 Burrow, 233. § 3 Term, 495.

2. She was ascertained and certain.

3. The estate was limited, to take effect in her absolutely, upon the death of her father.

4. That was an event which must unavoidably happen by the efflux of time.

5. Nothing but her death, before the death of her father, would defeat the remainder limited to her.

6. She had a fixed right of property on the death of the devisor. The period of enjoyment *only* was deferred and uncertain.

7. The time of enjoyment *in possession* depended upon the death of her mother. The right was in nowise dependent on that event.

8. Upon the death of her father, she surviving him, her estate, before *defeasible*, became indefeasible and absolute.

We are thus brought to the conclusion, upon technical as well as untechnical grounds, that Mary Jane Barr had, at the time of her death, an indefeasible estate of remainder in fee in the premises in controversy.

In the view we have taken of this case, the doctrine of shifting uses can have no application; we therefore forbear to advert to the rules of law relating to that subject.

IV. Mary Jane Barr having died unmarried and intestate, it remains to inquire to whom her estate passed.

The descent cast was governed by the statute of December 30th, 1815.

The first section only applies to the subject.

The first part of the fourth clause of that section is as follows:

"4. If there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the *brothers and sisters* of the ancestor from whom the estate came, or their legal representatives." This gave the property "to the brothers and sisters" of the testator, "or their legal representatives."

The language of this clause is plain and unambiguous.

There is nothing in the context, rightly considered, which qualifies or affects it. There is, we think, no room for construction.* We concur entirely in the views of the eminent counsel, whose professional opinions, long since written, have been submitted to us. We think the point hardly admits of discussion. If there could be any doubt on the subject, it is removed by the act of 1835, which substitutes for the rule of descent here under consideration, the one which we are asked to apply. Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating we should legislate. That we have no power to do. Our function is to execute the law, not to make it.

The instructions given by the court to the jury were in accordance with the views we have expressed. We find no error in the record, and the judgment is

AFFIRMED.

Mr. Justice GRIER (with whom concurred CLIFFORD, J.), dissenting.

I cannot let this case pass without expressing my entire dissent from the conclusions of the majority of my brethren, both on the construction of the will of William Barr and the statute of descents of Ohio.

In the construction of a will the first great rule—one that should control and govern all others—is, that the court should seek the intention of the testator from the four corners of his will. All technical rules, from Shelley's case down, were established by courts only for the purpose of effectuating such intention. But it is easy to pervert the testator's intention by an astute application of cases and precedents, of which the present case is the last example of many which have preceded it, and where the testator's intention is entirely defeated by the application of rules intended to effectuate it. The remainder in fee to the children of John M. Barr was not to vest *till the decease of Maria Barr.* "And upon the decease of said Maria, I devise the remainder of

* Armstrong *v.* Miller, 6 Ohio, 124.

my estate to the legitimate child or children of John M. Barr and his heirs forever, remainder over to the testator's sons-in-law in case of failure of such issue of the son." Such is the language. By construing the remainder to vest before "the decease of Maria Barr," the executory devise to the sons-in-law is entirely defeated, and the clear intention of the testator frustrated by factitious rules intended to facilitate its discovery.

It often happens that legislative acts require the same liberal rules of construction as wills, where the testator is presumed to be *inops concilii*. It only requires the reading of the fifth section of the statute before the fourth in order to effectuate the intention of the legislature, and to clear it from the absurdity of giving an intestate's estate, not to his next of kin, but to his brothers and sisters, instead of his own children.

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## WALKLEY *v.* CITY OF MUSCATINE.

After judgment at law for a sum of money against a municipal corporation, and execution returned unsatisfied, mandamus, not bill in equity, is the proper mode to compel the levy of a tax which the corporation was bound to levy to pay the judgment.

APPEAL from a decree of the Circuit Court of the United States for Iowa.

A bill had been filed in that court to compel the authorities of the city of Muscatine to levy a tax upon the property of the inhabitants, for the purpose of paying the interest on certain bonds, to the amount of $130,000, that had been issued for the benefit of the Mississippi and Missouri Railroad Company. It appeared that a judgment had been recovered in the same court against the city for $7666, interest due on the bonds held by the plaintiff; that execution had been issued and returned unsatisfied, no property being found liable to execution; that the mayor and aldermen had

been requested to levy a tax to pay the judgment, but had refused; that the city authorities possessed the power under their charter to impose a tax of one per cent. on the valuation of the property of the city, and had made a levy annually, but had appropriated the proceeds to other purposes, and wholly neglected to pay the interest on the bonds before the judgment, or to pay the judgment since it was rendered. The bill prayed that the mayor and aldermen might be decreed to levy a tax, and appropriate so much of the proceeds as might be sufficient to pay the judgment, interest, and costs. An answer was put in, and replication and proofs taken. On the hearing the court dismissed the bill. The creditor appealed.

*Mr. J. Grant, for the appellant:*

In *The Board of Commissioners of Knox County* v. *Aspinwall*,* where the application was for a mandamus to compel the levy of a tax, this court, in answer to an argument that the creditor could have relief in equity alone, say:

"A court of equity is sometimes resorted to as ancillary to a court of law in obtaining satisfaction of its judgment. It is no objection to the writ of mandamus that the party might possibly obtain another remedy by new litigation in a new tribunal."

The court holds, apparently, that a writ of mandamus is a cumulative remedy, and does not oust the court of equity of its jurisdiction.

*Mr. W. F. Brannan, contra.*

Mr. Justice NELSON delivered the opinion of the court.

We are of opinion the complainant has mistaken the appropriate remedy in the case, which was by writ of mandamus from the Circuit Court in which the judgment was rendered against the defendants. The writ affords a full and

* 24 Howard, 385.

adequate remedy at law. There are numerous recent cases in this court on the subject.*

We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus. An injunction is generally a preventive, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases where it is used by the court to carry into effect its own decrees—as in putting the purchaser under a decree of foreclosure of a mortgage into the possession of the premises. Even the exercise of power to this extent was doubted till the case of *Kershaw* v. *Thompson*,† in which the learned chancellor, after an examination of the cases in England on the subject, came to the conclusion he possessed it; not, however, by the writ of injunction, but by the writ of assistance. Chancellor Sanford, who adopted the practice in *Ludlow* v. *Lansing*,‡ observed that it was not usual before the case of *Kershaw* v. *Thompson*, but that he had examined all the cases cited, and that the English cases seemed to warrant the decision. He further observed that if the decision of the late chancellor was in any respect new, the innovation was, in his opinion, judicious and fit.

The counsel for the complainant has referred to some expressions by the learned judge in the opinion delivered in the case of *The Board of Commissioners of Knox County* v. *Aspinwall*, as giving countenance to the remedy by bill in equity; but this is a clear misapprehension. It is there observed, "that a court of equity is sometimes resorted to as auxiliary to a court of law in obtaining satisfaction of judgments. But no court," he observes, "having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice." We add, that a court of equity is invoked as auxiliary to a court of law in the enforcement

* Board of Commissioners of Knox County *v.* Aspinwall, 24 Howard, 376; Supervisors *v.* United States, 4 Wallace, 435; Von Hoffman *v.* City of Quincy, Id. 535; City of Galena *v.* Amy, 5 Id. 705.

† 4 Johnson's Chancery, 609.

‡ 1 Hopkins, 231; see also Valentine *v.* Teller, Id. 422.

of its judgments in cases only where the latter is inadequate to afford the proper remedy. The principle has no application in the present case.

DECREE AFFIRMED.

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## UNITED STATES v. ECKFORD.

When the United States is plaintiff and the defendant has pleaded a set-off (as certain acts of Congress authorize him to do), no judgment for any ascertained excess can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in such amount. *De Groot* v. *United States* (5 Wallace, 432) affirmed.

APPEAL from the Court of Claims, the case being thus:

An act of Congress* of the 3d of March, 1797, § 3, provides that where a suit is instituted against any person indebted to the United States, the court shall, on motion, grant judgment at the return term, unless the defendant shall, in open court, make oath or affirmation that he is *equitably entitled to credits* which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury and rejected, specifying each particular claim so rejected in the affidavit. The same act provides, § 4, that in such suits no claim for a credit shall be admitted upon trial but such as shall appear to have been submitted to the accounting officers of the treasury for their examination and by them been disallowed, unless it shall appear that the defendant, at the time of trial, is in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident.

With this act in force, the United States sued the executors of Eckford, who had been collector of New York, on his

* 1 Stat. at Large, 515.

official bond, in the District Court for Southern New York. Among other pleas was that of set-off. The jury sustained the plea, and certified that there was due from the United States to the defendants, $20,545. On this verdict a judgment was entered, "that the United States take nothing by their bill, and that the defendants go thereof without day; and that the said executors are entitled to be paid the said balance so certified," &c.

The claim not being paid, the executors brought suit against the United States in the Court of Claims, and offered the record of the Circuit Court in evidence. It was objected to by the counsel of the United States; but the objection was overruled and the record read, and judgment accordingly. The United States appealed; and, divested of its special form below, the question now here was, whether, when the United States sued a person indebted to it, and a set-off to a greater amount than the claim was pleaded and proved, a judgment could be given against the United States for the excess.

By statutes of New York, in case of such pleas, "if there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered to the defendant for the amount."

*Mr. E. P. Norton*, *for the United States*, *appellant*, relied, as concluding all argument, on *De Groot* v. *United States*,* where this court says:

"When the United States is plaintiff in one of the Federal courts, and the defendant has pleaded a set-off, which the acts of Congress have authorized him to rely on, *no judgment can be rendered against the government*, although it may be judicially ascertained that on striking a balance of just demands the government is indebted to the defendant in an ascertained amount."

*Reeside* v. *Walker*,† was cited to a similar effect.

*Mr. S. E. Lyon*, *contra*, argued that the ruling below was

* 5 Wallace, 431.

† 11 Howard, 290.

supported by *United States* v. *Wilkins*,* where Story, J., for the court, in construing the act under which the set-off was offered and proved, says:

"There being no *limitation as to the nature and origin of the* CLAIM *for a credit which may be set up in a suit*, we think it a reasonable construction of the act that it intended to allow the defendant the *full benefit* at the trial of any credits which may be set up in the suit. . . . The object of the act seems to be *to liquidate and adjust all accounts* between *the parties*."

How does the defendant here have "the *full* benefit of any credit he may have," or how can "all the accounts between the parties be *liquidated* and *adjusted* by the trial," if the executors may not have judgment for the excess; the law of the State where the cause is tried, permitting it?

The word of the statute—"credits"—is as comprehensive as any that could be used. Any view opposite to this might work great injustice. To a claim on the part of the United States the defendant would be compelled to interpose the whole amount of his credits, and if they exceeded the plaintiff's charges, by a general verdict for the defendant, there would be no means of determining the amount allowed by the jury in reduction, and he thereby destroys his claim upon the government for the balance. Again, suppose the set-off to consist of a single claim or item, incapable of separation or division in its proof or allowance, and it exceeds the plaintiff's demand. To prove any part is to prove the whole. To decide in favor of a portion, must carry with it a determination in favor of the entire claim. Or, suppose the credits to consist of several matters or items, no one of which is equal to the plaintiff's debt, and yet any two are beyond that amount. How, in either of these cases, is the defendant's cause of action to be divided and distinguished?

In *United States* v. *Bank of the Metropolis*,† the jury certified a balance due the defendants from the United States, and the judgment upon the certificate was affirmed by the Supreme Court.

* 6 Wheaton, 135.

† 15 Peters, 377.

Opinion of the court.

Mr. Justice CLIFFORD delivered the opinion of the court.

Statement of facts shows that the United States, in June, 1839, brought an action of debt in the Circuit Court on the official bond of the collector of the port of New York, against the executors of Henry Eckford, who was one of the sureties in that bond. Purpose of the suit was to recover moneys which the collector had received as such, without having ever accounted for the same as required by law. Defendants interposed various pleas, and among others pleaded that the moneys retained by the collector were received after he was reappointed, and at a time when the testator of the defendants was not a surety. They also pleaded a set-off, claiming that a large sum was due to their testator from the plaintiffs on several accounts, and especially for the occupation of real estate. Verdict of the jury was for the defendants, and the jury certified, as stated in the record, that there was due from the United States to the defendants the sum of twenty thousand five hundred and forty-five dollars and fifty cents. Judgment was accordingly rendered in the Circuit Court that the defendants do go thereof without day, and that the surviving executors were entitled to be paid the balance so certified by the jurors.

Upon these facts the Court of Claims decided: (1) That the Circuit Court had jurisdiction of the subject-matter of the suit, and the set-off pleaded. (2) That the finding of the jury and the determination of the court constituted, in substance and effect, a valid and binding judgment against the United States for the sum certified by the jury. (3) That such judgment, as it remains unsatisfied and unrecovered, cannot be impeached in a collateral suit. (4) That the finding of the jury, under the circumstances stated, is conclusive, and is not subject to re-examination in any Federal court by virtue of the seventh amendment to the Constitution. Dissatisfied with the judgment of the court, the United States appealed.

1. Settled rule of law, as universally understood, is that the Judiciary Act does not authorize a suit against the

United States in any of the Federal courts. Where a party contracting with the United States is dissatisfied with the course pursued towards him by the officers of the government charged with the fulfilment of the contract, his only remedy, except in the limited class of cases cognizable in the Court of Claims, is by petition to Congress.*

The Supreme Court was created by the Constitution, but the Circuit Courts were created by an act of Congress, and they are not authorized to exercise jurisdiction in any case except where the jurisdiction was conferred by an act of Congress.†

Jurisdiction cannot be exercised by a Circuit Court in a suit against the United States, or against any other party, unless the plaintiff can bring his case within some act of Congress.‡

Right of set-off, properly so called, did not exist at common law, but is founded on the statute of 2 Geo. II, c. 24, s. 4, which in substance and effect enacted that where there were mutual debts between the plaintiff and the defendant, . . . one debt may be set against the other, and such matter may be given in evidence under the general issue, or be pleaded in bar, so that notice shall be given of the sum or debt intended to be offered in evidence.§ Such being the general rule of law, it is quite clear that the right of the claimant must depend upon the regulations prescribed by Congress for the government of the Federal courts in suits between the United States and individuals.

Where a suit is instituted against any person indebted to the United States, the act of the 3d of March, 1797, provides in its third section that the court shall, on motion, grant

* Briscoe *v.* Bank of Kentucky, 11 Peters, 321; Cohens *v.* Virginia, 6 Wheaton, 411, 412; Conklin's Treatise (4th ed.), 137; Reeside *v.* Walker, 11 Howard, 287; United States *v.* McLemore, 4 Id. 286; Hill *v.* United States, 9 Id. 389.

† United States *v.* Hudson, 7 Cranch, 32; United States *v.* Bevans, 3 Wheaton, 336; McIntire *v.* Wood, 7 Cranch, 504; United States *v.* Coolidge, 1 Wheaton, 415.

‡ United States *v.* Clarke, 8 Peters, 444.

§ Chitty on Contracts, 948.

judgment at the return term, unless the defendant shall, in open court, make oath or affirmation that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury and rejected, specifying each particular claim so rejected in the affidavit. Section four of the same act also provides that in suits between the United States and individuals no claim for a credit shall be admitted upon trial, but such as shall appear to have been submitted to the accounting officers of the treasury for their examination, and by them been disallowed, unless it shall appear that the defendant, at the time of trial, is in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident.* Same rules are prescribed in respect to set-offs in suits against postmasters, except that the party claiming the credit is required to present the claim to the auditor of the Post-office Department.†

Extent of the authority conferred by that section is as plain as any grant of power can well be which is conferred in clear and unambiguous language. Claims for credit in suits against persons indebted to the United States, if it appears that the claim had previously been presented to the accounting officers of the treasury for their examination, and had been by them disallowed, in whole or in part, may be admitted upon the trial of the suit, but it can only be admitted as a claim for a credit, and not as a demand for judgment. Such a claim for a credit shall be admitted, and if proved should be allowed in reduction of the alleged indebtedness of the defendant, even to the discharge of the entire claim of the plaintiffs, but there is not a word in the provision conferring any jurisdiction upon the court to determine that the United States is indebted to the defendant for any balance, or to render judgment in his favor for the excess of the set-off over his indebtedness as proved in the trial.

* 1 Stat. at Large, 515; United States *v.* Giles et al., 9 Cranch, 236.
† 5 Stat. at Large, 83.

Equitable claims for credit, though never presented and disallowed, may be admitted upon the trial if brought within the conditions prescribed in the latter clause of the section; but if admitted they also are to be adjudicated as claims for credit, and not as demands for judgment against the United States.

Perhaps the best exposition of the law upon the subject is given in the opinion of the court in the case of *Reeside* v. *Walker*,* which was before the court on a writ of error to the Circuit Court of this district. Express ruling of the court in that case was that no action of any kind could be sustained against the government for any supposed debt, unless by its own consent; and that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit. Such a proceeding, the court held, could not be upheld against the government except by a mere evasion, which would be as useless in the end "as it would be derogatory to judicial fairness." All the court appear to have concurred in that judgment, and in our opinion it is decisive of the present controversy.

Attempt is not made to sustain the jurisdiction of the Circuit Court in such a case by virtue of any provisions of any act of Congress regulating judicial proceedings, but the argument is that the ruling of the court below may be supported because the law of the State may be regarded as the rule of decision in the Circuit Court, and that by the law of the State judgment in such a case may be rendered for the defendant for the balance found due from the plaintiff.

Rules of decision undoubtedly are derived, in certain cases in suits at common law, from the laws of the several States, but the thirty-fourth section of the Judiciary Act does not apply to the process or practice of the Federal courts, unless adopted by an act of Congress, or some rule of court not inconsistent with the laws of the United States.†

* 11 Howard, 290.

† 1 Stat. at Large, 92; Wayman *v.* Southard, 10 Wheaton, 24; Bank of the United States *v.* Halstead, Id. 62.

Extended argument upon the subject, however, is unnecessary, as the point has been directly determined in this court, and ought not any longer to be regarded as an open question. Speaking to the precise point, the court said, in *United States* v. *Robeson*:* "This is a question which arises exclusively under the acts of Congress, and no local law or usage can have any influence upon it. The rule as to set-off in such cases must be uniform in the different States, for it constitutes the law of the courts of the United States in a matter which relates to the Federal government;" and in that view of the subject we entirely concur.

The rule is, as there stated, that where a defendant has in his own right an equitable claim against the United States for services rendered or otherwise, and has presented it to the proper accounting officers of the treasury, who have refused to allow it, he may set up the claim as a credit on a writ brought against him for any balance of money claimed to be due by the government. Same rule is adopted by Mr. Conklin in his valuable treatise, and we have no doubt it is correct.†

Without extending the argument, we adopt the views expressed by this court in the case of *De Groot* v. *United States*,‡ decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount.

Comment upon the other authorities presented by the claimant is unnecessary, as we are fully satisfied that those to which we have referred give the correct rule of law upon the subject.

JUDGMENT REVERSED.

* 9 Peters, 324. † Conklin's Treatise, 137. ‡ 5 Wallace, 432.

## FOLEY *v.* SMITH.

The rule of law that he who takes a note overdue and dishonored, takes it encumbered with all the equities between the prior parties to it, being the law of Louisiana as well as of those States which have adopted the common law, a person who takes such a note from one intrusted by the owner with the collection of it only, cannot come in that State more than elsewhere upon the proceeds of a mortgage given to secure the note so taken along with several others; the mortgaged property, on sale, proving insufficient to pay all.

ERROR to the Circuit Court for the Eastern District of Louisiana.

Mrs. Smith, the appellee, having sold to McHatton a plantation in the parish of East Baton Rouge, received from him notes for $70,000 of the purchase-money, secured by a mortgage on the property sold. One of these notes for the sum of $15,000 was placed by Mrs. Smith before due in the Bank of Kentucky for collection, and that bank forwarded it for the same purpose to the Citizens' Bank of New Orleans. The note was indorsed in blank by Mrs. Smith and by the Bank of Kentucky. Not being paid at maturity, it was duly protested, and in this condition remained in the Citizens' Bank for over seven months, when one McKnight, who had been acting as the agent of the Bank of Kentucky at New Orleans, took the note from the Citizens' Bank, and sold and delivered it for full value to Foley & Co. McKnight was supposed to have acted under a power of attorney from the Bank of Kentucky, which was not produced. He transferred the note by a public notarial act in writing, by which he professed to assign the note to Foley & Co., with all rights, remedies and mortgages to which the said Bank of Kentucky was or might be entitled as holder of the note, but without warranty on the part of said bank, except as to the existence of the debt represented by the notes.

When the other notes, falling due after the one above mentioned, had matured and were unpaid, Mrs. Smith instituted proceedings under the law of Louisiana to foreclose her mortgage; and under these proceedings the land was sold, and

she became the purchaser. The sale did not bring enough to satisfy the remaining notes in her hands.

Foley & Co. intervened in these proceedings, and asked that the amount of the note which they held might first be paid to them out of the proceeds of the property sold. The court below dismissed their claim.

*Mr. Miles Taylor, for Foley & Co., plaintiffs in error:*

Mrs. Smith, by her own act, authorized and enabled the Bank of Kentucky to act as the owner of the note, without disclosing the fact that it was an agent; and in point of fact F. & Co. dealt with the bank in the character of a principal, and without having any reason whatever to suppose that it was not so in reality. Mrs. Smith is therefore liable, upon the principle, that of two innocent parties, the one shall suffer who, by his agent, causes the injury, and will in all such cases receive the least harm.*

*Mr. Durant, contra.*

Mr. Justice MILLER delivered the opinion of the court.

We cannot see how the Circuit Court could have rendered any other decree than that which it did, namely, to dismiss the appellant's claim.

The rule of law that he who takes a note overdue and dishonored, takes it encumbered with all the equities between the prior parties to it, is the law of Louisiana as well as of those States which have adopted the common law. This is well established by the numerous decisions cited in the brief of counsel for appellee filed in the Circuit Court.

Under this rule the purchaser from the Bank of Kentucky could get no better title than the bank had when it sold. It is conceded that it had no title whatever. The appellants purchased of McKnight, as agent of the Bank of Kentucky, and as the note was not the property of McKnight, or of the

* Murray *v.* Lardner, 2 Wallace, 110; Hunter *v.* Hudson River Company, 20 Barbour, 506; Commercial Bank *v.* Kortright, 22 Wendell, 348.

bank which he represented, appellants must show some authority for the sale from the real owner, or the sale is invalid. Such authority is claimed in argument to result from the possession of the note by McKnight. But if mere possession by the person who professes to transfer a note were sufficient authority, there would be no difference, as regards its negotiability, in a note before its maturity and after its protest.

The appellants in this case relied upon the public act of transfer by McKnight, and if this was without authority, their purchase was void.

The principle is invoked by appellants, that in case of a loss of this kind, in which one of two innocent persons must suffer, that one should sustain the loss who has most trusted the party through whom the loss came. It is a sound principle, and its application to this case does not favor the appellants. If Mrs. Smith trusted the Bank of Kentucky with her note, it was for a purpose which was ended when the note was protested. By indorsing the note she did trust the bank with full power to dispose of it before due, although that was not intended, and she trusted the bank for the return of the money to her if the money had been paid. This trust the law implied. But her trust ceased, except as to the mere possession of the note as a bailment, after the note was protested. It was the appellants, who, with notice of the dishonor of the note, purchased it, who trusted the bank for the title, which it professed to sell.

It is to be remembered that the intervention of appellants did not claim a personal judgment against McHatton or Mrs. Smith on the note, but an appropriation of the proceeds of the sale to the payment of the note held by them.

As Mrs. Smith is the real owner of the debt due from McHatton, evidenced by the note in the possession of plaintiffs, there can be no equity in making her substantially pay the note out of the proceeds of the sale, or in postponing her just claim, to that of appellants, who are not innocent holders without notice.

DECREE AFFIRMED.

## CITY OF WASHINGTON *v.* DENNISON.

1. A writ of error not sealed until eleven days after the judgment which it would seek to reverse was rendered, cannot operate as a supersedeas.
2. Nor one where there has been an omission to serve the citation before the return day of the writ.

ERROR to the Supreme Court of the District of Columbia.

This was a motion for a supersedeas of an execution against the City of Washington, plaintiffs in error, founded upon a writ of error, bond and citation, in compliance with the twenty-second and twenty-third sections of the Judiciary Act.

The twenty-second section referred to, enacts that this court may examine judgments in Circuit Courts upon writ of error, to which shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors and prayer for reversal, with a citation to the adverse party, signed, &c., and the adverse party having at least thirty days' notice.

The twenty-third section enacts, that this writ of error

> "Shall be a supersedeas and stay of execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, *within ten days, Sundays exclusive, after rendering the judgment* complained of."

In the present case the judgment was rendered on the 23d of November, 1867. The writ of error, though made out before and placed in the clerk's office, was not sealed till the 6th of December, which was eleven days after the judgment was rendered.

The term of the court for 1867 began on the 2d of December. The citation was served on the 6th of that month.

*Mr. J. H. Bradley, for the plaintiff in error; Messrs. Davidge and Fendall, contra.*

Mr. Justice NELSON delivered the opinion of the court.

The act gave to the city ten days, exclusive of Sundays, to sue out the writ of error, and take the other necessary steps which are required to operate as a supersedeas. The ten days expired on the 5th of December.

According to the settled practice, if the writ of error is sued out before the first day of the term, it must be made returnable on the first day of the next term, and so as to the citation; and, if sued out after, it must be made returnable the first day of the succeeding term.*

The cases cited also show, that both the writ and citation must be served before the return day—the writ by filing it in the clerk's office, and the citation by serving it on the party, or his attorney, or counsel.

In the present case it is, perhaps, sufficiently shown that the writ was placed in the clerk's office before the return day, but it was not sealed till the 5th of December, and until then it was a nullity.† Writs of error from this court to the Supreme Court of the District of Columbia are sued out under the same regulations as in cases of judgments in the Circuit Courts of the United States.‡

The writ, therefore, not being sealed till the 5th day of December, eleven days after the judgment, it was too late to operate as a supersedeas, and it cannot be amended in this respect, as was held in *Hodge et al.* v. *Williams*.§

But if this objection could have been avoided, the omission to serve the citation before the return day of the writ is fatal.* It was not served till 6th of December.

MOTION DENIED.

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* Villabolos *v.* United States, 6 Howard, 89, 90; United States *v.* Curry, Id. 106, 112; Insurance Co. *v.* Mordecai, 21 Id. 195.

† Overton *v.* Cheek, 22 Howard, 46; Act of Congress, May 8, 1792, § 9.

‡ Brightly's Digest, 234, § 5; 12 Stat. at Large, 764, § 11.

§ 22 Howard, 87.

## EX PARTE DE GROOT.

Mandamus from this court will not lie to reverse a judgment of a court below, refusing a mandamus against the Secretary of the Treasury, commanding him to pay a sum of money awarded to the relator by the Secretary of War, in pursuance of a joint resolution of Congress, and to compel such court below to issue one.

THIS was an application for a mandamus to the judges of the Supreme Court of the District of Columbia.

The petition was presented to that court praying for the award of a mandamus to the defendant, the Secretary of the Treasury, commanding him to pay to the relator the sum of $114,000, which had been awarded to him by the Secretary of War in pursuance of a joint resolution of Congress. The petition set out at large the grounds of the indebtedness of the government to the relator, the joint resolution, and the award of the Secretary of War for the amount above stated. The court below denied the prayer for a mandamus, and the papers were now presented to this court for a mandamus to the court below, for the purpose of reversing its decision, and commanding it to issue the mandamus.

*Mr. Brent, for the petitioner.*

Mr. Justice NELSON delivered the opinion of the court.

The party has mistaken his remedy, if he has any, which is by writ of error to the court below to reverse the judgment there rendered in the case. The authorities are uniform on the question.*

* Decatur *v.* Paulding, 14 Peters, 497; Kendall *v.* United States, 12 Id. 527; Brashear *v.* Mason, 6 Howard, 92; The United States *v.* Guthrie, 17 Id. 284.

## THE BATTLE.

Capture as prize of war, *jure belli*, overrides all previous liens.

APPEAL from the District Court of the United States for the Southern District of Florida.

The libel set forth a seizure of the steamer Battle and cargo on the 18th July, 1863, on the high seas, as prize of war, which were brought into the port and harbor of Key West. She was captured about fifty miles south-southeast from Mobile Point by the United States steamer De Soto, Walker commanding. No claim of ownership for vessel or cargo was presented to the court. The vessel had just run, or was in the act of running, the blockade of Mobile when she was captured. The vessel and cargo were sold pending the suit. The proceeds of the sale of the vessel were $23,000, and of the cargo, $240,895.62. The vessel and cargo were condemned for breach of blockade, and also as enemy property.

There were two claims set up against the steamer in the court below, one by James Brooks, of New Albany, State of Indiana, for supplies furnished at that port in May, 1860, to the amount of $3408.32, and another by Daniel Hipple and others for materials furnished, and for work and labor in building a cabin on said boat, in January, 1860, to the amount of $7230.92, at the port of New Albany aforesaid; that after deducting all payments a balance remains due of $3615.45. These claims were dismissed by the court below.

*The appellant was not represented by counsel; Mr. N. Wilson, for the captors, and Mr. Ashton, special counsel, for the United States.*

Mr. Justice NELSON delivered the opinion of the court.

The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination.* DECREE AFFIRMED.

* The Hampton, 5 Wallace, 372; The Frances, 8 Cranch, 418.

## GARDNER *v.* THE COLLECTOR.

Whenever a question arises of the existence of a statute, or of the time when a statute takes effect, or of its precise terms, the judges who may be called upon to decide it may resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always resorting first to that which in its nature is most appropriate, unless the then positive law has enacted a different rule.

ERROR to the Circuit Court for the Southern District of New York.

The Constitution of the United States says, under the legislative head, as follows:

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated. . . . If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it."

And an act of September 15th, 1789, creating the Department of State, provides that whenever a bill, order, resolution or vote of the Senate and House of Representatives, having been approved and signed by the President of the United States, or not having been returned by him with his objections, shall become a law, or take effect, it shall forthwith thereafter be received by the said Secretary from the President, and he shall carefully preserve the originals, and cause them to be recorded in books provided for that purpose. An act of July 7th, 1838, dispenses with this recording in a book.

With these provisions in force, Congress passed through both houses, in December, 1861, a bill which declared "that from and after the *date* of the passage of the act," the duties on tea should be twenty cents per pound. A previous statute

had fixed the duty at fifteen cents. The roll of the engrossed bill was taken to the President, and by him thus signed, *no year being indicated:*

"APPROVED December 24.
ABRAHAM LINCOLN."

The record kept in the office of the Secretary of State showed, however, that this enrolled statute, with the President's approval on it, was filed in that office December 26th, 1861, and the journal of the House of Representatives, in Congress, showed that a message was received from the President January 6th, 1862, stating that on the 24th day of the preceding month he had approved this bill.

In the volume of the statutes of the United States, published by authority in 1863, the act was presented with an approval thus indicated:

"APPROVED December 24 [1861]."

In this state of things, Gardner, in 1864, entered at the custom-house in New York certain packages of tea, on which the collector of the customs there, assuming that there was a statute laying that duty, required him to pay twenty cents per pound. Gardner declined to pay twenty cents per pound on the ground that there was no statute fixing that duty, but offered to pay fifteen cents, the duty fixed by what he asserted to be the only act in the case. Being compelled to pay the twenty cents, and having paid it under protest, he brought suit in the court below to recover the excess. The court below gave judgment against him, and on error here the question was, whether the bill fixing the twenty cents had passed, or, in other words, whether it was a law on the 28th April, 1864, when the teas in question were entered.

*Mr. George Ticknor Curtis, for the plaintiff in error:*

The President's certificate on the roll is a record of the strictest character. It cannot be explained, controlled or aided by any other evidence whatever. This follows from the requirement of the Constitution, that if he approve the

bill he shall sign it. That the roll is in all cases the record or "original" of a statute, is shown by the acts of Congress of September 15th, 1789, and of July 7th, 1838.

Now, whatever methods may be adopted of proving copies of the roll itself, no proof can be admitted to supply what the record does not contain. A law may be construed, judicially, if the means of ascertaining the legislative intention exist in the law itself. But if there is a positive omission in a law of what is essential to its operation, the omission cannot be supplied. A record imports absolute verity. It is of so high a nature, says Lord Coke, that it can be tried only by itself. And that this principle extends by the common law to the records of statutes, is evident from the rule that a statute cannot be proved from a journal of Parliament, but must be proved from the roll, which is the record; and from the further rule, that if it purports to be a general statute, the judges will take notice from the record whether it be a statute or not, and thus the plea of *nul tiel record*, or denial that there is such a record, cannot be interposed.* These principles appear to have been adopted into our legislation, which makes the bill signed by the President, and deposited in the Department of State, the "original," or record of the statute.

If, then, there be in the Department of State a record which purports to contain a general statute, the judges will take notice of that record, and *on it* will proceed to determine whether it be a statute or not.

The date of the executive approval of a bill is an essential part of this record, and it is, under our Constitution, and in the modern English practice, *necessarily* the date of the passage of the law. In England, prior to 1792–3, all acts took date from the first day of the session. Great mischiefs followed from the enforcement of this rule. They culminated in *Latless* v. *Holmes*,† where an act by its terms was to take

* Coke, Littleton, 117*b*, 98*b*; Comyn's Digest, tit. Parliament R. 3, 4; Pacific Railroad *v.* The Governor, 23 Missouri, 353; People *v.* Devlin, 33 New York, 269.

† 4 Term, 660.

effect from and after its passage. It was held that the time of its *actual* passage could not be shown; and that there could be no relief against its retrospective operation, great as the hardship manifestly was. This led to the act, 33 Geo. III, chap. 13, which directed that the *day*, *month* and *year* of the royal assent be indorsed on the roll, and that such indorsement be taken as a part of the act, and as the date of its commencement when no other commencement is therein provided.

As our Constitution does not permit any bill to become a law before it has been presented to the President, and requires him, if he approves it, to sign it, those who fixed our first precedents, which have never been departed from, established by them the rule that the President must record the date of his approval, and this must be the date of the passage of the law. *Matthews* v. *Zane** fully recognizes this rule.

Now, a law which is to operate from the *date* of its passage, and which has yet no date, can have no operation, especially if its provisions would supersede some former law. The former law remains in force,† and in order to make a date, the year, as well as the day of the month, must appear. How is it to be known, judicially, in what *year* occurred that 24th day of December on which the President signed this roll?

*Parol evidence* is out of the question. That would break in upon the rule that a record must prove itself, and would oblige the citizen, when seeking the date of the President's approval, to inquire whether there are living witnesses who can prove that date.

*Other records*, such as the journals of the two Houses, would require an *inference to be drawn*, that is to say, they supply defects in one record by arguments from another, and so break down the rule that a record must prove itself.

* 7 Wheaton, 211.

† Opinion of the judges of Massachusetts, 3 Gray, 606, 607; Rex *v.* Biers, 1 Adolphus & Ellis, 327; Langley *v.* Haynes, Moore, 302; Gibbs *v.* Pike, 8 Meeson & Welsby, 223.

*A resort to the calendar* would afford no aid here, because the 24th day of December occurs in every year, and consequently the calendar of any year since the passage of the former law, which made the duties fifteen cents per pound, would determine nothing as to the year in which the President signed a law making the duties twenty cents.

Our conclusion is,

1. That the President alone can make the record which is to show the date of his approval.

2. That if the President's record is defective in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect.

*Mr. Ashton, contra:*

1. The Constitution says that if the President approves, he *shall* SIGN. It requires nothing but his signature. The word "*approved*" is surplusage. And for the same reason, and to the same extent, in a legal sense, is the *date* of approval. In a practical sense it may be, and is important. The best evidence of that time is, of course, the contemporaneous memorandum of the signer himself: and usage has accepted that memorandum, not as a record, perhaps, but as the best proof that the nature of the case admits. But what is the rule when the usual and conclusive evidence of the time of signing is absent? That the bill has been approved is certain. If so, it has become a *law*. Shall this be made null—declared not to have been at all—the approval, the signing, the going into effect, contrary to the truth of the case,—because we cannot admit unquestionable evidence of the day when the final act was done? The question seems to carry its own answer.

2. But conceding that the time of the approval can only be proved by the record, what is the "record?" It consists of the *recorded proceedings* connected with, and leading to, and following after, the law—the journals of Congress, the records and files of the office of the Secretary of State,—and all these may be resorted to for the purpose of determining the time when the approval of the President occurred.

*In the Matter of Welman*,* the court say:

"It may be necessary and admissible in some instances, particularly when an act becomes a law by not being either signed or returned with objections, to carry back the *inquiry to the legislative journals.* But it would be unsafe, as it would be unfit, to allow the commencement of a public law, whenever the question may arise, to depend on the uncertainty of parol proof, or upon anything extrinsic to the law and *the authenticated recorded proceedings in passing it.*"

So cases settle that the court may inspect those journals to correct clerical mistakes, or carelessness.† Even to correct an erroneous entry of the date of approval;‡ or to ascertain whether an act was passed by *ayes* and *nays*.§ The court may inquire whether an act, coming within the two-third clause of the Constitution, have passed by the requisite number of votes.‖ Parol evidence will be received, too, to show that an actual signing of the bill, as approved, was done by mistake.¶

In Pennsylvania, the constitution does not require a bill to be signed by the speakers of the two houses of the legislature; and it was there held, that the signatures, though proper, were not essential to the validity of the law. The fact of its passage and *approval* was held to be provable by the certificate of the Secretary of State that the bill was duly enrolled in his office.**

Mr. Justice MILLER delivered the opinion of the court.

The date of the President's approval of the bill is undoubtedly the date at which it became a law, if it ever did. In the volume of the statutes now before us, published in

* 20 Vermont, 656.

† Supervisors *v.* Heenan, 2 Minnesota, 330; Turley *v.* County of Logan, 17 Illinois, 151.

‡ Fowler *v.* Peirce, 2 California, 165.

§ Spangler *v.* Jacoby, 14 Illinois, 297.

‖ People *v.* Purdy, 2 Hill, 31; Hunt *v.* Van Alstyne, 25 Wendell, 605.

¶ People *v.* Hatch, 19 Illinois, 283.

** Speer *v.* Plank Road Co., 10 Harris, 378.

1863, the approval is dated December 24th [1861], but the figures 1861 are in brackets, by which it is understood that no such figures are found in the original enrolled act on file in the Department of State. And it is conceded that on inspection, the roll shows on the face of the bill no other date for the approval of the President than the day of the month already stated.

It is not denied that the President's signature to the bill is genuine, and that he did approve it. The volume of the United States Statutes at Large, which contains this act, was published by authority the year before the entry was made of his tea by the plaintiff. The record kept in the office of the Secretary of State shows that this enrolled statute, with the President's approval on it, was filed in that office, December 26th, 1861. The journal of the House of Representatives in Congress shows that a message was received from the President, January 6th, 1862, stating that on the 24th day of the preceding month he had approved this bill. So that, if we can look to any of these sources of information, the court can have no doubt that the bill was in force as a statute at the time the duties on plaintiff's tea became chargeable.

The whole of the very able and ingenious argument of counsel for plaintiff rests on these two propositions, as stated in his own language: "That the President alone can make the record which is to show the date of his approval; and that if the President's record is defective in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect."

The first of these propositions assumes that no act of Congress can become a valid statute, unless some official written statement is found in it of the precise date when the President approved it, and that it is a part of the duty of the President to make this statement; a duty so important that unless made by him, and by no one else, all the previous proceedings of the two Houses of Congress, and the approval of the President, and his signature attesting that approval, are all vain and nugatory.

We should reasonably expect to find a duty so very important as this, the neglect of which is followed by such serious consequences, prescribed by some positive and express provision of the Constitution, or, at least, by some act of Congress.

The only duty required of the President by the Constitution in regard to a bill which he approves is, that he shall sign it. Nothing more. The simple signing his name at the appropriate place is the one act which the Constitution requires of him as the evidence of his approval, and upon his performance of this act the bill becomes a law.

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated." "If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it." Here are two courses of action by the President in reference to a bill presented to him, each of which results in the bill becoming a law. One of them is by signing the bill within ten days, and the other is by keeping it ten days, and refusing to sign it. Even in the event of his approving the bill, it is not required that he shall write on the bill the word approved, nor that he shall date it.

If a date by the President is essential to the validity of the statute, it must be as essential when he retains the bill and fails to sign it as when he signs it. It is his action in retaining the bill for ten days which makes it a law as much as it is in signing it. Yet, in the latter case, no evidence is required of the President, either by the Constitution or in actual practice, to show that he had ever received or considered the bill.

It is not possible, therefore, to hold that the Constitution, either expressly or by just implication, imposes upon the President the duty of affixing a date to his signature to a bill.

Nor does any act of Congress require him to do this. The statutes of September 15th, 1789, and of July 7th, 1838, so far from requiring the President to affix a date to his act of signing bills, provide another means of ascertaining when a statute takes effect, namely, by finding it on file in the office of the Secretary of State; for by this statute all such bills, orders, resolutions or votes of Congress as shall become laws, or shall take effect, are to be received from the President and filed in that office. The duty, then, of making such memorandums as shall show when they were received by this Department, in which the rolls are to remain permanently, and where alone they can be inspected, is much clearer than any such duty on the part of the President. As the only valuable purpose of having a date is to determine when the statute takes effect, it is reasonable that this should be made by the officer who receives it from the President forthwith, and who is to be the future custodian of the statute—who alone can give certified copies of it, and from whose office the legally authorized publisher receives the copy from which it is printed.

If neither the Constitution nor the statutes impose this duty upon the President, we are equally unable to find anything in the practice of the English Parliament to sustain this view. The custom there anciently was for the enrolled bill, on receiving the assent of the King, generally given by commission in Parliament, to be delivered, with the statement of this fact indorsed on it, to the clerk of Parliament. From thence transcripts were sent to the sheriffs of the counties, who were ordered to proclaim them in their county courts, where the transcripts were filed for reference. Since the art of printing, this latter custom has been abandoned. But an act of 33 George III, chap. 15, requires the clerk of Parliament to indorse the date of the King's approval upon the roll of each statute, which is to be the date from which it shall take effect.* The enactment of such a statute shows that no rule had previously existed, that the date was affixed

* Bacon's Abridgment Statutes, letter C.

by the King or by the commissioners who, in his name, gave his assent to the bill.

The second proposition, that "if the President's record is defective in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect," is still more at variance with both principle and authority than the one we have just considered.

The statute under consideration is a public statute, as distinguished from a private statute. It is one of which the courts take judicial notice, without proof, and, therefore, the use of the words "extrinsic evidence" are inappropriate. Such statutes are not proved as issues of fact as private statutes are. But if we suppose the phrase to have been used to express the sources of information to which the court may resort, the proposition is still inadmissible.

In point of moral force in producing conviction in the mind that a bill was signed on a given day, there may be often found stronger evidence than the date accompanying the signature. It is general experience that mistakes are often made in such dates. So well is this understood that the general rule of law that parol evidence cannot be received to contradict a written contract, does not apply to the date, which, though forming a part of the written instrument, may be contradicted whenever it is material to the issue to do so. So also written contracts, or other instruments having no date on their face, may have the time of their execution proved by parol or other competent testimony. It is believed that this principle would be applicable to any instrument in writing offered to a jury on an issue of fact even if it were a private statute, always requiring, however, the best evidence of the date that exists. But the argument we are considering imposes upon the judges who are to take judicial notice of a statute, a more limited range of search for information than that which is open to a jury, when the rule of judicial notice, as we shall show hereafter, was adopted for the purpose of enlarging it.

The record of the Secretary of State of the time of filing such a paper, the journals of the two Houses of Congress,

the message of the President, and other circumstantial facts, may produce stronger conviction of the day and of the year in which the bill was signed, than the date affixed by the President. There is no reason, then, on sound principle, why the court should confine itself to the date made by the President, or, if he has made none, should reject all other sources of knowledge. The judicial notice of the court must extend, not only to the existence of the statute, but to the time at which it takes effect, and to its true construction.

This view of the subject is well supported by authority.

In the learned work of Mr. Dwarris on Statutes* we are told that the principal reason of the rule that the courts should take judicial notice of public statutes, and should not permit them to be put in issue as private statutes are, was that many ancient statutes were no longer to be found, which yet were within the time of legal memory, and could not, therefore, be treated as common law. In order to prevent their existence being brought to the test of proof by record, the principle was adopted that the court should take notice of them; and that the judges are to inform themselves in the best way they can.

This is confirmed by Sir Matthew Hale in his History of the Common Law.† Alluding to these statutes, of which there are many that are no longer to be found among the rolls, he says: "An act of Parliament, made within the time of memory, loses not its being so, because not extant of record, especially if it be a general act of Parliament. For of general acts of Parliament the courts of common law are to take notice without pleading them. And such acts shall never be put to be tried by the record upon an issue of *nul tiel record*, but it shall be tried by the court, who, if there be any difficulty or uncertainty touching it, or the right of pleading it, are to use for their information ancient copies, transcripts, books, pleadings, and memorials, to inform themselves, but not to admit the same to be put in issue by a plea of *nul tiel record*. For, as shall be shown

* Page 467.

† Pages 14, 16.

hereafter, there are many old statutes which are admitted, and obtain as such, though there be no record at this day extant thereof; nor yet any other written evidence of the same but which is in a manner only traditionl, as namely, ancient and modern books of pleadings, and the common received opinion and reputation and approbation of the judges learned in the law."*

Lord Coke,† giving an account of the manner in which the statutes were formerly published in the county courts, in regard to which he had made diligent search, observes that "although proclamation be not made in the county, every one is bound to take notice of that which is done in Parliament, for as soon as Parliament hath concluded anything, the law intends that every person hath notice thereof, for the Parliament represents the body of the whole realm, and therefore it is not requisite that any proclamation be made, seeing the statute took effect before." If this proposition be sound, of which there seems to be no reason to doubt, how can it be held that the judges, upon whom is imposed the burden of deciding what the legislative body has done, when it is in dispute, are debarred from resorting to the written record which that body makes of its proceedings in regard to any particular statute?

The courts of last resort in several of the States have expressly decided that this may be done.‡

In the Prince's case,§ the rule on this subject is laid down by the court in the following language: "As to the fourth point it was resolved, that against a general act of Parliament, or such whereof the judges *ex officio* ought to take notice, the other party cannot plead *nul tiel record*, for of such

* See 1 Kent's Commentaries, 460; Sedgwick on Statutes and Constitutional Law, 34.

† 4 Institutes, 26.

‡ Purdy *v.* The People, 4 Hill, 384; De Bow *v.* The People, 1 Denio, 9; Spangle *v.* Jacob, 19 Illinois, 283; Young *v.* Thomson, 14 Id. 297; Speer *v.* Plank Road, 22 Penna. State, 376; Matter of Welman, 20 Vermont, 656; Supervisors *v.* Heenan, 2 Minnesota, 330; Fowler *v.* Pierce, 2 California, 151.

§ 8 Reports, 28.

acts the judges ought to take notice. But if it be misrecited the party ought to demur in law upon it. And in that case the law is grounded upon great reason, for God forbid, if the record of such acts should be lost, or consumed by fire or other means, that it should be to the general prejudice of the commonwealth, but rather, although it be lost or consumed, the judges either by the printed copy, or by the record in which it was pleaded, or by other means, may inform themselves of it."

In this case the Lord Chancellor was assisted by a judge from each of the common law courts, of whom Coke was one, and the decision as reported by him, and the reason on which it was founded, are entitled to the highest consideration.

We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.

JUDGMENT AFFIRMED.

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## PRENTICE v. PICKERSGILL.

A judgment affirmed under Rule 23 of the court, with ten per cent. damages, it appearing from the character of the pleadings, that the writ of error must have been taken only for delay.

ERROR to the Circuit Court for the Western District of Pennsylvania.

The twenty-third rule of this court declares that "in all cases where a writ of error shall delay the proceedings on

the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment; and the said damages shall be calculated from the date of the judgment in the court below until the money is paid." With this rule in force Prentice sold to Pickersgill a lot of ground having a mortgage of $5000 on it; Pickersgill paying $1500 in cash, and Prentice covenanting to pay off the mortgage. The covenant not being kept, and the property having been sold on a foreclosure of the mortgage, Pickersgill sued Prentice on the covenant. Prentice pleaded that as "he claimed, supposed, and understood," the covenant was satisfied and discharged, he having paid Pickersgill $1500 back; but that a dispute arising between the parties as to whether anything more ought to be paid, the matter was agreed to be left to one Henry, who said and decided that $1500 more ought to be paid.

*Replication* that there was no such reference; that Henry did not make any award or decision; and that the said defendant did not pay to the plaintiff the sum of $1500, or *any* sum of money, for or on account of any award or determination; concluding to the country.

To this replication, after issue joined, and when the cause was on the trial list, and ready for trial, Prentice *demurred*, assigning for cause that the replication did not properly traverse the plea; that it introduced new matter in the allegation that the defendant did not pay to the plaintiff $1500, or any sum of money, for or on account of the award, which allegation ought to have concluded with a verification, and not to the country, and that it was colorable, uncertain, &c.

The demurrer being overruled, the case went to trial, before Grier, J., when the defendant wholly failing to prove any reference, or submission, or award by Henry, the jury found for the plaintiff $2618; the plaintiff having been credited by them with the $1500 paid back. Judgment having gone accordingly, a writ of error was taken by the defendant to this court; no counsel appearing for him in this court, nor any brief being filed.

*Messrs. Veech and Henry, for the other party, defendant in error:*

The averment in the replication, that the defendant did not pay the sum of $1500, or any sum on account of any award or determination made by Henry, was immaterial, and at most matter of surplusage. Independently of that averment, the replication was a complete answer to the plea. Moreover, the demurrer was too late. It was filed after issue joined, and when the cause was on the trial-list, and ready for trial. The case was tried before the jury on its merits, and the defendant below utterly failed to make out any defence to the plaintiff's claim. The plaintiff had credited him with the $1500, and the verdict was for the residue. In point of fact, the defendant below had no defence, and his demurrer, like his writ of error, was intended for delay.

The CHIEF JUSTICE: The writ of error in this case was sued out merely for delay. The judgment will therefore be affirmed under the twenty-third rule, with ten per centum damages on the amount of the judgment below.

AFFIRMED ACCORDINGLY.

NOTE.

At the close of the term another case, *The Chicago City Railway Co.* v. *Bour*, a suit brought by a passenger against a railroad company to recover damages for an injury done to him, by reason of the negligence of their servants in running one of their cars, was affirmed with like damages, there having been no exception to the rulings or instructions of the court, and the court observing that the case seemed "to have been brought simply for delay." See also *The Douro*, 3 Wallace, 566.

## UNITED STATES, EX REL., *v.* COUNCIL OF KEOKUK.

1. An act of Congress passed on the admission of Iowa into the Union in 1845, having provided that the laws of the United States not locally inapplicable should have the same effect within that State as elsewhere —the "Process Act" of May 19th, 1828,—by which the modes and forms of process in common law suits were made the same in the Circuit Courts of the United States as those used in the highest State court of original jurisdiction—became applicable to the Federal courts of Iowa.
2. Accordingly, mandamus being, in the Supreme Court of the State, the remedy to compel a municipal corporation to levy a tax to pay a judgment of which a creditor has no means of obtaining payment, a party having a judgment in a Circuit Court, is entitled to the same remedy in that court.
3. An injunction by a State court against such a levy is inoperative against a mandamus from the Federal court ordering it, though issuing subsequently to the injunction. *Riggs* v. *Johnson County* (*supra*, 166) affirmed.

ERROR to the Circuit Court for the Northern District of Illinois.

The case was submitted by

*Mr. Howell, for the plaintiff in error, and by Messrs. Strong and Craig, contra.*

Mr. Justice CLIFFORD stated the case and delivered the opinion of the court.

The General Assembly of the State of Iowa, by a law passed January 29th, 1857, authorized the corporation defendants to levy a direct tax of one hundred and fifty thousand dollars for the benefit of the Keokuk, Mount Pleasant, and Muscatine Railroad Company, and to issue the bonds of the city for the amount, payable in one, two, and three years, with interest coupons annexed, at the rate not exceeding ten per cent. per annum.* They voted the tax and issued the bonds, and the relator became the *bonâ fide* holder for value of twenty-five of the bonds before their maturity. Payment being refused after their maturity, he brought suit on the same in the Circuit Court of the United States for the Dis-

* Session Laws 1857, 402.

trict of Iowa, against the defendants, but the judges of the court being interested in the matters involved, the cause was duly transferred to the Circuit Court of the United States for the Northern District of Illinois, as appears by the record.

Judgment was rendered in favor of the relator in the latter court October 19th, 1864, for the sum of thirty-six thousand five hundred and forty-nine dollars, and costs of suit. Defendants having no corporate property, and the relator being without any other remedy, applied to the Circuit Court where the judgment was rendered for a mandamus to compel the payment. Pursuant to the application, the Circuit Court granted the alternative writ, commanding the defendants to make an appropriation to pay the amount, or show cause on the return day of the writ why they should not obey its commands.

In their return the defendants admit that the General Assembly passed the law, that they issued the bonds, and that the relator recovered judgment as alleged, but aver that on the ninth day of October, 1863, before the relator recovered his judgment, they were enjoined by the State court from levying any general or special tax upon the taxable property within the limits of the defendant corporation for the payment of the bonds of the relator—principal or interest—and that they cannot pay the judgment without being guilty of contempt for violating that injunction. Other defences were set up in the return, but it is not necessary to notice any other, as they were not sustained by the court.

Relator demurred to every defence set up in the return. Reference, however, will only be made to the demurrer to the defence founded on the injunction granted by the State court. Causes of demurrer shown were as follows: (1) That the writ does not enjoin the defendants from paying over the taxes already received, but only enjoins the future collection of such taxes. (2) That the relator was not a party to those proceedings, and that the State court had no jurisdiction for the want of proper parties. (3) That the State court cannot oust the Circuit Court of its jurisdiction to enforce its own judgments.

Parties were heard and the court overruled the demurrer, holding that the injunction of the State court prevented the Circuit Court from issuing a peremptory mandamus. Standing upon his demurrer, the relator excepted to the ruling of the court and sued out this writ of error.

Principal question in the case is whether the injunction of the State court had the effect to take away the jurisdiction from the Circuit Court to issue the writ of mandamus as prayed by the relator. Transferred, as the cause had been, from the Circuit Court for the District of Iowa, it is quite clear that power of the court to which it was transferred was exactly the same in respect to the controversy as belonged to the tribunal where it was commenced.

Created, as the defendant corporation was, by the law passed by the General Assembly of Iowa, and being a municipal corporation in that State, it is quite clear that all the rights, duties and obligations of the corporation must be ascertained and defined by the laws of that State.

Modes of process and forms of process in that State, unless changed by rules of court, are the same in suits at common law as were used in the highest court of original jurisdiction in the State at the time the Federal courts were organized in that State. State processes and modes of process were first adopted by the act of the twenty-ninth of September, 1789; and by the act of the eighth of May, 1792, those regulations were made permanent, but they were confined in their application to the old States.* Subsequent enactment extended those regulations to the new States admitted prior to the first day of August, 1842, when the last general provision upon the subject was passed.†

Iowa was admitted into the Union on an equal footing with the original States in all respects, and by the supplemental act passed on the same day, it is provided that the laws of the United States, which are not locally inapplicable, shall have the same force and effect within that State as elsewhere within the United States.‡ Legal effect of that pro-

* 1 Stat. at Large, 93–276. † 4 Id. 274; 5 Id. 499. ‡ 5 Id. 742–789.

vision was, that the Process Act of the nineteenth of May, 1828, became applicable in the Federal courts of that State.*

Where the debt of a municipal corporation has been reduced to judgment, and the judgment creditor has no other means to enforce the payment, the remedy in the Supreme Court of the State is mandamus to compel the proper officers of the municipality to levy and collect a tax for that purpose.†

By virtue of the Process Acts the relator is undoubtedly entitled to the same remedy in the Circuit Court for that district, unless the power of the court to issue the writ is taken away or perpetually suspended by the injunction issued by the State court. Discussion of that question is unnecessary, as this court decided, at the present term, in the case of *Riggs* v. *Johnson County*, that a State court cannot enjoin the process of the Federal courts.‡

Orders for an injunction issued by State court are as inoperative upon the process of the Circuit Court of that district as they would be if directed to the process of a Circuit Court in any other district of the United States, because the State and Federal courts, in their sphere of action, are independent of any such control.

Judgment REVERSED and the cause remanded, with directions to sustain the demurrer of the relator, and for further proceedings in conformity to the opinion of the court.

Mr. Justice MILLER did not sit in this case.

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* 4 Stat. at Large, 273.

† Coy *v.* City Council of Lyons, 17 Iowa, 1; Dox *v.* Johnson, 12 Id. 237; Clark *v.* City of Davenport, 12 Id. 335; Code, § 2179; Revision, 3761.

‡ Duncan *v.* Darst, 1 Howard, 306; McKim *v.* Voorhies, 7 Cranch, 281; Diggs et al. *v.* Wolcott, 4 Id. 179.

Statement of the case.

## SAME *v.* SAME.

The case of *Riggs* v. *Johnson County* (*supra*, 166) affirmed.

ERROR to the Circuit Court for the Northern District of Illinois: a case submitted by *Mr. Howell, for the plaintiff in error, and by Messrs. Strong and Craig, contra:*

Mr. Justice CLIFFORD stated the case and delivered the opinion of the court.

Amended information of the relator states that the corporation defendants, in pursuance of the authority of an act of the General Assembly of the State, issued one hundred corporate bonds, each for the sum of one thousand dollars, redeemable in twenty years from date, with eight per cent. interest, payable semi-annually. Interest coupons were attached to the bonds, and by their terms they were payable to bearer. Statement of the relator is, that he became the holder of a large number of the bonds with the coupons attached in the ordinary course of business, before their maturity, and for a valuable consideration.

By the statute of the State and the ordinances of the city, the proper officers of the city were required to levy and collect, in addition to the other taxes, an annual tax upon all property within the corporate limits of the city, subject to municipal taxation, to pay the bonds and coupons as the same should become due. Defendants neglected to pay the coupons as the interest became payable, and the relator brought suit against them in the Circuit Court of the United States for the District of Iowa; but the suit, *pendente lite*, was transferred to the Circuit Court for the Northern District of Illinois, because the judges of the court for the former district were interested in the matters in controversy. Judgment was rendered for the relator, October 19th, 1864, in the latter district, for the sum of five thousand four hundred and twenty-seven dollars and fifty cents damages, being the interest due on one hundred and eight coupons held by the relator.

Authority to issue the bonds was conferred by the act

amending the charter of the city, passed January 22d, 1853, and the ordinance of the city directing their issue bears date February 5th, 1856, and is fully set forth in the record. Recovery of the judgment, however, did not avail the relator, as the defendants still refused to pay, and they had no corporate property liable to seizure on execution; and being without any other remedy, he applied to the Circuit Court in which the judgment was rendered for a mandamus, commanding the proper authorities of the city, at their next meeting, to levy a sufficient tax to pay the judgment, costs, and interest. Order for the alternative writ was entered May 15th, 1865, and it was made returnable on the first Monday of July, in the same year.

Defendants admit in their answer that the bonds with coupons annexed were issued as alleged; and they also admit the judgment, and that the relator made demand that they should levy and collect a tax for the payment of the sum recovered, but allege that they were perpetually enjoined, on the nineteenth day of September, 1853, from levying or collecting any tax for the payment of the principal or interest of those bonds, and that they are utterly unable to obey the commands of the alternative writ.

Reference is made to that part of the answer only which is material in this investigation. Relator demurred to the entire answer, and the court sustained the demurrer to the defence set up, that the bonds and coupons were issued without authority, and that they were null and void, but overruled it as to the defence that the proper officers of the city had been enjoined from levying and collecting any tax to pay the judgment. Causes of demurrer shown in respect to that defence were, that the State court could not oust the Circuit Court of jurisdiction to enforce its own judgments, and that the decree of the State court could not bar him from the right to use the process of the Circuit Court to collect his judgment, as he was not a party to those proceedings. Ruling of the Circuit Court, however, was otherwise, and the relator excepted and removed the cause into this court by writ of error.

Sole defence relied on in this court is, that the defendants have been absolutely and perpetually enjoined from levying and collecting the tax by the decree of the State court, and the defendants admit that the only question is, whether the facts set forth in that part of their return to the alternative writ constitute a good defence to the petition and information of the relator. They also admit that the writ of mandamus in such a case is not a prerogative writ, and we may add that it is settled law in this court that it is not even a new suit, but is a writ in aid of jurisdiction which has previously attached, and that under such circumstances it becomes the proper substitute for an execution to enforce the judgment. Viewed in that light, the granting of the writ is no hardship upon the defendants, as they are exposed to no injustice. Alleged hardship is imaginary, and the argument deduced from that suggestion falls to the ground as soon as it is shown that the injunction of the State court is inoperative to defeat the force and effect of Federal process.

Grant that an injunction issued by a State court may have that effect, and the judicial powers confided to the Supreme Court, and such inferior courts as Congress may from time to time ordain and establish, are of no value, as they can never execute their judgments without the consent of the State courts. Fears that the officers of the corporation may be exposed to imprisonment or actions of trespass, without adequate remedy or redress, are unfounded and groundless. Careful consideration was given to that point in the case of *Riggs* v. *Johnson County*, decided at the present term, and we refer to the opinion in that case as furnishing a satisfactory answer to those suggestions. Suffice it to say, that we adhere to the rule that the injunction issued by a State court is inoperative to control, or in any manner to affect process or proceeding in the Circuit Courts of the United States.

Judgment REVERSED and the cause remanded, with instructions to sustain the demurrer of the relator, and for further proceedings in conformity to the opinion of the court.

Mr. Justice MILLER did not sit in this case.

## THE OUACHITA COTTON.

1. The statute of July 13th, 1861, and the subsequent proclamation of President Lincoln under it, which made all commercial intercourse between any part of a State where insurrection against the United States existed and the citizens of the rest of the United States "unlawful," so long as such condition of hostility should continue, rendered void all purchases of cotton from the rebel confederacy by citizens or corporations of New Orleans, after the 6th of May, 1862, from which date the restoration of the national authority had fixed upon them the same disabilities as to commercial intercourse with the territory declared to be in insurrection as it had previously fixed upon the inhabitants of the loyal States.
2. Under the *proviso* of the above-mentioned statute which gave the President power in his discretion to license commercial intercourse, no one else could give licenses. Accordingly, any given by the military authorities were nullities. *The Reform* (3 Wallace, 617), and *The Sea Lion* (Id. 642), affirmed.
3. The title of a purchaser from a citizen of New Orleans, who had himself purchased from the rebel confederacy after the 6th of May, 1862, was not made valid by the fact that such second purchaser was a foreign neutral, purchasing *bonâ fide* for value.

THE case thus entitled was a matter of three appeals from the Circuit Court of the United States for Illinois in a question of 395 bales of cotton which had been seized during the rebellion by a flotilla of the United States. The matter was thus:

An act of Congress of July 13th, 1861, passed soon after the outbreak of the late rebellion, enacts (§ 5) that

"It may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States, and *thereupon 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."

The act proceeds:

"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 vehicle conveying the same, or conveying persons to or from such State or sections, be forfeited to the United States."

The same section also contained this proviso:

"That the *President* may, in *his* discretion, *license and permit commercial intercourse* with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as *he*, in *his* discretion, may think most conducive to the public interest, and such intercourse, *so far as by him licensed*, shall be conducted and carried on *in pursuance of rules and regulations prescribed by the Secretary of the Treasury*."

On the 16th of August, 1861, the President issued a proclamation, declaring "that the inhabitants of Louisiana and some other States named (except the inhabitants of that part of the State of Virginia lying west of the Alleghany Mountains, and of such other parts of that State and the other States hereinbefore mentioned as might maintain a loyal adhesion to the Union and Constitution, or might be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents), were in a state of insurrection against the United States, and *that all commercial intercourse between the same and the inhabitants thereof*, with the exceptions aforesaid, and the citizens of other States, and other parts of the United States, *is unlawful*, and shall remain unlawful, until such insurrection shall cease or has been suppressed."

With this statute and this proclamation in force, three distinct parties, American citizens or subjects,—namely, Withenbury & Doyle, The New Orleans Bank, and one Leon Queyrous,—purchased during the rebellion, *but after New Orleans was restored, by capture*, May 6th, 1862, *to the Federal jurisdiction*, a quantity of cotton from the late rebel confederation. The cotton had been raised on the Ouachita, in Louisiana, and in 1862 sold by its owners to the confederation, who left it stored on the plantation where it was raised.

The circumstances under which the three parties above-named purchased respectively from the Confederate government were these:

1. Withenbury & Doyle were citizens of Ohio. The outbreak of the rebellion found them in Louisiana owners and masters there of two steamers running in lawful commerce between New Orleans and Upper Louisiana. Before very long the boats were in the service of the rebel confederacy, —wholly by compulsion, *as was asserted by Withenbury & Doyle*, and against every loyal effort on their part to keep their boats from it. The Confederacy, as in time of war, had seized them, it was alleged, meaning to pay what it deemed a fair price. Being thus indebted to Withenbury & Doyle for the use of the boats, these persons took the cotton (still on the plantation where it was raised) in payment, making the negotiation by which they became owners, with one McKee, an agent of the Confederate government. Such was *their* title to the cotton bought by them.

2. The title of the Bank was thus: On the capture of New Orleans by the forces of the United States, the Louisiana State Bank, a moneyed corporation in that city, found itself with a large amount of Confederate currency on hand, which, as was said, it had been compelled by the rebel confederacy to receive on deposit. It being valueless at New Orleans after the capture, and its effect—if it could be put into circulation in the regions yet under rebel control—being likely to be the yet further discrediting of the rebel credit—while if cotton could be got for it and brought into loyal regions —*that* would add to the resources of these last, *the commander of the United States forces in New Orleans*, in December, 1862, authorized the bank at its desire to dispose of this currency in the purchase of cotton within the rebel lines. Under this permission, an agent of the bank passed through the United States lines into Upper Louisiana, and purchased the cotton in question (or some other which to facilitate transfer he exchanged for it) of a sub-agent of McKee, the agent already named, in August, 1863.

3. Queyrous's purchase was thus: He was a *naturalized*

*citizen of the United States*, residing in New Orleans, and, in March, 1864, purchased the cotton of Buckner, an agent of the Confederate States.

Soon after all this, to wit, in April, 1864, a flotilla of gunboats of the United States sailed up the Ouachita River, found the cotton still upon the plantation, where it had been raised, and which was in a part of Louisiana then, as, from the origin of the rebellion, it had been, subject to the power of the rebel confederacy—and seizing 935 bales of it, transported it to Cairo, where it was libelled in the District Court there, as prize of war.

Withenbury & Doyle intervened as claimants, on sale of it, to its proceeds, under their title as stated, for the whole 935 bales. A firm named Grieff & Zunts, who had purchased from the bank, came in as succeeding to *its* title for the same total amount; while a French firm, *foreigners, resident in France*, Le More & Co., who had purchased 830 bales from Queyrous, intervened for that proportion of the capture.

By order of the court the claims were consolidated, and having been considered, were dismissed on the ground that the transactions of the original parties, Withenbury & Doyle, the Bank and Queyrous, were "void;" the inhabitants of the loyal and disloyal districts having been rendered incapable of any dealing with each other, so long as the rebellion continued; prohibition being the rule, and license the exception; and the license in this case not having been by the President, who alone was capable of giving one. None of the original parties, therefore, who dealt with the rebels, had any title, and neither Grieff & Zunts, nor the house of Le More in France, who stood in the shoes of two of them, could get through them one that should be different.

The claims of all three intervenors were accordingly dismissed, and *without the question between the captors and the United States having been disposed of*, the correctness of this decree of dismissal was made by this appeal the question now before the court.

The appeals were argued elaborately in this court, by *Mr. R. M. Corwine, representing Withenbury & Doyle; Mr.*

*Goold, representing Grieff & Zunts; and Messrs. Louis Janin and J. A. McClernand, representing LeMore.* These counsel made common case as against the United States and the captors, and particular case as against each other. The disposition of the court against all the appellants in common, dispenses with any note of the argument on the latter heads. As against the United States it was argued—

1. That the property libelled being the property of loyal citizens of the United States, and within their territorial jurisdiction, *inland*, could not lawfully be the subject of capture by the naval forces of the United States as prize of war or otherwise.

2. As long as the rebels held, with the strong hand of war, any of the territory of the United States, to the exclusion of the laws and officers of the United States, that citizens thereof, then in such territory, might lawfully sell to or buy property of those rebels, whether the latter had such transaction individually or under the assumed name of a government; provided, it did not appear that the same was done with the *intention* and for the purpose of aiding such assumed government in its unlawful usurpations.

3. That it was lawful for any parties having *licenses* granted to them by the proper authorities of the United States for that purpose, to carry on trade in the region where this cotton was; and that two of these purchasers had such licenses.

4. That whatever loyal citizens did, in aid of the rebel cause, by compulsion, or in order to avoid military conscription, would not deprive them of their legal and constitutional rights as citizens of the United States.

5. That property acquired as this was, although it remained within the lines of the insurgents, was not stamped with the disabilities of enemy's property, but was entitled to the care of the government so soon as removed beyond the enemy's lines.

6. That the Non-intercourse Act of July 13th, 1861, being in violation of the general rights of the citizens of one State to trade with those of every other, is to be construed strictly;

that it forfeits no goods but those "*coming from said State or section* INTO the other parts of the United States, and all proceeding TO such State." The property must, therefore, be caught in the predicament of *passing* from one State to another.

7. That as respected the case of Le More & Co., especially, it was obvious that whatever might be the case if the cotton had been yet owned by Queyrous, that Le More & Co. being citizens of a foreign and neutral state and purchasers *bonâ fide* for value, held the property discharged of all liability; that certainly as a neutral they could have purchased of the Confederacy directly, and that their right was not impaired by its coming through the channel that it did.

*Mr. Stanbery, A. G., and Mr. Ashton, special counsel of the United States, with Mr. L. Weldon, for the captors*, placed the matter chiefly on the broad principle declared in *Griswold* v. *Waddington*,* as well as in later and in earlier cases.† In the case named, Chancellor Kent thus expressed himself:

"There is no authority in law, whether that law be national, maritime, or municipal, for any kind of private, voluntary, unlicensed business communication or intercourse with an enemy. It is all noxious, and in a greater or less degree it is criminal. Every attempt at drawing distinctions has failed; all kinds of intercourse, except that which is hostile, is illegal. The law has put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety, in this principle, and every relaxation of it tends to corrupt the allegiance of the citizen, and prolong the calamities of war."

The act of Congress and the Proclamation were yet over and above this general principle of law.

2. The President alone had power to license; a matter twice decided by this court.‡

* 1 Johnson, 483.

† See specially Brown *v.* United States, 8 Cranch, 136; Scholefield *v.* Eichelberger, 7 Peters, 592.

‡ The Reform, 3 Wallace, 632; The Sea Lion, 5 Id. 647.

3. Queyrous having thus had no title whatever, Le More, who got no more than he had, could not have a good one.

Mr. Justice SWAYNE delivered the opinion of the court.

These three cases relate to the same cotton. The several appellants are conflicting claimants, and it will conduce to brevity and clearness in the expression of our views as to the merits of their respective claims, to dispose of all the cases together.

The cotton was seized on the bank of the Ouachita River, in the State of Louisiana, by the naval forces of the United States, in April, 1864. It was sent to Cairo, and libelled as prize of war in the District Court of the United States for the Southern District of Illinois. The court, by an interlocutory decree, directed the cotton to be sold, and the proceeds to be held subject to its order. The decree was executed, and the proceeds are so held. The appellants intervened in that court by filing their petitions. The claim of Withenbury & Doyle, and that of Grieff & Zunts, each, covers all the cotton. Le More & Co. claim 830 bales.

The court below decreed against all the claimants, and ordered their petitions, respectively, to be dismissed. From these decrees the several parties appealed, and the cases are now before this court for final decision.

The original case is still pending in the District Court. No further step in it has been taken. It is there awaiting adjudication. It is not in this court, and we can do nothing which will affect it, further than to dispose of the cases before us. Neither the captors nor the United States have yet been heard in the main case. All questions between them, relating to it, are still in abeyance. If this court should decree in favor of either of the two larger claims in the cases before us, there would be nothing left for the original parties to contend for. The entire *res* of the controversy would be lost to both. If we should sustain the smaller claim and exclude the others, the proceeds of 105 bales of the cotton will remain undisposed of. But if the decrees below shall

be affirmed, the effect will be only to remove from the original case the grafts which have been placed upon it by the parties before us, and thereby to leave it in all respects as it was before they intervened.

The place where the cotton was seized was, at the time of the seizure, and had been from the commencement of the war, insurgent territory. It was raised near the place of seizure, upon the plantation of Simmons & Tatem, and was sold by Simmons—who had become the sole owner—to the rebel government, in the fall of 1862. Payment was made in Confederate bonds.

Withenbury & Doyle were citizens of the State of Ohio, but were in Louisiana at the breaking out of the rebellion. They owned two steamboats, and were engaged in running them upon the waters of that State. They remained there, and their boats were largely employed in the rebel service. They claim to have been thoroughly loyal to the United States all the time, and that such use of their boats was, on their part, the result of fear and compulsion, and was inevitable.

They bought the cotton in controversy of McKee, the cotton agent of the rebel government, in August, 1863. The consideration of the purchase was the indebtedness of that government for the service of the boats. Withenbury says in his deposition: "The so-called Confederate government owed me largely for the services of my steamboat, and I received from their agent, A. W. McKee, cotton in preference to Confederate money. This cotton was situated on the Ouachita and Red Rivers, about equally divided. The largest quantity in any one place was nine hundred and thirty-five bales (935), which was stored on the plantation of Dr. John T. Simmons, on the Ouachita River, below Monroe." The testimony of McKee, the rebel agent, is to the same effect. He says: "The services of their boats ended in 1863, in the month of April. I then agreed to pay them in cotton if money was not soon forthcoming. . . . I paid them in the Simmons crop of cotton, on the Ouachita River. . . There was no contract or bargain made how they

were to be paid, or how much they were to be paid. The boats were required to do the work with the understanding that they would be paid the customary prices. . . . On settlement in the spring of 1863, there was a balance due them, for services rendered under my direction, of between eighty and ninety thousand dollars."

Doyle procured permission from the proper military authorities of the United States, to bring to New Orleans, upon government transports, from Upper Louisiana, 2500 bales of cotton, then lying there, which he claimed belonged to him. The cotton in controversy was a part of it. Before this could be done the cotton in question was seized, removed to Cairo, and libelled as before stated.

Le More & Co. are a commercial house of Havre, in France. They claim 830 bales of the cotton. They purchased through their agent, Jules Le More, on the 1st of March, 1864. The purchase was made of Leon Queyrous, a naturalized citizen, residing in New Orleans. He bought of Buckner, an agent of the rebel government, in the preceding month of February. Possession was delivered by Buckner to Queyrous, and by Queyrous to the agent of Le More & Co.

Grieff & Zunts claim through the Bank of the State of Louisiana. In the fall of 1862, after the capture of New Orleans by the land and naval forces of the United States, the bank having on hand upwards of a million dollars of Confederate money, applied to the military authorities there for permission to send it within the rebel lines, and invest it in cotton. Permission was accordingly given, and an agent was sent to Upper Louisiana with the money. He made large purchases in the country upon the Red River. Finding it impossible to remove the cotton, he exchanged it with the rebel authorities for cotton in the Ouachita District, including, as is alleged, the cotton in controversy. This arrangement was made in 1863. The bank sold to Grieff & Zunts in March, 1864. It is strenuously insisted by the counsel for the other claimants that the proof shows that the contract of exchange did not include the cotton in controversy, that it was conditional, and was subsequently rescinded.

by the parties, and that the bank took no title under it. However these things may be, they are immaterial in the view which we have taken of the case. We have, therefore, not found it necessary fully to examine the testimony relating to them. For the purposes of this opinion, it is assumed that the facts are, as they are claimed to be by the counsel of Grieff & Zunts.

The fifth section of the act of July 13th, 1861, authorized the President, under the circumstances mentioned, to declare any State, or part of a State, to be "in a state of insurrection against the United States," and it enacts that thereupon, "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: . . . *Provided, however*, that the President may, in his discretion, license and permit commercial intercourse with any such part of such State, the inhabitants whereof are so declared in a state of insurrection, in such articles and for such time and by such persons as he, in his discretion, may think most conducive to the public interest, and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

On the 16th of August, 1861, the President issued a proclamation declaring the rebel States, including Louisiana, to be in a state of insurrection. It excepted several localities from its operation. Among them were such parts of the States mentioned "as may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents." By another proclamation of the 2d of April, 1863, the President declared the same States to be in insurrection, and revoked all the exceptions contained in the former proclamation, but again made certain local exceptions, of which "the port of New Orleans" was one. This proclamation declares "that all commercial intercourse, not licensed and conducted as is provided in said act, between the said States and the inhabitants thereof, with

the exceptions aforesaid, is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed, and notice thereof has been given by proclamation." The date of this proclamation was prior to either of the purchases of the cotton from the rebel agents, to which the claimants, respectively, trace their titles.

The subjugation of New Orleans and the restoration of the national authority there are regarded as having become complete on the 6th of May, 1862. From that time its citizens were clothed with the same rights of property, and were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection, as the inhabitants of the loyal States. Such is the result of the application of well-settled principles of public law. The proclamation of the 2d of April, 1863, recognized but did not change the existing condition of things. It was the same afterwards as before. The effect of the proclamation was cumulative.*

The language of the act of 1861, and of the proclamation of 1863, is clear and explicit. There is no room for doubt as to their meaning, nor as to their effect in these cases. Commercial intercourse between the inhabitants of territory in insurrection and those of territory not in insurrection, except under the license of the President, and according to regulations prescribed by the Secretary of the Treasury, was entirely prohibited. As was well remarked in the able opinion of the court below, "Prohibition was the rule, and license the exception." No such license was given by the President to either of the parties by whom the purchases of the cotton were made from the agents of the rebel government. Those given by the military authorities were nullities. They conferred no rights whatever. No one could give them but the President. From any other source they were void. The law-making power, in its wisdom and caution, confided this important authority, so liable to be abused, to the Chief Magistrate alone.†

* The Venice, 2 Wallace, 258.

† The Reform, 3 Id. 617 The Sea Lion, 5 Id. 642.

Statement of the case.

Withenbury & Doyle being citizens and residents of Ohio; Queyrous being a citizen of Louisiana, and a resident of New Orleans, and the Bank of the State of Louisiana being a local institution of that city when they purchased, their purchases were all illegal and void, and passed no title to the vendees. Withenbury & Doyle, therefore, never had any title. Queyrous took none, and, therefore, could convey none to Le More & Co. The bank acquired none, and nothing passed by the sale to Grieff & Zunts.

All the parties in this litigation stand before us without any right or interest in the cotton which this court can recognize.

Other questions of fact and of law have been argued with great ability; but as we have found the statute and the proclamation conclusive in every aspect of the cases which can be presented, we have deemed it unnecessary further to examine the subject.

We have found no error in the record.

This conclusion is not in conflict with the ruling in the case of *Mrs. Alexander's Cotton.** Upon that subject it is sufficient to remark that there, the whole case was not, as here, before us.

The several decrees of the District Court are

AFFIRMED.

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## HANGER *v.* ABBOTT.

The time during which the courts in the lately rebellious States were closed to citizens of the loyal States, is, in suit brought by them since, to be excluded from the computation of the time fixed by statutes of limitation within which suits may be brought; though exception for such cause be not provided for in the statutes. And this independently of the Act of Congress of June 11th, 1864.

ERROR to the Circuit Court for the Eastern District of Arkansas.

* 2 Wallace, 404.

Opinion of the court.

J. & E. Abbott, of New Hampshire, sued Hanger, of Arkansas, in assumpsit. The latter pleaded the statute of limitations of Arkansas, which limits such action to three years. The former replied the rebellion, which broke out after the cause of action accrued, and closed for more than three years all lawful courts. On demurrer, and judgment against it, and error to this court, the question here was, simply, whether the time during which the courts in Arkansas were closed on account of the rebellion, was to be excluded from the computation of time fixed by the Arkansas statute of limitations within which suits on contracts were to be brought, there being no exception by the terms of the statute itself for any such case.

*Mr. Reverdy Johnson, for the plaintiff in error*, cited *Alabama* v. *Dalton* in this court;* *Mr. S. C. Eastman, contra*, placed the case on general principles of law, and on an act of Congress of June 11th, 1864, ch. cxviii.

Mr. Justice CLIFFORD delivered the opinion of the court.

The declaration was in assumpsit, and the plaintiffs alleged that the defendant, on the tenth day of April, 1865, was indebted to them for divers goods, wares, and merchandise, and also for money had and received, in the sum of ten thousand dollars. Defendant appeared and pleaded two pleas in answer to the declaration:

(1) That he never promised as the plaintiffs have alleged.

(2) That the cause of action did not accrue at any time within three years next before the commencement of the suit.

Issue was joined by the plaintiffs on the first plea, and in answer to the second, they filed seven replications, but particular reference need only be made to the fifth and sixth of the series.

Substance of the fifth replication was, that the defendant, from the sixth day of May, 1861, to the first day of January,

* 9 Howard, 522.

1865, was an actual resident of Arkansas, and that the plaintiffs were, at the same time, actual residents of New Hampshire, and that, during the whole of that period, they were prevented, by reason of resistance to the execution of the Federal laws, and the interruption of the ordinary course of judicial proceedings, in the former State, from instituting their action, and from having the defendant served with proper process; and so they aver that they did commence their suit within three years next before the cause of action accrued.

Sixth replication alleges, that the parties respectively had been, for more than three years before the commencement of the suit, actual residents of their respective States, and that the cause of action accrued before the twenty-fifth day of October, 1859, and that after the same had so accrued, to wit, on the sixth day of May, 1861, all the lawful courts of the State where the defendant resided were closed by reason of the insurrection and rebellion which then and there arose against the lawful authority of the United States; that the courts so remained closed from that day to the first day of January, 1865, and so the plaintiffs say that the period during which the courts were not open for the reasons stated, should not be deemed and taken as any part of the three years' limitation, as pleaded; and they in fact say that they did commence their suit within three years next before the cause of action accrued.

Demurrers were filed by the defendant to the replications, and the court gave judgment for the plaintiffs in the sum of nine thousand four hundred eighty-three dollars and twenty-six cents damages and costs of suit; whereupon the defendant sued out this writ of error.

Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and, on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States.*

* 12 Stat. at Large, 1258–257.

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country.* Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation.†

Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties.‡ Direct consequence of the rule as established in those cases is, that as soon as war is commenced all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in an action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defence.§ Various attempts, says Mr. Wheaton,‖ have been made to evade the operation of the rule, and to escape its penalties, but they have all been defeated by its inflexible rigor. All foreign writers on international law concur in the opinion that the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealings between the

* The William Bagaley, 5 Wallace, 405; Jecker et al. *v.* Montgomery, 18 Howard, 111; Wheaton on Maritime Captures, 209.

† The Rapid, 8 Cranch, 155; The Hoop, 1 Robinson Admiralty, 196.

‡ Maclachlan on Shipping, 475; Story on Partnership, § 316; Griswold *v.* Waddington, 15 Johnson, 57; Same case, 16 Id. 438.

§ Williamson *v.* Patterson, 7 Taunton, 43.

‖ On International Law, by Lawrence, 551, 556.

subjects of the belligerent states. Hostilities once commenced, any attempt at trading on the part of the subjects of either state, unless by permission of the sovereign, is prohibited, and becomes *ipso facto* a breach of the allegiance due to their respective sovereigns, and as such is forbidden by the public law of the civilized world.*

Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of Congress.†

In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times.‡ Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain, in the language of the civilians, *a persona standi in judicio.*§

Trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war, but there is no exigency in war which requires that belligerents should confiscate or annul the debts due by the citizens of the other contending party.

We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right. We preclude him during war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the

* Bynkershoek, B. 1, c. 3; Vattel, B. 3, c. 4; Potts *v.* Bell, 8 Term, 561.

† Exposito *v.* Bowden, 4 Ellis & Blackburne, 963; Same case, 7 Id. 778.

‡ Kent's Com. (11th ed.), 73.

§ 1 Id. (11th ed.), 76; Flint *v.* Waters, 15 East, 260.

remedy.* During war, says Sir William Scott, there is a total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other.† Views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. He says, in effect, that the power of confiscating such debts theoretically exists, though it is seldom or never practically exerted; that the right of the creditor to sue for the recovery of the debt is not extinguished, that it is only suspended during the war, and revives in full force on the restoration of peace.‡

Under the thirty-fourth section of the Judiciary Act, the statutes of limitations of the several States, where no special provision has been made by Congress, form the rule of decision in the courts of the United States, and the same effect is given to them as is given in the courts of the State.§

Grant that the law of nations is that debts due from individuals to the enemy may, by the rigorous application of the rights of war, be confiscated, still it is a right which is seldom or never exercised in modern warfare, and the rule is universally acknowledged that if the debts are not so confiscated, the right to enforce payment revives when the war has terminated.‖ Vattel says the sovereign may confiscate debts

* Chitty on C. & M. 423.

† The Hoop, 1 C. Robinson's Adm. 200; Alcinous *v.* Nigreu, 4 Ellis & Blackburne, 217.

‡ Wheaton's International Law, by Lawrence, 541–877; Furtado *v.* Rogers, 3 Bosanquet & Puller, 191; Ex parte Boussmaker, 13 Vesey, Jr., 71; Signora, Edward's Adm. 60; Brown *v.* United States, 8 Cranch, 110; Ware *v.* Hilton, 3 Dallas, 199; Upton, Maritime W. & P. 42; Halleck's International Law, 358.

§ Angell on Limitations, § 24; McCluny *v.* Silliman, 3 Peters, 270; Bank of United States *v.* Daniels, 12 Peters, 32; Porterfield *v.* Clark, 2 Howard, 125.

‖ Manning, International Law, 130; Bynkershoek, B. 1, c. 3.

due from his subjects to the enemy, if the term of payment happens in time of war, or at least he may prohibit his subjects from paying while the war continues, but at present a regard to the advantages and safety of commerce induces a less rigorous rule.*

Where a debt has not been confiscated, the rule is undoubted that the right to sue revives on the restoration of peace, and Mr. Chitty says that with the return of peace we return to the creditor the right and the remedy. Unless we return the remedy with the right the pretence of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended.

When our ancestors immigrated here, they brought with them the statute of 21 Jac. I, c. 16, entitled "An act for limitation of actions, and for avoiding of suits in law," known as the statute of limitations. Proceedings in courts of justice are usually determined by the *lex fori* of the place where the suit is pending, including the statutes of limitation, which are those of the country where the suit is brought, and not those of the *lex loci contractus*.†

Such statutes exist in all the States, and with few exceptions they have been copied from the one brought here in colonial times. They are statutes of repose to quiet titles, to suppress fraud, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions. They proceed also upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint, because they rest on the negligence or *laches* of the party himself.‡

Persons within the age of twenty-one years, *femes covert*, *non compos mentis*, persons imprisoned or beyond the seas, were excepted out of the operation of the third section of

* Vattel, B. 3, c. 5, § 77.

† Townsend *v.* Jamison, 9 Howard, 407; Wheaton's International Law, by Lawrence, 187–288; Story, Conflict of Laws, § 577.

‡ Story, Conflict of Laws, § 576; Chitty on Contracts (10th Am. ed.), 907.

the act, and were allowed the same period of time after such disability was removed. Just exceptions indeed are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence. Cases where the courts of justice are closed in consequence of insurrection or rebellion are not within the express terms of any such exception, but the statute of limitations was passed in 1623, more than a century before it came to be understood that debts due to alien enemies were not subject to confiscation. Down to 1737, says Chancellor Kent, the opinion of jurists was in favor of the right to confiscate, and many maintained that such debts were annulled by the declaration of war. Regarding such debts as annulled by war, the law-makers of that day never thought of making provision for the collection of the same on the restoration of peace between the belligerents. Commerce and civilization have wrought great changes in the spirit of nations touching the conduct of war, and in respect to the principles of international law applicable to the subject.

Constant usage and practice of belligerent nations from the earliest times subjected enemy's goods in neutral vessels to capture and condemnation as prize of war, but the maxim is now universally acknowledged that "free ships make free goods" which is another victory of commerce over the feelings of avarice and revenge. Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it both "the right and the remedy." *

Total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability, and opens the doors of the courts. Absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations, and if so, then it is clear that

* Wolf *v.* Oxholm, 6 Maull & Selwyn, 92.

peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitation is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons on which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law.* Ability to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the acts of the two governments and by the law of nations, not applicable at the date of the contract, but which comes into operation in consequence of an event over which he has no control.

Old decisions, made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect to the leading case of *Prideaux* v. *Webber*† there is much doubt. *Miller* v. *Prideaux*,‡ *Lee* v. *Rogers*,§ *Hall* v. *Wybourne*,‖ *Aubrey* v. *Fortescue*,¶ are of the same class, and to the same effect. All of those decisions were made between parties who were citizens of the same jurisdiction, and most of them were made nearly a hundred years before the international rule was acknowledged, that war only suspended debts due to an enemy, and that peace had the effect to restore the remedy. The rule of the present day is, that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace.**

The suspension of the remedy during war is so absolute

* 2 Wildman's International Law, 17.
† 1 Levinz, 31.
‡ 1 Keble, 157.
§ 1 Levinz, 110.
‖ 2 Salkeld, 420.
¶ 10 Modern, 205.
** 1 Kent's Com. (11th ed), 169; Grotius, B. 3, c. 20, §§ 16–18.

that courts of justice will not even grant a commission to take testimony in an enemy's country.* But when the reason for the suspension ceases, the right to prosecute revives, and the fact that the right had been suspended constitutes no disability.†

When the courts of justice are open, and judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, says Lord Coke, it is said to be time of peace, but when by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, *et silent leges inter arma*, then it is said to be time of war; and having described the conditions, both of war and peace, he adds emphatically, that if a man is disseized in time of peace, and the descent is cast in time of war, this shall not take away the entry of the disseizee, which is a direct authority for the plaintiffs in this case.‡

Text writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the statute of limitations, but Plowden says that things happening by an invincible necessity, though they be against common law, or an act of Parliament, shall not be prejudicial. That, therefore, to say that the courts were shut, is a good excuse on voucher of record.§ Exceptions not mentioned in the statutes have sometimes been admitted, and this court held that the time which elapsed while certain prior proceedings were suspended by appeal, should be deducted, as it appeared that the injured party in the meantime had no right to demand his money, or to sue for the recovery of the same; and in view of those circumstances, the court decided that his right of

* Barrick *v.* Buba, 32 English Law and Equity, 465; Wood *v.* Allen, 2 Dallas, 102.

† Foxcraft *v.* Galloway, 2 Dallas, 132; Wall *v.* Robson, 2 Nott & McCord, 498; Hopkins *v.* Bell, 3 Cranch, 458; Higginson *v.* Air, 1 Desaussure, 427.

‡ 2 Co. Litt. 249 b; Bracton, lib. 4, fol. 240; 1 Hale's P. C. 347.

§ Brooke, tit. Failure of Record; Blanshard on Limitations, 163; 6 Bacon's Ab. 395; 1 Plowden, 9 b.

action had not accrued so as to bar it, although not commenced within six years.* But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period.

Reference is made to the remarks of the judge who gave the opinion in the case of *Alabama* v. *Dalton*,† but the case then before the court involved no such question as is presented in this case, and those remarks are more than counterbalanced by those made by the Chief Justice in *McIver* v. *Ragan*,‡ where he admits that the case would be within the exceptions to the statute, if it appeared that the courts of the country were closed so that no suits could be instituted.

Viewed in any light, we think the decision of the Circuit Court overruling the demurrer to the fifth and sixth replications of the plaintiffs was correct.

Plaintiffs also rely upon the act of Congress of the eleventh of June, 1864, as being sufficient to take the case out of the operation of the statute, but it is not necessary to decide that point in this case, and we express no opinion upon the subject.

JUDGMENT AFFIRMED WITH COSTS.

* Montgomery *v.* Hernandez, 12 Wheaton, 129.
† 9 Howard, 522. ‡ 2 Wheaton, 29.

## CLARK *v.* UNITED STATES.

1. Where a party, who, by contract, has a right to have and takes security to have work finished by a certain day,—no penalty nor any right to terminate the contract for non-completion being reserved,—permits the other side, after breach, to go on in an effort to complete the contract, he has no right to compel him to complete it in a manner which necessarily involves him in loss.
2. Where one party agrees to build an embankment for a certain sum per cubic yard, at such places as he shall be directed by another, and the place selected by this other is such that there is a natural settling of the batture or foundation while the embankment is building, and a consequent waste and shrinkage of the embankment, any system of measurement which does not allow for the embankment which supplies the place of the settling is not a correct one.

APPEAL from the Court of Claims.

The case was thus: Clark entered into a contract with the United States to *furnish all the material and make* 221,000 *cubic yards* of embankment at the Navy Yard at Memphis, Tennessee; the embankment to be made *in such manner* and *places* as should be directed by the engineer, and finished on or before the 15th of July, 1847. The United States engaged, that for the materials and *embankment made*, &c., according to the contract, there should be paid, on account of all bills presented for the aforesaid materials and *work delivered and executed*, "eighteen cents for every cubic yard." Ten per cent. was to be withheld from the amount of all payments as collateral security, and a bond given to secure performance.

Clark having brought suit in the Court of Claims to recover a balance which he asserted to be due on this contract, that court found—

"1. That he built 128,913.55 yards of the embankment, for which he had been paid.

"2. That the system of measurements pursued by the officers of the United States, and by which the said quantity of yards was computed, consisted in measuring from a fixed base monthly, and that the claimant at the time objected to the system, con-

tending that he should be paid for the quantity of earth actually deposited by him on the embankment.

"3. That there was a waste and shrinkage of the embankment while building, and a natural settling of the *batture on which the embankment was built*, and that the loss occasioned thereby necessarily was borne by the claimant *under the system of measurements adopted.*

"4. That this system was the one customarily used on the public works of the government, and that there was no competent evidence offered to show a contrary custom.

"5. That the officers of the government interfered with the claimant in the execution of his work, compelling him to dump loose earth where it was exposed to the direct currents of the river, and that they also used the embankment as a roadway, to the loss and injury of the claimant, but that all of such acts of which there was sufficient evidence, occurred subsequent to the 15th day of July, 1847, and when the claimant was in default in not having performed his said agreement and completed the said embankment."

And the court decided:

"That the contract was entire and not severable, and that by the terms thereof the claimant could only recover for the embankment completed and not for the quantity of earth deposited by him therein, and that as a necessary and legal consequence thereof all loss by settling, shrinkage, and the action of the currents of the river, was to be borne by the claimant and not by the United States.

"That the claimant was not entitled to recover for the interference of the defendants or their officers subsequent to the 15th July, 1847, the time when the work under his said contract was to have been completed by the terms of his agreement."

From this decision Clark appealed.

*Messrs. Norton and Weed, Solicitor and Assistant Solicitor for the Court of Claims*, in support of the decision, contended, by brief filed, that the claimant having contracted to furnish materials, as well as to do the work, all loss, though arising

from inevitable accident, *was* to be *borne* by him: that it *was* a case for the maxim, *res perit domino*. They contended also that the contract was entire, and that the appellant having been bound to complete his work by July 15th, and the United States having had a right to use the place from that day, he could recover nothing unless he showed that the failure to complete was caused by the United States.

*Mr. Hughes, who filed a brief for Mr. McCalla, contra.*

Mr. Justice MILLER delivered the opinion of the court.

1. Among the facts found by the court it is stated that "the officers of government interfered with claimant in the execution of his work, compelling him to dump loose earth where it was exposed to the direct current of the river, and that they also used the embankment as a roadway to the loss and injury of the claimant; but that all of such acts of which there was sufficient evidence, occurred subsequent to the 15th day of July, 1847, and when claimant was in default in not having performed his said agreement, and completed said embankment." And they declare the law applicable to this state of facts to be, "that the claimant was not entitled to recover for the interference of defendants or their officers subsequent to the 15th July, 1847, the time when the work under his contract was to have been completed by the terms of his agreement."

We are of opinion that this ruling was erroneous. The court seems to have placed this right of the agents of the government to use the embankment as a roadway, and to compel him to dump loose earth into the current, by which it was carried away, both of which are found to be to his loss and injury, upon the simple fact that those injuries were inflicted after the day at which his contract should have been completed. What relation there is between his failure to do all the work by a certain day, and the claim of the government to subject him to these losses, is not pointed out by the court, nor is it perceived by us. The contract declares

no penalty for not completing the work by the 15th July. It does not even authorize the government to forfeit the contract or to terminate it. The utmost that can be claimed for this failure is such damages as it may have sustained because the work was not finished in time. For this the plaintiff had given a bond with sureties. But if the government permitted him to go on in the effort to complete the contract, it surely had acquired no right to compel him to do it in a manner which necessarily involved him in great loss, and to use the embankment as a roadway, to his further injury.

2. The court finds that there was waste and shrinkage of the embankment while building, and a natural settling of the batture on which the embankment was built, and that the loss occasioned thereby necessarily was borne by the claimant under the system of measurement adopted. And they find, as matter of law, that the contract being entire and not severable, claimant could only recover for embankment completed, and that, as a necessary consequence, all losses by settling and shrinkage, and the action of the current, were to be borne by the claimant.

We take it for granted that the word "settling" in this finding of the law is used for the settling of the batture. If this be so, we think the court erred in this matter also. It must be evident, if the foundation on which the embankment was built had settled lower while the building was going on, that the embankment which supplied the place of this settling was there, and had become the property of the government. If the system of measurement did not enable the engineer to compute this accurately they should have done it approximately, or adopted some other system. It is clear that for the embankment built by him and remaining, he should be paid; and if the quantity necessary to be built had increased by this settling, it was the loss of the government, which had agreed to pay by the cubic yard, and not by a certain sum for the job in the aggregate.

3. A more difficult question is presented in reference to the question of loss by the action of the current, and the

natural waste and shrinkage of the embankment while it was in process of completion.

It is certainly true that if this embankment had been built on dry land the contract is of that nature that these losses would fall on claimant, and the custom of measurement found by the court probably was founded on such work. But we do not feel so clear that in a contract like this, in which no place is mentioned for its precise location, and in regard to which the contract obliges the party to do the work "in such manner and at *such places* as shall be directed by the said engineer or other authorized agent," the government is only bound to pay for what earth remains visible, and capable of being triangulated after the work is finished. If, for instance, the engineer had ordered plaintiff to commence in the middle of the river, and had caused him to dump the whole 221,000 yards in the midst of the current, where it could neither be seen nor measured, we are of opinion that the quantity of dirt placed there should be ascertained by some other mode, and paid for. As the contract is silent as to the place where the work was to be done, as there are no facts found concerning the previous negotiations as to location or character of work required, we have not sufficient means of determining whether the application of the law to this point by the court was correct or not. We must, therefore, dismiss this, the most important branch of the case, with the foregoing remarks, and as the judgment of the Court of Claims must be reversed for the errors already mentioned, the court may on a new trial find differently, or may find such acts as will enable us to determine the law of the case if it shall become necessary.

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

## TOME v. DUBOIS.

1. Conversion of personal property by a wrongdoer does not deprive the owner of the power of making a valid sale of it. He may, if he sees fit, waive the tort, and affirm the wrongful act; and in that event a purchaser from him, first giving due notice of the transfer, may demand the property, and in case of refusal maintain trover for the wrongful retention of it. Such a sale is not a sale of a right of action, but a sale of the property itself.
2. Where the owners of saw-logs which in a freshet had floated far down a river, and coming thus as waifs to persons along the river, had been saved and sawed by them into boards, affirmed the acts of such persons in saving and sawing them, the salvors, on a claim by the owners to the value of the lumber, are entitled to just compensation for their work and expenses in saving it.
3. Refusal to grant specific prayers of a party for instruction is not error; the substance of the requested instructions being embraced in the instructions actually given.

ERROR to the Circuit Court for the District of Maryland; the case, as stated in the brief of counsel, and assumed by this court, being in substance thus:

Dubois & Lowe brought trover against Tome, Shure & Abbott to recover damages for the conversion by them of certain saw-logs, and certain planks, which Dubois & Lowe alleged to be their property.

At the trial of the cause, evidence was offered on the part of the plaintiffs, that on September 30th, 1861, several booms on the Susquehanna River were carried away by a freshet, and that a large quantity of logs for lumber were swept down the river; that telegrams were at once sent to the postmasters at Port Deposit and Havre de Grace, towns on the lower part of the river, requesting them to have the logs caught and saved for the owners, and that under such notices, the defendants caught and saved a quantity of the logs, and at once began to saw them into lumber. Evidence was also offered, that a few days after the freshet, the owners of the logs appointed a committee of three persons to go down the river, and settle with the persons who had saved any portion of the logs, and with full authority to sell the same; that on

Statement of the case.

the 7th or 8th October, 1861, the committee went to the saw-mill of the defendants, about seven miles from Havre de Grace, and saw some of the logs there; that the committee offered to sell to the defendants all the logs between Safe Harbor Dam and Havre de Grace, which included the logs then in the possession of defendants, but the parties could not agree as to the terms of sale; that the defendants were then engaged in sawing the logs, and had prior to that time sawed some of them, and that the committee prohibited all further sawing thereof; that they estimated the lumber which had been sawed at from 40,000 to 200,000 feet; that they made several visits to the mill of the defendants, and on their last visit, which was in December, 1861, and was for the purpose of ascertaining and measuring the whole amount, there were, in their judgment and by their measurement, 400,000 feet of sawed lumber, and 100,000 feet in logs. Evidence was also offered, that on the 26th October, 1861, the plaintiffs bought all of the logs from Safe Harbor to Havre de Grace from the committee, and settled with them therefor; that on the next day the plaintiffs gave notice to Tome (one of the defendants) of the purchase, and he having refused to pay them for the logs which had been sawed, they demanded possession of all the lumber sawed and unsawed in the defendants' possession, and prohibited the sawing of any more, but he denied their ownership, alleging that the logs and lumber had not been scaled and delivered to them; and that after the logs had been scaled, and the quantity of lumber estimated by the committee in December, 1861, the plaintiffs made another application to the same defendant without success, he referring them to Shure (a co-defendant in this case), of whom they had made repeated demands, and received repeated refusals. The plaintiffs also gave evidence, that the logs when sawed, were worth from $13 to $16 per thousand feet.

On the part of the defendants, evidence was offered that after the receipt of the notices by telegraph, they commenced to save the logs as they were brought down by the freshet, and that with the expectation of becoming the purchasers

of the logs, they sawed and converted the same into lumber as fast as they were saved, and directed the foreman at their saw-mill to keep an account of the same; that they had converted about twenty-two logs into lumber, when the committee came to the mill, and objected to the manner of keeping the account, and gave directions as to the keeping of the same in a different manner; that of the logs when so sawed into lumber they had sold three canal-boat loads on the 18th and 25th of October, 1861, and received the money therefor, at the value of $11 per thousand feet; that about 780 logs were the whole amount so recovered and sawed by them, and that from the moment they heard of the sale of the logs by the committee to the plaintiffs, they ceased either to catch or saw the logs; that five of the logs sawed would make a thousand feet of lumber; and that it was worth $3 per thousand to saw it, and $5 per thousand to save the logs. The defendants also proved, that when called on by the committee after they had made their final estimate and measurement of the lumber, for an account of the logs so caught and manufactured into lumber, they expressed a willingness to furnish such account, and to pay therefor to the committee, for themselves or for the owners, but would not furnish an account for nor settle with the plaintiffs, whom they refused to know in the matter.

The defendants requested the court to instruct the jury as follows:

1. If the jury shall find that the logs in question were the property of the several parties shown by the evidence to have constituted the committee to dispose of the same, and that the defendants took the logs into their possession, and sawed the same into boards without the consent of the owners, then the taking and sawing were a tortious conversion of the logs, for which the defendants became responsible to the original owners in trover, and the plaintiffs are not entitled to recover in this action, notwithstanding the jury shall also find that after the conversion, the plaintiffs purchased all the former owners' interest in the logs.

2. That if the jury shall find for the plaintiffs, the measure of

damages is the value of the logs at the time and place of the conversion.

3. If the jury shall find that the logs in question were saved by the defendants from the freshet for the benefit of the owners when they should appear, and then shall further find that being perishable, they were sawed by the defendants also for the benefit of whom it might concern, then the measure of damages will be the value of the logs at the time and place they were so saved, or the value of the lumber, deducting therefrom the cost of saving and sawing.

4. If the jury find from the evidence that the logs were saved in conformity with the instructions of those who were the owners thereof at the time of the freshet, and that they or so many thereof as were saved were thereafter sawed into plank, with the sanction of the committee representing the owners, then the jury, in estimating the value of the logs and lumber at the time of the demand and refusal, are to allow a reasonable sum as compensation for saving such logs, and sawing the same into plank.

But the court rejected the prayers presented by the defendants, and instructed the jury:

If the jury find from the evidence in this case that the saw-logs and planks found by the witnesses at defendants' mill were saw-logs that had come down the river during the freshet, belonging to the owners represented by the committee, or plank sawed from the logs, and that the logs and plank were sold by the committee to the plaintiffs in this case, and that subsequently to the purchase the plaintiffs demanded the same from the defendants, and that the defendants refused to give up the same to the plaintiffs, then the plaintiffs are entitled to a verdict for such sum as the jury may find the logs and plank to have been worth at the time of such demand and refusal at the mill of the defendants, with interest from the time of such demand, after deducting whatever cost the jury may find the defendants incurred for the saving of the logs, and also the cost of sawing; if the jury shall further find that the saving and sawing were done at the request or by the sanction of the owners or the committee.

Exceptions were duly taken by the defendants to the refusal of the court to instruct the jury as requested and also to the instructions given by the court; and the refusal and the instructions given were now the matters in question here.

*Mr. G. H. Williams, for the plaintiff in error*, contended, 1st, that if the sawing of the logs (which was a necessary part of their saving) was a tortious conversion, then the right of action therefor was not assignable,* and also that the instruction tended to confuse the jury by leaving to them to find or not a fact which was not disputed, viz., that at least the logs were saved under instructions. That the defendants were not, at all events, trespassers *ab initio;* and that if the plaintiffs could not sue for so many of the logs as were converted previous to their purchase, there was no separation of the residue, or delivery by the former owners, for which trover would lie.†

*Mr. J. N. Steele, contra.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Careful attention to the facts of the case, as given in the statement prepared as a part of the opinion of the court, will very much facilitate the investigation, as it discloses very fully the substance of the entire transaction, the order of the events and the pretensions of the respective parties.

Original ownership of the logs is not a question in the case, and the present parties conceded that the booms containing the logs were broken by the freshet, and that the logs, in spite of any efforts of the owners, were carried away by the current, and floated down the river. Telegrams were sent by the owners making known their loss, and requesting the persons to whom they were directed to take measures in their discretion to save the logs, and it is with-

* Overton *v.* Williston, 31 Pennsylvania State, 160; Gardner *v.* Adams, 12 Wendell, 297; McGoon *v.* Ankeny, 11 Illinois, 558; Dunklin *v.* Wilkins, 5 Alabama, 199.

† White *v.* Wilks, 5 Taunton, 176; Shepley *v.* Davis, Id. 622.

out dispute that the defendants promptly engaged in the business, and saved the logs in controversy. Owning saw-mills, they immediately commenced to saw the logs, as they secured them, into planks. Other persons also lost logs by the same freshet, and the several owners appointed a committee of three persons to go down the river and, if possible, protect their interests, and to sell the logs if in their discretion it was thought best. Pursuant to that authority they went to the mills of the defendants, and offered to sell them the logs, sawed and unsawed, but the parties not being able to agree, the committee notified the defendants that they must stop sawing the logs into lumber. Unable to come to any satisfactory arrangement, the committee left and sold the whole lumber, logs and planks, to the plaintiffs, who paid the consideration. Having become the owners, the plaintiffs went to the mills of the defendants, and failing to sell the lumber to them, or to come to any agreement with them, they demanded the lumber, logs and planks, and the defendants refusing to deliver the same, they instituted this suit in the Circuit Court.

Purchase by the plaintiffs was made on the twenty-sixth day of October, 1861, as appears by the evidence. Refusal of the defendants to deliver the lumber as demanded, was placed upon the ground that they, the defendants, were responsible to the former owners, and they denied that the ownership was in the plaintiffs, as the logs and planks had not been scaled and delivered to them since the purchase.

Theory of the first prayer for instruction is, that the defendants are not liable in this action, because they took the logs into their possession, and sawed the same into planks while the logs were the property of the original owners. Stated in other words, the proposition is, that the logs, at the time of the conversion, were the property of the vendors of the plaintiffs, and the defendants contend that, having tortiously converted the lumber to their own use, before the sale, they are not liable to the plaintiffs as the purchasers. Delivery was not essential, as it is well settled that when the terms of the sale are agreed on, and the bargain is

struck, and everything the seller has to do with the property is complete, the contract of sale becomes absolute between the parties without delivery, and the property and risk vest in the purchaser.*

Owners of personal property are not obliged to treat every act of a third person who invades their right of property or possession as constituting a tortious conversion of the property, but they may, if they see fit, waive the tort, and in that state of the case, they may sell the property and convey a good title, and their vendee may, upon demand and refusal, maintain trover.†

Such a defence of a wrongdoer is not entitled to any special favor, and we concur in the remarks of Judge Story, that there is no principle of law which establishes that a sale of personal property is void because the property was not in the possession of the rightful owner at the time the sale was made. Under such circumstances, the sale is not a sale of a right of action, but a sale of the thing itself, and good to pass the title against every person not holding the same in good faith for a valuable consideration without notice, and *à fortiori* against a wrongdoer.‡

Conversion relied on by the plaintiffs is not because the defendants intermeddled with the logs without authority, or that they refused to deliver the lumber when it was demanded by the committee. They could not rely on those acts with any hope of success, as the plaintiffs, at those dates, had no title to the lumber, which at that time was vested in their vendors. But they subsequently became the purchasers, and the proofs show that they twice demanded the lumber after the defendants knew that the plaintiffs had become the purchasers.

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* Leonard et al. *v.* Davis et al., 1 Black, 483; 2 Kent's Com. (11th ed.) 492.

† Hall *v.* Robinson, 2 Comstock, 293; Cartland *v.* Morrison, 32 Illinois, 190; 2 Greenleaf's Evidence, 108; Hambly *v.* Trott, Cowper, 372; Cravath *v.* Plympton, 13 Massachusetts, 454; Webber *v.* Davis, 44 Maine, 147.

‡ Brig Sarah Ann, 2 Sumner, 211; Carpenter *v.* Hale, 8 Gray, 157; Zabriskie *v.* Smith, 3 Kernan, 322; Morgan *v.* Bradley, 3 Hawks, 559.

Third prayer for instructions corresponds with the proofs, which show that the defendants persistently denied the title of the plaintiffs, and claimed the right to hold the lumber, sawed and unsawed, for the benefit of the original owners, which is a theory without merit, and which requires no further explanation. Claiming no title to the property, they refused to deliver it, because, as they insist, they had taken away from the original owner the power to sell, by tortiously converting it to their own use. Even at the trial they admitted that the property did not belong to them, but insisted that the purchasers acquired no title for the reasons already suggested. Claim is also made in argument that the defendants had sold a part of the lumber, but it is too late to raise any such question in this court, as none such was raised at the trial, or reserved in the bill of exceptions.

Proper exceptions were also taken to the refusal of the court to give the second and fourth prayers presented by the defendants, but the exceptions cannot be sustained, as the substance of both is embraced in the instructions given by the court. Purport of those prayers were that the defendants were entitled to a reasonable sum for the cost of saving and sawing the logs. Instructions of the court to the jury were, that they should deduct from the value of the lumber the cost of saving the lumber, and also the cost of sawing, which is all the defendants could demand in any view of the facts. Valid objection cannot be taken to the qualification annexed to that instruction, as the testimony was without conflict that the defendants had saved the logs and manufactured a part of them into plank, and there is no proof that the owners or the committee made any complaint that the work had been done without authority. Amount of the verdict affords satisfactory evidence that the finding was correct. The residue of the instruction is unexceptionable and there is no error in the record.

JUDGMENT AFFIRMED WITH COSTS.

## INSURANCE COMPANY *v.* HALLOCK.

1. Under the civil code of Indiana, the "order of sale" in proceedings for the foreclosure of a mortgage comes within the function and supplies the purpose of an execution. Consequently, the code requiring executions to be sealed with the seal of the court, such order of sale, if not so sealed, is void.
2. The sheriff could not sell without such order.

ERROR to the Circuit Court for the District of Indiana; the case being thus:

In Indiana the distinction between proceedings in common law and chancery is abolished, and under their code one form of action only, the "civil action," is known.* This code provides as follows:

"Sect. 407. When a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced by execution."

"Sect. 409. The execution must issue in the name of the State, and be directed to the sheriff of the county, sealed with the seal, and attested by the clerk of the court."

The proceedings to foreclose a mortgage are the same as in other actions, except that when there is no express agreement in the mortgage, nor any separate instrument, for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged, and in that case the judgment of foreclosure shall order the mortgaged premises to be sold, or so much thereof as will satisfy the judgment. If there is a promise in the mortgage, or in a separate instrument, to pay the sum secured, the court shall direct in the order of sale that any balance which may remain unsatisfied after the sale of the mortgaged premises, shall be levied of any other property of the mortgage debtor.†

* 2 Gavin & Hord's Statutes of Indiana, 33.

† Sections 632–634.

Section 635 is thus:

"A copy of the order of sale, and judgment, shall be issued and certified by the clerk, *under the seal of the court*, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, *as upon execution;* and if any part of the judgment, interest, and costs, remain unsatisfied, the sheriff shall forthwith proceed to levy the residue of the other property of the defendant."

With these provisions of the code in force, the Ætna Insurance Company, brought suit against Hallock and others, to try the title to land. The defendants had possession, claiming under a judicial sale in proceedings to foreclose a mortgage. It was admitted that the plaintiffs below had the legal title to the land in controversy, unless it had been divested by those proceedings.

On the trial the defendant having introduced a transcript of the record of the proceedings under which they claimed title from the Court of Common Pleas of Vanderburgh County, "the plaintiffs then offered in evidence the original order of sale issued to the sheriff on the decree of foreclosure, and upon which order of sale the sheriff sold to the defendant in the case the premises in controversy, which order of sale appeared, on inspection thereof, not to have been issued under the seal of said Court of Common Pleas of Vanderburgh County, and not to have had the seal of said court impressed thereon, or in any manner annexed thereto. . . . And the court, *because the said order of sale was not issued under the seal of the said Court of Common Pleas of Vanderburgh County*, did find for plaintiffs, to which finding of the court the defendants at the time excepted." Judgment having been given accordingly, the question now before this court was the correctness of the decision so made.

*Mr. R. M. Corwine, for the plaintiff in error:*

Did the omission to use the seal of the court make the order void, or was it avoidable merely? The general rule

in judicial sales is, that the purchaser is not bound to look beyond the "judgment, levy, and sale." All other steps (such as the issuing of an execution after a year and a day without a revivor) are merely directory to the officer.* As between the parties to the process, or their privies, the return is usually conclusive, and not liable to be collaterally impeached. In *Sowle* v. *Champion*, in the Supreme Court of Indiana,† it was held that an order of sale, issued on a decree of foreclosure, which did not set out a copy of the decree, was informal, under the statute, but was *not void*, and if not set aside on the defendants' motion, that all acts done under it were valid. Yet the direction of the code, "that *a copy of the order of sale* and judgment *shall* be issued," is as stringent and mandatory as that other direction, that it "shall be issued and certified by the clerk *under the seal of the court*," &c. If the one is merely directory, the other is so also.

*Messrs. Hughes, Denvers, and Peck, contra.*

Mr. Justice MILLER delivered the opinion of the court.

If the paper here called an order of sale is to be treated as a writ of execution or *fieri facias* issued to the sheriff, or as a process of any kind issued from the court, which the law required to be issued under the seal of the court, there can be no question that it was void, and conferred no authority upon the officer to sell the land.

The authorities are uniform that all process issuing from a court, which by law authenticates such process with its seal, is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one.

We have decided in this court that a writ of error is void for want of a seal, though the clerk had returned the transcript in obedience to the writ.‡

* Jackson *v.* Bartlett, 8 Johnson, 361, 367; Jackson *v.* Rosevelt, 13 Id. 101, 102.

† 16 Indiana, 165.

‡ Overton *v.* Check, 22 Howard, 46.

We have held that a bill of exceptions must be under the seal of the judge.*

It is true that the paper now under consideration is not an ordinary *fieri facias*, nor is it any other common-law writ. It may be well, therefore, to consider what is its relation to the writ of *fieri facias*, and especially whether it was essential to the authority of the sheriff to make the sale. That the ordinary writ of *fieri facias* is the authority of the sheriff to levy on property and sell it is undoubted, and needs no reference to authorities to support it; and if the supposed writ is void, then the levy and sale are also void, and not merely voidable, because they are made without any authority on the part of the officer.

The decisions cited by counsel are all cases where process was issued irregularly, in point of time, or where the officer has not proceeded according to some statutory requirement which was directory to him, but did not affect his power to sell.

But if his power to sell depends upon a process, and that process shows on its face that it is void, it can confer no authority, and all his proceedings under it are simply void.

The question then recurs, did the authority of the sheriff to make the sale on which plaintiffs in error rely, depend upon the order of sale issued by the Court of Common Pleas?

In courts which pursue the chancery practice in foreclosing mortgages, unaffected by statutory provisions, the sale is made by a commissioner appointed by the court. This is usually one of the standing master commissioners of the court, or, for reasons shown, some special commissioner for that purpose. In neither case does any process or order under seal of the court issue to the commissioner. He may, if he thinks proper, procure a copy of the decree and order appointing him commissioner, or if the party who wishes

* Pomeroy's Lessee *v.* Bank of Indiana, 1 Wallace, 592; and see Boal's Lessee *v.* King, 6 Ohio, 11; Bybee *v.* Ashby, 2 Gilman, 157; Tibbetts *v.* Shaw, 19 Maine, 204; Witherill *v.* Randall, 30 Id. 170; State *v.* Curtis, 1 Hayward, 471; Hall *v.* Jones, 9 Pickering, 446.

the decree executed thinks proper in this mode to demand of him to proceed, he may furnish him such copy.

But it is believed that the decree itself is the authority on which the commissioner acts, and if he proceeds in conformity to the decree, the sale will be valid although no copy has been placed in the hands of the commissioner.

In the courts of Indiana the distinction between common law and chancery proceedings is abolished, and under their code of civil procedure but one form of action, called a civil action, is known. This code provides, § 407, that "when a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced by execution." Section 409 says, "The execution must issue in the name of the State, and be directed to the sheriff of the county, sealed with the seal, and attested by the clerk of the court."

Section 635, which relates to the proceedings to foreclose a mortgage, we give verbatim:

"A copy of the order of sale, and judgment, shall be issued and certified by the clerk, *under the seal of the court*, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, *as upon execution;* and if any part of the judgment, interest, and costs remain unsatisfied, the sheriff shall forwith proceed to levy the residue of the other property of the defendant."

Though the order of sale here described may not come under the name of any of the recognized common law writs of execution, as *capias*, *fieri facias*, or others, yet it comes clearly within the function and supplies the purpose of an execution—that is, a process issuing from a court to enforce its judgment.

The statute recognizes it as such, and requires that it shall issue under the seal of the court. The sheriff to whom it is directed is required to proceed "as upon execution." If the debt is not satisfied by the sale of the property specifically mentioned in the order, it then operates as a *fieri facias*, under which the sheriff is directed to levy the residue of any

other property of the defendant. It is therefore to all intents and purposes an execution, and the statute expressly requires that it must issue under the seal of the court. Without the seal it is void. We cannot distinguish it from any other writ or process in this particular.

It is equally clear that under the Indiana statute the sheriff could not sell without this order, certified under the seal of the court, and placed in his hands. This is his authority, and if it is for any reason void, his acts purporting to be done under it are also void.

JUDGMENT AFFIRMED.

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## CANAL COMPANY *v.* GORDON.

1. The jurisdiction of a court of equity invoked to enforce a statutory lien, rests upon the statute, and can extend no further.
2. Exceptions to the report of a master in chancery cannot be taken for the first time in this court.
3. In a contract to make and complete a structure, with agreements for monthly payments, a failure to make a payment at the time specified is a breach which justifies the abandonment of the work, and entitles the contractor to recover a reasonable compensation for the work actually performed. And this, notwithstanding a clause in the contract providing for the rate of interest which the deferred payment shall bear in case of failure.
4. Where a release is fraudulently obtained from one of two joint contractors, the releasing contractor is not an indispensable party to a bill filed by his co-contractor against the other party to the contract.
5. Such a release so fraudulently obtained, does not operate to invalidate the lien previously secured.
6. A statute of California gives to mechanics a lien upon the flumes or aqueducts "which they may have constructed or repaired," provided suit be brought "within one year after the work is done." A canal company, having a part of a canal already made, which they could use at certain times of the year, but to use which at all times and with complete effect, it was necessary to extend to a river giving a full supply of water, employed two contractors to make this extension or new canal. The work was to be paid for in monthly instalments. A failure to make the monthly payment occurred June 7th, 1853. On the same day the contractors gave notice that the "contract was annulled and at an end,"

and they "no longer parties to it;" but to prevent injury to the company, stated that they would continue to work for another week, leaving the subject of payment to the company's honor, *when, unless a satisfactory arrangement was made, they would discontinue work.* On the 13th, no notice being taken of this letter, they again addressed the company, saying that, receiving no reply, they withdrew their former offer and all the note, except that part which declared the contract ended. On this case,

*Held*,

i. That the lien was filed within the year.

ii. That it affected only the extension or new canal.

APPEAL from the Circuit Court for the Northern District of California; the case being thus:

A statute of California gives to all persons performing labor or furnishing materials for the construction or repairs of any building a lien, jointly, upon the building which they may have constructed or repaired, or for which they may have furnished materials, to the extent of the labor done, or materials furnished, or both. And a subsequent statute extends the previous one so as to include in its provisions ditches, *flumes, or aqueducts*, constructed to create hydraulic power, or for mining purposes. It is provided, however, "that no lien shall continue for a longer period than one year after the work is done or materials furnished, unless suit be brought in a proper court to enforce the same *within that time.*"

With this statute in force, the South Fork Canal Company was desirous of having—for those purposes of mining to which in California water-conduits contribute aid—a canal or flume from a grand reservoir near Placerville *to the south fork of the American River*, a distance of about twenty-five miles. Beginning at the Placerville end, and making the canal in the direction purposed, they had, after they had made it about half way, a canal, which they used with a certain advantage. But by itself, this part—a part between Placerville and Long Cañon—had no supply of water for more than two or three months in the year, and these were winter months. Then certain mountain streams fed it. Extended to the American River, the supply of water it was

expected would be both increased and be constant. The Company accordingly, in March, 1853, entered into a contract with two persons, named Gordon & Kinyon, for an extension of the work from the point where the already mentioned part ended, to the river to which they thought that it was desirable to bring it. This new part was divided into sections designated as sections 17 to 25.

By the terms of the contract it was stipulated that the work should *be completed by July 1st*, 1853. It was to be paid for monthly, however, in a way specified, as the work progressed: it being provided at the same time, that if any money due should *not* be paid when due, such amounts should bear interest at current rates till paid.

Under the contract Gordon & Kinyon worked till *the 7th day of June*, 1853, at which time, on estimate taken according to the terms of the contract, they were entitled for work done in May, to about $20,000. The money not being paid, they *on that day*—the date is important—gave the company notice by which, after stating that punctuality on the company's part in making its promised payments was indispensable to their (Gordon & Kinyon's) being able to pay the numerous men whom they had at work, and that they thus acted in order to avoid embarrassment and discredit to themselves, they declared the contract "annulled and at an end," and they themselves "no longer parties to it." Expressing, however, in strong terms their obligations to the officers of the company for their personal kindness, expressing also the great interest which they themselves felt in the "noble enterprise" which they had been directing, and "pride in the contract from the very difficulty of its execution and its importance relatively to the whole work," they added in a form "strictly confidential," and, as they said, for the purpose of allowing the company to make other arrangements without interrupting the work, that they would, for six days longer from the date of the note (June 7th), continue the work undertaken by them, at their own risk, and should "not ask pay beyond this date unless the company choose from their own sense of honor to pay." They added, that at the

end of the six days they would discontinue work unless a new and secure financial arrangement should be made, one either satisfactory to themselves or such as two of their own directors named would pronounce to be proper.

*Receiving no reply to this letter*, they wrote the company on the evening of the 13th of June that no action having been taken on the letter, nor answer given to it, and the six days having elapsed at 4 P.M. of the then 13th of June, they withdrew the whole of the former note—as they said that it was competent for them to do (the offers having been voluntary) —*except that part of it which declared the contract broken, annulled, and ended.*

On the next day Gordon informed the company in writing that Kinyon was only interested in the contract to the extent of one-third of the profits, and on the 21st of June, he and Kinyon filed a notice of their claim of a lien on "*the works known as the South Fork Canal*" for the amount which they claimed. A day or two after the delivery to the company of the note of the 7th, the amount due on the May estimate was tendered to Kinyon, who declined to accept it.

On the 23d of June, Gordon & Kinyon brought suit against the company, for the purpose of enforcing their lien.

A few days afterwards, that is to say, on the 28th, the directors, in their office at Placerville, Gordon being in the city of San Francisco, took from Kinyon a release, executed in the name of Gordon & Kinyon, of all claims against the company. The consideration paid Kinyon for this release was $2000 in money, and $3000 in the company's stock, estimated at par. The certificates for this stock were made out in the name of Kinyon's wife. The whole of this transaction was concealed from Gordon by Kinyon, who immediately after it proceeded to San Francisco, whence by the next steamer he fled the country.

*On the 12th of June* of the following year (1854), Gordon—having discontinued the suit already brought—filed a bill in the court, setting forth the contract, and the facts of the case, as above given, alleging that the contract had been broken by the company's failure to pay, that the work had

been done to the amount of $84,000, that the release was fraudulent, and praying that the release might be disregarded, and the South Canal sold to satisfy his lien. An interlocutory decree being made in his favor, and the matter referred to a master, who reported $76,589 due (less $6200 credits) on the contract for work done on the canal, and $16,250 for work preliminary to it, such as roads, saw-mills, timber-slides, and such like things, which assisted in and were indispensable to accomplish the main work. No exceptions being filed, the report was confirmed, and a decree made for the amount reported, less the credits and less the $16,250 for preliminary work, this being held by the court not a lien under the statute. *And the lien was decreed to extend to the whole canal; and the whole was directed to be sold to satisfy it.*

As respected the relation of the two parts of the canal, testimony in the case, it may be mentioned, stated that both parts were "parts of the same work, and each necessary to the other;" that to disconnect the two would lessen their value greatly; the work being worth "very little—valueless" —without the extension to the American River.

It was from this decree that the present appeal, one by the company alone, came.

*Mr. Wills, for the appellant*, contended—

I. That the contract in its nature was entire, and for the performance of the whole work, and that the contractors having abandoned it before completion, were not entitled to recover even for what they actually did. Any delay in the payment of the estimates by the company was to be compensated, according to an express provision of the contract, by the payment of interest thereon from the time of such non-payment until paid.

II. That the lien, if it ever attached, was lost, 1st, by the release to the company by Kinyon, one of the co-contractors; 2dly, by the voluntary and needless dismissal of the first action; and 3dly, by the failure of Gordon to institute the present suit until after the lapse of more than one year from

June 7th, 1853, which failure (Mr. Wills argued, on the letter of that date and of the subsequent 13th) was plainly evident; it being clear from these letters that the contract was ended on the 7th of June, and that all work done afterwards, if any was done, was done voluntarily. The 12th of June, 1854, when the suit below was brought, was therefore more than a year after the work was finished, and the case thus was not within the statute.

III. That the lien, if attaching at all, was to be restricted to the part, branch, or division of the canal on which the work was actually done, and for which the materials were furnished, and not extended over the whole.

*Mr. Botts, contra:*

I. The first breach of the contract was made by the company's non-payment, and fully authorized the contractors to abandon the work and to sue on a *quantum meruit* for the work already done.* The provision with regard to the rate of interest did not authorize, or relieve from, the breach. On the contrary, it recognized the fact that a failure to pay would constitute a breach, and provided a measure of damages for the breach other than that fixed by California statute, which, in the absence of agreement, is interest at 10 per cent. The only effect, then, was to substitute the particular for the general measure of damages.

II. The release executed by Kinyon was palpably fraudulent.

III. Was the lien proceeded on within the year? The year ran not from the time when the company received notice of Gordon's election to abandon the contract, because it is not on the contract that this action is based, but from the period of the completion of the work, the value of which constitutes the complainant's claim. Tried by this test, the action was clearly within the time.

IV. The sale of the whole canal was rightly ordered. When the part upon which labor is bestowed is in its nature capable of being used separately and distinctly from the

* Cutter *v.* Powell, 2 Smith's Leading Cases, 18, notes.

other portions of the structure, the lien is properly restricted to that part. But where the portion constructed by one mechanic is an inseparable part of the whole, whenever the use for which the thing is intended can in no degree be attained without the co-operation of all the parts, then, the liens of all the contractors rest upon the whole structure, and are not limited to their respective portions. We go further. Although the structure may possibly be divided without totally destroying the use for which it was intended, if the sum of the values of the different parts would be greatly less than the value of the whole, the lien of each contractor will rest upon the whole, and the structure will not be divided. Or, if a particular part erected by a particular contractor is comparatively worthless unless connected with the other parts, no division will be made. The extension was part and parcel of the original plan, the object being to conduct the headwaters of the South Fork to the "Placer" mines at Placerville. That the canal was begun at the Placerville end, and that the winter streams or *arroyos* were turned into the channel as the work progressed, in no manner affected the integrity of the original design. The canal is a single structure intended for a single purpose. Any division of it destroys the structure; and if it were divided into the sections, or artificial divisions for the purpose of contract, each part in the hands of a separate owner would be comparatively useless. The value of each lien would of necessity be impaired, if not destroyed. To cut up the flume into sections and assign his portion to each contractor, would be to give some of them aqueducts which had, and could have, no water to carry.

The decree, in short, was too favorable to the appellants. It ought to have been in favor of Gordon for the entire sum claimed.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States for the Northern District of California.

Gordon was the complainant, and the appellants were the defendants in that court. The record is very voluminous, but the questions presented for our determination are few in number, and their proper solution is, we think, attended with no serious difficulty.

We shall confine our opinion to the objections to the decree, taken in the argument for the appellants. According to the rule of this court, the appellee can ask nothing here but what the decree gave him. It is the appellants who complain. The questions which we are to examine are such as they present for our consideration. The position of an appellee in this court is simply defensive. It is only where both parties appeal, that a case is open here for examination as it was in the court below.

The bill was filed to enforce a particular lien given by a statute of California. The jurisdiction of the court rested upon this basis, and could extend no further.

The case was referred to a master. He reported that the defendant was indebted to the complainant in the sum of $76,589.89, with interest from the 13th of June, 1853, for work done upon the canal of the defendant, pursuant to the contract out of which this litigation has arisen: and in the further sum of $16,250.50, for what the master terms "preliminary work," without which, he states, the contract could not have been fulfilled. The latter work consisted of the building of saw-mills, railroads, other roads, an inclined plane, timber-slides, and other apparatus. The particulars are given in a schedule annexed to the report. He reported further that the defendant was entitled to credits amounting in the aggregate to $6200. According to the rules of the Circuit Court, the parties were allowed a certain time within which to file exceptions, and failing to do so, the amounts found by the master were to be taken as conclusive. No exceptions were filed by the appellants.

The court disallowed the amount found for the preliminary work, holding it not to be a lien. The amount of the credits was deducted from the amount found to be due for

the work done upon the canal, and a decree was rendered for the balance, with interest.

The finding of the master is as conclusive here as it was in the court below. There has been no controversy upon that subject. It is not denied that the amount is correct—if the complainant had not forfeited his right to any compensation by the violations of the contract alleged to have been committed by Gordon & Kinyon. This part of the case has been argued very fully by the counsel on both sides. We have looked carefully into the evidence. The result is, that we are entirely satisfied with the report, and in this respect with the decree. We think the fault of the rupture lies wholly with the company. Gordon & Kinyon adhered to the contract, and pursued the work longer than they were bound to do. When they retired they were fully justified, and had a clear equity to be paid a fair compensation for the work they had performed.

The release given by Kinyon to the company cannot avail them. It was a gross fraud. The evidence fixes upon it, and sets in the strongest light, this character. It would be a waste of time to discuss the subject. Our minds rest upon the conclusion we have arrived at, undisturbed by a doubt.

Yet, the release is not without effect. It severed the connection of Kinyon with the contract, and extinguished any claim which he might otherwise have had to be heard in this litigation. He can have no interest in the result, whatever it may be. Complete justice can be done between the parties before us, and the whole case disposed of without his presence in the record. He is, therefore, not an indispensable party. The company are estopped to deny this proposition. His relation to the case is not unlike that of an obligee in a title bond, to a suit upon it for specific performance by an assignee, to whom the obligee has parted with all his interest in the bond. In that class of cases it is held not to be indispensable that the assignor should be a party.

The court below held that Gordon had a lien upon the entire length of the canal or flume, extending from the

grand reservoir, near Placerville, to the South Fork of the American River, a distance of about twenty-five miles. When the contract with Gordon & Kinyon was entered into, the flume was completed from the reservoir to Long Cañon, a distance of eleven and two-third miles. Water flowing through it was used by means of several outlets for mining purposes. It was fed from sources other than the South Fork. The contract with Gordon & Kinyon was for the extension of the canal, by the construction of sections "from section 17 to 25 inclusive." Their work commenced where the existing canal ended, and reached to the South Fork of the American River. The object was to make use of that stream as an additional feeder, and thus to increase the supply of water in the canal.

The two parts of the work—the one extending from the reservoir to the cañon, and the other thence to the South Fork—were known respectively as the lower and the upper section. The two sections were constructed by different contractors, and, as already shown, at different times. The former was completed and in use before the latter was begun. In these respects they were distinct works. The points of identity are continuity and a common object, use, and ownership.

The lien laws of California provide that all contractors, laborers, and other persons "furnishing materials for, or employed in, the construction of any bridge, ditch, flume, or aqueduct, shall have a lien upon the structure," which they may have constructed or repaired, or for which they may have furnished materials of any description, "to the extent of the labor done, and materials furnished, or both." It is further provided that the lien shall not bind the structure for a longer period than one year after the work is done or materials furnished, unless suit be brought to enforce the lien within that time.

Several objections have been taken to the decree touching the lien.

It is not denied that it became fixed by a regular compliance with the preliminary statutory conditions. But the

appellants insist that it was extinguished by the release given to them by Kinyon. It would be a mockery of justice to allow an instrument so stained with turpitude to have such an effect. The subject has already been sufficiently considered.

It is said the lien was waived by the dismissal of the prior suit. The dismissal of that suit can obviously have no effect upon the rights of the parties in this litigation.

It is insisted that this suit was not brought in time to feed and preserve the lien. The evidence shows that the work was continued by the contractors down to the 13th day of June, 1853, inclusive. This bill was filed on the 12th day of June, 1854. That was within the time prescribed by the statute.

It is urged that the decree is erroneous in holding that the lien extended the entire length of the canal instead of limiting it to the upper section, where all the work was done. Is this objection well taken? Liens of this kind were unknown in the common law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law.* Where they exist in this country they are the creatures of local legislation. They are governed in everything by the statutes under which they arise. These statutes vary widely in different States. Hence we have found no adjudication in any other State which throws any light upon the question before us, and there has been none in California. We are, therefore, compelled to meet the case as one of the first impression.

We have already shown that the upper and lower sections were distinct works in several essential particulars, to which we need not again advert. The lower one having been finished and in use before the upper one was contracted for, if those having a lien upon the former, had insisted that it became extended over the latter, as soon as the latter was completed, no legal mind, we apprehend, could have doubted that the claim could not be sustained. If it could, Gordon's

* Domat, §§ 1742, 1744.

lien might have been rendered valueless. We think the converse of this proposition applies with equal force. If a lien upon the lower section could not have been extended over the upper one, upon what principle can it be maintained that Gordon's lien embraced the lower section? A lateral feeder constructed and intersecting the main line after it was completed, would certainly not be subject to a previous lien upon the main line, if such a lien existed. We can see no substantial difference between that case, and the one before us. The upper section was only an additional feeder. That it was an elongation of the main line, and not a lateral work, does not affect the principle involved. The controlling circumstances and the object in both cases would be the same.

We think the language of the statute rightly interpreted is decisive.

The lien is given to contractors and laborers upon the ditch or flume "which they may have constructed or repaired, . . . to the extent of the labor done and materials furnished." The work of Gordon was all done upon the upper section. He had nothing to do with the lower section. So far as he was concerned, and for all the purposes of this litigation, they were distinct and independent works. A different principle would produce confusion, and lead to serious evils. We have no difficulty in coming to the conclusion that the decree in this particular is erroneous.

It is, therefore, REVERSED, and the cause remanded to the court below with instructions to enter a decree

IN CONFORMITY WITH THIS OPINION.

Mr. Justice FIELD, dissenting. I dissent from so much of the opinion and decision as limits the lien of the contractor to that portion of the canal which was constructed by him. I think the lien extends to the entire canal, as much so as a lien for work upon a wing of a house extends to the entire building.

MILLER and GRIER, JJ., concurred with Field, J.

## UNITED STATES *v.* ALIRE.

A case in the Court of Claims which involves the right of a claimant to a military bounty land warrant under the acts of Congress of March 3d, 1855, and May 14th, 1856, which claim had been rejected by the commissioner of pensions, and the rejection confirmed by the Secretary of the Interior, is apparently within that part of the fifth section of the act of March 3d, 1863, which provides "that when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the government in the adjustment of such class of cases, . . . and such facts shall be certified to by the presiding justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy."

Accordingly, an appeal from a judgment of the Court of Claims in such a case, where there had been no special allowance, and which had been dismissed by this court, because not a judgment for money and over $3000, was, on motion of the United States, reinstated, and the record remanded to the Court of Claims for such further proceedings as might seem fit and proper in the cause as it respected the appeal prayed for.

APPEAL from the Court of Claims.

Julian Alire filed a petition in that court setting forth that under the acts of Congress of March 3d, 1855, and of May 14th, 1856, he had made application to the commissioner of pensions for one hundred and sixty acres of bounty land, and had conformed to the provisions of the said acts, and the rules and regulations of the pension office; that the application was rejected by the commissioner, and that, on appeal to the Secretary of the Interior, the rejection had been confirmed. Issue was taken in the Court of Claims on this petition, and the cause having been afterwards heard before it, a decree was rendered in favor of the petitioner for a bounty land warrant, to be made and delivered to him by the proper officer. It was also further ordered that the decree should be certified by the clerk of the court, under its seal, and remitted to the Secretary of the Department of the Interior.

From this decree the United States appealed, on the ground among others that the court below had no jurisdiction of the case. The soundness of this view depended, of course, on statutes organizing or regulating that court.

Statement of the case.

The first act* organizing the court was passed February 24th, 1855, and the jurisdiction conferred was "to hear and determine all claims founded upon *any law of Congress*, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein, and also all claims which may be referred to said court by either house of Congress."

The court was directed to keep a record of their proceedings, and, at the commencement of each session of Congress, and of each month during the session, report to Congress the cases upon which the court had fully acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which it is founded. The court were also directed† to prepare a bill in the cases determined favorably, in such form as, if enacted, will carry the same into effect.

The next act relating to the organization of the court was passed March 3d, 1863.‡

The second section of this act conferred substantially the same jurisdiction as to cases before the court as in the first section of the previous act; but jurisdiction, in addition, was conferred over set-offs, counter-claims, &c., &c., on the part of the government against the petitioner.

The fifth section provided, that either party might appeal to the Supreme Court of the United States from any final judgment or decree which might thereafter be rendered in the Court of Claims, *wherein the amount in controversy exceeded three thousand dollars.*

The seventh section, that in all cases of final judgment by said court, or on appeal by the Supreme Court, where the same was affirmed in favor of the claimant, the *sum* due thereby shall be paid out of any general appropriation made by law for the payment of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, &c. And in cases where the judgment appealed from is in favor

* 10 Stat. at Large, 612, § 1. † § 5. ‡ 12 Stat. at Large, 765.

of said claimant, or the same is affirmed by the Supreme Court, *interest* at the rate of five per cent. *shall be allowed* from the date of its presentation to the Secretary of the Treasury for payment, but *no interest* shall be allowed subsequent to the affirmance unless presented for payment to the Secretary of the Treasury as aforesaid, with a proviso that *no interest* shall be allowed on any claim up to the time of the rendition of the judgment by said Court of Claims, unless on a contract expressly stipulating for interest.

The thirteenth section enacted that all laws, and parts of laws, inconsistent with the provisions of this act, were thereby repealed.

*Mr. Norton, solicitor for the Court of Claims*, contended that the fifth and seventh sections of the act of 1863 showed that the Court of Claims could give no judgments against the United States for anything but money.

*Messrs. Hughes, Denvers, and Peck, with Mr. Watts (by brief filed), argued, contra*, that the jurisdiction was, by the previous act of 1855, expressly given where the claim was founded on any act of Congress; and that confessedly the claim was here so founded.

Mr. Justice NELSON delivered the opinion of the court.

The only question presented in the record, which we shall examine, is whether or not the court below had jurisdiction of the cause.

It will be seen by reference to the two acts of Congress on this subject, that the only judgments which the Court of Claims are authorized to render against the government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the government to the petitioner. And, although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is

quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government.

This view is confirmed by the judgment of this court in the case of *Gordon, Adm'r*, v. *United States*,* in which the court denied any jurisdiction over the case on account of the power of the executive department over its judgment by the fourteenth section of the act of 1863. That section was repealed by the first section of the act of March 17th, 1866.

The decree, or judgment, in the present case is, that the claimant recover of the government a military land warrant for one hundred and sixty acres of land, and that it be made out and delivered to the said Julian Alire by the proper officer, and the decree to be certified and remitted to the Secretary of the Interior. We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the Court of Claims, to be obeyed or satisfied. Nor does either court possess any authority to render such a judgment, as is apparent from a perusal of the seventh section of the act of 1863, and which is the only one providing for the rendition of a judgment or decree in any case before the court below.

Even if the first section of the act of 1855 and the second of 1863 could be construed as giving a jurisdiction in cases other than money demands against the government, no judgment could be rendered by the court below, and, of consequence, the carrying into effect their finding must depend on the act of 1855. But we are of opinion that it was intended by the several provisions of the act of 1863 that the cases to be heard were to pass into a judgment as prescribed in the seventh section of the latter act, and hence they must be such in their nature and character as may admit of a judgment or decree in conformity with its provisions.

Our conclusion is, the court below had no jurisdiction of

* 2 Wallace, 561; 1 Court of Claims Reports, 33; Acts establishing the Court of Claims.

this case, and that the decree must be reversed, and the cause remanded to the court with directions to enter a decree dismissing the petition.

NOTE.

A motion was subsequently made on the part of the United States to reinstate on the docket this cause, dismissed as above stated at this term (on the ground that it did not appear that the amount in controversy exceeded $3000), and to remand it to the Court of Claims with a view to an amended or special appeal under the fifth section of the act of March 3d, 1863,* which provides "that when the judgment or decree will affect a class of cases or furnish a precedent for the future action of any executive department of the government in the adjustment of such class of cases, . . . and such facts shall be certified to by the presiding justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy."

Mr. Justice NELSON delivered the opinion of the court.

The case involves the right of the claimant to a military bounty land warrant under the acts of Congress passed March 3d, 1855, and May 14th, 1856, which claim had been rejected by the commissioner of pensions, and the rejection confirmed by the Secretary of the Interior. The case would seem to fall within the provision providing for a special appeal on behalf of the government. We see no valid objection to the motion, and therefore direct the cause to be reinstated on the docket, and the record remanded back to the Court of Claims for such further proceedings as may seem fit and proper in the cause as it respects the appeal prayed for.

REMANDED ACCORDINGLY.

* 12 Stat. at Large, 765–6.

## ROBERTS v. GRAHAM.

1. In a suit against a common carrier for not carrying a party according to contract, the allegation of a breach "whereby the plaintiff was subjected to great inconvenience and injury," is not an allegation of special damage.
2. An objection of variance between allegation and proof must be taken when the evidence is offered. It cannot be taken advantage of after it is closed.

ERROR to the Circuit Court for the Northern District of California.

*Mr. Brady, for the plaintiff in error; Messrs. Carlisle and McPherson, contra.*

Mr. Justice SWAYNE stated the case and 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 California.

Graham was the plaintiff in the court below. The complainant sets forth a contract, whereby Roberts agreed to transport him and his wife and child as first cabin passengers from New York to San Francisco, by the Panama route, and to furnish them with suitable accommodations, provisions, and supplies on the way.

Among other breaches, it is alleged that the defendant did not furnish them with first cabin fare, but that the child was furnished with only second cabin fare of the poorest quality; that he did not furnish them with suitable and proper accommodations, provisions, and supplies, but that on the contrary he overloaded the steamer Moses Taylor, on which they were conveyed from Panama to San Francisco, "with a number of passengers, wholly out of proportion to her size, and much greater than she could suitably accommodate, and that by reason thereof, the plaintiff and his wife and child were subjected to great inconvenience and injury."

In the course of the plaintiff's testimony he gave evidence tending to prove his illness, and that it was caused by ex-

posure, in his not having sufficient bed or berth clothing on the Moses Taylor; "that bed-clothing had been furnished him, but that he was compelled to deprive himself of it, in order to supply his child, which child had not been furnished with a berth or bed-clothing."

The evidence being closed, the defendant's counsel asked the court to instruct the jury, that in assessing the damages by reason of the sickness of the plaintiff himself during the voyage, they must exclude from consideration sickness arising from the want of sufficient bed-clothing on the Moses Taylor, because "there is no allegation in the complaint on which to base a recovery for such injuries, and because the allegation is, that the plaintiff's sickness was caused by exposure and detention at Panama, before the arrival there of the Moses Taylor."

This instruction the court refused to give. "And the said judge thereupon charged the jury that if they found from the evidence that the plaintiff's sickness and consequent injuries was caused by exposure by reason of not being furnished with a sufficient quantity of bed-clothing on the steamer Moses Taylor, then they must estimate the damages to plaintiff caused by such exposure and want of sufficient clothing or covering for his berth, and by his illness consequent thereon, and include such damages in their verdict."

To this refusal to instruct, and to the instruction given, the defendant excepted.

It is objected that the plaintiff was allowed to recover for a special damage not alleged in the complaint. As a general proposition, that cannot be done. Special damage, whether resulting from tort or breach of contract, must be particularly averred, in order that the defendant may be notified of the charge, and come prepared to meet it.

*Special*, as contradistinguished from *general* damage, is that which is the natural, but not the necessary, consequence of the act complained of. In this connection, in the case before us, two questions are presented for our consideration: Was the sickness of the defendant, alleged to have been in-

duced by his exposure on the Moses Taylor, *special damage*, within the rule of pleading on that subject? and if so, was the right of the defendant to object to a recovery upon that ground waived by his conduct at the trial?

The complaint avers that the defendant, by this breach of the contract, "was subjected to great inconvenience and injury."

It does not appear that the defendant objected to the admission of the testimony, that he moved to have it ruled out, or that he made any allusion to the subject until he asked the court, at the close of the argument, to instruct the jury, as shown by the bill of exceptions.

In *Ward* v. *Smith*,* the suit was upon a lease. The declaration averred that the defendant refused, "on request, to permit the plaintiff to take possession and have the use of the premises, whereby the plaintiff had sustained loss, and had been obliged to hire other premises at great cost and expense for rent and charges."

The plaintiff proved on the trial that the premises had been taken for his wife's business, who was a milliner, were advantageously situated for that trade, "and that by not being suffered to occupy them, he sustained considerable loss by the passing by of a profitable part of the year for that business in the meantime." The plaintiff recovered. It was urged by the defendant, upon a motion for a new trial, "that there was no special damage averred in the declaration, for that there were no particular customers named therein as having withdrawn their custom from the defendant's wife; and further, that there was no averment of the business of the wife, or that the plaintiff had sustained any loss in her business."

Richards, Chief Baron, said: "As to the objection of evidence of special damage having been admitted, there was, in fact, no special damage, as such, proved. The object of the witness's testimony was to show that the plaintiff *had sustained inconvenience.*"

* 11 Price, 19.

Baron Graham said, that no special damage had been proved. He added: "Loss of customers and general damage occasioned thereby, however, may have been given in evidence under this declaration; for it charges *general loss*, without specifying any particular individuals whose custom had been lost, and it was competent for the plaintiff to show *certain damages* sustained by breach of the agreement in this action, *without stating his loss more specially in the declaration.*"

It would not be easy to distinguish that case, as to the point under consideration, from the one before us. It is of undoubted authority, and is conclusive.

The objection of variance not taken at the trial, cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below; nor can it avail him on a motion for a new trial.* If parol evidence be received without objection, to prove the contents of a record, it is sufficient for that purpose.† In *McMicken* v. *Brown*,‡ the defendant made no objection to the introduction of the testimony, but prayed the court to instruct the jury that it was insufficient to warrant a verdict against him. The jury found for the plaintiff. It was held by the appellate court that he should have objected to the admission of the evidence, and that not having done so, he was concluded by the verdict. The judgment was affirmed.

In the case before us the plaintiff was entitled to be apprised of the objection if it were intended to be relied upon, at an earlier period in the progress of the trial. The court would doubtless have permitted an amendment if deemed necessary, upon such terms as the interests of justice might seem to require.

The defendant's right to make the objection was waived and concluded by the delay. He could not make it at the time and in the manner it was presented.

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* Mosher *v.* Lawrence & Westcott, 4 Denio, 421; Lawrence *v.* Barker, 5 Wendell, 305.

† Newberry *v.* Lee, 3 Hill, 523.

‡ 6 Martin, N. S. 86; see also Goslin *v.* Corry, 7 Manning & Granger, 347; and Doe *v.* Benjamin, 9 Adolphus & Ellis, 644.

Statement of the case.

Upon both grounds we hold that the rulings of the Circuit Court were correct.

JUDGMENT AFFIRMED.

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## THE WREN.

1. The liability to confiscation, which attaches to a vessel that has contracted guilt by breach of blockade, does not attach to her longer than till the *end* of her return voyage.
2. A vessel condemned below as enemy's property restored by this court; the proofs being of a hearsay and loose character and such as did not rise to the dignity of evidence within the law of that subject. But costs were withheld.

APPEAL from the District Court for the Southern District of Florida, condemning as prize of war the Wren.

The steamship Wren, a merchant vessel, left the port of Havana on the 12th of June, 1865, for Liverpool, *via* Halifax, Nova Scotia, with a crew of about thirty-five persons, who, on the morning of the next day, mutinied, confined the officers in their quarters, carried the vessel into the port of Key West, and delivered her as prize to the acting admiral commanding at that station. The seizure was in pursuance of secret arrangements with the United States consul at Havana, before the vessel left that port. A libel was filed against the vessel by the United States District Attorney, before the judge of the Southern District of Florida, as prize of war. The master, one Stiles, put in a claim in behalf of *John Laird*, a British subject, as owner.

This Stiles had been an officer in the navy of the United States. The record also disclosed this answer of his to the standing interrogatory as to the papers of the vessel:

All the letters and papers of which he has any knowledge of having been on board on the present voyage were taken by the asserted captors with the exception of one letter to himself from the agent of the vessel, Mr. Helms, at Havana, which was *destroyed*, and an order in favor of this deponent from Mr. Helms

for the payment of £40, payable on delivery of the ship at Liverpool.

After hearing the proofs, including those hereafter mentioned, the court condemned the vessel on the ground that she was the *property of the enemies of the United States.* Laird appealed.

In this court it was insisted, that the vessel was liable to be condemned—

1. For breach of blockade on the voyage next preceding that on which she was captured.

2. As being enemies' property.

1. *As respected the breach of blockade.* It appeared that the vessel had been engaged in running the blockade of the port of Galveston, Texas, from the port of Havana, and that a short time before she entered on the present voyage she had successfully entered Galveston, discharged her cargo, and taken on one of cotton, and returned in safety to Havana.

2. *As it respected the ownership.* On the side of the claimant, it appeared from the *registry* of the vessel that the "Wren," her registered name, was a British ship, built at Birkenhead, in Chester County, England, by Messrs. Laird Brothers, in 1864; that she belonged to John Laird, the younger, of Birkenhead, ship-builder, as owner; that William Raisbeck was, at the date of the registry, master of the ship; that Liverpool was her port of registry; and that she was of 267 tons registry tonnage. The registry bore date the 24th December, 1864.

John Duggan, one of the crew examined *in preparatorio*, and who resided in Liverpool, testified that he shipped in the vessel at Liverpool, in December, 1864, on the voyage to Havana, and continued one of her crew while she was engaged in running the blockade, and down till her seizure by the crew, the 13th June, 1865. He stated that she was British built, called The Wren, and never had any other name; and that he knew nothing as it respected any bill of sale. Other witnesses examined on this subject of a sale agreed with this witness. Shipments addressed to him as master, dated Havana, 15th March, 1865, showed that Rais-

beck, the registered master of the vessel, came out with her to Havana. Stiles was appointed master afterwards.

On the other hand, the material evidence, to prove that the vessel at the time of seizure was enemies' property, was as follows: The answers of the purser of the ship, McGahan, to the fourteenth interrogatory were thus:

"He *believes* that Frazer, Trenholm & Co., of Liverpool, are the owners of the vessel, and were so at the time she was seized; has no personal knowledge as to who are the owners; he has *heard* Major *Helms*, at Havana, and Mr. Lafitte also, at Havana, *speak of Frazer, Trenholm & Co., as owners.*"

So Duggan, one of the crew, in reply to the fifth interrogatory:

"He does not know to whom the vessel belonged, but *has heard* Captain Moore, one of her former masters, with whom he sailed in said vessel in former voyages, *say* that she was owned by the Confederate government."

Another item of proof relied on was, that Major Helms, a Confederate agent at Havana (and who had been connected in some way with the voyages of the vessel while running the blockade), appointed Stiles to the command of the vessel for the voyage from Havana to Liverpool. McGahan, the purser already mentioned, testified that the master was appointed to command, *as he understood*, by Major Helms, at Havana; he did not *know* who delivered possession of the vessel; he *believed* that the master took possession by the authority of Major Helms. Duggan, one of the crew, stated that the name of the master was Stiles; that he was appointed to the command of the vessel by Major Helms, at Havana.

McGahan was again examined, among others, on an order for further proofs, in which examination he says that he did not know who appointed Stiles to the command of the Wren at the time of leaving Havana; he *believed that Major Helms* appointed him; he arrived at the conclusion from hearing Major Helms speak of the resignation of the former captain.

It appeared, however, from the testimony of Stiles him-

self, and of Long, his first officer, that he was appointed to the command by a Mr. Ramsey, who shipped the crew at Havana for the voyage to Liverpool, and thus seemed to have had some agency of the vessel.

The first officer stated, also, that when he needed anything for the use of the vessel, he was generally sent by Captain Stiles to Ramsey to obtain it.

*Mr. Pierrepont, for the appellant*, contended—

*On the 1st point:* That the vessel having run the blockade and *completed* her return voyage, ceased to be *in delicto*.*

*On the 2d point:* That there was no sufficient evidence whatever—it being, at best, but slight and loose hearsay—of enemy property, even if war had not ceased before the capture, and made prize of war impossible. But the war had ceased. This capture was on June 16th. It was matter of public history, and one of which the court would take judicial notice, that Lee had surrendered 9th April, Kirby Smith and Johnson in the same month, and that Davis was captured on the 13th May. Independently of this, that the capture was by a band of mutineers while the vessel was on a peaceful voyage, which took from the case every aspect of capture *jure belli*.

*Mr. Ashton, special counsel of the United States, contra*, argued—

1. That the *last* voyage before the capture having been one in breach of blockade, this subjected the vessel to lawful capture on the present voyage.†

2. That the register was a mere cloak for rebel title, that the Lairds were not *novi hospites* in this court. They were notorious as builders of the Alabama and other piratical

* Wheaton on Captures, 306; Haslett *v.* Roche, Maritime Warfare, 175; 1 Duer on Insurance, 88; 1 Kent's Commentaries, 152; The Mentor, 1 Robinson, 179; The Rosalie and Betty, 2 Id. 343; The Nancy, 3 Id. 122; The Lisette, 6 Id. 387; Carrington *v.* The Merchants' Insurance Co., 8 Peters, 495; Williams *v.* Smith, 2 Caines, 1.

† The Christiansberg, 6 Robinson, 376.

cruisers of the rebel combination. Mr. Trenholm, of the firm of Frazer, Trenholm & Co., was a citizen of the rebel confederacy. The character of all these parties, and of rebel ship-building interests, was established by the judicial records of Great Britain and the diplomatic history of the late contest,* and were facts of which this court would take cognizance, and to which it would give due effect in a case of asserted ownership by these firms or any of their members, of a vessel found in any way employed or navigated in the interest of their rebel patrons. Moreover, Helm was an agent of the confederacy. Stiles had been an officer of its marine forces. And the spoliation of papers was the crowning proof. The capture was made *nondum cessante bello*, and though effected by non-commissioned persons, yet being adopted by the government, the property became on condemnation one of its droits, as it became, independently of capture, as part of the assets of the extinct confederation.

Mr. Justice NELSON delivered the opinion of the court.

The court below condemned the vessel on the ground that she was the property of the enemies of the United States. And this is the only question in the case. For, although it was insisted on the argument that the condemnation might have been placed on the ground that the vessel was taken in contemplation of law *in delicto*, for violating the blockade of the port of Galveston, Texas, the position is founded in a clear misapprehension of the law. The doctrine on this subject is accurately stated by Chancellor Kent.† "If a ship," he observes, "has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel further than to the end of the return voyage; and, if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent force to vindicate the law." And

* Diplomatic Correspondence, part 1, pp. 222, 377, 381, 382.

† 1 Commentaries, 151.

the modern doctrine is now well settled, that the only penalty annexed to the breach of a blockade is the forfeiture of vessel and cargo when taken *in delicto*. The earlier doctrine was much more severe, and inflicted imprisonment and other personal punishment on the master and crew.

2. As respects the ownership. The certificate of registry, under the English acts, must specify the name, occupation, and residence of the owner, the name of the ship, the place to which she belongs, her tonnage, the name of the master, the time and place of the built, name of the surveying officer, together with a particular description of the vessel. This act has been fully complied with in the present case. And the certificate shows that the claimant is the builder of the vessel and owner, and the proofs show with reasonable certainty that his registered master brought the vessel to Havana, and was there engaged in command of her within three months after she was launched and fully equipped for the voyage, and which was within three months of the time when she was seized, as prize, by her crew. It is quite apparent, therefore, upon the proofs, that the claimant not only built the vessel, but put his master in command in this, her first voyage, and the presumption would seem very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months, which elapsed after she was built, and before the seizure took place. In addition to this, she was in the command of a master claiming to represent Laird as owner. These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the claimant.*

Now, most of the proofs relied on to disprove this evidence are wholly inadmissible, and incompetent as testimony in a court of justice. We cannot think that it needs any argument to show that they do not rise to the character or dignity of testimony in any court that respects the law of evidence.

We agree that in the facts and circumstances surrounding

* Cowen's Phillips, vol. 3, p. 39; 3 Kent's Commentaries, 150.

and attending the history and operations of this vessel, and of the individuals connected with her, there are matters for well-grounded suspicion and conjecture as it respects the purpose and intent with which the vessel was originally built and sent to Havana; and, as she entered immediately in furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unnatural or unreasonable to suspect that the so-called Confederate States, or their agents, had some connection, if not interest in her. But this alone is not evidence upon which to found a judgment in the administration of justice. The facts that the master, Stiles, who was put in command of her for the voyage home, from Havana to Liverpool, was an officer in the enemies' naval service, and had belonged to the United States navy; and Helms, who was in some way, not explained, connected with her voyages in running the blockade, and who was the agent of the enemy at Havana, might well be entitled to consideration and weight on the question if there had been any legal proof in the case laying a foundation for such a conclusion. So, also, would the evidence that Stiles destroyed at the time of the capture a letter from Helms, agent of the ship, as he calls him, to himself, and an order for the payment to him for £40 on the delivery of the ship at Liverpool. But in the view we have taken of the case there is no foundation of legal proof of the ownership of the vessel in the Confederate States on which these circumstances can rest, or be attached, as auxiliary considerations to influence the judgment of a court.

Our conclusion is, that the decree below must be REVERSED, and the vessel

RESTORED, BUT WITHOUT COSTS.

## STEARNS *v.* UNITED STATES.

The authority of the Mexican governors to make alienations of the public domain within the limits of California, ceased July 7th, 1846. Grants made after that date are void. A grant so made, though antedated, was accordingly in this case held null.

APPEAL from the District Court for the Northern District of California. The case being one of fact merely.

*Messrs. Carlisle and Cushing, for the appellant; Mr. Stanbery, A. G., and Mr. Browning, contra.*

Mr. Justice SWAYNE delivered the opinion of the court; stating the case.

This case was instituted originally before the "Board of Commissioners to ascertain and settle Private land Claims in the State of California." The decision of the board was adverse to the claim. The case was thereupon removed, pursuant to law, to the District Court of the United States for the Northern District of California. The decree there also was adverse, and the claimant has brought the case before this court by appeal.

Two objections were taken in the argument at the bar in behalf of the United States.

First. That the papers upon which the claim rests, were antedated, and were, in fact, executed after the 7th of July, 1846; and,

Second. That the boundaries specified were so indefinite, that they render the claim void for uncertainty.

The paper title produced by the claimant consists of a grant by Pio Pico to Joseph Andrade, dated May 6th, 1846, and the expediente, found in the archives. The latter is made up of the petition of Andrade, dated May 4th, 1846, a marginal order by the governor, dated May 5th, 1846, directing the title to issue, and the borrador of the titulo issued to the interested party. Andrade transferred his claim to Stearns, the claimant and appellant, on the 9th of August, 1846. The

petition, marginal order, and concession, all bear date at Los Angeles. The petition is in the handwriting of Vicente Gomez, signed by Andrade, and witnessed by Cota and Enrigues. The concession is in the handwriting of Benito Diaz, and signed by Pico as governor, and Jose Matias Moreno as secretary.

The conquest of Upper California by the arms of the United States is regarded as having become complete on the 7th of July, 1846. Monterey was captured on that day. They then held military possession of a large part of the country. The Mexican forces were in full retreat to Lower California. But a few weeks elapsed until the surrender of Los Angeles, and the establishment of a territorial government by the invaders. The 7th of July has been fixed upon as the point of time at which terminated the authority of the Mexican governor to make alienations of the public domain within the conquered territory. All grants made after that time are void.*

The forces under General Castro fell back from Monterey on the 7th of July, and reached Los Angeles the latter part of that month. Andrade, Vicente Gomez, and Benito Diaz, were all soldiers in his army, and reached Los Angeles with the rest of the troops.

The counsel for the United States insist that the papers were prepared at this time, and not at the prior times when they bear date.

All the parties whose writing or signatures appear in them were at Los Angeles the last of July. This fact is too clear for controversy, and there is none upon the subject. Were they there on the 4th, 5th, and 6th days of the preceding month of May? This inquiry is the hinge of the controversy between the parties as to this part of the case.

Pico, the governor, and Moreno, the secretary, testify that the dates are correct, but it is admitted that their characters are so deeply affected by fraud and perjury in other cases that no weight can safely be given to their testimony. It

* United States *v.* Pico, 23 Howard, 326; Same *v.* Yorba, 1 Wallace, 422.

does not appear that Andrade was examined as a witness. After reading carefully the testimony of Ambrosio Gomez, Chaves, Montenegro, De la Guerra, and Padilla, it is difficult to resist the conclusion that he was in Monterey and not at Los Angeles upon the days when the papers bear date. This conviction is fixed in our minds. The testimony of Cota and Serrano, taken by the claimant, is insufficient to remove it.

Vicente Gomez says in his deposition that the date of the petition is "surely" correct; but he says further that he went from Monterey to Los Angeles with the army of General Castro; that he wrote the petition at Los Angeles upon that occasion, and that he was not there at any other time during the year 1846. The fact last mentioned, if true, is conclusive. But the character of this witness is admitted to be upon a level with those of Pico and Moreno. His testimony, therefore, needs corroboration to entitle it to belief. This the United States have supplied by the monthly custom-house balance-sheet, in the handwriting of Gomez, and approved by Manuel Castro, dated at Monterey, May 1st, 1846, produced from the Spanish archives, and by the deposition of his brother, Ambrosio Gomez, of Castro, of De la Guerra, and of Montenegro. This testimony, without that of Vicente Gomez, and indeed in contradiction to it, would be sufficient to establish the fact that he was at Monterey, and could not have been at Los Angeles upon the days of May in question. This point seemed hardly to be controverted in the argument for the claimant. The proof is conclusive. Benito Diaz testifies that the concession is in his handwriting, that it was not written at its date, and that it was written at Los Angeles in July or August, after his arrival there with General Castro. His character is subject to the same infirmity as that of Gomez, and his testimony equally requires support from other sources. The custom-house exhibits produced and identified by Hopkins, and the testimony of De la Guerra, Chaves, Pinto, Fernandez, and Rodrigues, leave no room for doubt that he was not at Los Angeles in the early part of May. He was clearly then at

Monterey, and in the performance of his duties there as an employé in the custom-house.

The explanations submitted by the counsel for the claimant are ingenious and plausible, but neither they nor the testimony adduced by the claimant are sufficient to countervail the weight of the evidence to which we have referred.

There was no informe and no diseno. None were submitted when the concession was applied for. The petition was not presented through the prefect. The latter was required by the established orders both of Alvarado and Pico, upon the subject. It does not appear that judicial possession was ever given or attempted to be given. On the 8th of May, 1846, forty-five expedientes were sent to the departmental assembly for approval. The one in question in this case was not among them. If then in existence, why was it not transmitted with the others? The omission is unaccounted for.

Stearns lived in California before and at the time of the conquest. In the spring of 1847, Col. J. D. Stevenson, an officer of the United States, was placed in command of the southern military district of California, and charged particularly with the duty of investigating the land grants which had been made by the Mexican authorities within the limits of his command. He says: "Soon after I got my district in order I began to make inquiries as to who were the civil officers under Pico, and learned from A. Stearns and others, that he (Stearns) was either the prefect or sub-prefect, and an intimate and confidential friend of Pico, and from him and others I learned that grants were made after it was known that the Americans had taken possession of California, which were antedated, and especially those made in this section of country from San Jose this way, and that a very large portion of them were signed by Pico on the day and night preceding his start for Mexico, which was about the 8th or 9th August, 1846; Stearns told me that he was present on the day and night referred to, especially the night those grants were executed, and that Pico left him (Stearns) in charge as next officer in command. These grants were

frequently the subject of conversation; and on one occasion a party, to whom a valuable grant was made, confessed to me that the grant was executed that night, and he knew nothing of it until he was sent for to accept the grant. I availed myself of every opportunity to obtain information about these grants, both by conversation and otherwise." The credibility of this witness, and the truth of his statements, are undisputed.

It has been pressed upon our attention with zeal and ability that it could not have been known by the Mexican authorities, even as late as the 9th of August, that the country would be held permanently by the United States, and that hence there was no inducement to antedate the papers in the case before us. That like papers belonging to other expedientes were antedated about that time cannot be denied. The reasons and object in all the cases were doubtless the same. It is frequently difficult to unveil the heart and find the motive which animated the guilty act. Where the guilt is doubtful, the inquiry is important, and the result may be decisive. Where the guilt is otherwise clear, the inquiry is of no moment. Whatever the result, it cannot affect the grasp which the previous conviction holds upon the mind. The state of the evidence before us presents a case of the latter character.

But it is not difficult to imagine an adequate motive for the imputed fraud. The United States were substantially in possession of the country. The military power of their adversary was destroyed. The indications were unmistakable, that it was their intention to appropriate and absorb the country. If the dominion of Mexico were not to be restored, the earlier her grants, the more likely they were to be sustained by the succeeding government. It could not be expected that those would be recognized which were made after her authority was overthrown. The antedated grants cost her nothing. Her officers gave only what was already lost, and thereby rewarded her friends and injured her enemy.

Our conclusion upon this branch of the case renders it unnecessary to consider the subject of the boundaries.

The decree of the Circuit Court is

AFFIRMED.

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## SOCIETY FOR SAVINGS *v.* COITE.

1. A statute of a State requiring savings societies, authorized to receive deposits but without authority to issue bills, and having no capital stock, to pay annually into the State treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property.
2. Such a tax is valid.
3. Consequently the fact that a savings society so taxed has invested a part of its deposits in securities of the United States declared by Congress, in the act which authorized their issue, to be exempt from taxation by State authority, does not exempt the society from taxation to the extent of deposits so invested.

ERROR to the Supreme Court of Connecticut; the case being thus:

The legislature of Connecticut, in 1863, enacted that the several *savings banks* in the State should make annual return to the comptroller of public accounts, "*of the total amounts of all deposits*" in them respectively, on the first day of July in each successive year; and that each should annually pay to the treasurer of the State, "a sum equal to three-fourths of one per cent. *on the total amount of deposits*" in such savings bank, on the days aforesaid. The statute declared that this tax should be in lieu of all other taxes upon savings banks or their deposit.

With this statute in existence, the "Society for Savings"—one of the savings banks of Connecticut, and as such empowered by its charter to receive deposits of money, and improve them for the benefit of its depositors, but having no capital stock or stockholders—had on the 1st July, 1863, $500,161 of its deposits invested in securities of the United States, which, by the act of Congress authorizing their

issue, were declared to be exempt from taxation by State authority, "whether held by individuals, *corporations*, or associations."* Upon the amount of their deposits thus invested, the society refused to pay the sum equal to the prescribed percentage.

On a suit brought by Coite, treasurer of the State, for the purpose of recovering the tax thus withheld, the Supreme Court of Connecticut decided that the tax in question was not a tax on property, but on the corporation as such, and rendered judgment accordingly for the plaintiff.†

The correctness of the judgment was the point now here on error.

*Mr. Chamberlin, for the plaintiff in error:*

The question is, whether the statute of Connecticut, as sought to be enforced by the State treasurer, imposed a tax upon *securities* of the United States? If so, it is confessedly illegal.

The *language* lays a tax based upon property. It is even more directly upon the "property," than the statute of New York which received construction in the "*Bank Tax Case.*"‡ That provided for a tax "*upon a valuation equal* to the amount of capital stock," &c.; this for a tax "*on the total amount*" of deposits, &c. The first is on a *valuation equal to the amount;* the second *on the amount*, &c. That case goes far to conclude this. In that case the court says, that in making up a tax under the law, "the commissioners need only look into the condition of the bank 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*," &c. The New York legislature probably meant to impose a tax which should be construed as a tax upon franchise and privilege irrespective of property; but the court inquire, what is *the basis* of the tax? In New York the *basis* is found to be the amount of "capital paid in or secured," &c.; in Connecticut it is equally

* 12 Stat. at Large, 346.

† Coite *v.* Savings Bank, 32 Connecticut, 173.

‡ 2 Wallace, 207.

clear that "the amount of deposits" is the basis. Deposits for all the purposes of this case sustain the same relation *to this institution* which capital sustains to a bank. Each represents money received by the corporation to be managed for the benefit of the owners; each is properly classed among the liabilities of the corporation; each constitutes the principal fund from which investments are made, and the difference consists in the fact that "capital" remains with the corporation, while deposits in this institution may be withdrawn.

Where is the difference between a tax upon property, and a tax upon a person measured by the amount of his property? In either case the property is the foundation and moving cause of the tax. If a person has no property he has no tax. If he has small or large possessions his tax is small or large in proportion. Suppose a person should invest the sum of $1000 in United States securities, and the legislature of the State should say to him in the form of a law, "Inasmuch as we cannot tax you for the money lent to the general government, you as an individual shall pay a sum equal to the tax on $1000, vested in taxable securities." Would such a law be valid? Certainly not. But why not? The law does not tax the sum lent; it imposes the tax upon the *individual.* But the intent is too obvious. It is in form a tax upon the individual, but in substance a tax upon the sum lent. And so in the case under consideration. It is the duty of courts to look through the shadow to the reality.*

The tax, if not upon property *as such*, is *measured by the extent of the property*—the amount of the deposits being the measure. A tax upon "faculty" or "franchise," estimating its value by the money it has secured, is the same thing in substance as taxing the money secured; and a tax upon the money secured—or *with reference to it as a basis*—is substantially the same thing as a tax upon the securities for which it has been exchanged. Such a tax cannot be laid while a portion of the property, the amount of which is so adopted

* Brown *v.* Maryland, 12 Wheaton, 419.

"as the standard of taxable liability," is so invested as, under the protecting power of a higher authority, to be exempt. The privilege of exemption from taxation of so much property as may have been lent to the United States, ought not to depend *upon the mode of estimating* the property of an individual or a corporation.

A tax unpaid upon a franchise of a corporation, the power and authority of which is limited to holding, managing and investing money entirely for the benefit of depositors, and which has no corporate property distinct from that which they so hold in special trust, which has no stockholders or members interested in its profits or who can receive dividends from its earnings, necessarily operates as an assessment on the property *of those for whose use* the franchise is exercised. The parties *for whose use* the franchise is exercised being distinct from the corporation and sustaining no other than a property relation to the corporation—it becomes in its *essence* and *operation* a direct tax upon "property," the burden falling and resting directly and only there.

Let each individual and corporation throughout the State be required to state the amount of *the cost* of the personal property owned by him on the first day of January in each year, and pay three-fourths of one per cent. on such amount, and you get a tax quite similar to the one in question.

*Messrs. Hubbard and McFarlane, contra:*

We assume—

1. That a State legislature may impose taxes on the exercise of a franchise created by itself.

2. That it may measure the tax by the measure of exercise.

3. That it may measure the exercise by an arbitrary standard, as a fixed sum, or by a more equitable standard, as the amount of money received in the exercise of the franchise, or even by the value on an appraisal of the earnings or property (including Federal stocks) owned by the possessor of the franchise.

Now the statute in this case does not impose a tax on the

property of the Savings Bank, but on the corporation as such; in other words, it imposes a tax or excise on the privilege or franchise of the corporation.

The standard fixed by the statute disregards all reference to actual assets, modes of investment, accumulations, losses, profits, or valuations. If the bank have earned by use or investment of its deposits a surplus, no matter how large, above the amount of its deposits, this surplus is not taxable. Its taxes do not increase. On the other hand, if such investment has been wholly lost or destroyed, the taxes would not be diminished. Thus it is seen that the law has no reference to a valuation of assets, but to the fixed arithmetical standard of "the total amount of all deposits." Now to say that the corporation is entitled to a reduction of taxes because some of its assets happen for the time being to be non-taxable, and that it is not entitled to a reduction when a portion of these assets become worthless or non-existing, is absurd.

The phraseology of the act is consistent with this view. The requirement is not that the banks shall pay a tax of one-half of one per cent. on their deposits, but "a sum equal to one-half of one per cent. on the total amount of deposits in such institution."

A tax of a similar character to this is imposed by a Connecticut statute of 1862, on agents of foreign insurance companies, who are required to pay to the treasurer of the State two per cent. on the gross amount of premiums and assessments annually received by them. What is *this* tax? Obviously an excise tax on a foreign corporation, through its agent, for the privilege of doing business. What is the extent of the tax? Precisely in proportion to the business done. Would it make any difference with the amount of the tax that the foreign corporation, or the agent, had invested the year's premiums and assessments in Federal securities? Clearly not! So in the case at bar, the tax is not imposed on the property of the savings bank, but on the corporation. The extent of the tax is measured in each year by the amount of its business, the extent to which it

exercises its franchise, or in other words, by "the total amount of its deposits."

The case of *Portland Bank* v. *Apthorp*,* which arose in the State of Massachusetts, in 1815, is akin to this. The Constitution of Massachusetts provides that the legislature "may impose and levy proportionate and reasonable assessments, rates, and taxes upon all the inhabitants of, and estates lying within, the commonwealth; and also to impose and levy reasonable duties and excises." With this provision in force, the State, in 1812, enacted that all its banks should pay, at times stated by the commonwealth, a tax of one-half of one per cent. on the amount of the original stock of said banks respectively actually paid in. The validity of the statute was called in question, as being repugnant to the constitutional provision for the taxation of property. The court held that the assessment was not a tax on the stock, but an excise duty on the franchise of the corporation, and as such warranted by the constitutional provision in respect to excise taxes.

But the recent case of *The Commonwealth* v. *Five Cents Saving Bank*† is in every respect parallel. That case was thus: Massachusetts, in 1862, enacted:

"That every savings bank incorporated under the laws of this commonwealth, shall pay [at times specified by the statute] to the treasurer of the commonwealth, a tax on account of its depositors, of one-half of one per cent. per annum on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for the six months preceding the first day of May, and the other on the average amount of its deposits for the six months preceding the first day of November."

Payment of the tax under this statute was resisted on the same ground as it was resisted on in the former case. The court sustained the validity of the law for the same reasons as before. It says:

"It appears to us that the assessment imposed by the provi-

* 12 Massachusetts, 252

† 5 Allen, 431.

sions of the statute under consideration, must be regarded as an excise or duty on the privilege or franchise of the corporation, and not as a direct tax on money in its hands belonging to depositors. . . . . In the next place, the manner in which the amount of the assessment is to be ascertained clearly indicates that the tax is designed to be a corporate charge. It is not a tax levied on each deposit at a certain rate in proportion to its amount, but it is assessed on the amount of all the deposits in the bank, ascertained and fixed by the average sums which it has had in its hands during the six months preceding a specific day. It is the extent to which the corporation has exercised the franchise conferred on it by law, of receiving deposits during a certain period, that is made the basis on which to estimate the sum which is to be paid for the enjoyment of the privilege."

But more than all, these views have been declared anew in that same State in *Commonwealth* v. *Provident Institution for Savings*,* a case involving the issue now at bar.

The *Bank Tax Case*, so much relied on, has no application. There, this court had decided that an act of New York, passed in 1857, and laying a tax, did not include the Federal securities held by banks. Subsequently (A.D. 1863), the same State passed an act providing in terms for "a valuation." The law directed the mode of valuation. It was to be composed of two things. 1. The capital originally contributed. 2. The surplus on hand earned by that capital. In other words, the bank was not allowed to show that its capital was impaired. Accordingly this court, under the special circumstances of the case, on a question of construction of the act of 1863, in comparison with the act of 1857, and with full knowledge that the former act was passed for the purpose of avoiding the decision of this court, held that the act in question was intended to impose a tax on property, by a new and specified mode of valuation.

*Reply:*

1. When, under the authority given by the Federal Constitution to "borrow money on the credit of the United

* 12 Allen, 313.

States," Congress puts that credit into the market, and by express enactment, as part of the contract of borrowing, declares that the securities held by "corporations" shall be exempt from taxation by or under State authority; it exempts from taxation by or under that authority, the franchise or privilege which such corporations had of lending to the United States, upon the faith of such contract, and of the securities so to be issued. The power to tax the franchise or privilege of lending or investing in a given case, retards, impedes, and burdens the power to borrow in that case. The position of the other side is, that the States may tax against corporations existing under and in pursuance of their laws and enjoying their protection, the privilege or franchise of lending money to the United States. If "the power to tax implies the power to destroy," is not this holding that the States may prohibit all persons, natural and artificial, existing under and enjoying the protection of their laws, from lending to the United States?

Suppose the tax in this case be not nominally a tax upon property—if it be a tax upon the power to *lend*, without the exercise of which the United States can not borrow—is it not necessarily a tax or burden upon "the power to borrow?" Does it not come within the inhibition stated by this court in *Weston* v. *Charleston*:* "the right to tax the contract to any extent when made, must operate upon the power to borrow before it is exercised, and have a sensible influence upon the contract." Is not the contract made by Congress, that this plaintiff (a "corporation") shall not be taxed on account of these securities, violated, if the amount it has invested in them is included in the "measure of taxable liability?" Do not the opposite counsel then assume too much in assuming that over a tax imposed on a franchise, however the quantum of the tax may be measured, limited, or ascertained, this court has no control.

We say that whatever be the source from which the power to lend to the United States is derived, it is alike under the

* 2 Peters, 468–9.

protection of the paramount authority of the borrower, and is beyond the power of State nullification, either legislative or judicial.

2. Most if not all the positions set up and advocated by the defendant in error, were discussed on behalf of the Tax Commissioners, in *The Bank Tax Case.** It was then argued that the tax was *not on the property* of the bank, but on the *corporation specifically*. That the corporation was created by the State and ought to pay for the valuable franchise which it enjoyed. That the *purpose* of the act *was* to compel payment *therefor*. That the reference in the statute to "a valuation equal to the amount of their capital stock," &c., was only for the purpose of fixing the amount the corporation ought annually to pay for their *franchise*. That it had no regard to the actual capital *owned* by the bank, or to the securities, or to the value of the securities held by it. That the corporations being created by the State, and dependent upon the State for continued existence, could properly be compelled to aid in bearing the State burdens, as the price of their existence. But the court declared that the positions were not true.

3. The cases cited from the State courts of Massachusetts are not *authority* here. The case most relied on, the last of the three cited, is now here on error.†

Mr. Justice CLIFFORD delivered the opinion of the court.

Savings banks, and societies for savings, in the State of Connecticut are required by the law of the State to pay annually to the State treasurer for the use of the State a sum equal to three-fourths of one per cent. on the total amount of deposits in such institution on the first day of July in each year. Preparatory to such an assessment the treasurer of every such institution is required, within the first ten days of July in each year, to make out under oath, and de-

* See 2d Wallace, 201, where the argument is given.

† The reader desiring to see further argument on both sides of this question, can refer to the arguments in the next case, pp. 613–620.

liver to the comptroller of public accounts, a correct statement of the total amount of all such deposits on that day in their respective institutions. Payment of the tax is required to be made in semi-annual instalments, and the provision is that the tax, so levied, shall be in lieu of all other taxes on said institutions and the deposits therein.*

Institutions called savings and building associations are also embraced in the same provision, but the clauses of the section having respect to such associations are omitted, as they are not in any view material in this investigation. They are stock associations of a novel and peculiar character, organized under a general law, and are quite distinct from savings banks and societies for savings, which are merely banks of deposit and loan, having no stock, and which were created under special charters from the legislature of the State.†

Such institutions are banks of deposit, but they have no capital stock or stockholders, and are without any authority to make discounts or issue any circulating medium. Money in limited amounts may be deposited in such banks for safekeeping and be withdrawn at the pleasure of the owner, under such regulations as the charter and by-laws may prescribe. Authority is vested in the corporation by its charter to receive such deposits in trust for the owner, and to loan, use, and improve the same, and to apply and divide the net income and profits thereof in just proportions among the persons making such deposits, subject to certain reasonable deductions as therein provided.

Like other corporations they may choose their own officers and may admit new members; and the charter also provides that they may sue and be sued, that they may take and hold real estate, other than such as is conveyed as security or in payment of debts, to a limited amount, and may vest their funds in the stock of the State banks or other public stock of the State or of the United States, and may dispose of the

* Session Laws 1862, p. 49.

† Comp. Stat 218.

same from time to time in such amounts as will meet the demands for the deposits made in such institution.*

Whole amount of deposits in the defendant bank on the first day of July, 1863, was $4,758,273.37, of which the sum of $500,161 was then invested and held in securities of the United States, declared by act of Congress to be exempt from taxation, as appears by the return of the treasurer of the bank to the comptroller of public accounts and by the agreed statement in the record. Prompt payment of the first instalment of the tax, as required by law, was made by the bank, less the prescribed percentage upon the amount of the deposits invested in government securities, which they refused to pay, insisting that the tax to that extent was unauthorized and illegal. Due proceedings were accordingly instituted by the plaintiff, as the treasurer of the State, to recover of the bank the balance of the tax so withheld.† Judgment in the court below was rendered for the plaintiff, and the defendants sued out this writ of error.

1. Payment is required to be made to the treasurer of the State, for the use of the State, of a sum equal to three-fourths of one per cent. on the total amount of deposits in such institution, on the first day of July in each year, and the question is whether, by the true construction of that provision, the assessment is properly to be regarded as a tax on property or as a tax on the privileges and franchises of the defendant corporation. Viewed as a tax on property the assessment, so far as respects the amount in controversy, would be illegal, as it is well settled by repeated decisions of this court that the States cannot tax the securities of the United States, declared by act of Congress to be exempt from taxation, for any purpose whatever. Congress has power to borrow money on the credit of the United States, and the people, by making the government supreme, have shielded its action in the exercise of that power from every species of unfriendly State legislation. Undoubtedly the States may tax all subjects over which the sovereign power of the State

* 2 Private Laws, 1049.

† 7 General Statutes, 61.

extends, but they are not authorized to tax the instruments of the Federal government nor the means employed by Congress to carry into effect the enumerated powers of the Constitution, or any other power vested by the fundamental law in the government of the United States. Such were the early doctrines of this court upon the subject, and those doctrines have been reaffirmed and enforced in the recent decisions of the court.

All subjects over which the sovereign power of a State extends are, as a general rule, proper objects of taxation, but the power of a State to tax does not extend to those means which are employed by Congress to carry into execution the powers conferred in the Federal Constitution.*

Unquestionably the taxing power of the States is very comprehensive and pervading, but it is not without limits. State tax laws cannot restrain the action of the national government, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value within the sovereignty of the State, but they cannot reach the administration of justice in the Federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of commerce.†

True reason for the rule is that the Constitution of the United States and the laws of Congress made in pursuance thereof are the supreme law of the land, and the express provision is that the judges in every State court shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.‡

2. None of these principles are denied by the original plaintiff. On the contrary, he admits that the States do not possess the power, by taxation or otherwise, to retard, impede, burden, or in any manner to control the operation of the constitutional laws passed by Congress to carry into

* McCulloch *v.* Maryland, 4 Wheaton, 429.

† Brown *v.* Maryland, 12 Wheaton, 448; Weston et al. *v.* Charleston, 2 Peters, 467.

‡ Constitution, Article VI.

execution the powers vested in the Federal government. Conceding all this, he still denies that the tax in this case is in any proper sense subject to any such objection, but insists that in any and every point of view it is a tax on the privileges and franchises of the defendant corporation, which was created by the legislature of the State, and which, by all the authorities, it is entirely competent for the State to tax, with the other property of the citizens, for the support of the State government.

Power to tax is granted for the benefit of all, and none have any right to complain if the power is fairly exercised and the proceeds are properly applied to discharge the obligations for which the taxes were imposed. Such a power resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies.*

Unless exempted in terms which amount to a contract, the privileges and franchises of a private corporation are as much the legitimate subject of taxation as any other property of the citizens which is within the sovereign power of the State. Repeated decisions of this court have held, in respect to such corporations, that the taxing power of the State is never presumed to be relinquished, and consequently that it exists unless the intention to relinquish it is declared in clear and unambiguous terms.†

Corporate franchises are legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation upon the possession of its franchises, and whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises.‡

Nothing can be more certain in legal decision than that

* Providence Bank *v.* Billings et al., 4 Peters, 563.

† P. & W. R. R. Co. *v.* Maryland, 10 Howard, 393.

‡ Dartmouth College *v.* Woodward, 4 Wheaton, 700.

the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government. Authority to that effect resides in the State independent of the Federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities.*

Private corporations engaged in their own business and pursuing their own interests according to their own will are as much subject to the taxing power of the State as individuals, and it cannot make any difference whether the tax is imposed upon their property, unless exempted by some paramount law, or the franchise of the corporation, as both are alike under the protection and within the control of the sovereign power.†

Recurring to the language of the act, it is necessary to bear in mind that the defendant corporation belongs to a class of savings banks having deposits and assets, but which have no capital stock or stockholders. Such a corporation as a savings and building association, it seems, was unknown in that State at the time when the first act was passed requiring savings banks and savings associations to pay annually into the treasury of the State a sum equal to a prescribed percentage upon the total amount of deposits in their respective institutions on a given day in each year.‡

The original act was passed in 1851, more than ten years before the present securities of the United States were issued and put into the market. Charters were subsequently granted by the State to savings and building associations, which are stock companies, and the Tax Act of 1857 was so modified as to include the stock of those corporations.§

Savings and building associations, as they are called, are also included in the act under consideration as well as sav-

* Osborn v. Bank of the United States, 9 Wheaton, 859.

† Angell & Ames on Corporations (8th ed.), § 438; Brown v. Maryland, 12 Wheaton, 444.

‡ Comp. Stat. 842.

§ Comp. Stat. 218; Session Laws 1859, p. 58.

ings banks, and societies for savings.* Hence it is that stock as well as deposits is mentioned in the provision, but it is clear that the word stock applies solely to the former class of corporations, and not to the latter, as the latter have not, and never had any capital stock.

Amount of the tax required to be paid by the defendant corporation is a sum equal to three-fourths of one per cent. on the total amount of deposits in the institution on the first day of July in each year. Reference is evidently made to the total amount of deposits on the day named, not as the subject-matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens.

Views of the defendants are, that the sums required to be paid to the treasury of the State, is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition. Different modes of taxation are adopted in different States, and even in the same States at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets, or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period.

Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained.

* Session Acts 1862, p. 49.

Irregularity of taxation is a fruitful source of complaint, and it is but right to say that the mode prescribed in this provision, of computing the sum to be paid, is well calculated to distribute the burdens in equal and just proportions. Arbitrary sums are almost necessarily unequal, as the legislature cannot foresee the varying circumstances of the future which may surround the business of a corporation, and which may abridge or augment its receipts and increase or diminish its profits.

Satisfactory inducements may be suggested as having prompted the mode of taxation adopted by the legislature without imputing any such motives as are supposed by the defendants. Common justice requires that taxation, as far as possible, should be equal, and the language of the provision in this case supports no other inference than that the legislature in framing it was governed solely by that consideration.

Deposits are not capital stock in any point of view, and they are not even investments in the sense in which the word is employed in that provision.* Where the deposit is general and there is no special agreement proved, it is doubtless true that the title of the money deposited in a bank passes to the bank, and the bank becomes liable to the depositor for the amount as a debt.† Regarded entirely as a transaction between the bank and the depositor, it would be correct to say that the money deposited became the assets of the bank, and it may also be conceded that all such assets, unless invested in property or securities exempted from taxation, might be required to contribute to the support of the State government as the property of the bank, but it is obvious that the word deposits, as employed in that provision, is not used by the legislature in any such sense. Whenever the law imposes a tax on property in that State, it makes provision that the value of the property shall be ascertained by appraisement, and the requirement is that the tax shall

* Bank for Savings *v.* Collector, 3 Wallace, 514.

† Thomson *v.* Riggs, 5 Id. 678.

be assessed on the appraised value of the property. Taxpayers are required to furnish to the assessors of the town in which they reside a schedule, under oath, of all their taxable property, and it is made the duty of the assessors to appraise the same, and enter the value thereof on the appropriate lists. Municipal corporations as well as the State may levy taxes on the taxable property of the citizens, but all taxes, State and municipal, are collected by the collectors of the towns. Joint stock companies, and all chartered corporations, except banking, insurance, railroad, and savings corporations, &c., are subject to these regulations.

Attention to those regulations, even for a moment, will show that none of them have any application to the assessment described in the provision under consideration. Instead of a list furnished to the assessors of the town the requirement is that a return shall be made to the comptroller of public accounts, and the assessment as required to be made is wholly irrespective of value or of profit or loss. Town collectors have nothing to do in collecting the amount, and the tax, when paid, is in lieu of all other taxes on the institution. Other corporations in the State, with certain exceptions, are taxed upon a valuation "in the same manner and to the same extent as if such property was owned by an individual resident in this State."* But the corporation defendants are only required to pay to the treasurer of the State a sum equal to three-fourths of one per cent. on the total amount of their deposits on the first day of July in each year. They pay nothing for municipal and local taxes, either to the cities, towns, or districts in which they are located, and they are expressly exempted from all other taxation. Much weight is also due to the fact that the taxes are imposed directly by the legislature, without regard to investment or value, and if the amount was fixed by law, all, we think, would agree that the assessment was a tax upon the corporation, and not upon its property as contended by the defendants.

* Revised Statutes, 709.

Syllabus.

Neither investment nor the value of the deposits being mentioned in the provision, it seems clear that they are unimportant in this investigation, as the amount of the tax is the same whether the deposits, on the day named, have or have not been invested, and whether they are above the par value or of no value at all. Moneys received constitute deposits in the sense in which the word is used in that provision, and the total amount of such deposits on that day furnishes the true basis of computation, wholly irrespective of their market value or of the disposition made of the funds by the defendants.*

Looking at the case in any point of view, we are of the opinion that there is no error in the record.

JUDGMENT AFFIRMED WITH COSTS.

The CHIEF JUSTICE, GRIER, J., and MILLER, J., dissented; on the ground that the tax was a tax on the property and not upon the franchises and privileges of the plaintiff in error.

[See the next case.—REP.]

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## PROVIDENT INSTITUTION *v.* MASSACHUSETTS.

1. The preceding case (*Society for Savings* v. *Coite*) affirmed and declared to be applicable to this case.
2. Under the constitution and laws of Massachusetts, as interpreted by its highest court prior to the present case, in two cases not involving any question under the Judiciary Act, and by long usage, a statute which enacts that every institution for saving incorporated under the laws of that commonwealth, shall pay to the commonwealth "a tax on account of its depositors" of a certain percentage "*on the amount of its deposits*, to be assessed, one-half of said annual tax *on the average amount* of its deposits for the six months preceding the 1st of May, and the average amount of its deposits for the six months preceding the 1st of November," is to be regarded as a franchise tax, not as a tax on property, and is valid. Nor is there anything inconsistent with this view in the decisions of this court

* Savings Bank *v.* Collector, 3 Wallace, 514.

3. Accordingly, a savings institution in Massachusetts having a portion of its deposits invested in Federal securities declared by the act of Congress authorizing their issue to be exempt from taxation under State authority, is liable under the above statute to a tax on account of such deposits as on account of others.

THIS case, which came here on writ of error to the Supreme Court of Massachusetts, involved as a general matter the same question as the case just preceding; to wit, the taxation by State legislatures of Federal securities held by savings banks created by them; the difference between the two cases being that the question in the former case arose under a statute of Connecticut having one form of language, and in this case arose under a statute of Massachusetts having another form, more or less different.

The present case was thus:

A statute of Massachusetts of 1862 (entitled "An act to levy taxes on certain insurance companies and *on depositors* in savings banks") provides by its fourth section that every institution for savings incorporated under the laws of that commonwealth, should pay to the commonwealth "*a tax on account of its depositors* of one-half of one per cent. per annum* *on the amount of its deposits*, to be *assessed*, one-half of said annual tax *on the average amount of its deposits* for the six months preceding the first day of May, and the other, *on the average amount of its deposits* for the six months preceding the first day of November."

The act by its twelfth section exempted "*all property taxed*" under the above section from taxation for the current year in which the tax was paid; and relieved savings banks from making return of deposits in accordance with the provisions of previous statutes.

With this statute in existence, the Provident Institution for Savings, a corporation having no property except its deposits and the property in which they were invested, and *authorized by the general statute of Massachusetts* to receive money on deposit for the use and benefit of the depositors,

* By Act of 1863, increased to *three-fourths* of one per cent. per annum.

and to *invest its deposits in securities of the United States*, had as its average amount of the deposits for the six months preceding the first day of May, 1865, $8,047,652.19, of which $1,327,000 stood invested in public funds of the United States, exempt by law of the United States from taxation under State authority. It paid all taxes asked of it except on the portion which stood thus invested; upon that it declined to pay a tax. On suit brought by the commonwealth to recover the same, the Supreme Judicial Court of that State, regarding the taxing as one on franchise and not on property, and therefore lawful, gave judgment for the commonwealth.

On error here, the question was the correctness of this judgment; in other words, whether the State by force of the statutes could exact the tax on that portion of the society's deposits which was invested in the public funds of the United States?

*Messrs. Bonney and Bartlett, for the plaintiff in error:*

I. It may be stated as a fact, that up to the time of the statute of 1862, the taxes on deposits in savings banks were assessed directly to the depositors. But as the Supreme Court of the State has declared,* a large portion of such deposits being under $500 in amount, and for that reason not included in the returns to assessors, required by general statute, usually escaped taxation.

The purpose, then, of the act of 1862 was to change the form of taxation of the property of depositors, so as to prevent its escaping complete taxation when assessed, as it previously had been, in the annual valuation of the property of individuals.

1. The title of the act declares it to be "An act to levy taxes . . . . on *depositors* in savings banks."

2. The act itself, in one section, declares that every savings bank shall pay to the commonwealth an annual tax, "*on account of its depositors*, of one and one-half per cent.," &c. In

* Bigelow, C. J., 5 Allen, 437.

another, that "*all property*" thus taxed "shall be otherwise exempt from taxation for the current year."

3. The Supreme Court of Massachusetts has settled, in a case *which involved no question as to the taxation of United States securities*, that by the true construction of this act *it imposed the new tax solely on the corporation and not upon the* "money in its hands belonging to *depositors*," and this concludes that question.*

Since the design was to make the tax of that property more complete, and more like the mode of taxing other like property, the inference is cogent that the substituted tax was also *on property*, and not a *bonus* for a franchise, if indeed that distinction is of any importance, which we assert that it is not.

But whatever may have been the purpose, the act shows that the assessment is direct upon the property of the corporation.

II. The laws of the United States provide that securities of the United States shall be exempt from taxation by or under State authority.

What avails it to the citizen who has lent his money to the government that the constitution or laws of the United States declare its public stocks exempt from State taxation, if a State may, under the pretence of shifting taxation from property to franchise, impose it as an excise or duty on the privilege he enjoys of pursuing his avocation, acquiring or holding property, or other "franchise,"—to be "estimated," "apportioned" or "graduated" by the amount of all the property he possesses, however invested?

That State has virtually said: "Savings banks hold all their deposits in strict trust for their depositors; they must invest them only in certain designated property; in the more hazardous, only in limited amounts. But there is one class —the public funds of the United States, an especially convenient and safe investment—by the laws and decisions of the United States exempt from State taxation in their hands,

* Commonwealth *v.* Savings Bank, 5 Allen, 432.

and therefore especially inviting; in these they may invest without limit, all their assets, if they choose."*

The savings banks have no sooner availed themselves of this privilege, and invested largely in this property, than the State demands of them a tax of three-fourths of one per cent. per annum on *all* their deposits!

What matters it to either the savings banks or the United States what the *theory* of the tax is; whether it be on franchise or deposits? The one knows that if it had not the deposits it would not have the tax. The other that they can borrow money no better under one mode of taxation than under the other.

This new device of substantially taxing property, and declaring it to be a tax upon a franchise, requires to be carefully watched, or the government will be largely crippled in its means of borrowing money. Technically, a franchise is a special right conferred by government on designated individuals, but the same doctrine is applicable to all special pursuits of the citizens. Massachusetts, accordingly, taxes for what is called faculty (which is a franchise or right held under general laws), numerous classes of persons. If, under the guise of taxing the exercise of the various pursuits of life, all property used or acquired in those pursuits is declared the measure of its enjoyment, and the rate of taxation governed by it, it is clear that the exemption from taxation attached by law to United States securities is futile.

*Mr. Allen, Attorney-General of Massachusetts, contra:*

The general proposition to be maintained on the part of the commonwealth of Massachusetts is, that the present is in the nature of an excise laid upon the franchises of savings institutions, and not upon their property; and that, this being so, no abatement should be made by reason of government securities held by them.

1. In Massachusetts it is, and long has been, customary to

* General Statutes, chap. 57, §§ 141–145.

tax or lay an excise upon franchises, independently of property. The authority to do this is derived from that clause of the constitution which authorizes the legislature "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."*

The term "commodities" includes the privilege of carrying on any kind of business. In early times, under this clause of the constitution, excises upon innholders, the recording of deeds, the commissions of numerous public officers, and the admission of attorneys, were levied and collected, as excises upon "commodities."†

Now the tax laid upon a corporation in Massachusetts is ordinarily an excise or duty upon the privilege of doing business in a corporate form; and this, as is said in *Portland Bank* v. *Apthorp*,‡ decided in 1815, affirmed A.D. 1862 in *Commonwealth* v. *People's Five Cents Savings Bank*,§ has always been considered as an excise on a "commodity," within the meaning of the constitution.

This system is quite different from that of some other States. In New York, "all taxation is upon property;" property, exclusive of franchises. In *Bank Tax Case*,‖ it is expressly stated that the tax in New York is not a franchise tax, but a property tax. And in that case a valuation of the property was made, and not a valuation of the franchise.

Considered as a property tax, confessedly the present tax could not be supported even under the constitution of Massachusetts. This has been twice adjudged in Massachusetts, to wit, in *Commonwealth* v. *People's Five Cents Savings Bank*,¶ and in *Commonwealth* v. *Provident Institution for Savings*.** The doctrine has been recognized in several other cases. The reason is, that it is not proportional. No question was raised concerning the effect of holding government bonds in *Com-*

* Constitution of Massachusetts, pt. 2, c. 1, § 1, Art. 4.
† Massachusetts Stat., 1795, c. 80.
‡ 12 Massachusetts, 252.
§ 5 Allen, 431.
‖ 2 Wallace, 209.
¶ 5 Allen, 428.
** 12 Id. 312.

*monwealth* v. *People's Five Cents Savings Bank.* It was simply a question under the State constitution. That decision, arrived at under those circumstances, and repeatedly recognized since, settles the law for Massachusetts, except so far as it may be modified by the decision of this court, in reference to government securities. This consideration furnishes a strong argument to show that the legislature did not design the tax to be a property tax. It intended to act within the constitution, and a construction which is consistent with the constitution should be given to their acts, if possible. The practical question for this court to determine now is, whether, after such a decision, made under such circumstances, this court will feel at liberty to inquire into its correctness after the lapse of years, simply because a new fact, now for the first time existing, and not affecting the principle, gives this court the power to do so. Such a course would virtually do away with the rule that the construction given by the highest State court to the State constitution and statutes, shall be binding upon this court.

2. But this tax is not a property tax. It does not depend on the amount of property held by the savings institution, but it depends upon its capacity to exercise the privileges conferred by the charter. It does not depend on any valuation of property, but on the average amount which has stood to the credit of the depositors.

The average amount of deposits, and the amount of property owned by the institution, may be widely apart.

If not a property tax, this must be considered as a franchise tax.

If a franchise tax, no abatement should be made on the ground that the corporation may hold government securities. The tax is laid upon the capacity, or power, or privilege, or franchise to make investments; this capacity is measured by the average amount of deposits received; but it is wholly immaterial whether the savings institution exercises this privilege or not. Not being laid upon the property at all, it matters not whether the bank held Federal securities or not.

Reply against the tax.

*Reply:*

Neither the *Portland Bank* v. *Apthorp* nor the *Commonwealth* v. *People's Five Cents Savings Bank* touches or disposes of any other question than these, viz.:

1. That the tax in both of them was not a tax under the clause of the State constitution giving authority to the legislature "to impose and levy *proportionate* and *reasonable* assessments, rates, and taxes *upon all the inhabitants of, and persons resident and estates lying within, the commonwealth*," because those taxes must be proportionate upon all persons and property within the State.

2. That the only other power of taxation under the State constitution was to be found in these words: "To impose and levy *reasonable duties and excises* upon any *produce, goods, wares*, and *merchandise* and *commodities* whatsoever, *brought into, produced, manufactured*, or *being* within the State."

In the discussion of the grounds on which the tax is held to be a corporate charge, and not one on depositors, the court state that it is "the extent to which the corporation has exercised the franchise during a certain period that is made the basis on which to estimate the sum to be paid for the enjoyment of the privilege," and that it is a reasonable basis. But they were not called on to, and did not decide whether this measure of enjoyment, viz., "the amount of its deposits," was a measure fixed by property.

Nor did they decide in either of those cases that a franchise tax thus authorized was not, or could not be, either in substance or form, a tax on, or measured by, the property of the corporations.

As, therefore, until the decision of the present cause, there had been no adjudication that the tax was not upon the property of the corporation, but merely that it was not a tax on depositors, we turn again to the act, and finding that these same deposits had, prior to the act, been taxed as *property* to the depositors, and that the act merely shifts the tax to the corporation, and exempts depositors from tax on it; and add to this the language and scope of the act which lays a *tax* (not "a duty" or "excise") on account of

depositors, on the amount of deposits,—we submit that the tax must be deemed as still a tax on property.

The suggestion of opposing counsel that the tax may be measured not by property *in esse*, but by something that may have been lost or passed away, assumes that all taxation is indispensably restricted to property in immediate enjoyment when the tax is laid. It is not obvious why it may not be legally based upon property enjoyed and consumed during the year. It certainly is or may be so as to income, and yet such tax would be measured by property.

In the *Bank Tax Case*,* the tax was like the one upon this corporation. It was upon "a valuation equal to the amount of the capital stock, paid in, or secured to be paid in, and their surplus earnings." There was no appraisement of the true value of the capital stock, which might have been diminished by losses, leaving no surplus earnings, but it was held to be a tax fixed and measured by an approximate valuation. The arguments by which the tax was attempted to be sustained were in all respects the same that are urged in this case, viz., that it was a tax on a franchise and not on property; but they failed, and the reasoning of the court as to the character of the tax is full and conclusive.

But, if this court should follow the opinion of the State court, and hold the tax to be one founded on the consideration of the grant of a charter, it will not advance the cause. The question still remains, Is the tax, whatever its consideration, a tax on property? and we submit—

1. That there is nothing in the constitution or laws of the State that prevents an annual tax for a franchise from being laid, so to speak, directly on and measured by the property of the corporation; and this excludes the suggestion that the tax in question must be deemed not to have been intended to be laid on property, since the power to so levy it is, we submit, unquestionable. The clause in the constitution which authorizes a tax on a franchise as a "commodity," embraces "any goods, wares, and merchandise," &c. A tax

* 2 Wallace, 201.

on them must be in the popular sense a tax on property. Why may it not be so, if on a franchise?

2. That if the true purpose and construction of the act were as thus contended, yet it is not perceived why, if a tax be upon property, or measured by the amount of property, it is material whether the liability to such taxation rests upon, or is in consideration of, a grant of corporate powers. If this act had distinctly assessed a tax upon a valuation of the entire property of the appellants, and declared it to be a tax levied in consideration of the grant of corporate powers, would that not be a tax upon its property? and if among that property United States securities were found, would not they be exempted?

3. Rightly speaking, no tax is *upon* property or *upon* a franchise. It is upon persons or parties holding and enjoying such property or franchise, and in consideration of such holding and enjoyment.

4. If it be asked, Can no tax be legally laid on a special franchise granted by the State? we answer, that doubtless a bonus may be reserved and fixed at the time, and by the terms of the grant, or a tax may be laid fairly, governed by the emoluments or benefits derived, or that might be derived, from the enjoyment of the privilege. But a tax under this guise, on or measured by all the capital employed in the use of this privilege, is a tax on property.

II. There remains the broad ground on which the case may and ought perhaps to be put, viz., that under *no form* can the Federal securities be practically rendered by State legislation less valuable.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Institutions for savings incorporated under the laws of Massachusetts, are required by law to pay to the treasurer of the commonwealth a tax on account of their depositors of three-fourths of one per cent. per annum on the amount of their deposits. Half the amount of such annual tax is to

* The reader desirous to see further argument on both sides of this question, can refer to the arguments in the preceding case, pp. 595–602.

be assessed on the average amount of such deposits for the six months preceding the first day of May, and the other half on the average amount of their deposits for the six months preceding the first day of November in each year. Semi-annual returns are required to be made by the corporation, specifying the amount of their deposits on those days, and the average amount for the six months next preceding; and the provision is, that the property taxed under that section, or under the section preceding it, "shall be otherwise exempt from taxation for the current year in which the tax is paid."*

Average amount of deposits in the institution standing to the credit of depositors for the six months preceding the first day of May, 1865, was $8,047,652.19, of which $1,327,000 were invested in the public funds of the United States. Due returns were made by the corporation defendants, and they paid the percentage on the whole amount of the deposits not invested in the national public funds.

Corporations neglecting to pay such a tax are made liable, by the eleventh section of the act, for the amount withheld, with costs and interest, in an action of assumpsit in the name of the commonwealth. Proceedings were accordingly commenced, and the parties submitted the controversy to the State court upon an agreed statement of facts, which is exhibited in the record. Judgment was rendered for the plaintiff for the balance of the tax, with costs and interest, and the defendants sued out a writ of error under the twenty-fifth section of the Judiciary Act, and removed the cause into this court.

By their charter the corporation defendants were empowered to receive deposits from any person or persons disposed to become depositors, and to use and improve the same to the best advantage, but they were required to apply and divide the income or profit thereof, with reasonable deductions, among the persons making the deposits.†

* Sessions Laws, 1862, pp. 198-9; Ibid. 1863, p. 479.

† 5 Special Laws, 172.

Such corporations may receive on deposit, for the use and benefit of the depositors, all sums of money offered for that purpose, but recent legislation provides that they shall not hold of one depositor, other than a religious or charitable corporation, more than one thousand dollars at the same time. They may invest such deposits in first mortgages of real estate, or in the stock of the State banks, or in the public funds of the State or of certain other States, or of the United States, or the deposits may be loaned to any city, county or town in the State, or on notes with a pledge of any of those securities as collateral.*

I. Most of the questions involved in this record were very carefully considered in the case *The Society for Savings* v. *Coite*, argued at the present term,† and received the conclusive determination of the court. Extended argument in support of that judgment is unnecessary, as we are entirely satisfied with our conclusions and with the reasons assigned therefor at the time the judgment was rendered.

Substance of the points determined in that case, so far as they are applicable in this controversy, may be stated as follows: (1) That the securities issued by the United States declared by act of Congress to be exempt from taxation, cannot be taxed by the States for any purpose. (2) That power to borrow money on the credit of the United States is conferred upon Congress, and that inasmuch as the Constitution and the laws of Congress passed in pursuance thereof are made the supreme law of the land, it follows that the action of Congress in the exercise of that power is shielded from every species of unfriendly State legislation. (3) That the States cannot tax the instruments of the Federal government nor the means employed by Congress to carry into effect the powers conferred in the Federal Constitution, although their authority is undeniable to tax all subjects over which the sovereign power of the State extends. (4) That State laws requiring savings institutions authorized by law

* General Statutes, 317.

† The preceding case.—REP.

to receive deposits, but without authority to issue bills and having no capital stock, to pay annually into the State treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a given day, in lieu of all other taxes, are properly regarded as imposing a franchise tax, and not a tax on property. (5) That the privileges and franchises of a private corporation, unless exempted in terms, which amount to a contract, are as much the legitimate subject of taxation as any other property of the citizen which enjoys the protection and is within the control of the sovereign power of the State. (6) That corporate franchises are legal estates, and not mere naked powers, but powers coupled with an interest which vest in the corporation by virtue of their charter. (7) That private corporations and all trades and avocations by which the citizens acquire a livelihood may be taxed by the State for the support of the State government. (8) That such authority resides in the States independent of the Federal government, and that it is wholly unaffected by the fact that the party, whether corporation or individual, has or has not made investments in Federal securities. (9) That the power rests in the discretion of the legislature to decide whether the sum to be levied shall be a fixed one, and, if not, to determine in what manner and by what means the amount shall be determined.

Those several propositions, except perhaps the fourth, are as applicable to the present case as to that in which they were announced, and it is clear that nothing is left in this record for decision save the question whether the tax imposed in this case is to be regarded as a tax on property or a tax on the privileges and franchises of the corporation.

Taxation in that State is regulated to a certain extent by the constitution of the State, adopted in 1780, and which is still in force, and in that respect without alteration. Full power and authority are therein given to the legislature "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying within the said commonwealth, and also to impose and levy reasonable duties and excises

upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same." First judicial exposition of that clause was given in the year 1815, in a case which was fully considered, and of much importance, and which remains unquestioned to the present time.*

Incorporated banks were required by the act of the legislature, passed June 23d, 1812, to pay annually to the treasurer of the State, for the use of the same, a tax of one-half of one per cent. on the amount of the original stock issued to the stockholders.† Due assessment of the tax was made, and the bank failing to pay the amount, it was collected by warrant of distress, and the bank instituted an action of trespass against the treasurer of the State, who issued the warrant.

Several objections were taken to the assessment, which it becomes important to notice: (1) That the tax was illegal, because it was not equal and proportional, as required by the constitution. (2) That the bank could not be made liable to the tax, because their charter was granted long before the statute imposing the tax was passed. (3) That the legislature could not select any specific property as the subject of taxation, and assess the owner for it separately and distinctly from his equal and proportional share of such taxes as were required of all other inhabitants.

Views of the court were, however, that the law was perfectly consistent with the constitution, with the rights of the complaining corporation, and with the practice of the State under the constitution, from the time of its adoption.

Although such was the unanimous conclusion of the court in the case, still they all distinctly held that, under the first branch of the power conferred, the requisition upon the bank could not be justified, because the condition annexed to the power to impose and levy assessments, rates, and taxes, as given in the constitution, is that the taxes shall be

* Portland Bank *v.* Apthorp, 12 Massachusetts, 252.

† 4 Massachusetts Laws, 317.

proportional "upon all the inhabitants of, persons resident, and estates lying within the commonwealth;" that the due exercise of that power requires an estimate, or valuation, of all the property in the State, and that the assessment upon each individual shall be according to his proportion of that property.

Express determination of the court was, that the legislature could not select any company or individual or any specific article of property and assess them by themselves, as that would be a violation of that provision of the constitution which requires that the taxes shall be proportional. They also held that the object of the charter was to enable the corporation to conduct their business as an individual, to make contracts, and enforce them as such, avoiding the inconvenience of a copartnership; that inasmuch as there was no express waiver in the charter of the power to impose a duty or excise, it could not be held that the legislature had relinquished that right, and that a tax upon all the banks in the State was justifiable under the second branch of that clause.

Operation and effect of the term excise, as used in that clause, are limited to "any produce, goods, wares, merchandise, and commodities," but the court regarded the latter word as, perhaps, embracing everything which may be the subject of taxation, and stated that it had been applied by the legislature from the earliest practice under the constitution, as authorizing a tax upon the privilege of pursuing particular branches of business and employment. They defined the term to mean "convenience, privilege, profit, and gains," and affirmed that the legislature, by virtue of it, had exercised the right for thirty years, without complaint, of exacting annually a sum of money from auctioneers, attorneys, tavern-keepers, and retailers of spirituous liquors. Money exacted in such cases, say the court, is not a proportional tax, nor is it an excise or duty upon any produce, goods, wares, or merchandise, but "it is a commodity, convenience, and privilege which the legislature, by contemporaneous construction of the constitution, assumed

a right to sell at a reasonable price, and by parity of reason, it may impose the same conditions upon every other employment or handicraft."

Regarded merely as a question of power, it is undoubtedly true, as stated by the court in that case, that the legislature might as well exact a fee or tribute from brokers, factors, or commission merchants, for the privilege of transacting their business, as from auctioneers, inn-holders, retailers, or attorneys, as every citizen has as much right to exercise either of those employments free of tribute, as the cultivator of the soil or the mechanic has to pursue their particular callings.

Taken in any point of view the decision in that case is decisive of the question under consideration, unless it be assumed that the whole tax was illegal and void as directly contrary to the State constitution. Such a conclusion can hardly be admitted, in view of the fact that the rule of construction adopted in that case has prevailed under the highest judicial sanction of the State for more than fifty years. Assessors and people, as well as the bench and the bar, are familiar with that construction of the constitution which had prevailed in practice for more than thirty years when the rule was announced by the courts. Indeed, usage was one of the strong arguments employed by the Supreme Court of the State in support of their conclusion at the time the prevailing rule of construction first received judicial sanction.

Usage of successive legislatures, said the court, from the time the government began, when its powers as well as the rights of the citizen were well understood, and when there was a general disposition to keep all the departments within their prescribed sphere, down to the present time, furnishes strong grounds for explanation of parts of the constitution which are obscure or not perfectly explicit.

Forcible as those suggestions were fifty years ago when they were made, the unbroken usage in the same direction since that time adds much to their cogency, and justifies the conclusion of the present Supreme Court of the State that the rule ought not to be disturbed.

Argument for the defendant corporation is, that the act

authorizing the tax in this case lays a direct assessment upon the property of the corporation, and fixes a special standard by which the value of that property shall be measured, and that in so doing it includes the portion of the corporate property invested in the securities exempted from taxation. But the assessment of the tax is to be made semi-annually on the average amount of their deposits for the six months preceding the respective days named, and not on the value of the property, as supposed. Reference to the average amount of the deposits is made, not as descriptive of the subject to be assessed, but as furnishing the basis of computing the amount of the tax to be paid by the corporation. The subject-matter to be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis of computing the amount.

Deposits, as the word is employed in that section, are the sums received by the institution from depositors without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments, as the word is there used, which simply means the sums received, wholly irrespective of the disposition made of the same or their market value.*

When the question as to the construction of that section was presented to the Supreme Court of the State in this case, the counsel of the State conceded that the assessment could not be maintained as an exercise of power conferred by the State constitution to impose and levy proportional and reasonable assessments, rates, and taxes, and the court held that if viewed as a tax assessed under that clause it would be contrary to the State constitution, because it was not proportional on all persons and estates as the constitution required. They accordingly held, as the same court ruled fifty years before, that the assessment imposed under the fourth section of that act must be regarded as an excise or duty on the privilege or franchise of the corporation, and not as a tax on the money in their hands belonging to the

* Bank of Savings *v.* Collector, 3 Wallace, 514.

depositors. The mandate of the fourth section, say the court, is clear and explicit. It is the corporation that is to make the payment, and if it fail to do so it is liable, not only to an action for the amount of the tax, but what is more significant, it may be enjoined from the future exercise of its franchise until all taxes shall be fully paid.*

Apart from the intrinsic merit of those two decisions, the Attorney-General contends that inasmuch as they are decisions of the highest court of the State in respect to the construction of the constitution and tax laws of the State, they ought to be regarded as authorities in this court. State decisions involving questions re-examinable here under the twenty-fifth section of the Judiciary Act, and especially the decision in the case removed here for review, can have no authoritative influence in this court, because the State courts in deciding those few questions act in a subordinate relation to the paramount jurisdiction of this court as conferred under the Federal Constitution.

Federal courts and State courts, it may also be remarked, exercise concurrent jurisdiction in a large class of cases, but the decisions of the State courts in such cases, where the question is one of a general character, and not one arising under the local law, are not regarded as authorities in this court, nor are the decisions of this court in such cases obligatory upon the tribunals of the States. But the decisions of this court in cases involving Federal questions are conclusive authorities in the State courts, and their decisions upon the construction of their own constitution and local laws are equally so in this court unless the case be one which presents some question arising under the twenty-fifth section of the Judiciary Act. No such questions were involved in the cases to which reference is made, and therefore they must be regarded as conclusive authorities that the tax in this case is a tax on the privileges and franchises of the corporation and not a tax on property, as contended by the original defendants. Decisions of the State court rendered

* Commonwealth *v.* Savings Bank, 5 Allen, 431.

since that time are to the same effect, and there is nothing in the decisions of this court in any respect inconsistent with that rule.

Recent decisions of this court, like those of earlier date, affirm that the public securities of the United States, whether held by corporations or individuals, are exempt from taxation by the States for any purpose. Such immunity from State taxation not only exempts such securities from taxes levied directly on the holder of the same, but even where such securities form a part of the capital stock of a bank the rule is equally well established that a State cannot tax such capital stock without deducting such portion thereof as is made up of such public securities. *Bank of Commerce* v. *New York City* (2 Black, 628). Statement of that case shows that the assessment was made under a then recent law of the State which required the tax to be imposed upon a valuation of the stock, like the property of individual citizens, and not as formerly on the amount of the nominal capital, without regard to the depreciation. Prior system of taxation in that State was different, and this court admits that according to that system it was immaterial as to the character or description of the property which constituted the capital, as the tax was one annexed to the franchise as a royalty for the grant, and was imposed wholly irrespective of the character of the property. Nothing more was decided in the *Bank Tax Case*, than that a tax levied under a law of the State which enacted that all banks and banking associations should be liable to taxation on a valuation equal to the amount of their capital paid in or secured to be paid in, and their surplus earnings, in the manner provided by law, was a tax on the property of the complaining bank, and that inasmuch as the capital of the bank consisted of public securities, declared by act of Congress to be exempt from taxation, the law imposing the tax was unconstitutional and void.*

Express reservation of the right of the States to tax the

* Bank Tax Case, 2 Wallace, 200.

privileges and franchises of the corporation was not made in that case, but in the case decided only one year later it was distinctly held that the States do possess the power to tax the shares of the national banks in the hands of the stockholders, although the capital of those banks is wholly invested in the public securities. Precise extent of that decision was, that the shares of those banks were subject in the hands of shareholders to State taxation under the limitation provided in the forty-first section of the act of June 3d, 1864, without regard to the fact that a part or the whole of the capital was invested in the national securities declared by act of Congress to be exempt from such taxation.*

Principal reason assigned for the conclusion is, that the liability to taxation is only a burden annexed to the rights and privileges granted to the corporation; but the court also held that the tax on the shares was not a tax on the capital of the bank.†

Suppose it was otherwise, still the rule of construction adopted by the highest court of the State, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the Judiciary Act, must be regarded as conclusive in this court.‡

Considered as a tax on property no part of the tax could be supported under the constitution of the State, and there never was a moment when such a tax, if viewed as a property tax, could be upheld since the State was organized under a written constitution. The amount of the tax does not depend on the amount of the property held by the institution, but it depends upon the capacity of the institution to exercise the privileges conferred by the charter.

Valuation of property has nothing to do with determining the amount of the tax, but the amount depends on the average amount of the deposits for the six months preceding the

* Van Allen *v.* Assessors, 3 Wallace, 573.

† Queen *v.* Arnaud, 9 Adolphus & Ellis, New Series, 806.

‡ McCutcheon *v.* Marshall, 8 Peters, 240; Bank of Hamilton *v.* Dudley, 2 Id. 492; Leffingwell *v.* Warren. 2 Black, 599.

respective days named, and it is quite obvious that there is no necessary relation between the average amount of the deposits and the amount of the property owned by the institution. Granting that it is not a property tax, then it must be considered as a franchise tax laid upon the corporation for the privileges conferred by the charter, which, by all the authorities, it is competent for the State to tax irrespective of what disposition the institution has made of the funds, or in what manner they may have been invested. Counties, cities, towns, and school districts, as well as the State, may impose and levy reasonable assessments, rates, and taxes upon property, but the assessment to the corporation defendants, if paid, exempts them from all other taxation for the current year.*

State taxes on property are voted by the legislature, but the requirement of law in this case is that the treasurer shall send his warrants for the assessing thereof to the sheriffs of the several counties, who shall immediately transmit the same to the assessors to whom they are directed. Assessment of all taxes on property, whether state, county, city, town, or school district, is required to be made by the assessors of the cities and towns, and the cities and towns in case of neglect are made liable to the State and the several counties for the amount of the taxes. True lists are required to be furnished to the assessors by the inhabitants of all their polls and estates, both real and personal, not exempted from taxation, and the provision is that in case of neglect the assessors shall ascertain the particulars, as near as possible, and make an estimate thereof at its just value.†

Warrants with the tax-lists annexed are issued by the assessors, and the taxes are collected by the collectors elected by the cities and towns in the same manner as other subordinate municipal officers.‡

Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the State treasury. They differ from property taxes,

* Sessions Laws, 1862, p. 200. † General Statutes, 77, 78. ‡ Id. 164.

as levied for state and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection, and they are in lieu of all other taxation, state or municipal. Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter. Unlike as the two systems are in every particular, it seems to be a work of supererogation to point out the differences, which are radical and substantial.

JUDGMENT AFFIRMED WITH COSTS.

The CHIEF JUSTICE, GRIER, J., and MILLER, J., in this as in the last preceding case dissented, on the ground that the tax was one on the property and not on the franchises of the Provident Institution.

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## HAMILTON COMPANY *v.* MASSACHUSETTS.

1. Questions not decided in the State court, because not raised and presented by the complaining party, will not be re-examined in this court on a writ of error under the twenty-fifth section of the Judiciary Act.
2. It is not sufficient that such a question might have arisen and been applicable to the case, unless it appears in the record that it did arise, and was applied by the State court in disposing of the controversy.
3. A statute of Massachusetts which requires corporations having a capital stock divided into shares, to pay a tax of a certain percentage (one-sixth of one per cent.) upon "the excess of the market value" of all such stock over the value of its real estate and machinery, is, under the settled course of decision in the State of Massachusetts on its constitution and laws, a statute which imposes a franchise tax.
4. The tax is lawful.
5. *Provident Institution* v. *Massachusetts* (last preceding case) affirmed.

APPEAL from the Superior Court of the Commonwealth of Massachusetts.

This case—which was one agreed on and stated in the court

below—raised, under some circumstantial variety,—the defendant in it there being a manufacturing company having capital stock,—the same substantial question raised in the two preceding cases of saving fund societies. It was thus:

A statute of Massachusetts provides—

"SECT. 1. That the assessors of the several towns shall annually return to the treasurer of the commonwealth the names of all corporations 'having a capital stock divided into shares,' &c., and the value of the *real* estate and *machinery* for which each is taxed in such towns.

"SECT. 2. That every such corporation shall annually return to the same officer 'the amount of the capital stock of the corporation, and the par value and the cash market value of the shares, on the 1st day of May.'

"SECT. 5. That a board of commissioners shall ascertain the *excess of the market value* of all the capital stock of each corporation over the value of its real estate and machinery, and that the corporation shall annually pay to the commonwealth '*a tax* of one and one-sixth per cent. upon such excess.'"

With this statute in force a return from the Hamilton Manufacturing Company, a corporation of the sort described, and incorporated by Massachusetts, showed that the cash market value of its capital stock did not exceed by more than $263,997 the value of its real estate, machinery, and of its other property, *provided* that from this last were *ex*cluded securities of the United States held by the company, and which, by the act of Congress authorizing their issue, were declared to be exempt from taxation by State authority, "whether held by individuals, corporations, or associations." But that with those securities included, the capital stock did exceed by a greater sum than that named the value of such real estate and machinery.

A tax being demanded by the State of Massachusetts on more than the $263,997 (supposing that the tax was laid at the rate prescribed), it necessarily fell—and of course unlawfully—on the exempted Federal securities, *if* the tax laid by the statute was one on *property*.

If, on the other hand, the tax was one on the franchise and privileges of the corporation, and such a tax, when operating as in this case, was lawful, then it was rightly demanded, even in so far as it might affect the securities of the United States. The Hamilton Company refused to pay the tax demanded; and suit was brought accordingly. The court below gave judgment for the whole sum demanded. The case was now here under the twenty-fifth section of the Judiciary Act.

Excepting therefore a matter apparently suggested in that court, but not pressed there or here, as to whether the company could, under its charter, rightly hold Federal securities, the questions now were,—

1. Whether the tax imposed by the State was to be regarded as a tax on property, or as a tax on the franchise and privileges of the corporation?

2. Whether, if the last, and when operating as it did here, it was lawful so far as affecting the Federal securities?

*Mr. H. L. Dawes, for the plaintiff in error; Mr. Allen, Attorney-General of Massachusetts, for that State, contra.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Corporations as well as individuals are subject to taxation in Massachusetts, and with that view the assessors of cities and towns are required annually to return, on or before the first Monday of August, to the treasurer of the State, the names of all chartered corporations having a capital stock divided into shares, established in their respective cities or towns, or owning real estate therein, and the value of their real estate and machinery, for which they were taxed in such cities or towns, on the first day of May preceding such returns. Such corporations, if their stock is not exempted from taxation, State and municipal, by the laws of the United States, are also required annually, between the first and tenth days of May, to return to the State treasurer, under the oath of their treasurer, a complete list of their shareholders, with their places of residence, the number of

shares belonging to each, the amount of their capital stock, the corporation's place of business, and the par value and the cash market value of the shares on the first day of May.*

Commissioners are also constituted by the fifth section of the act, and they are required to ascertain from the returns, or otherwise, the excess of the market value of all the capital stock of every such corporation, not exempted as aforesaid, over the value of their real estate and machinery, if any, as returned by the assessors of the cities and towns; and having ascertained such excess, as required, it is made their duty, on or before the first Monday of October following, to notify the corporation treasurer of the result of their doings, and the provision is that every such corporation shall annually, on or before the first Monday of November succeeding, pay to the treasurer of the State a tax of one and one-sixth per cent. upon such excess.

Proper steps were taken by the commissioners, and the agreed statement shows that they duly ascertained the excess of the market value of all the capital stock of the defendant corporation over the value of their real estate and machinery, as returned by the local assessors, and that within the time required they notified the treasurer of the corporation of the ascertained result.

Cash market value of the capital stock, as ascertained, was twelve hundred and thirty thousand dollars, as appears by the agreed statement, and the value of the real estate and machinery, as actually returned by the local assessors, was nine hundred and fifty-nine thousand four hundred dollars, and the agreed statement also shows that the taxes upon that valuation as assessed to the corporation by the local assessors, were duly paid. Excess of the cash market value of the capital stock over their real estate and machinery, as ascertained by the commissioners, was two hundred and seventy thousand six hundred dollars, as agreed by the parties.

In addition to their real estate and machinery, the corporation defendants owned personal property standing on their

* Sessions Laws 1864, 132.

books as valued at two hundred and sixty-three thousand nine hundred and ninety-seven dollars and seventy-five cents, and also bonds of the United States to the amount of three hundred thousand dollars, which, it is conceded, were exempt from State taxation.

Amount for which they were taxed was two hundred and seventy thousand six hundred dollars, but they had on their books a balance of untaxed property, besides the bonds, of two hundred and sixty-three thousand nine hundred and ninety-seven dollars and seventy-five cents. They refused to pay the tax, and the State brought suit to recover the amount. Judgment was rendered in favor of the State for the sum of three thousand six hundred and fifteen dollars and seventy-six cents, which is the amount of the tax of one and one-sixth per cent. upon the whole excess of the cash market value of their capital stock, over the value of their real estate and machinery, as returned by the assessors. Dissatisfied with the judgment of the State court, the corporation defendants sued out this writ of error and removed the cause into this court.

1. Questions not decided in the State court, because not raised and presented by the complaining party, will not be re-examined in this court on a writ of error sued out under the twenty-fifth section of the Judiciary Act. Apart from the question of jurisdiction it is necessary that it shall appear that the question presented for decision in this court was raised in the State court, and that the decision of the State court was given as required in that section. Clear and necessary intendment that the question was raised and must have been decided as claimed, in order to have induced the judgment, is sufficient, but it is not sufficient to show that such a question might have arisen and been applicable to the case, unless it appears in the record that it did arise and was applied by the State court in disposing of the controversy.

2. Defendant corporation resisted the claim of the State in the State court solely upon the ground that they were not

liable under that act of the legislature to pay any tax at all to the State, because the cash market value of their capital stock did not exceed the returned value of their real estate and machinery, and the value of the bonds held by them which are exempt from State taxation. On the other hand the State contended that the defendants were bound by virtue of that act to pay a tax to the State treasurer upon the whole excess of the cash market value, as ascertained, of their capital stock over the value of their real estate and machinery as returned by the assessors.

Liability to taxation in some form was conceded by the defendants except for the amount of their government securities, and the State did not claim any right to tax those securities or their real estate and machinery included in the lists furnished to the local assessors. Obvious issue between the parties was whether the value of the bonds held by the defendants should or should not be deducted from the excess of the cash market value of their capital stock over the value of their real estate and machinery. And the parties taking the same view as to the real issue between them, agreed that if the court was of the opinion that such a deduction should be made from the said excess as ascertained by the commissioners, then judgment should be entered for the defendants, otherwise for the plaintiff, for such an amount as in the opinion of the court the State is entitled to recover, with interest.

Viewed in any light, the agreed statement of facts shows to a demonstration, that the only question in the record, not fully determined in the case just decided, is whether the tax imposed by the State is properly to be regarded as a tax on property or as a tax on the privileges and franchises of the corporation. Such a tax so levied is clearly not proportional as is required by the State constitution in respect to rates and taxes, and consequently, if sustained at all, either in whole or in part, it must be as an exercise of the power conferred in the State constitution of imposing reasonable duties and excises upon "commodities" within the State. Taxation, as contemplated in the provision under consideration,

on the corporations designated in the second section of the act, is without any reference to the amount required to be raised in the State on the actual property held by the corporation, and without any reference to the whole amount of property in the State liable to be assessed for State and municipal purposes.*

Regarded as a tax on property, therefore, the tax is plainly invalid, and cannot be supported for a moment, as the law, if construed as authorizing such a tax, is in direct contravention of the State constitution as understood from the time of its adoption. Manufacturing corporations are private corporations in the strictest sense, as they are created for the convenience of the corporation, and are charged with no public duties whatever. Under the laws of the State and the provisions of their charters they enjoy great privileges adapted to the purposes of private profit, and by the laws of the State they are exempt from all other taxation, municipal or State, except a property tax on their real estate and machinery, which is based on a valuation in the same manner as taxes are imposed on the property of individuals.

Corporate franchises, as determined in the preceding case, are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of their charter, and the rule is equally well settled that the privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the State. Such corporations are not exempted by the laws of the State, and never were in terms which deprived the legislature of the power to impose on them a franchise tax.†

All trades and avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of

* Commonwealth *v.* Hamilton Manufacturing Company, 12 Allen, 300.

† 5 Massachusetts Stat. 76; 6 Spec. Laws, 227, 597; Sess. Laws, 1830, 326; 7 Spec. Laws, 192, 730; Revised Stat. 830.

the State government. Power to that effect resides in the State independent of the Federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investments in Federal securities. Unless such be the rule, the two systems of government, State and Federal, cannot both continue to exist, as the States will be left without any means of support or of discharging their public obligations.

Congress undoubtedly may levy and collect taxes, duties, imposts, and excises, for the purposes described in the Constitution, but the power therein conferred does not, *proprio vigore*, operate as a prohibition upon the States to exercise the same powers to raise moneys to support their own governments. They cannot lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, not because Congress may lay and collect taxes, duties, imposts, and excises, but because the Constitution expressly provides that no State shall exercise that power without the consent of the Congress.*

Want of authority in the States to tax the securities of the United States issued in the exercise of the admitted power of Congress to borrow money on the credit of the United States, is equally certain although there is no express prohibition in the Constitution to that effect. Outside of those provisions, however, the power of the State to tax extends to all objects except the instruments and means of the Federal government, within the sovereign power of the State. Guided by these principles in the construction of the fifth section of the act under consideration, it is quite clear that the substantial question presented for decision is the same as that determined in the case just decided. Only difference is that different elements of calculation are prescribed as the basis of computation in ascertaining the amount of the required contribution.

Separated from the peculiar provision of the State consti-

* Art. I, § 8.

tution, and the long practice under the original decision, the present decision of the State court upon the subject might well be criticized as founded in unsubstantial distinctions, but when weighed as an exposition of that peculiar clause and in view of the long practice of the State, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence. Most of the solid reasons for the rule are put forth in the early decision. Successors to the chief justice of that day, in treating the subject, though their opinions are able and well considered, have not been able to add much to the cogency and conclusive character of the reasons assigned by the court at that time in support of the well-founded distinction between franchise taxes and taxes on property.*

Fifty years have elapsed since that decision was made, and the practice in substance and effect is still continued, having been repeatedly sanctioned by the unanimous decisions of the highest judicial authority of the State. Attempt is made to support the theory of the corporation defendants by the recent decisions of this court, but the effort is not successful, as was satisfactorily shown in the preceding case, to which reference is made.

Property taxation and excise taxation, as authorized in the constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the term "commodities" as uniformly given by the courts of the State, and as universally understood by the tax-payers and assessors. If regarded as meaning goods and wares only, there would be much difficulty in the case, but if it signifies "convenience, privilege, profit, and gains," as uniformly held by the State court, then all difficulty vanishes, and the case is clear. Such was the construction given to the term by the Supreme Court of the State more than fifty years before the present controversy arose, and the rule is well settled in this court that the construction of the constitution or statute of a State by the highest judicial tribu-

* Portland Bank *v.* Apthorp, 12 Massachusetts, 252.

nal of such State, in a case not involving any question under the twenty-fifth section of the Judiciary Act, is to be regarded as a part of the provision, and that it is as binding upon the courts of the United States as the text.*

Many of the views expressed by the State court in this case, as well as those advanced by the counsel of the State in the argument of the case, deserve particular notice. They say and we agree that the market value of the capital stock on the shares is the basis for computing the present tax. Whatever swells the market value necessarily swells the tax, as is well contended for the State. Even if a purely fictitious value is given to it by the action of brokers or speculators, it makes no difference, the corporation must pay the one and one-sixth per cent. upon the excess of such market value of the capital stock over the value of their real estate and machinery as returned by the local assessors.

Taxes rise with inflation, however caused or to whatever extent, whether temporary or permanent; and depression, be it ever so great, and whether caused by imaginary difficulties or by war or famine, lessens the demand for contribution in a corresponding ratio. Suffice it to say that universal experience shows that actual value, as ascertained by the appraisement of the assessors, may be very different from the market value, as a great variety of elements enter into the latter estimation which have no place in the former. Demonstration of that proposition is afforded in the very able opinion of the Supreme Court of the State in this case.

Our conclusion is, that the decision of the State court is correct.

JUDGMENT AFFIRMED WITH COSTS.

The CHIEF JUSTICE, GRIER, J., and MILLER, J., as in the preceding two cases, similar, dissented, and on the same ground, to wit, that the tax was a tax on the property, and not on the franchises and privileges of the plaintiff in error.

* Leffingwell *v.* Warren, 2 Black, 603; Bank of Hamilton *v.* Dudley, 2 Peters, 492; Shelby *v.* Gray, 11 Wheaton, 351.

Syllabus.

## GAINES *v.* NEW ORLEANS.

1. By the law of Louisiana, if a man *bonâ fide* believe a woman free to marry him on account of the invalidity of a former marriage; and with such a belief of this, does marry her, such marriage has its civil effects; and the child born of it is legitimate, and can inherit its father's estate.
2. The fact of marriage being proved, the presumptions of law are all in favor of good faith.

   The court finds as a fact that there was a marriage in good faith between the late Daniel Clark, of New Orleans, and Marie Julie (Zulime) Carriere, of the same place, some time before the birth of the present Myra Clark Gaines.

   The said Myra can, therefore, take the estate of Clark left to his said daughter by an olographic will made in 1813; the same having been the last will made by him; and having been duly admitted as such to probate by the courts of Louisiana having competent jurisdiction.
3. The probate of a will duly received to probate by a State court of competent jurisdiction, is conclusive of the validity and contents of the will in this court.
4. A will made a short time before a testator's death acknowledging a child as his legitimate and only daughter, is to be regarded, on a question of legitimacy, as an affirmative evidence of great weight; and in the nature of a dying testimony of the testator to the fact.
5. The probate of a will of later date necessarily and by the mere fact of its probate annuls a prior will, so far as the provisions of the two are inconsistent, and so far as the estate was not legally administered under the earlier will.

   Accordingly, Clark's will of 1811 was annulled by his will of 1813.
6. The power of executors in Louisiana to make sale of real estate there, terminated by the code in force in 1813, in that State, at the end of a year from their appointment, unless there was an order of court to sell. A sale made after the expiration of the year, in a case where no order of court was shown, and where the will itself gave no power of sale, was a nullity.

   Accordingly, sales made in 1819–20–21, &c., by Relf & Chew, as executors of Clark's will of 1811, proved in that year, passed no title.
7. The deed of a sole instituted heir gives no title by the law of Louisiana as against the real and paramount heir.

   Accordingly, deeds of Mrs. Mary Clark, mother of Daniel Clark, did not pass his property as against Mrs. Gaines, his only legitimate daughter.
8. On suit brought by such real and paramount heir claiming under a will of one date to recover possession, it is no defence by a party in possession under sales made by the executors or alleged instituted heir under an earlier and now annulled will, that the estate of the testator

was insolvent; a fact, however, which the court considers not to be predicable of Clark's at his death.

9. Testamentary accounts confirmed by a probate court "in all respects in which they are not opposed," cannot be regarded as "duly homologated," so as to conclude persons whose opposition has never been withdrawn, but is still active.

Of this character has been the opposition of Mrs. Gaines to the accounts filed by Relf & Chew, executors of the will of Clark made in 1811.

10. A probate court cannot by subsequent order give validity to sales of real estate made by executors, which were void by the laws of the State where made.

11. Where each of two parties claim title from one person as a common source, neither, by the law of Louisiana, is at liberty to deny that such person had title.

Accordingly, where Mrs. Gaines, out of possession, claimed under a will of Clark made in 1813, and adverse parties claimed under an earlier will of the same person, it was not competent for these last to show that as to two-thirds of the property in contest, the equitable title was not in Clark at all, at his death, but in his partners in trade, Chew & Relf.

Independently of this, the court expresses itself as not at all disposed to regard as a "valid and executed contract" a partnership agreement by which it was sought to prove such ownership out of a testator at his death, and in his partners (who were the executors also of one will of his), the agreement itself having for twenty-five years not been made known either to creditors, purchasers, or the Court of Probate, and only now produced to be used in a collateral way, and one which, in effect, would show that neither party to a suit wherein each claimed title, had it.

12. Although, when a claimant is endeavoring to establish an *equitable* title, a court of equity may refuse the use of its peculiar powers in aiding to establish it against the purchaser of the legal estate, who has acquired it fairly and honestly, yet where the complainant is not doing this, but is asserting a right to the *legal* estate, it does not follow that he loses that right, because the defendant may have purchased in good faith what he *supposed* was the legal title.

13. The case of *Gaines* v. *Hennen* (24 Howard, 615) concludes question upon the sufficiency of any plea of prescription, similar to the one set up in that case. The one in the present case being similar, the court treat its sufficiency as a question not open for argument.

14. The questions of law and fact applicable to the rights of Mrs. Gaines in the estate of her father, Daniel Clark, were determined in the case of *Gaines* v. *Hennen*, a case here solemnly affirmed.

THIS case came here upon appeal from the Circuit Court of the District of Louisiana.

It was a bill in equity, filed by Mrs. Myra Clark Gaines,

December 22d, 1856, against certain defendants, in which she sought to recover very valuable real estate, situated in New Orleans, which belonged, as she alleged, to Daniel Clark, her father, who died in New Orleans, in August, 1813, Mrs. Gaines claiming title as universal legatee under a last will of his made in 1813.

The bill alleged,—

1st. That the complainant was the only legitimate child of Clark.

2d. That all the property sought to be recovered belonged to Clark at his decease.

3d. That at his death he left a valid last will and testament in which the complainant was declared his only legitimate child, and made his universal legatee, subject to certain payments.

4th. That this will of 1813, having been lost or destroyed, it was duly recognized and admitted to probate by the Supreme Court of Louisiana in 1856, and ordered to be executed.

5th. That Clark had made a provisional will in 1811, in which he made his mother, Mary Clark, his universal legatee and sole heir, and appointed Richard Relf and Beverly Chew the testamentary executors thereof; which will of 1811 was revoked by the will of 1813, but that Relf & Chew wrongfully obtained the probate of the will of 1811, and illegally administered the estate under it; making sales fraudulently and with notice of the complainant's equities, &c.

6th. That the complainant was a minor until 1827, and ignorant of her parentage and rights in her father's estate until 1834, and that from that time to the present she had persistently claimed this estate, and diligently sought its recovery by all the legal means in her power.

The bill sought a discovery from the defendants, and prayed a delivery of the property, and an account of the rents and profits, and for general relief.

THE ANSWER of the defendants admitted the possession in them of the property claimed in the bill, and that the *legal*

title thereof was in Clark, at the time of his death in 1813; but they set up—

That Clark's title passed to them or their grantors by virtue of sales made by Relf & Chew, as testamentary executors of the will of 1811.

That this title passed also under sales made by Relf & Chew, as attorneys of Mary Clark, "sole heir and legatee" of the will of 1811.

That the estate of Clark was insolvent.

That the accounts of Chew & Relf reporting the sales had been duly approved by the Probate Court of New Orleans; and that this was binding on the complainant.

That an equitable title to two-thirds of the property was in Relf & Chew, and creditors of Clark, by virtue of certain partnership articles, of June 19th, 1813.

They also pleaded the prescription of five, ten, twenty, and thirty years; and that they are "purchasers in good faith, without notice, for a valuable consideration;" and that they are purchasers from "purchasers in good faith, without notice, for a valuable consideration."

They also relied upon the nullity of the probate of the will of 1813, by the Supreme Court of Louisiana, in 1856, there having been no decree of nullity of the prior will of 1811.

Upon these issues judgment was rendered against the complainant, and from such judgment it was that the present appeal was taken.

The case with two accompanying it constituted the seventh, eighth and ninth appeals to this court of a controversy known as the "Gaines case." For more than one-third of a century, in one form and another, it had been the subject of judicial decision in this court, and the records now—complicated in the extreme—reached nearly eight thousand closely printed pages. If this court, when the case was last heard before it,* spoke of it as "one which, when hereafter some distinguished American lawyer shall retire from his

* A.D. 1860, 24 Howard, 615.

practice to write the history of his country's jurisprudence, will be registered by him as the most remarkable in the records of its courts," the present reporter will surely be excused, if, in that haste which a speedy publication of current decisions requires, *he* shall, from such records as he has described,—and in a matter where as to facts, simply, this high tribunal has been always largely divided on the evidence,—have attained much less than perfect accuracy of detail or even than the truest form of presentation generally. As far as he has himself conceived the case from the huge volumes in which it was imbedded—but deprecating reliance upon his statement in any matter affecting property involved in these issues if, contrary to the hope expressed by this court, further question about property is anywhere to be made—the subject, in its outlines and general effect, seemed thus to present itself:

The close of the last century found residing at New Orleans, then but a small town, a person named Daniel Clark. He was a native of Ireland, born at Sligo about the year 1766, but had received an education in England, at Eton and other places there. Before reaching the age of 21 he had come to New Orleans by invitation of an uncle already resident there; a person of some consideration, and to whose property he succeeded in 1799. He is described as having been a man of much personal pride and social ambition, of high intelligence, full of enterprise, and though "very peculiar in some respects" (and, in at least one, censurable), to have been characterized by numerous chivalric and honorable dispositions. His pecuniary integrity was unquestioned. He became early an actor in the events of his day and region, a leader of party there, and connected either by concert or by opposition with many public men of the time. To him more than to almost any one, as it seemed, was to be attributed the acquisition by our country of the State of Louisiana. He had been consul of the United States there before the acquisition, and in 1806–8, represented the Territory in Congress; its first representative in

that body. Everywhere his associations were of a marked kind, and with people of social importance. Up to 1808 or 1810 he was engaged in commercial affairs on a considerable scale, and extending from New Orleans to Montreal; being associated at New Orleans with two gentlemen, both long known there as occupying positions of public trust, Messrs. Richard Relf and Beverly Chew, as partners, and in Philadelphia with the late Daniel W. Coxe, a person of distinguished standing in that city. With Mr. Coxe his relations began so far back as 1791. Mr. Clark died in New Orleans August 16th, 1813, at the age of 48, and, as was commonly reputed, a bachelor; but as was testified, engaged to be married to a lady of that place, Madame ——, previously married and now divorced. No will but one, dated in 1811, was found after his death. It left his property to his mother, who with her husband had followed Daniel Clark to this country, and was now resident at Germantown, near Philadelphia; but of any wife or child, or children, lawful or illegitimate, it said nothing. That document had been made on the eve of a voyage from New Orleans to Philadelphia, and was in these words:

"IN THE NAME OF GOD, AMEN! I, Daniel Clark, of New Orleans, do make this my last will and testament: Imprimis, I order all my just debts to be paid; second, I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all estate, whether real or personal, which I may die possessed of; thirdly, I hereby nominate and appoint my friends, Richard Relf and Beverly Chew, my executors, with power to settle everything relating to my estate.

"DANIEL CLARK.

"NEW ORLEANS, 20th May, 1811."

A few hours after Clark's death allegations were made by one Chevalier Dusuau De la Croix,—who represented that he had "strong reasons to believe, and did verily believe, that such a will was executed," and that he was interested in it,—of a later will, and a petition was presented to the Court of Probate, in New Orleans, setting forth the probable

existence of such a will, and praying that each one of the different notaries of the city might appear before the court immediately, "in order to certify if there does or does not exist in his office any testament or codicil or sealed packet deposited by the said late Daniel Clark." None such was produced. The will above quoted was therefore proved before Judge Pitou, Judge of Probate, hereafter mentioned, and under it Relf and Chew, the persons named in it as executors—his already mentioned partners in trade—disposed of Clark's estates.

Soon after the time that Clark first found himself at New Orleans, was living there also a native of Clermont, France, named Jerome Des Granges. Des Granges made some pretensions to family importance at home, but in New Orleans was a confectioner; making and vending syrups and liquors also, and having a distillery. He had married in 1794, with the ceremonies of the Roman church, a young person of New Orleans, Zulime de Carriere, not then, as it seemed, above fourteen or fifteen years old, a native of New Orleans, from French parents in Gascony and Bordeaux, and was living with her as his wife: a person whom various testimony proved to have been remarkable for beauty.

With Zulime, Clark became acquainted, and formed an illicit connection in or prior to 1801.

In the spring of the year just named Des Granges sailed for France, his apparent purpose there being the recovery of some property, to which his wife and her sisters, two of whom were Madame Despau and Madame Caillavet, were entitled. On the 26th of March, in the same year, these all gave to him—describing him as "our brother-in-law"—a power of attorney of the fullest kind to act for them. Des Granges in turn on that same day gives to Marie Zulime Carriere, describing her as "my legitimate wife," a like power to act for him. Under this last, Zulime did act for him frequently; and on *the 9th of November*, 1801, *being then in New Orleans, substituted her brother-in-law Caillavet* to receive for her certain moneys, &c. In this she describes herself, as in previous papers, as "the legitimate wife" of Des Granges.

When exactly Des Granges sailed did not appear; but he was in Bordeaux in July, 1801, and in that month writes to Clark, thanking him for letters of introduction, &c. He adds:

"When one has a friend such as you, he cannot feel too deep an interest in him. . . . I have taken the liberty to inclose a package for my wife, which I beg you to remit to her. Permit me, my dear friend, to reiterate my acceptance of the kind offer you made me before I came away, and should my wife find herself embarrassed in any respect, you will truly oblige me by aiding her with your kind advice."

Des Granges returned to New Orleans "a few months" prior to the 4th of September, 1802. He was there on that day.

While Des Granges was absent in France, Zulime was found pregnant, and was sent by Clark from New Orleans to Philadelphia, with letters introducing her to his friend and partner, Mr. Coxe. These letters informed Coxe that the pregnancy was by him, Clark, and asked that Madame Des Granges might be provided with suitable lodgings, medical attendance, and other matters necessary in such a case. The matter was all attended to by Mr. Coxe, "as the friend of Clark," and arriving at term the child was born; a girl, who received the name of Caroline. She lived in Philadelphia during childhood with her nurse, and more or less under Mr. Coxe's eye, until, becoming older, she was placed in another family in the country, in accordance with Clark's desire to have her put where her "health, morals, and education would be attended to." She remained in or near Philadelphia till she grew up, Clark, while he lived, paying her expenses. Arriving at womanhood, she was respectably married to a person named Barnes.

Madame Despau, a sister of Madame Des Granges, was with this last on the occasion of the birth of this child. As to Clark's presence in Philadelphia at the same time with these two sisters, and as to the date of this common presence there,—a matter of some importance, it may perhaps be thought, in a subsequent part of the narrative,—we speak

further on. There was no doubt that the two sisters were in Philadelphia while Clark was there, not long before a certain voyage which he made from Philadelphia and New York for Europe, and of whose date we speak hereafter.*

The birth of the child was stated by Madame Despau to have been in 1801, though she said nothing about the place or circumstances of its birth. Mr. Coxe fixed it, according to his belief, in April, 1802.†

As soon after the birth of the child thus just mentioned as was prudent, Zulime returned to New Orleans, Des Granges apparently knowing nothing of what had occurred.

An incident of some importance now took place; deserving mention here chiefly as being much referred to in testimony given further on by the sisters of Zulime. It was an arrest by the church authorities of Des Granges, for bigamy.

An ecclesiastical record, dated 4th September, 1802 (Louisiana being still under Spanish and Catholic regulations) recited that it had been reported in all the city, publicly and notoriously, that Des Granges, at the time of his marriage with Zulime in 1794, and now, was married "to Barbara Jeanbelle, *who has just arrived;*" that the said Des Granges, having arrived from France "a few months since," had caused another woman to come here. The record continued: "And as it has been ascertained that the said Des Granges is about to depart with the last of his three wives, let him be placed in the public prison during these proceedings." Des Granges, Barbara Jeanbelle (signing herself,

* See *infra*, p. 678.

† The exact date of Zulime's arrival in Philadelphia was not fixed. Mr. Coxe, who was examined in different branches of the Gaines controversy, once in 1841 and once in 1849, said, on the first occasion: "*In or about* the year 1802, Madame Des Granges brought me a letter from Daniel Clark, introducing her, and informing me in confidence." In the second he said: "In the *early part of the year* 1802." . . . With regard to the letter itself introducing Zulime, he stated his impression to be, that owing to its nature he had destroyed it at the time, or soon after reading it; if not, that it had been burnt in 1806, in which year his counting-house was consumed by fire. The records in New Orleans showed that *Zulime was in that city, November 9th*, 1801; as also on the 6th September, 1802.

"B. M. Zambell *de Orsi*," and sometimes so styled in the proceedings), Zulime, and the "other woman," whose name, it seemed, was Yllar, were all examined by these ecclesiastical authorities. Des Granges and Barbara both stated that, about eleven years previously, he, Des Granges, had courted her in New York. She said that it had been her intention to marry Des Granges; that she obtained her father's permission to go to Philadelphia in order to be married; that while there, Des Granges begged her to come to New Orleans to consummate the marriage, which she refused to do, and as he was coming away that she changed her mind; that she then afterwards, at Philadelphia, married one Soumeyliat, with whom she went to Bordeaux; and was living there at the time when Des Granges lately arrived there; that he there found her—Des Granges himself stated, "by mere accident." According to Des Granges' account, the father of Barbara had refused his consent to the marriage because he was poor. What brought Madame Soumeyliat just now to New Orleans did not at all appear.

The other woman testified that she had come to this country only because, having asked Des Granges at Bordeaux, to tell her if it held out better inducements in order to gain a livelihood by sewing, he had advised her to come.

Zulime, being asked if she had heard that her husband was married to another woman, answered that, "about *a year since*, she heard it stated in New Orleans that her husband was married in the North, and that in consequence she wished to ascertain whether it was true or not, and she left this city for Philadelphia and New York to ascertain the truth of the report. She had learned only that he had courted a woman, whose father, not consenting to the match, it did not take place, and she married another man shortly afterwards." She added, that the report of her husband marrying three women had caused her no uneasiness, as she was satisfied it was not true.

Des Granges being asked, "why his wife went to the North last year?" answered, "that the principal reason was that a report had circulated in this city that he was married to

another woman; and that she went because she wished to ascertain whether it was true; that he had brought no documents to prove his innocence," taking it for granted that it would naturally fall, his wife being satisfied of it.

The record concluded with this

DECREE.

"Not being able to prove the public report which is contained in the original decree of these proceedings, and having no more proofs for the present, let all proceedings be suspended, with power to prosecute them hereafter, if necessary, and let the person of Geronimo des Granges be set at liberty, he paying the costs."

It is, however, a noteworthy circumstance, perhaps, that though no evidence of the marriage of Des Granges and Barbara was produced in the ecclesiastical proceeding, there was produced in the present case a certificate in Latin, dated New York, 11th September, A.D. 1806, apparently from the Rev. W. V. O'Brian, pastor of St. Peter's Roman Catholic Church in that city, certifying that he had married, on the 6th July, 1790, "Jacobum Degrange and Barbara M. Orci." The original records of the church were now burnt.

However, Des Granges left the place, and did not return to New Orleans prior to 1805.*

As respected the fact of bigamy, Madame Benguerel, a witness in this case, testified that she and her husband were well acquainted with Des Granges, and with a person whom he married "before he imposed himself on Zulime," and that reproaching him for his baseness in the latter act, "he endeavored to excuse himself by saying, that at the time he married Zulime he had abandoned his lawful wife, and never intended to see her again."

*At this point of the history arose the great question of this case,*

* Judge Foulhouse, a witness, who had studied Theology and Ecclesiastical law of the Catholic Church at St. Sulpice, and who was examined as to the nature of this old record, inferred from one part of it that there was real purpose to proceed against Des Granges for bigamy, while from another that it was with "a view to save him from trouble and get rid of him."

*a question namely, whether anywhere about this time, that is to say, in or anywhere between the early part of* 1802 *and the end of* 1803,—*after the birth of the child just mentioned,—any marriage ceremony had been performed between Clark and Zulime.* It was alleged on the one side that one had been performed in Philadelphia in 1803, or, possibly, in 1802. The other side denied that one had been performed anywhere. The matter will be entered upon hereafter.

Whether really married or not, Zulime became pregnant again, and of this pregnancy, Myra, the present complainant (wife in first marriage of W. W. Whitney, Esq., and in second of General E. P. Gaines, and now widow of this last), was born in New Orleans some time in 1804 or 1805 or 1806. The immediate place of the birth was the house of a friend of Clark named Boisfontaine, then casually unoccupied; another friend, a protégé of Clark's, who had been a sea-captain and afterwards in the army, Colonel Davis, a brother-in-law of Boisfontaine, making the specific arrangements.

"The child," said Davis, in an account found in the record, "was placed where it was supposed she would be properly attended to, and Mr. Clark having left New Orleans for a short time soon after, I consented to see that this was done. It was soon apparent that the infant was neglected, and after some hesitation I communicated the facts to my wife. She went at once to see the child, was touched with compassion at her forlorn and desolate condition, and consented to take her at once to her own house. There Mr. Clark found her on his return. He did not wish to acknowledge her publicly as his own, and Mrs. Davis having no daughter and becoming attached to the infant, of which she thus accidentally became, as it were, the mother, determined to keep her until she should be claimed by her parents."

When about two weeks old the child was brought to Mrs. Davis's house and there given to a niece of Colonel Davis, Mrs. Harriet Harper, resident in his family. Mrs. Harper had recently had an infant of her own, and this new one was nursed at her own breast instead. The name "Myra"

was given to the child by Colonel Davis, after a niece of his own.

Returning with the narrative to the mother. The exact relations between Clark and Zulime from the birth of the second child up to 1808, did not appear minutely. Clark at all times kept house for himself in New Orleans, and after the birth of the child, Zulime apparently had a house, also supported by Clark. In 1806 he was sent to Congress. A quarrel took place between himself and Zulime while he was away. According to one of her sisters he had "heard things about her," things which, according to the same account, he was satisfied, though at a day too late for any advantage, were "calumnious."* She, according to the same account, was fretted because he would not promulgate what was asserted in the present case to be a marriage. Whatever the cause, the estrangement seemed to have been complete in 1808, or perhaps earlier. Clark, then in Congress, addressed a lady of Baltimore, at this time in Annapolis, of the highest social position. He thus wrote to Coxe in 1808:

WASHINGTON, 12th January, 1808.

MY DEAR SIR:

Your accounts of my visit to Annapolis have been, as usual, much ahead. Whenever I am fortunate enough to induce any one to engage herself to me, I shall let you and Mrs. Coxe both know it; but until I see *jour a mes affaires*, I shall make no engagement.

Remember me respectfully to Mrs. Coxe, and believe me, my dear friend,

Yours sincerely,

DANIEL CLARK.

* Mrs. Harriet Harper, another witness, stated that Clark, on going to Washington, left as a servant with Zulime at New Orleans the wife of his own personal servant, a slave whom he much liked, named Lubin; that while he was thus absent, certain individuals who had or supposed they had "a great interest in dissolving his connection with the mother of his child, commenced a plan of breaking it up, by writing to Mr. Clark imputations against her, and by filling her mind with unfavorable impressions against him, till at length his mind was so poisoned, that when he arrived at New Orleans he and she had a severe quarrel and separated; immediately after which she left New Orleans."

WASHINGTON, 9th February, 1808.

MY DEAR FRIEND:

I shall set off this evening for Annapolis, and shall pass two or three days there. If I find Miss —— —— as favorably inclined toward me as you have hinted, I shall endeavor so to secure her affections as to permit me to offer myself to her, at my return to this country in the course of the ensuing winter. I shall first go home to settle my affairs. On this subject I have never yet spoken to her, and I now communicate my intentions to you, that you may inform Mrs. Coxe, who will, I hope, as well as yourself, keep the affair quiet. At my return I shall inform you of the result.

Yours affectionately,

DANIEL CLARK.

WASHINGTON, 14th February, 1808.

MY DEAR FRIEND:

Previous to setting off for Annapolis I informed you of my intention. I am sorry to have now to mention that it not only has not been effected, but that the affair is forever ended. The reasons I will give you when we meet, although they are too trifling in themselves to have caused the effect produced by them. I beg you to state this to Mrs. Coxe, and if you are spoken to on the subject, to state that you have had no knowledge of the affair.

Yours sincerely,

DANIEL CLARK.

This part of the history, Mr. Coxe, in his testimony, narrated thus:

"Clark paid his addresses, with a view to marriage, to Miss —— ——, of Baltimore, granddaughter of the late —— ——, of ——, and was partly engaged to her. He addressed her in the years 1807 and 1808. The engagement was afterwards dissolved in consequence of demands, on the part of the lady's family, of settlements and other stipulations, which convinced him that the match would be ineligible. She afterwards married the Marquis of Carmarthen, now Duke of Leeds. Soon after the rupture of the engagement in the year 1808, he went to New Orleans. The engagement with Miss —— was afterwards, as I understood from Mr. Clark, attempted to be renewed through the intervention of Robert Goodloe Harper, Esq., who had mar-

ried into the —— family; but on reflection Mr. Clark thought the connection not desirable, and that the settlements and other stipulations demanded on her part might ruin him; and he relinquished it from these causes, and also in part in consequence of my disapprobation of it, and my belief that it might affect both him and me injuriously."

Some time prior to June 24th, 1806, Zulime filed a petition in the District Court of New Orleans against Des Granges for something. For what exactly, the reporter cannot assert, owing to the fact that the petition itself, having been lost from the court office, made no part of the transcript. The record disclosed only a summons dated June 24th, 1806, to "Mr. Ellerly, curator of Des Granges," "to *comply with the prayer* of the annexed petition," or to file an answer in eight days. To this petition, Ellerly for the defendant put in for plea—

"That this court ought not to have cognizance of the same, because the laws by which this court was created and the jurisdiction thereof established, do not extend the same *to cases of divorce*, or give this court any authority to pronounce therein, and because the *damages in the said petition prayed for* cannot be inquired into or assessed, until after the judgment of this court in touching *the validity of the marriage* between the petitioner and this defendant shall be first declared."

The defendant subsequently, for answer, said, "that the facts in the said petition are untrue." The certificate of marriage between Des Granges and Zulime made part of this record; and the docket entries completed it, thus:

ZULIME CARRIERE v. DES GRANGES. } No. 356.—Brown & Fromentin for plaintiff; Ellerly for defendants.

Petition filed June 24th, 1806. Debt or damages, $100. Plea filed July 1st, 1806. Set for trial on Thursday, 24th July.

Summons issued for M. Coudrain, Chovot, Mary Marr, Rose Carriere, Christopher Joseph Le Prevost, Trouque, Le Breton d'Orgenoy, and Joseph Villar, Senior.

Attorneys, $10.00 } Mr. Fourke, sworn.
Clerk, . . 7.87½ } Mr. d'Orgenoy.
Madam Marr.

Judgment for plaintiff. Damages, $100. July 24th, 1806.

In the summer of 1807, Zulime came to Philadelphia with her sister, Madame Despau, again bringing a letter of introduction from Clark to Coxe. Clark was there in April, 1808, and in that month left it for New Orleans. In August, 1808, at Philadelphia, Zulime, in regular form of the church, was married, under the name of Carriere, to a French gentleman of good standing, named Gardette. The marriage register of St. Joseph's Church there thus recorded the fact:

MARRIED. By Right Rev. Michael Egan, James Gardette and Mary Zulema *Carriere*, in the year of our Lord 1808, August 2. *Witnesses:* John Morges, John Dubarry, William Martin, John Rowan, and Isabel Rowan.

On this subject, also, Mr. Coxe testified. He said:

"Zulime did know of Mr. Clark's addresses to Miss ——. In an interview between her and me at her request, at her lodgings, she complained to me of Mr. Clark's desertion of her, said she understood he was going to marry Miss ——, and intimated that she considered herself at liberty to marry another. While I was there, Monsieur Gardette came in, and I took my leave. This was the only conversation I ever had with her on the subject. She never informed me, either before or after the death of Daniel Clark, that she had been married to him, nor that Myra Gaines was the legitimate offspring of that marriage."

The parties to the connection above recorded lived for several years after it in Philadelphia, and resided next in France. They lived reputably together, as it seemed, in both countries, for twenty-three years, acknowledged as man and wife, and on the death of Monsieur Gardette, in 1831, Zulime went into mourning, and, as was said by her sister, received property as his widow. Having had three children, always acknowledged, by this connection, Zulime, after M. Gardette's death, returned with them, or those who survived, to New Orleans; and after living there with them respectably for many years after this controversy began, died in that city in the autumn of 1853. In May, 1836, she transferred to the complainant all rights that she had "in the

estate, property, or succession of the said Daniel Clark." She was never examined as a witness, so far as her testimony appeared of record, in any part of the controversy; nor did she ever, through the courts, claim his estate, or so declare the fact of a marriage with him.

We have mentioned that, in New Orleans, Mr. Clark's child was taken by Colonel Davis to his own house. In the spring of 1811, being about to sail from New Orleans to Philadelphia, Clark made the will, already mentioned, of 1811, and wrote to Davis from shipboard, at the mouth of the river, mentioning certain evidences of property—then standing in Colonel Davis's control—which, "in case of misfortune," he says, "you will dispose of as I have directed." And setting sail from Philadelphia, on his return, in July following, he incloses to him a communication, which, "in case of accident or misfortune to me," he directs Davis to open, and to act in regard to the contents as "I directed you with respect to the other affairs committed to your charge before leaving New Orleans." "To account," he says, "in a satisfactory manner, to the person committed to your honor, will, I flatter myself, be done by you when she is able to manage her own affairs; until when, I commit her under God to your protection." These deposits of property, as Davis stated, related to Myra. Clark had, prior to all this, placed in Davis's name "as owner" a large amount of real estate, with instructions to use and place it, for the best advantage, for his daughter Myra's interest.

In 1812, Davis came with his family to reside in Philadelphia, and brought the child with him; Clark now giving him a sum of twenty-three hundred and sixty dollars.* In Philadelphia the child was brought up by Colonel and Mrs. Davis; and commonly known by the name of "Myra Davis," though a few particular friends of Davis knew, perhaps, that she was but an adopted child.

Arriving in Philadelphia, Colonel Davis found the mother

* Suit was subsequently brought for this money by the executors of the will of 1811, and recovered from Davis. He had left his note for it with Clark.

a resident there, not far from his own house. She visited Colonel Davis's but on a single occasion; and had no interviews with the child there or elsewhere, though not in any way formally forbidden to see her. "She once met me," testified Davis, "in the street, with Myra, and stopped to speak to me. She did not speak to Myra, or take any such notice of her that the latter remarked it. But she looked very hard at her."

In 1830, Davis, who had been elected to the legislature of Pennsylvania, being away from home, and having need for certain papers which he had left there, Myra in a search for them came accidentally upon some letters which partially revealed the circumstances of her birth. Exceedingly distressed, it was necessary that Davis, on his return, should disclose to her more fully the history. She was still commonly known as "Myra Davis."

In 1832, she was married to Mr. W. W. Whitney, of New York, whose marriage to her was announced in the newspapers of Philadelphia, as to Miss Myra, "daughter of Col. S. B. Davis." The husband, receiving a number of old letters from Colonel Davis, was struck by an account in one of them, from a person named Bellechasse, and then resident in Matanzas, Cuba, of a will made by Clark just before his death, in 1813, which was said to have been fraudulently suppressed, and by which his now wife, then seven or eight years old, was made sole devisee by Clark of vast property.

Whitney and his wife went to Matanzas, Cuba, saw Bellechasse—an old resident of New Orleans, as it appeared, and an intimate friend of Clark; with him in his last hours, and in his house after his death. From him they got such accounts and such references, that they proceeded to New Orleans to endeavor to establish this will. Whitney began by charging a fraudulent suppression of it on certain persons there, for which he was arrested and put into prison, and compelled to give large bail in order to get out. Getting out, he proceeded to collect his proofs. They consisted chiefly of the testimony of Mrs. Harriet Harper, already named, now sixty years old, by whom the child had been nursed; of Mr.

Pierre Baron Boisfontaine, a man of about the same age, who had been for eight years in the British army, and afterwards for several years agent of Clark's plantations; and of Bellechasse himself, an army man like Boisfontaine, till Louisiana had passed to the control of this country. He was now seventy-two years old. The substance of their evidence was this—(one point in controversy, at that time especially, being whether *Myra* was a child of Clark at all;* then whether legitimate; and, finally, whether Clark had left a will in her favor):

Mrs. Harper testified, at different times and in substance, thus:

"Mr. Clark and my late husband were intimate friends. I suckled in her infancy Mr. Clark's daughter Myra. I did it voluntarily, in consequence of her having suffered from the hired nurses. Mr. Clark considered that this constituted a powerful claim on his gratitude, and he afterwards gave me his confidence respecting her. I was residing with my late husband in the family of his uncle, Colonel Davis, when the infant Myra was brought into the family by Colonel and Madame Davis. I had at that time an infant of my own. I was solicited by them to suckle the infant they had brought. Colonel and Madame Davis told me she was the child of Daniel Clark. Mr. Clark afterwards assured me she was his child, and always told me she was his only child; she was always called Myra Clark by the whole family. I never knew her by any other name till after her marriage. Mr. Clark, during his continual attentions to, and while caressing her, ever called her his dear little daughter Myra; his affections and attentions to her seemed to increase with her age; in fact, he showed, and seemed to feel, all the paternal regard for her that the most affectionate father could show to an only child. Her clothing and playthings, which were of the most extravagant and costly description, were provided for her by

* One allegation of the defence all through it, and pressed in different stages with more or less confidence, was that the only child of Clark was Caroline, and that, as had been confessed by Zulime, and as others, assuming to know, had verified, "Daniel Clark was imposed upon and deceived into the belief that the said Myra was his child, when in truth she was the child of another man."

Mr. Clark; he also purchased for her a valuable servant. Mr. Clark invariably spoke of her to me as his only child, and as destined to inherit his splendid fortune. I witnessed the continued and increasing parental solicitude of Mr. Clark for his daughter Myra, from her early infancy till 1812, when her departure for Philadelphia with the family of Colonel Davis took place. Mr. Clark continued his frequent visits to my husband and self till his last sickness in 1813. Up to that period he always spoke of his daughter Myra with the most enthusiastic affection.

"On the occasion of the duel which he had with Governor Claiborne, in, I think, 1807, he told me after that affair, that he had previous, by way of precaution, secured to his daughter Myra the amplest provision, in case he should have fallen, and that he had also left documents so arranged as to manifest everything of interest to her. Afterwards, in 1811, when he was about to visit Philadelphia, he told me he had made arrangements, by means of confidential transfers of property, to secure the interests of his said child, and had also left with Chew and Relf a will in favor of his mother; that this will was the result of his situation at the time.

"In 1813, some few months before his death, he told me he felt he ought no longer to defer securing his estate to his daughter Myra by a last will. Near this period he stopped one day at my house, and said to me he was on his way to the plantation of Chevalier de la Croix, for the purpose of requesting him to be named in his will one of his executors, and tutor to his daughter Myra. On his return he told me, with much apparent gratification, that De la Croix had consented to serve, and that Judge Pitot and Colonel Bellechasse had consented to be the other executors. Between this period and the time he brought his last will to my house, Mr. Clark spoke very often of being engaged in making his last will; he always spoke of it in connection with his only and beloved daughter Myra, and said he was making it for her sake, to make her his sole heiress, and to insure her being educated according to his wishes. At the times Mr. Clark spoke of being engaged in making his last will, he told me over and over again what would constitute its contents; that he should in it acknowledge the said Myra as his legitimate daughter, and bequeath all his estate to her, but direct that an annuity of $2000 should be paid to his mother during

her life, and an annuity of $500 to a young female at the north of the United States, named Caroline Des Granges, till her majority, then it was to cease, and $5000 were to be paid her as a legacy; that his slave Lubin was to be freed, and a maintenance provided for him. He often spoke with earnestness of the moral benefit to his daughter Myra, from being acknowledged by him in his last will as his legitimate daughter, and of the happiness it would give his mother; he expressed the most extravagant pride and ambition for her; he would frequently use the emphatic language, that he was making her 'a bill of rights.' About four weeks before his death, Mr. Clark brought his will to my house; as he came in he said: 'Now my will is finished, my estate is secured to Myra beyond human contingency; now, if I die to-morrow, she will go forth to society, to my relations, to my mother, acknowledged by me in my last will as my legitimate daughter, and will be educated, according to my minutest wishes, under the superintendence of the Chevalier de la Croix, and her interests will be under the care of Chevalier de la Croix, Judge Pitot, and Colonel Bellechasse; here is the charter of her rights, it is now completely finished, and I have brought it to you to read.' He left it in my possession until the next day; I read it deliberately from beginning to end.

"After Mr. Clark's death, Colonel Bellechasse stopped at my house, and told me Mr. Clark's last will was suppressed, and that the old provisional will of 1811 was brought forward; he repeated what Mr. Baron and Lubin said (as he said) about the matter. Knowing well the unbounded confidence reposed in Lubin by Mr. Clark, I sent for him; he came and related to me what he said occurred soon after Mr. Clark's death. I understood that the notaries of New Orleans were summoned in court on the petition of Mr. Dusuau de la Croix, to swear whether they had a duplicate of Mr. Clark's last will. The late John Poultney, of New Orleans, deceased, came with several friends to examine an iron chest of Mr. Clark's that stood in my house, in the faint hope, as they said, of finding a duplicate of Mr. Clark's last will, that is, the will of 1813. This was immediately subsequently to Mr. Clark's death.

"Mr. Clark was a man of powerful and acknowledged talents, towering ambition, great pride and dignity of character, strong feelings and affections. The spectacle of such a man absorbed in one object that seemed to engage all his faculties, was of

itself highly impressive. To the excessive love for his child, all who were intimate with him could bear witness; but when he came to frame his last will, arrange his plans for her future aggrandizement, for her education, and embody principles and advice for her government through life, his wish and effort by means of his last will to carry himself beyond the grave, in all the relations as a parent to his sole and orphan child, these scenes are as vivid to my mind as if they had lately occurred."

Baron Boisfontaine testified, in the same manner, thus:

"Mr. Clark left at his death a daughter named Myra, whom he acknowledged as his own before and after her birth, and as long as he lived. In my presence he spoke of the necessary preparations for her birth, and asked my brother's wife to be present at her birth, and in my presence he proposed to my sister and brother-in-law, Mr. S. B. Davis, that they should take care of her after her birth. After her birth he acknowledged her to me as his own, constantly, and at various places. He was very fond of her, and seemed to take pleasure in talking to me about her.

"I was present at Mr. Clark's house about fifteen days before his death, when he took from a small black case a sealed packet, handed it to Chevalier de la Croix, and said, 'My last will is finished; it is in this sealed packet, with valuable papers; as you consented, I have made you in it tutor to my daughter. If any misfortune happens to me, will you do for her all you promised me? Will you take her at once from Davis? I have given her all my estate in my will, an annuity to my mother, and some legacies to friends. You, Pitot, and Bellechasse, are the executors.' About ten days before this, Mr. Clark, talking of Myra, said that his will was done. Previous to this he often told me, commencing about four months before his death, that he was making his last will. Two or three days before his death I came to see him on plantation business; he told me that he felt quite ill. I went to the plantation to set things in order, so that I might stay with him, and returned the same day and stayed with him constantly till he died. The day before he died, speaking of his daughter Myra, he told me that his last will was in his office-room below, in the little black case; that he would die contented, as he had insured his estate to her in the will. He mentioned his pleasure that he had made his

Statement of the case.

mother comfortable by an annuity in it, and remembered some friends by legacies. He told me how well satisfied he was that Chevalier de la Croix, Judge Pitot, and Bellechasse were executors in it, and Chevalier de la Croix Myra's tutor. About two hours before his death he showed strong feelings for said Myra, and told me that he wished his will to be taken to Chevalier de la Croix, as he was her tutor, as well as one of the executors in it; and just afterwards told Lubin, his confidential servant, to be sure, as soon as he died, to carry his little black case to Chevalier de la Croix. After this, and a very short time before Mr. Clark died, I saw Mr. —— take a bundle of keys from Mr. Clark's armoire, one of which I believe opened the little black case; I had seen Mr. Clark open it very often. After taking these keys from the armoire, Mr. —— went below. When I went below I did not see Mr. ——, and the office-room door was shut. Lubin told me that when Mr. —— went down with the keys from the armoire, he followed, saw him then, on getting down, go into the office-room, and that Mr. ——, on going into the office-room, locked the office-room door. I was with Mr. Clark when he died, and by him constantly for the last two days of his life. About two hours before he died he spoke of his last will and his daughter Myra in connection, and almost his last words were about her, and that his will must be taken care of on her account.

"When, after Mr. Clark's death, the disappearance of his last will was the subject of conversation, I related what he told me about his last will in his last sickness. Judge Pitot and John Lind* told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Mr. Clark had told me about it; that when they read it it was finished, was dated, and signed by Mr. Clark; was an olographic will; was in Mr. Clark's handwriting; that in it he acknowledged the said Myra as his legitimate daughter, and bequeathed all his estate to her, gave an annuity to his mother, and legacies for some friends.

"The mother of Myra Clark was a lady of the Carriere family; not being present at any marriage, I can only declare it my belief that Mr. Clark was her husband. It was represented to me

* A notary.

that this lady married Mr. Des Granges in good faith, but it was found out some time afterwards that he already had a living wife, when the lady separated from him. Mr. Clark, some time after this, married her at the North; when the time arrived for it to be made public, interested persons had produced a false state of things between them; and this lady, living in Philadelphia, and Mr. Clark not there, was persuaded by a lawyer employed, that her marriage with Mr. Clark was invalid, which believing, she married Monsieur Gardette. He frequently lamented to me that this barrier had been made, but that she was blameless. He said he would never give Myra a stepmother. He spoke to me of his daughter Myra from the first as legitimate; and when he made known to me that he was making his last will, he said to me he should declare her in it as his legitimate daughter. From the above I believe there was a marriage. The said Myra is the only child Mr. Clark ever acknowledged to me as his.

"From the time of said Myra's birth Mr. Clark treated me as a confidential friend, in matters relating to her and to his affairs generally."

The testimony of Bellechasse, in effect, was thus:

"Clark carried me with him on divers occasions to see Myra, and in my presence he manifested for her the most ardent love. He always gave me to understand, as well by reason of his extraordinary affection for said Myra, as by his positive declaration to that effect, that she would be the heiress of his fortune. In 1811, when he was about to make a visit to the North, in a formal act or deed of sale before a notary public, he conveyed to me some lots, perhaps fifty, as if I had paid the due price for them, when in truth nothing had been paid, for the sale was made with or under the confidential understanding that I should hold them for the sole use and benefit of said Myra, in the event of his death before his return. On his return I wished to reconvey them to him, but Clark would not allow me to do so, wishing, as I suppose, to give another proof of his confidence in my honor and rectitude, particularly as he, Clark, never wished to receive any written acknowledgment of the confidential nature of the sale. In 1813 he told me he was thinking of reducing to order his affairs, and of making his last will, so as

not to leave any longer exposed to risk the standing and fortune of his child, and that he wished me to consent to become one of his executors; I did so consent. He spoke of Judge Pitot and Chevalier de la Croix as persons whom he contemplated to have associated with him. He spoke with much reflection and deliberation of his being occupied in preparing his last will. On these occasions he spoke in the most impressive and emphatic manner of Myra as the object of his last will, and that he should in it declare her to be his legitimate child and heiress of all his estate, and he accordingly so made his last will. A very short time before the sickness that ended in his death, he conversed with us about her in the paternal and affectionate terms as theretofore; told us that he had completed and finished his last will. He thereupon took from a small black case his said last will, and gave it open to me and Judge Pitot to look at and examine. It was wholly written, dated, and signed, in his own handwriting. Pitot, De la Croix, and myself, were the executors. In it Myra was declared to be his legitimate daughter, and the heiress of all his estate. Some short time afterwards I called to see him, and learned from —— that he was sick in bed, too sick to be seen by me; however, indignant at an attempt to prevent me from seeing my friend, I pressed forward into his room. He took me by the hand, and with affectionate reprehension said, 'How is it, Bellechasse, that you have not come to see me before since my sickness? I told —— to send for you.' My answer was that I had received no message or account whatever of his sickness. I said further: 'My friend, you know that on various occasions I have been your physician, and on this occasion I wish to be again.' He looked at me and squeezed my hand. Fearful of oppressing him I retired, and told —— that I would remain to attend occasionally to Clark. —— said there was no occasion for it; that the doctor or doctors had ordered that he should be kept as quiet as possible. On ——'s promising to send for me if there should appear to be any danger, I departed. On the next day, without receiving any message, I went and found Clark dead. I continued my way till I reached Pitot's, whom I found much affected by the death of Clark, and very indignant at the conduct of ——, as well for having always prevented the assistance of Clark's friends, as for not having informed them (particularly him, Pitot, who lived near Clark), of his approaching dissolution, that by their presence the fraud-

ulent suppression of the last will of Clark might have been prevented. 'What!' I said, 'has Clark's last will disappeared?' 'Yes, my friend; it was not in the case in which he had placed it, and the succinct and provisional will of a dozen lines, which he previously made when about sailing for the North, and which he delivered to Relf, has been brought forward.'

"To fill my sacred duty towards Clark and his daughter, I wrote and sent her, many years before I saw her in Matanzas, in 1833, two letters, to Philadelphia. In these letters I informed her of the confidential trust held by me for her from her father, and of the fraudulent suppression of her father's last will, made in her favor; but neither of these letters, although sent by a safe conveyance, got into her hands, as she assured me afterwards in Matanzas. In that place I spoke at length with her and her husband of her rights, and of the cruel suppression of those rights. Since that time I have never seen them. On some occasions I wrote to them again, always assuring them of my friendly and almost paternal feelings towards the child of my old friend. I never heard Clark speak of having any other child besides the said Myra; I never heard him say that she was a natural child; I never heard him speak of any stain upon her, or her birth, but on the contrary he styled her in his will of 1813 his legitimate daughter; he told me that she was his only child.

"The last will of Clark, viz., his will of 1813, was legal in form. Few men were equal to Clark in talents and intelligence. He was well instructed in the principal matters that appertain to a gentleman and the proprietor of vast possessions; and the future happiness, fortune, and standing of his child were the objects dearest to his heart, and he satisfied himself that there was no obstacle to his bestowing his fortune upon her. Pitot, the judge of the Court of Probates at New Orleans, was one of the executors in Clark's last will, viz., that of 1813. He examined it after it was finished, and he should have known whether it was legal in form and in its provisions. Few lawyers in Louisiana were better acquainted with the laws than Clark; and had he not been, he numbered among his intimate friends some of the ablest lawyers of that State, and he was the last man to neglect any means necessary to accomplish an object which he was so intent upon."

Statement of the case.

Dusuau de la Croix, already mentioned as having, in 1813, caused the notaries of New Orleans to be summoned to see if no will of 1813 existed, now, A. D. 1834, testified in substance, thus:

That he was very intimate with Clark, for a great many years, and up to the time of his death; that some few months previous to this event, Clark visited him, and expressed a wish that he, the deponent, should become his executor. In this conversation Clark spoke of a young female, named Myra; he expressed a wish that the deponent should become tutor to this female, and that she should be sent to France for her education, and said that he, Clark, would leave her a sufficient fortune to do away with the stain of her birth; that a month or two after this, the deponent called to see Clark at his house, and found him in his cabinet; he had just sealed up a packet. The superscription on it was as follows: "To be opened in case of death." Clark threw it down in the presence of deponent, and told him that it contained his last will, and some other papers which would be of service. The deponent did not see the will, nor does he know anything about its contents; he only saw the package with the superscription on it.*

In this conversation Clark observed that he had named R. Relf and B. Chew as his executors in a former will.

On this and other evidence of its specific contents, the will thus lost or destroyed and sworn to, was finally, on the 18th of February, 1856, received by the Supreme Court of Louisiana as the last will of Daniel Clark; reserving to Relf (the surviving executor of the former one) the right, "if he have any, to oppose the will in any manner allowed

* This testimony of De la Croix is commented on by the court, *infra*, Gaines *v.* De la Croix, p. 721, and in so far as it goes to militate against the will of 1813, discredited. It seemed that when the notaries answered that no will of Clark was in their possession, De la Croix, assuming that none existed, or could be proved, made purchases of slaves from Relf, acting executor of the will of 1811. Suit was now brought against him for their value. He thus had a direct interest to support the will of 1811, as against that of 1813. What he said in favor of the existence of the will of 1813 was an admission against himself; while his declaration that he knew nothing of its contents was not allowed to impair the value of the testimony of other witnesses who swore to their nature.

by law as fully as he could have done had he not been a party to these proceedings."

The will now established contained these clauses:

"I do hereby *acknowledge* that my beloved Myra, who is now living in the family of Samuel B. Davis, is my *legitimate* and *only* daughter; and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named."

* * * * * * * * *

"I further give and bequeath an annuity of five hundred dollars to Caroline Des Granges, until she arrives at the age of majority; after which, I give and bequeath her a legacy of five thousand dollars."

But the establishment of this will did not end the matter. By the law of Louisiana, it is not allowed to a testator to make devises to his adulterine bastard. The question of a marriage ceremony performed between Clark and Zulime became, therefore, a matter of primary importance. Had any marriage ceremony been performed between them before the birth of Myra? There were evidences on both sides.

I. AGAINST such a conclusion were supposed to be:

1. The fact, in connection with Clark's special character, of the different social positions and reputation of the parties; the fact that the first child was, in reality, illegitimate, and was known to be so at least by Mr. Coxe; and that in New Orleans, a place, at this time, of a few thousand inhabitants, and where he was himself the most conspicuous and best known person in it—a leader of party there—he was looked upon by the community generally to be an unmarried man.

Thus one witness—Cavillier, a merchant in New Orleans—after stating that he was long and intimately acquainted with Clark, said:

"I never knew him as a married man; I never heard of his being married; I always knew him as a bachelor. . . . He was

considered as the lover of Mrs. Des Granges; was considered an honest man, a man of good reputation. It is for that very reason that I think he was never married to that woman, because he well knew her conduct, and was himself a man of delicacy of feeling."

So Julien Domingon, another witness:

"I am sixty-one years of age. I have lived in New Orleans forty-five years. I knew Clark as well as a young man of fifteen years and some months could know a man of about forty years. I first knew him in 1804. I always thought he was a single man. He was much before the public in those days; his character was much discussed in the public papers. It was never rumored or said, in public, that he was married. He had the reputation of having several mistresses. I do not recollect that at that time Madame Des Granges was reputed to be his mistress."

Mr. W. W. Montgomery:

"He was always considered a bachelor by his friends and acquaintances in general. I never heard him spoken of in New Orleans as a married man during his lifetime. He was a high-minded, honorable man. I do not believe that he was capable of addressing a young lady with a view to marriage if, at the same time, he had been, in truth, a married man. He had too much honor."

J. Courcelle said:

"Clark was never married, so far as I know. I have said that he was never married, because the population was so small that we knew everything that took place. I knew Madame Des Granges. I have been in certain circles where her reputation was spoken of lightly; *but I cannot give any positive testimony* about it. She was very *coquette et legere*."

Mr. Charles Harrod:

"I have always heard him speak of himself as a bachelor, and we frequently joked with him about a lady in Baltimore, whom we supposed he was going to marry. Frequently, when dining together, we conversed on such subjects, and the course of conversation was that of bachelors; it led me always to believe he

was a bachelor. I think he was considered a bachelor by the community of New Orleans."

E. Carraby:

"Clark and Madame Des Granges lived together in an illicit connection. I mean, this was the general report. Her reputation was known enough not to have been misunderstood by Clark. Mr. Clark was a too high-minded man to contract marriage with his paramour."

Mrs. Julia Wood:

"I lived in Mr. Relf's house when Clark lived there also. My conviction on this subject results from my intimate knowledge of him; and I know that he was not married as certainly as I know any other negative fact. I ought to add, that his peculiar tone and style of character was such that he would have been one of the very last men on earth to marry clandestinely, or to marry any woman whose social position was not in all respects equal to his own, or whose personal character was not of the highest order."

P. J. Tricou:

"She was considered as the *amante* of Clark."

J. B. Dejan:

"Was well acquainted with Clark from 1797 up to the time of his death in 1813. He stood high in the opinion of all the respectable families of New Orleans. He was a single man. I never heard from any person, up to the time of his death, that he was a married man."

Jean Canon:

"Knew Clark intimately. He never told me he was married. I always forbore questioning him about Madame Des Granges. Their connection was kept very secret. Clark kept such things concealed as much as possible; as he had several such connections, and it would have given him trouble had his particular female friends known them. Whenever he spoke of her, he spoke of her as a beautiful woman, and deservedly, for she really was a beautiful woman. When Clark saw a pretty woman he fell in love with her."

Mr. Hulings, an intimate acquaintance:

"I firmly believe Clark was never married."

Mrs. Hulings:

"It was as perfectly understood that Mr. Clark was an unmarried man as that Relf and Chew were married men."

D. W. Coxe, the partner of Clark:

"My personal relations with Daniel Clark, in the years 1802 and 1803, were of the most intimate and confidential character. I do not believe it possible that Daniel Clark, standing in the business and personal relationship of unlimited cordial confidence which he did to me, would have been married in the city of Philadelphia, or anywhere else where I was, at the time mentioned in the interrogatory, without his informing me of it, and inviting me to the wedding. Such a thing is, of course, possible, but I can imagine few events in life less probable."

Coxe further testified, that when Zulime was in Philadelphia, just before her marriage with Mr. Gardette, she told him "she had heard that Mr. Clark was going to be married to Miss ——, of Baltimore, which she complained was a violation of *his promise* to marry her."

2. In all of the public and notarial acts signed by Daniel Clark, he represented himself as a single man.

3. His relations regarded him as unmarried. Thus his mother in her will so speaks of him; and on the representations of Mr. Coxe and others that they were so, makes provision for both his "natural" children.

4. He declared himself (*a*) by words and (*b*) conduct, unmarried.

(*a*) In 1806 his sister writes to him in regard to a "toilet" which he had bought in London:

LIVERPOOL, May 3d, 1806.

MY DEAR BROTHER:

I scarcely know whether you will be obliged to me, or not, for the share I had in fitting up your truly elegant toilet, but the idea of its being intended for Mrs. D. Clark got strong possession of my mind, and so much do I wish to see one bear

that name worthy of you, that nothing in my opinion would be too good to trust in it. I cannot think how the plan of such a thing could enter into your head, for I assure you it has been exhibited in London as a masterpiece of elegance and fashion. Do pray write soon to me; you cannot think how uneasy I made myself when I heard you went to Vera Cruz. Why will you be forever toiling? Surely you should now sit down and enjoy life. Let me know if my suspicions are right about the destination of the toilet. If they are, may you be as happy in your choice as your affectionate sister,

JANE GREEN.

DANIEL CLARK, ESQ., New Orleans.

Clark replies to her:

NEW ORLEANS, 14th October, 1806.

MY DEAR SISTER:

I have received your letter of the 3d May, and thank you kindly for the pains you took in filling the toilet. I assure you that it would have given me infinite pleasure to have offered it either to Mrs. Clark, or any person likely to become Mrs. Clark; but this will not be the case for some time to come, for as long as I have the misfortune to be hampered with business, so long will I remain single for fear of misfortune or accident.

DANIEL CLARK.

(*b*) *He addressed other ladies.* The matter has been already spoken of in regard to Miss ——, in the year 1808. So it was testified by a female witness, that Clark "paid his addresses and was engaged to Madame —— (sister of the witness), up to the time of his death; that the courtship began about a year before Clark's death; that the engagement took place about eight months before; that the marriage was delayed, from causes which the witness did not particularly understand, from time to time, and was to have been celebrated within about two months, when it was put an end to by the death of Clark. The witness stated that she had never heard any cause assigned why the marriage was not celebrated immediately after the engagement; that her sister had been divorced; and, finally, in 1815, and after Clark's

death, that she was reunited by civil contract to the same man from whom she had been separated."

5. He suffered another man to possess Zulime as a wife.

On the matters presented in these two last heads, Mr. Coxe said on cross-examination:

"Daniel Clark was a high-tempered and chivalrous man, and his disposition was quick and impetuous. I have known no man who would have more promptly resented an imputation against his honor or integrity. I can express most decided belief that he would not have submitted to the indignity of allowing a man to take from him his wife, if he had any, and appropriating her to himself.

"I can express, also, a decided opinion upon the other point inquired of, and it is this: That I am perfectly sure, that if Daniel Clark had been in truth a married man (whether that marriage had been public or private), and his wife still living, he would never have held himself out to the community and the social circles in which he moved, directly or indirectly, as an unmarried man. I am equally sure, that in the case supposed he would never have approached a lady with overtures of marriage, nor would he have announced to his friend an intention of addressing a young lady with a view to marriage. There ought to have been no doubt upon the mind of any man who knew anything of Daniel Clark on this subject, that he would neither have been guilty, or even conceived, of acts so atrocious."

6. So it appeared that on the 30th November, 1805, Zulime, by her attorney, one "Eligius Fromentin," reciting "An act concerning alimony," &c., and that it was provided in it "that the county court shall have jurisdiction on applications from wives against their husbands for alimony on their husbands deserting his wife for one year successively, and in cases of cruel, inhuman, and barbarous treatment," and that she had been so treated "by Jerome Des Granges her husband," and "likewise deserted by him for three years past, to wit, from the second day of September, 1802, even unto this day, although she has been told that the said Jerome Des Granges returned from France to New Orleans some time in the course of last month, and is now in the city of New Or-

leans," petitioned the county court of New Orleans to condemn the said Des Granges "your petitioner's husband," to pay her alimony for her support, at the rate of $500 per annum. To this petition Des Granges never appeared, and judgment went against him by default.

7. So too it appeared that in June, 1817, application was made in behalf of the child, by the law firm of Davis & Pierce there,—Davis being a son of Col. Davis,—to the District Court of New Orleans, for alimony. The petition was entitled, "Myra Clark and her curator *ad litem*, S. B. Davis, *v.* B. Chew and R. Relf, executors of Daniel Clark, deceased," and sets forth that Myra Clark, 13 years of age, was "the *natural daughter* of Daniel Clark," acknowledged by him as such, and entitled to "*alimony*," from his estate. It further stated that "the petitioner had heard that some instrument was executed by her said father making some provision for her, and concluded with a prayer that the executors produce all papers relating to her," &c. This petition was withdrawn soon after being filed, in consequence, as it seemed, of an assurance from either Mr. Relf or Mr. Chew "that they would do all that was right if they could have a little time, and that it was not worth while to have a suit about it."

8. Mr. Coxe stated that some years before the one when he was now speaking (1849), having heard much of the will of 1813, and also that the late Stephen Mazureau, then a distinguished lawyer of New Orleans, was cognizant of certain matters connected therewith, and having in February, 1842, conversed with Mr. Mazureau on the subject, and being, as he testified, desirous not to rely on his own recollections of what Mazureau said, he had addressed Mazureau a letter, and that Mazureau's reply—which was annexed to Coxe's deposition—was as follows:

NEW ORLEANS, May 1st, 1842.

SIR: In the conversation with you in February last, I mentioned, in reply to your inquiries, that the late Daniel Clark once consulted me and the late Edward Livingston, Esq.,—not "to ascertain whether he could make some provision by will for

Myra, his supposed illegitimate daughter,"—but whether a certain will, of which he showed me a rough sketch, would be valid in law in this then Territory. The will thus intended to be made, stated Myra to be his natural child, and instituted her his universal heir, leaving to his own mother an annual rent of, I believe, $3000. Upon asking Mr. Clark what the name of the girl's mother was, he answered me: "You know the lady, it is Madame Des Granges." "But that woman was married, and Des Granges was alive when the girl was born. I recollect having heard a great deal of talk about it at the time, but never heard your name mentioned as connected with that love affair." "Yes," said Clark, "she was married, I know; and what matters it? The ruffian (who kept a confectionery-shop here) had deceived that pretty woman; he was married when he courted her and became her husband, and, as it was reported, he ran away afterwards from fear of being prosecuted. So, you see, this marriage was null." "That may be, but, until so declared by a competent tribunal, the marriage exists, and the child is of such a class of bastards* as not to be capable by our laws of receiving by will, from her supposed father, anything beyond what may be necessary for her sustenance and education. Such are the positive provisions of our code. The Spanish laws were somewhat more favorable. They permitted the father to leave to such a child one-fifth of the whole of his estate, but our code has restricted that to mere alimony."

I showed Clark both our codes and the Spanish laws, and, though apparently disappointed, he expressed his satisfaction that he could not make the will he intended to make. I went further, and showed him the girl could not be legitimated or even acknowledged as his child, by subsequent marriage or otherwise. I showed him, also, that if his mother survived him, she was his forced heir, and that in supposing that he could leave to the child anything beyond what is necessary for her sustenance, it could not be of the value of more than one-third of his estate, as his mother was entitled to take and receive two-thirds clear of all charges or dispositions.

"What shall I do, then?" asked Mr. Clark. "Sir, if you have friends in whom you can place your confidence—you probably

* An adulterous bastard.

have some—convey them secretly some of your property, or give them money for the use of the child, to be given to her by them when she becomes of age." "That I'll do," said Clark, and we separated.

I heard afterwards from him, and from Mr. Bellechasse, that he, Clark, had done what he told me he would do.

* * * * * * *

As this is written in haste, I would not like it to meet the eye of the public, though every particle of it is most substantially true.

I remain, with great respect, sir,
Your obedient servant,
MAZUREAU.

D. W. COXE.

Mr. Mazureau had not apparently been called as a witness to prove the facts stated in his letter.

9. If any marriage had been solemnized, it was at Philadelphia, and as primarily testified by the only witness who swore to being at it, in the year 1803, though in one deposition she said it was perhaps in 1802. None other was set up. Yet it seemed that in 1803 Clark had not been in Philadelphia; and that he was there in 1802 only at and near the time when he had sent Zulime to be delivered of Caroline, a circumstance, which, as the reader will, perhaps, see hereafter, the testimony to prove the marriage appeared rather to separate from the date of that event.

On the subject of Clark's presence in that city, in the years 1802 and 1803, the testimony was thus:

A letter from Clarke to Chew & Relf, dated Philadelphia, 18th February, 1802, said:

"I *returned* three or four days from Washington, where I had an opportunity of seeing the President and officers of government, by whom I was well received. . . . It has been hinted to me that a great deal is expected from my services."

How long he had staid at Washington, except by the expressions quoted, did not appear; nor when he first arrived in Philadelphia before going to Washington.

Mr. Coxe—having stated that Clark had sent Madame

Des Granges to him in an advanced state of pregnancy, and that she had been delivered under his care, as Clark's friend —testified, at different times, to this effect:

Clark arrived in Philadelphia within a very short time after the birth of Caroline, which was, I believe, in April, 1802. I then received from him the expression of his wishes in reference to the child. At this time he left with me a power of attorney, which is annexed, and to which I refer.* Immediately thereafter he left for New Orleans, and arrived in Philadelphia again, in a vessel from New Orleans, during the last days of July, 1802. He was at Wilmington, below this city, on the 22d of July, 1802, as will be seen by his annexed letter to me of that date.† He had pressing business of great magnitude, which occupied his entire time during his stay in Philadelphia. My impression is that I saw him every day during his stay in Philadelphia. On his arrival in Philadelphia he commenced making preparations for an immediate departure for Europe, on business of importance; and left the city in a few days for New York, from whence he sailed for Europe in a very short time; I am quite certain, previous to the middle of August, 1802.‡ He remained in Europe until, I think, the latter days of November, 1802, at which time he sailed directly from Europe to New Orleans, where he arrived, as I understood, in the last days of February, 1803; the vessel having put into Kingston, Jamaica, from some cause, which caused her to make a longer passage. He was not in Philadelphia at any time during the year 1803, to my knowledge; and I believe

* This power, executed by Clark at Philadelphia, was dated 22d April, 1802. It had no reference to the child.

† This document was annexed to testimony taken in the case. A letter of Clark, dated "Plaquemines, Sunday, 27th June, 1802," speaks of himself as hoping "to-morrow to get to sea."

‡ An original letter from Coxe to Relf & Chew, dated August 6th, 1802, produced, said:

"Mr. Clark wrote you very fully per mail some days since; since when he has come up to Germantown, and to-morrow sets out for New York, there to embark for England."

A letter from Clark to them, New York, 17th August, 1802, mentions his being about to sail "to-morrow."

In an original letter from Clark, in Liverpool, dated 7th October, 1802, he speaks of himself as having been there three days.

if he had been I would have known it. It could scarcely have been otherwise. As to the time of his arrival in New Orleans, I refer to the letter annexed.* . . . The occasion of his visit to Europe was urgent business connected with our commercial transactions, making it necessary that he should arrange certain business matters with our mercantile friends in that country, rendering it necessary for us to know the existing and probable future political state of England and the continent generally.

Coxe, as already mentioned, testified that he knew nothing whatever about any marriage, and wholly disbelieved that any had ever taken place.†

II. ON THE OTHER HAND were various testimonies relied on to prove a marriage; as—

1. The acknowledgment and declaration, testamentary and oral, of the child's legitimacy, already mentioned in the history of the will of 1813.

2. Positive testimony given in 1849, by one witness, Madame Sophie Despau, the sister of Zulime, to the *fact* of marriage. The testimony ran thus:

"I do know that Daniel Clark was married. He was married in Philadelphia, by a Catholic priest, to my sister Zulime. I was present at this marriage. This, to the best of my recollection, was in the year 1803; although there are some associations in my memory which make me think it not improbable

* This letter, dated 31st January, 1807, was one from Clark to Coxe, giving an account of a particular transaction, and in which he says: "When I returned from Europe, in the beginning of the year 1803, . . . the French making immediate preparations to take possession of Louisiana," &c. Other letters were produced, two addressed to him at New Orleans, April 18th, and May 27th, 1803; others from himself, dated New Orleans, 8th June, 13th July, 21st July, 18th August, 6th October, 1803, showing Clark's presence there then, and others from Mr. Jefferson and Mr. Madison to him during the same year; the last dated 31st October, 1803. This last letter pointed plainly to the critical condition of things at that time in Louisiana, and to the reliance had on Clark by the Federal government, in case of "a *coup de main*." There were also letters to Clark at New Orleans from Coxe, dated November 18th, and December 23d, 1803.

† See his testimony, *supra*, p. 672.

that the marriage may have taken place in the year 1802.* My impression, however, is, that the marriage took place in 1803. It was, I remember, a short while previous to Mr. Clark's going to Europe.† There was one child, and to the best of my knowledge and belief, only one child, born of this marriage, to wit, Myra. The circumstances attending the said marriage, were these: Zulime had previously been married to a man named Des Granges, with whom she lived several years, until she heard that he had another living wife at the time of his marriage with her. This information, confirmed by the subsequent admissions of Des Granges himself, led to a separation, when Zulime returned to her family. These circumstances were known to the public. While thus residing with her family, Mr. Clark made proposals of marriage with her. These proposals were made with the full knowledge of all the family. But it was considered essential, before any marriage could take place, that record proof of the invalidity of her marriage with Des Granges should be first obtained. To obtain this proof from the records of the Catholic church in New York, where Des Granges' prior marriage was celebrated, my sister and myself embarked for that city. It was agreed and understood that Mr. Clark should follow after us. On our arrival in New York, we learned that the registry of marriages of which we were in search had, in some way, been destroyed. Mr. Clark arrived after us. We were told that a Mr. Gardette, then living in Philadelphia, was one of the witnesses to Des Granges' prior marriage. We proceeded to Philadelphia, and found Mr. Gardette, who told us that he was present at said prior marriage of Des Granges; that he afterwards knew Des Granges and his wife by this marriage; and that this wife had gone to France. Mr. Clark then said to my sister, 'You have no longer any reason to refuse being married to me. It will, however, be necessary to keep our marriage secret until I have obtained judicial proof of the nullity of your

* The year of the alleged marriage as given in the text, is that given by Madame Despau, in a deposition of 1849. In a deposition taken in 1845, now offered by the defendants to contradict and discredit her, and, in connection with a deposition of her sister, who stated that same year (while both stated that they had personal knowledge of Caroline's birth and Madame Despau that she was born in 1801), to show conspiracy between the two sisters, she stated that the marriage was "in 1803."

† For the date of this voyage, see *supra*, p. 678, and notes.

marriage with Des Granges?' They, the said Zulime and the said Clark, were then married. Soon afterwards, our sister, Madame Caillavet, wrote to us from New Orleans, that Des Granges' former wife (the one he had at the time of marrying with Zulime) had arrived at New Orleans. We hastened our return to New Orleans, where Des Granges was prosecuted for bigamy.* Father Antoine, of the Catholic church in New Orleans, took part in the proceedings against him. Mr. Des Granges was condemned for bigamy in marrying the said Zulime, and was cast into prison, from whence he secretly escaped by connivance of the governor, as it was understood, and was taken down the Mississippi River by Mr. Le Brenton D'Orgenois, where he got to a vessel and escaped from the country. This happened not a great while before the cessation of the Spanish government in Louisiana. Mr. Clark told us that before he could promulgate his marriage with my sister, it would be necessary that there should be brought by her an action against the name of Des Granges. The change of government, which took place about that time, created delay; but at length, in 1806, Messrs. Brown and Fromentin, as the counsel of my sister, brought suit against Des Granges, in, I think, the City Court of New Orleans. The grounds of said suit were, that Des Granges had imposed himself upon her in marriage at a time when he had a lawful living wife. Judgment in said suit was rendered against Des Granges. But Mr. Clark still continued to defer promulgating his marriage with my sister, which very much fretted and irritated her feelings. While he was in Congress, my sister heard that he was courting Miss —— ——, of Baltimore. She was distressed, though she could not believe the report, knowing her-

* In the deposition of 1845, Madame Caillavet said thus:

"The circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Mr. Des Granges, she heard that he had a living wife. Our family charged him with the crime of bigamy in marrying the said Zulime. He at first denied it, but afterwards admitted it, and fled from the country. These circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family. It was considered essential first to obtain record proof of Des Granges having a living wife at the time he married my sister; to obtain which, from the records of the Catholic church in New York, we sailed for that city." [She then describes the visit to New York and Philadelphia, and marriage there as in the text.] "Soon afterwards our sister, Madame Caillavet, wrote to us from New Orleans that Des Granges' wife, whom he had married prior to marrying the said Zulime, had arrived at New Orleans. We hastened our return to New Orleans. He was prosecuted for bigamy," &c.

self to be his wife. Still, his strange conduct in deferring to promulgate his marriage with her had alarmed her, and she and I sailed to Philadelphia to get the proof of his marriage with my sister. We could find no record of the marriage, and were told that the priest who married her and Mr. Clark was gone to Ireland. My sister then sent for Mr. D. W. Coxe and mentioned to him the rumor above stated. He answered that he knew it to be true that Mr. Clark was engaged to the lady in question. My sister replied that it could not be so. He then told her that she would not be able to establish her marriage with Mr. Clark, if he were disposed to contest it. He advised her to take the advice of legal counsel, and said he would send one. A Mr. Smith came, and, after telling my sister that she could not legally establish her marriage with Mr. Clark, pretended to read to her a letter in English (a language then unknown to my sister), from Mr. Clark to Mr. Coxe, stating that he was about to marry Miss ——. The marriage between Mr. Clark and my sister was a private one. Besides myself, there was present at the marriage a Mr. Dorsier, of New Orleans, an Irish gentleman, a friend of Mr. Clark's, from New York, whose name I do not recollect. Mr. Clark told me in his lifetime that he had informed Colonel Davis, Mr. Coxe, and Mr. Relf, of this marriage. It was known only to a few friends. By the marriage of my sister with Mr. Des Granges there was born two children, a boy and a girl. The boy died. The girl lived, and was named Caroline.* She afterwards married a physician named Barnes. She was born in the year 1801. The marriage was privately celebrated at a house in Philadelphia, rented by Mr. Clark for my sister, but I am unable to remember the name of the street on which it was situated, or of the priest who officiated. The great lapse of time which has taken place since these events, renders it impossible for me to answer with the precision the question demands. As well as I can remember, it was in one of the early months of spring, in 1802 or 1803.

* In another deposition, this witness, after stating that Caroline was Des Granges' child, testified about her thus:

"*Since* the death of Mr. Clark, Mr. D. W. Coxe and Mr. Hulings, of Philadelphia, gave her the name of Caroline *Clark*, and took her to Mr. Clark's mother, and introduced her as the daughter of her son. She, of course, believed their story, which induced her, in her will, to leave a portion of her property to Caroline. Caroline was born in 1801. I was present at her birth.'

Mr. Clark was several weeks in Philadelphia before the marriage. I did not know, or cannot now remember, where he lived during that time. We stopped first at a boarding-house kept by an American lady, I think a widow, whose name I cannot remember. We were in Philadelphia but a short time previous to the marriage. My sister was about nineteen or twenty years old at the time of her marriage with Mr. Clark. After the marriage we resided together in the house provided for my sister, as I have already stated.

"I have stated fully my recollection of all that concerns the marriage. Not a great while after the marriage, Mr. Clark set out for Europe. Soon after his departure, in consequence of information received from our sister, Madame Caillavet, at New Orleans, in regard to the arrival there of the first wife of Des Granges, we set out for that city. We arrived there, I think, in the summer. I do not remember the precise time of Mr. Clark's arrival there, but it was afterwards. It is impossible for me to recollect with certainty the precise time occupied by each one of so many events that happened so many years ago.

"Mr. Clark furnished my sister with a handsome house in New Orleans, in which she and I resided together, and where he frequently visited my sister, taking his tea with us almost every evening. This house was situated on a corner, and, I think, near what was then called the Bayou Road; but I cannot recall the name of the street, or fix with certainty the precise locality.

"Mr. Clark enjoyed throughout Louisiana, as far as my knowledge extended, the character of a highly honorable man. He had great pride of character, and was as quick to resent and punish any personal indignity as any man I have known. I have always believed that his feelings and purposes towards my sister were sincere and honorable, and that he would have proven this by giving her her true position before the world as his lawful wife, if it had not been for the unfortunate state of feeling that was produced between them. I do not believe he was a man to impose designedly upon any one, or to suffer it to be done where he was concerned. What would have been his course in the matter if he had been apprised of the contemplated marriage between her and Gardette, it is impossible for me to say. My sister has told me, that in an interview had with him in Philadelphia, after the marriage with Mr. Gardette, he ex-

pressed the deepest regret that that barrier had been placed between them; stating that he had become thoroughly satisfied that things he had heard in regard to her, and which had influenced him to postpone the promulgation of his marriage with her, were calumnies; that he acquitted her of all blame; and that but for the marriage with Gardette, he would then have claimed and recognized her before the world as his wife.

"It was the misfortune of my sister, only a girl of thirteen, to be deceived in her first marriage with Mr. Des Granges, who, as I before stated, was a married man at the time he married my sister. Being satisfied that she had been imposed upon by Mr. Des Granges, and was no longer his wife, she married Mr. Clark. Had it not been for the interested wickedness of Mr. Coxe, in assuring her, and employing counsel to aid him in misrepresenting to her, that her marriage with Mr. Clark was illegal, she never would have married Mr. Gardette. It was the misfortune of my sister to have been deceived by those whose duty it was to protect her, and it is my firm belief, that neither in the eye of God nor highly honorable men or women, will she be condemned; but, on the contrary, be pitied for her unprecedented afflictions."

3. To the same general purpose was the testimony of another sister, Madame Rose Caillavet, taken in 1849, at the age of 83:

"I was not present at the marriage of my sister with Mr Clark; but it is within my knowledge, both from information derived from my sisters at the time, and from the statements of Mr. Clark, made to me during his lifetime, that a marriage was solemnized between them. It is to my personal knowledge that Mr. Clark, about the year 1802 or 3, made proposals of marriage with my sister Zulime, with the knowledge of all our family. They were discussed, and the preliminaries of the marriage arranged by my husband, in his house, in my presence. But my sister, having been previously married to one Des Granges, who was found to have had a lawful wife living at the time of his marriage with her, the marriage of Mr. Clark could not take place until proofs of the invalidity of her marriage with Des Granges were obtained. To procure these proofs from public records, my sisters, Zulime and Madame Despau, went to the

north of the United States, where Des Granges' prior marriage was said to have taken place. While there, my sister Zulime wrote to me that she and Mr. Clark were married.* I have always understood that the marriage between my sister and Mr. Clark was a private one, and that it was not promulgated by Mr. Clark in his lifetime, unless he did so in a last will made a short time previous to his death. Mr. Clark stated to me frequently that Myra was his lawful and only child.

"Some years after my sister's marriage with Mr. Des Granges, it became known in New Orleans that he had a prior wife living. My sister immediately separated herself from him, and came to reside with her family. At a later period, Mr. Des Granges was prosecuted, found guilty of bigamy in having married my sister Zulime, and cast into prison. I did not know the first wife of Des Granges, but it is within my knowledge that she came to New Orleans, and while there fully established her pretensions as his lawful wife."

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* This deposition of Madame Caillavet was taken, as above said, in 1849. In it the witness said that she desired to state as she now did, under the solemnities of her oath, that a certain deposition of hers taken in 1835 was, as it had been translated to her from the English copy filed, in very material parts a garbled and mistranslated statement of what she had really said. She had mentioned in this deposition that while Zulime and Madame Despau were at Philadelphia, "Des Granges returned from France, and at the same time or a very short time after his first wife made her appearance." The deposition proceeded; the italicized part being the part which she stated was a misconception of what she had said:

"Upon this, witness immediately apprised her sister of this fact, and she returned immediately to New Orleans. On the arrival of the said first wife of Des Granges, she complained to the governor, who caused Des Granges to be arrested (it was under the Spanish government); after some time, he obtained his release, and left the country. Before his departure, he confessed that he had previously married. Witness understood *afterwards* from her sister, by letters which she received from her secretly, that she was married with Mr. Daniel Clark. The preliminaries of the contemplated marriage were settled by the husband of witness, at his house, in the year 1802 or 1803, in the presence of witness.

"Cross-examination: *When her sister wrote to her about her marriage with Daniel Clark, she informed her afterwards that she had had a child (a daughter) by that marriage, who, she understood, was called Myra.*"

The witness, in making the correction, stated that "the information of witness, so far as derived from her sister in regard to the said marriage with Daniel Clark, was derived at the time the event took place."

The same witness, examined in 1845, said:

"Mr. Clark's marriage with my sister Zulime was after the detection of Des Granges' bigamy. The birth of their daughter, Myra Clark, was some years after the marriage. I was not present at the marriage of my sister with Mr. Clark. I believe they were married, because my sister wrote me from Philadelphia that she was married to Mr. Clark; Mr. Clark also told me the same on his arrival at New Orleans. They were married at Philadelphia. Not being in that city at the time, I am unable to answer the numerous questions on that subject.* I first saw Mr. Clark, I think, in the year 1802. I was introduced to him by Mr. Dosier, of Louisiana. My sister, after her marriage with Mr. Clark, arrived at New Orleans, accompanied only by her sister, Madame Despau. She was married to Mr. Clark as Miss Zulime de Carriere, *in the year* 1803; I do not remember the month; I do not remember the season of the year that Mr. Clark returned to New Orleans; she did not accompany him. I very frequently saw Daniel Clark after his marriage with my sister; as the marriage was a private one, it was not advisable that they should reside in the same house; he, however, provided her with all the elegancies of life, and was devoted to his wife and child."

4. Bellechasse, also (already mentioned):

"I cannot swear that Clark was married to Miss Carriere, the mother of his child, although many persons affirmed that such was the fact; but I am well assured that, if he was not married to her, he was never married to any other woman."

5. In regard to the petition presented by the law firm of Davis & Pierce, as at the suit of Myra Clark, Colonel Davis testified that if it contained such words, as "that the petitioner, Myra, was the natural daughter of Daniel Clark, late of the city of New Orleans, deceased, acknowledged by him

* In other depositions of the same witness (which were relied on by the defendants to prove falsehood in her), Madame Caillavet stated that the birth of both Des Granges' children (one being specified as "Caroline"), was "*well* known to her of her *personal* knowledge."

as such," or words to that effect, they were never made use of with or by his knowledge or consent.

6. The fact, that while several persons *supposed* that they each possessed Clark's entire confidence about all his domestic concerns, it was now evident that they possessed it only in relation to single, separated, and particular parts or items of them; and that on other things, even of a kindred kind to those which they knew much or all about, he kept his confidences habitually and closely locked up from them. Why not then about a marriage meant to be a secret one, supposing such a marriage to have been performed?

Thus the testimony showed conclusively, that his most intimate friends in New Orleans, Boisfontaine and Bellechasse, both of whom knew all about Myra there, knew nothing whatever about Caroline in Philadelphia. Baron Boisfontaine testified:

"From the time of Myra's birth, Mr. Clark treated me as his confidential friend, in matters relating to her and to his *affairs generally*. The said Myra is the *only* child he ever acknowledged to me as his."

So Colonel Bellechasse:

"I never heard Clark speak of having any other child beside Myra. He told me that she was his *only* child."

On the other hand, his partner Coxe, in Philadelphia, with whom he was undoubtedly most intimate, and who knew all about Caroline, knew nothing whatever about the history of Myra, living, after 1812, in the same city with him; and with difficulty would believe that she was a child of Clark's at all, or of anybody except Colonel and Mrs. Davis. He thus testified:

"Daniel Clark had not to my knowledge any other child besides Caroline. He never acknowledged any such child to me. My intimacy with him would have justified, and would have been likely to induce, such a disclosure to me, if there had been any such child or children. Such, at least, is my belief, *though in some respects Mr. Clark was a man of very peculiar character.*

After his death, I was informed by Dr. Hulings and S. B. Davis, for the first time, that he had another daughter by Madame Des Granges, born in New Orleans, called Myra."

So in February, 1802, a date very near (either before or after) to the birth of Caroline, Clark, having just returned from Washington, and being then in Philadelphia, where Zulime and her sister were, writes on the 18th of that month to Chew & Relf:

"When you write to me on private matters, let your letters come direct to Mr. Earle, as things will often occur which I wish only to see. . . . Forward me the $2000 which I wrote to you for in one or two good bills, that I may have some funds at my own disposal, without calling on Mr. Coxe for trifles, as I may want money. This must be a business kept to yourself."

III. The testimony of Colonel Davis, now aged eighty-one and upwards, was not perhaps of a very positive kind in any direction. He proved that Clark spoke of the child as his daughter, was proud and devotedly fond of her, and so spoke of her as to leave no other impression than that she was to be the recipient of all his property. He had never heard Clark "speak of Zulime as his wife, nor as holding a very different relation to him;" never having conversed with him on this subject. Clark had never made use of any expression to him which would convey the idea that Myra was an illegitimate child. He had no particular knowledge of Mr. Clark's ever having married. He never told Davis that he was married. The matter was never a subject of conversation between them. He did not think Mr. Clark would have been likely to marry two wives. He had never had any conversation with the sisters of Zulime (Mesdames Despau or Caillavet) in connection with Myra's legitimacy. They had never urged him to claim the estate for her. He added—

"Could I have had the satisfactory means of proving that Myra was Mr. Clark's legitimate child, and could I have had reason to believe that anything would have been gained from

out the estate, I certainly should have taken legal advice, and should have followed it. It was reported that Clark's estate was insolvent, and before I had any means of ascertaining the precise situation of the estate, Myra was married. I never doubted but that some arrangement had been made by Mr. Clark in relation to her."

In regard to this testimony of Colonel Davis, Peter A. Browne, a member of the Philadelphia bar—and on terms of intimacy with Davis, and an administrator *pendente lite* of his estate—testified:

"Colonel Davis frequently told me that she was the natural daughter of Clark, and his (Colonel Davis's) adopted child only. I cannot point out any time in particular in which this was said, because it happened in the course of conversation at intervals extending over the whole time of our acquaintance. On one occasion Colonel Davis told me that his deposition had been taken in one of the suits heretofore brought by the plaintiff, upon which I said that I supposed that he had declared that Daniel Clark had not been married to the plaintiff's mother. To which he answered that that question had not been put to him in such a direct manner as to elicit an answer; but added that Clark was no more married to her than he (Davis) was."

IV. So far as respected the great point of the marriage. On the other matters set up, the reporter must be brief.

The defendant's title, as shown from Relf & Chew, and relied on, was through sales made more than a year after Clark's death—some in 1820 and thereabouts. They were not apparently made in virtue of any order of court, directing them.

As respected Clark's insolvency at the time of his death, it was plain enough that in 1811, 1812, and even in 1813, and almost or quite up to the time of his death, he had no ready money, and was greatly straitened for the want of it: not being able to supply even his mother's small requirements. He was very gloomy and despondent as to the issue of commercial things, including his own; all then greatly embarrassed and depressed by our war of that day with Great

Britain. But not long before Colonel Davis's departure from New Orleans, Clark had exhibited to him a schedule of his affairs, showing a surplus of $500,000.

The other defences set up were chiefly matters of law, and need not, perhaps, be presented more fully than they are given at p. 644–5.

Such in a general way was the case as the reporter conceives it. And yet a good deal more, some may think, is required to give it its proper aspect. It must suffice to say that there was hardly a witness who was not directly or indirectly attacked. Forgeries and thefts were charged or insinuated in regard to document after document. The chastity of Madame Despau, who was divorced, and of Madame Caillavet in early life, as of Zulime herself, were assailed. Mrs. Harper's veracity was put to similar proof. A son of Colonel Davis (who, however, had had a newspaper quarrel with Mrs. Gaines), was a witness to disprove his father's statement as to what was directed to be put in the petition of 1805 for alimony, and to prove that in his father's family she was regarded as the natural child of Clark; while Mr. Coxe, examined on his *voir dire*, to show that he had settled a large claim against Clark's estate with Relf & Chew, the executors of the will of 1811, was argued not to be relieved of bias by the fact that he stated that he considered he had no interest, whatever, in the result; it being indifferent to him who succeeded to Daniel Clark's estate, the estate itself being liable to him into whosesoever hands it passed. But these parts of the controversy the reporter does not deem it necessary to present.

The controversy had been already, in various forms, six different times before this court.* *Messrs. Jones*, *Key*, *Reverdy Johnson*, *Campbell*, *Lawrence*, *Cushing*, and *Perin*, representing, at different times, the complainant, and *Messrs. R. S.*

* In Ex parte Myra Clark Whitney, 13 Peters, 404; Gaines *v.* Relf, 15 Id. 9; Gaines *v.* Chew, 2 Howard, 619; Paterson *v.* Gaines, 6 Id. 550; Gaines *v.* Relf, 12 Id. 472; Gaines *v.* Hennen, 24 Id. 553.

*Coxe*, *Janin*, *Henderson*, *Barton*, *Brent*, *May*, *Webster*, *Duncan*, and *Hennen*, the adverse claimants.

Some mention must be made of three of these cases, in which three the question of merits was involved. These were thus:

In 1836, Mrs. Gaines filed a bill against one Paterson and numerous other persons, purchasers of estates of which Clark died in possession, and also against Relf & Chew, executors of the will of 1811,—she, Mrs. Gaines, claiming these estates as heir and devisee of Clark. In their defences to this bill, different respondents pursued different courses—some one, some another. Relf & Chew, for example, demurred. Paterson, however, answered, and his case came up by itself, A.D. 1848, in *Paterson* v. *Gaines*.* The court, on the case as then presented, unanimously considered (Taney, C. J., and Catron and McLean, JJ., being absent, but Wayne, McKinley, Daniel, Nelson, Woodbury, and Grier, JJ., sitting), that the evidence of Madame Benguerel sufficiently established the bigamy of Des Granges, and that of Madame Despau the marriage with Clark; and it adjudged "upon the evidence in this cause," that this marriage was lawful, and that Mrs. Gaines was Clark's only legitimate child and heir at law, and entitled to *her legitimate portion* of four-fifths of Clark's estate. The will of 1813 had not yet been established.

The subject next came up against other defendants at December Term, 1851, in *Gaines* v. *Relf et al.*,† on a record with much additional evidence; more like the present case. The complainants there having set up the decree just mentioned (*Gaines* v. *Paterson*) as *res adjudicata*, the defendants asserted that the case was "no honest exposition of merits, but was brought about, allowed and consented to, for the purpose of pleading the same as *res adjudicata* upon points in litigation not honestly contended." The court (Catron, McKinley, Nelson, Grier, and Curtis, JJ., agreeing; Taney, C. J., and McLean, J., being absent, and Wayne and Daniel, JJ., dissent-

* 6 Howard, 550.

† 12 Id. 473.

ing), deciding that there was "no earnest controversy," held, among other things,—

1. That Mesdames Despau and Caillavet were not worthy of credit, and were contradicted both by Coxe and by the alimony record of 1805.

2. That the naked confession of Des Granges that he had been guilty of bigamy made to Madame Benguerel and her husband, was incompetent evidence, even admitting it was made.

3. That the record of the suit of 1806, wanting as it did the "petition," proved nothing, and was incompetent.

4. That the ecclesiastical record of 1802 of Des Granges' prosecution for bigamy overthrew the feeble and discredited evidence introduced to prove it.

Mr. Justice Catron, who gave the opinion, said, among other things, as in the extracts from it which follow:

"The complainant's principal witnesses are Madame Despau and Madame Caillavet. It appears that, in the spring of 1801, Des Granges went to France. He was absent from his wife Zulime about fifteen months.

"Coxe proves that Madame Des Granges brought him a letter of introduction from Clark, stating that she was then far gone in pregnancy, and requesting Coxe's attention to her wants; that he furnished a house and money, and employed a nurse; that Clark's letter stated the child was his; and we must assume that the mother by delivering the letter impliedly admitted the fact. She was delivered; Coxe had the child put out to nurse. All this time, Madame Despau was with Madame Des Granges. The child was Caroline, and who these witnesses swear without hesitation was the child of Des Granges; and who, Madame Despau swears, was born in 1801. Nor does either witness intimate that she was born in Philadelphia.

"It is true beyond question that these witnesses did know that their sister Des Granges went North to hide her adultery; that she did delude her absent husband; that she did impose on him the mendacious tale, that her sole business North was to clear up doubts that disturbed her mind about his having another wife. These facts they carefully conceal in their depo-

sitions; and on the contrary swear that she went North to get evidence of her husband's bigamy and imposition on her.

"When they swore positively that Caroline was the child of Des Granges, they did know that he had been in France, and his wife in New Orleans, and they had not seen each other for more than a year before the child was born; and Madame Despau could not be ignorant that Clark claimed it as his, and that the mother admitted the fact to Coxe.

"Des Granges went to France with a full power to transact business for his wife and her three sisters, in which the latter style him their brother-in-law. This was his sole business in France, so far as this record shows; and when there, he wrote to Clark, in July, 1801, to assist his, Des Granges' wife; expressing his sympathies, forwarding a package for her, and regretting that he had not heard from her. He also expressed the sincerest gratitude for Clark's proffered kindness in providing for and aiding Zulime in his absence. From these facts it is clear, as we think, that at the time Des Granges left for Europe, he and his wife were on terms of intercourse and ordinary affection, and certainly not separated; and that the cause of their separation is found in the connection formed by Clark and Zulime in Des Granges' absence.

"It is palpable that the witnesses, Despau and Caillavet, swear to a plausible tale of fiction, leaving out the circumstances of gross reality. These originated, beyond question, in profligacy of a highly dangerous and criminal character; that of a wife having committed adultery, and been delivered of an illegitimate child, in the absence of her husband; not only on his lawful business, but on hers, and at her instance.

"This child, with the knowledge of both of these witnesses, and certainly with the aid of one of them, if not both, was concealed in a foreign country, where the mother went and was delivered. This is the reality these witnesses conceal; roundly swearing that they knew this child to be Des Granges'.

"They also swear that Clark arranged with Zulime's family before he went to Philadelphia, and had the assent of her family to marry her; they having previously discovered Des Granges' bigamy. But, according to their account, so scrupulous and delicate was this injured woman, that she refused to marry Clark until she went to New York and there ascertained for herself the fact, that Des Granges had another wife; that Clark soon fol-

lowed Madame Des Granges and Madame Despau, as previously agreed on; and even then Madame Despau swears, when Gardette had informed them that he was present, and witnessed Des Granges' first marriage, her sister's sense of propriety and delicacy was so great, that earnest persuasions had to be used by Clark to overcome her scruples. We cannot shut our eyes on the truth, and accord our belief to this fiction.

"Madame Despau is further discredited by Coxe's evidence. Their contradictory statements raise a question of integrity between the witnesses. If they were equally entitled to credit, still Coxe's statement has several advantages. First: Madame Des Granges disavowed in the strongest terms that she was the wife of Clark by marrying Gardette. Secondly: So important a communication as Madame Despau declares her sister made to Mr. Coxe; so ruinous to Clark's matrimonial prospects, and so deeply disgraceful to him, must have been remembered by Coxe, if such communication had been made.

"Again. Madame Despau swears that she and her sister Des Granges went to Philadelphia to obtain evidence of Clark's marriage with Zulime; that they could find no record of the marriage, and were told the priest who performed the ceremony had gone to Ireland. What occasion could there be for further proof? Madame Despau swears that Clark had proposed, and family arrangements had been made with him at New Orleans, to marry Zulime; that these proposals were made with the full knowledge of all Zulime's family; that Clark followed the witness and Zulime North to fulfil the engagement; that he met them, and the marriage took place; that she, Madame Despau, was present; that Mr. Dosier, a wealthy planter of New Orleans, and an Irish gentleman of New York, were also present. Zulime's family consisted of three sisters and their husbands. Madame Caillavet swears that Clark conversed with her as his sister-in-law, and admitted the marriage openly to her. Than this, no further proof of it could be required, if true.

"In 1805, she again alleged in a legal proceeding, deeply affecting her and Des Granges, that she was his lawful wife, and that he was her husband. The court sanctioned her statement by founding its judgment on it; and as a wife, she recovered the amount claimed as alimony. With the full knowledge this woman had of all the circumstances connected with the charge of bigamy against Des Granges, our judgment is convinced that

she stated what was true, and that she was Des Granges' lawful wife at the time it is alleged she married Clark.

"The complicated and curious circumstances that surrounded this charge of bigamy against Des Granges in the Paterson case, and which were then so difficult to deal with, are easily enough understood now. The mystery is explained by the fact now presented, that in Des Granges' absence to France, his wife formed a connection with Clark, and the child Caroline came of that illicit connection. On Des Granges' return home, Madame Caillavet notified her sisters to return in haste, as Des Granges' first wife was at New Orleans. Mesdames Despau and Des Granges forthwith returned, and at this time it was that Des Granges was so fiercely assailed by public opinion, and very soon after arrested on general rumor and tried for bigamy. The reports, to which these witnesses swear, obviously originated with, and were relied on by Madame Des Granges, her sisters and friends, to harass and drive Des Granges from the country, so that his wife might indulge herself in the society of Clark, unincumbered and unannoyed by the presence of an humble and deserted husband. And this was in fact accomplished, for Des Granges did leave the country soon after he was tried for bigamy, and Clark did set up Des Granges' wife in a handsome establishment, where their intercourse was unrestrained.

"In 1805, when Des Granges again came to New Orleans, his wife immediately sued him for alimony, as above stated; speedily got judgment against him for five hundred dollars per annum on the same day, issued execution, and again drove him away.

"As to the testimony of Madame Benguerel. We deem it extremely improbable, that a man should openly confess to the friends of Zulime, who reproached him with having committed a foul and high crime, that he was guilty; and this, too, on the eve of his apprehension and examination, on which he was compelled to give evidence against himself, when he swore that there was no truth whatever in the charge, and in which he was supported by this supposed first wife, who was then examined, and also by Zulime herself.

"On the admissibility of Des Granges' confession, that he committed bigamy when he married Zulime, the question arises

whether this confession (if made) could be given in evidence against the defendants?

"The respondents introduced the copy of a mutilated record, now relied on, for the complainant, to prove the bigamy of Des Granges. It purports to be a suit of Zulime Carriere against Jerome Des Granges, commenced in 1806, in the former County Court of New Orleans.

"To give the record this effect, it must appear that the plaintiff did set out in her petition the fact that said marriage was null *by reason of the bigamy of Des Granges*, and that she prayed to have its nullity adjudged by a judicial decree, and that such decree was made *on the issue*. Nothing of the kind appears here. We have no evidence what the cause of action was, nor can any inference be drawn from the memoranda made by the clerk that the suit was to establish the *bigamy*. All that appears from these memoranda is, that debt or damages to the amount of $100 was claimed by the plaintiff, and that $100 in damages was recovered. Nor does the demurrer contradict this assumption. This mutilated record, therefore, proves nothing in this cause."

Judgment was accordingly given against Mrs. Gaines; but from it, as already said, Wayne and Daniel, JJ., dissented.

At December Term, 1860, the matter again came up in *Gaines* v. *Hennen*.* The evidence was much the same as in the former case, except that owing to the establishment in the meantime by the Supreme Court of Louisiana, of Clark's will of 1813, Mrs. Gaines now came into this court, declared by her father to be his legitimate daughter and universal legatee. This fact the court treated as a feature in the case greatly distinguishing it from all preceding ones; and as being itself a potential evidence of a marriage. At the same time they spoke with respect of the testimony of Mesdames Despau and Benguerel, while that of Mr. Coxe they considered, exhibited so considerable a bias against the marriage, that it was to be taken with considerable allowance. The

* 24 Howard, 553.

court thought the evidence of bigamy sufficient for a civil case, and treated the ecclesiastical record of 1802 as one of a court having no jurisdiction. They regarded the record of 1806, though the petition of it was lost, as a record declaring void for bigamy the marriage of Des Granges and Zulime. Independently of this, the law of Louisiana was declared to be that in cases of bigamy where either parent contracts the second marriage in good faith (a matter always presumable), the issue is legitimate. And the title of Mrs. Gaines not being held to be barred by prescription, the court declared that after a litigation of thirty years the principles applicable to that lady's rights in her father's estate, were "now finally settled." From this judgment, concurred in by McLean, Wayne, Nelson, Campbell, and Clifford, JJ., a dissent was recorded by the Chief Justice (Taney), and Catron and Grier, JJ.

Such was the state of things as the reporter understood them when the present case came here. This case was now placed partially on the ground that in *Gaines* v. *Hennen* an erroneous conception of fact was had by the court, owing to the immense size of the record; partially on the ground that *Gaines* v. *Hennen* was in reality not "an earnest controversy," any more than *Paterson* v. *Gaines* had been; partially on the insolvency of Clark's estate and the partnership articles giving two-thirds of the premises sought to be recovered to Chew & Relf; these last two being features, as it was said, peculiar to the present cases.

*Messrs. McConnell and Miles Taylor, for the appellants, relied largely on* Gaines *v.* Relf; *Mr. Cushing, contra, relied equally on* Gaines *v.* Hennen *and* Paterson *v.* Gaines.

Mr. Justice DAVIS delivered the opinion of the court.

It was supposed, after the decision in *Gaines* v. *Hennen*,* that the litigation, pursued in one form and another for over thirty years, by the complainant, to vindicate her rights in

* 24 Howard, 553.

the estate of her father, was ended. But this reasonable expectation has not been realized; for other cases, involving the same issues and pleadings, and supported by the same evidence, are before us; and we are asked to review the principles of law and questions of fact, on which the Hennen decision was pronounced, and thus reopen the whole controversy. The legal principles, on which that case was decided, are no longer open for consideration. They were fully and finally settled, and are controlling in all future disputes relating to the same subject. But these defendants insist they have a right to be heard on the issues of fact presented in this case, even, if they are the same as those decided in the Hennen case.

It can serve no useful purpose to discuss the point how far the decision in *Gaines* v. *Hennen* is *res judicata*, as to the city of New Orleans and others in like position; for we shall examine this case, as if the questions of fact, decided in the former case, were still open questions to these defendants and others, whose cases are now before the court. Nevertheless, it is proper to say, when this court, in a real contest, has decided questions of fact on the most careful investigation, and after full argument by able counsel, it will be presumed a correct conclusion was reached, and before a decision thus rendered will be reversed, it must very clearly appear that error was committed.

The legitimacy of Mrs. Gaines is the turning-point of this controversy; for, since the probate of the will of 1813, if legitimate, she cannot be deprived of the estate of her father by any of the defences interposed in this suit. These defendants claim, as a question of proof, from the record, that she is an illegitimate child—adulterous bastard of Daniel Clark—and cannot take the estate of her father, either as heir or legatee, under the will of 1813. This court decided, in the Hennen case, that by the law of Louisiana she was entitled to a legal filiation as the child of Daniel Clark and Marie Julie (Zulime) Carriere, begotten in lawful wedlock. Was that a mistaken judgment?

To this question we will first direct our attention, con-

sidering, afterwards, the objections made to a recovery by her, even if her legal filiation is established. We shall not attempt to give the history of the litigation, which, it is to be hoped, will be closed by this decision; for the profession is familiar with it by the repeated adjudications of this court. It is enough to say it has been pursued by the complainant through a third of a century, with a vigor and energy hardly ever surpassed, in defiance of obstacles which would have deterred persons of ordinary mind and character, and has enlisted, on both sides, at different periods, the ablest talent of the American bar.

This case seems to have been defended on the idea, that every presumption was against the legitimacy of Mrs. Gaines, and the inclination of courts would be so to decide. But, as she was declared legitimate by her father in his last will and testament, common justice, not to speak of legal rules, would require that such a declaration should only be overborne by the strongest proof; and yet detached portions of evidence, scattered through the record here and there, are invoked to destroy the dying declarations of an intelligent man, that a beloved child was capable of inheriting his property.

The influence of the probate of the will of 1813, in deciding the civil status of Mrs. Gaines, cannot be over-estimated. Without the evidence which it furnishes, her legitimacy might be questioned; but with it, in connection with the other evidence in the record, it is hard to see how it can longer be doubted. The circumstances under which this will was recognized are peculiar, and entitle the court which pronounced it valid to the tribute of our admiration. It was proved by the memory of witnesses, forty-three years after it was made, in the height of the litigation instituted by Mrs. Gaines to obtain possession of her father's estate; but, notwithstanding the effect of the probate of it was to recall the will of 1811, and endanger titles acquired under it, so strong was the proof of its authenticity, and so complete the evidence of its contents, that a court, administering justice in the midst of a people claiming rights hostile to it, did not

hesitate to order it to be recorded and executed as the last will and testament of Daniel Clark.

This will, thus allowed to go to probate, contains the following clause: "I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter; and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named." The will was made only a short time before the testator died, and is to be taken as his dying testimony that he believed the declarations in it to be true. And no one can read the evidence on which it was established, especially the evidence of Harriet Harper, Boisfontaine, and Bellechasse, without being convinced of the unbounded affection of Daniel Clark for his child, his sensibility as to her being declared legitimate, his pride in the position she would occupy as heir to his large estate, and his belief that he had secured the estate to her. Nearly his last words were about this child, and the necessity of taking care of the will on her account.

The inquiry naturally arises, what motive had he to declare his child legitimate if he knew the fact were otherwise? He was a man of superior intelligence, and long residence in Louisiana, and necessarily knew by the laws of the State he could secure to his child enough of his large property to make her rich, if she were illegitimate. Is it conceivable that such a man would risk a declaration of legitimacy, which he knew to be false, and thus jeopard the estate, which he insisted with so much confidence he had secured to his child, and in the security of which he said "he would die contented?"

It is argued that the conduct and letters of Clark, for years before this, are inconsistent with the idea of Myra's legitimacy. Conceding this is so, and yet it in nowise disproves the good faith and sincerity of Clark when he made his will. The conduct of Clark is susceptible of easy explanation. He had contracted an unfortunate marriage, and, in many

respects, a disreputable one, having married a person with whom he had previously lived improperly, who, without a divorce, had married again. Possessed of commanding influence and high position, and mingling in social intercourse with the best society of the country, it was natural, while in strong health and the full tide of prosperity, he should be desirous of concealing such a marriage; but when sickness overtook him, and he necessarily reviewed his past life, it was just as natural he should wish to repair the consequences of his folly (to use no harsher term) by a deliberate acknowledgment that the child born of that marriage was legitimate, and could, therefore, inherit his estate. He was intelligent enough to know that, if he died without giving his child the status to which she was entitled, she would in all probability pass through life with a stain upon her birth, and be unable to enjoy his property, for he had taken uncommon pains to conceal his marriage.

The difficulty of acknowledging the marriage to Zulime was greatly increased by her subsequent marriage to Gardette. Clark could not acknowledge it to the world without injuring her, which no right-minded man under the circumstances would wish to do. According to the testimony of Baron Boisfontaine, Clark considered her blameless, and would have made his marriage with her public if it had not been for the obstacle interposed by the Gardette marriage. It is easy to see the struggle in the mind of Clark on this subject. He had sustained improper relations with a woman of uncommon personal attractions, to whom he was passionately attached. This woman he afterwards married, and lived with in secret for several years. Estrangement took place, and he separated from her. She had repaired to Philadelphia to procure evidence of her marriage; but being unable to get it, and advised of its invalidity, had married another man with whom she was quietly living. Two children were the result of the intercourse between them—one born before and the other after marriage—the latter the legitimate heir of the father, if he married the mother, believing in good faith she was capable of contracting mar-

riage. To acknowledge a marriage with such surroundings was to lose social caste, and put in peril a woman whom he once loved and still professed to respect. Not to acknowledge it was to bastardize a child for whom he had great affection, and to see a large part of his estate go to others, who had no claims on his bounty. There were thus presented to his mind conflicting motives. Duty to himself and society, and affection for his child, prompted him to proclaim his marriage, while pride, the fear of social degradation, and the natural desire not to inflict additional injury upon Zulime, impelled him to a contrary course. That he yielded to the influence of unworthy motives, and lived for years a life of deception, only proves that his baser nature during that time got the control, and that he acted as other men in similar circumstances have acted before him. But, before he died, the better nature of this man of lofty pride and sensitive honor was aroused and gained the ascendency. He atoned in some measure for the errors of his past life; for he not only made a public acknowledgment, in the last solemn act of his life, that his child was legitimate, but a short time previous to his death frequently repeated the declaration to Mrs. Harper, who had nursed the child in infancy, and to Boisfontaine, who managed his plantations, and was with him when he died.

Testimony like this outweighs the evidence furnished by the conduct of Clark, when, governed by bad influences, he was even willing to leave a stain of dishonor on the birth of his child, rather than make known a marriage which would tend to degrade him in the estimation of his friends and the public. If the evidence of Mrs. Harper and Boisfontaine is true (and who can doubt it since the action of the Supreme Court of Louisiana?), it confirms the declarations of the will, and shows a willingness, nay, more, an anxiety on the part of Clark to talk about a subject the nearest his heart, and one which of necessity must have awakened his conscience. To whom would he be so likely to communicate the information that Myra was born in lawful wedlock as to the woman who nursed her and the man

who remained with him, at his request, during his sickness, and until he died?

But the will itself, in another clause, furnishes corroborating evidence of Mrs. Gaines's legitimacy. A legacy of five thousand dollars is left to Caroline Des Granges, with a suitable annuity until her majority. The person thus designated was the natural child of Clark by Zulime, and yet he avoids calling her his child, gives her the name of the ostensible husband of her mother at the time of her birth, and recognizes Myra as his legitimate and *only* daughter. Many reasons may have influenced Clark to pursue this course. Delicacy to the mother may have induced him to reveal no more than was necessary to accomplish his purpose; or an unwillingness, by his will, to affix a brand of reproach on this child, who was lawfully entitled to bear the name of Des Granges, may have been the motive; or a wish that Myra, the object of his greater affections and superior bounty, might never know the wickedness of his life, may have prompted his course. It is not necessary to inquire whether these considerations, singly or together, constituted the reasons for the peculiar wording of the legacy. It is enough to know from the legacy that Clark had both children in his mind when he drew his will. If so, and he knew both were illegitimate, why discriminate so largely in favor of one and against the other? No answer can be given to this question on the assumption he knew the birth of both to be dishonorable; but it is easily answered, if one was legitimate and the other not, for it is the experience of the world (and it is well it is so) that every person owning property desires his legitimate children to have the greater share of it.

The attempt to impeach the validity of this will shows the importance attached to it by the defence in determining the issue we are now considering. But the will cannot be attacked here. When a will is duly probated by a State court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court.

But why, if the will is invalid, has the probate of it rested for twelve years unrecalled, when express liberty was given

by the Supreme Court of Louisiana for any one interested to contest it in a direct action with complainant? If, with this clear indication of the proper course to be pursued, the probate of the will still remains unrevoked, the reasonable conclusion is, the will itself could not be successfully attacked. Be this as it may, while unrevoked it is the law of this case, and so this court held in *Gaines* v. *Hennen.*

But it is said the probate of the will in dispute cannot stand, because there was no direct action by the Louisiana court annulling the probate of the will of 1811. This was not necessary. The probate of the will of 1813, by the mere fact of its probate, necessarily annulled the will of 1811, so far as its provisions were inconsistent, and so far as the estate was not legally administered under it. And this precise point was decided in the Hennen case.

We will proceed now to consider the question of actual marriage, and whether Clark, in good faith, contracted it. Madame Sophie Despau swears to the solemnization of a marriage between Clark and Zulime, by a Catholic priest, in Philadelphia, in 1802 or 1803. If this witness is to be believed there is an end of the case, for no amount of negative testimony that Clark could not have made the marriage will weigh down the testimony of an unimpeached witness, who was present and witnessed the ceremony. But why does she not tell the truth? Is it because she was the sister of Zulime? Who so likely to be present at a private marriage, designed to be concealed from the world, as a near relative of one of the parties? Clark knew he was contracting a marriage which would lessen his standing in society, and might not want any very dear friend or relative present. Not so with Zulime. She was marrying a man of rank and position, with whom she had lived in unlawful intimacy, and what so natural that she should take with her to Philadelphia, as a witness of her happiness, the same sister who had witnessed her previous disgrace when Caroline was born. Is she not to be believed because she speaks of Caroline as one of the children born of the marriage of her sister with Des Granges, when she must have known she was the child

of Clark? It is doubtless true she knew Clark to be the real father of the child; but she certainly did not falsify in stating Caroline was born of the Des Granges marriage. This was true, and yet Clark had seduced the wife and was the father of the child. But is she to be condemned and her evidence discarded because she does not disclose the frailties of her sister, and instead of answering plainly that Caroline was the child of Clark, speaks of her as born of the marriage with Des Granges? Des Granges was, in the eye of the law, the father, though Clark was, in fact, the father; and although Madame Despau knew the real parentage of Caroline, we cannot say she did not believe she was answering properly the cross-interrogatories propounded to her. At any rate, we cannot say her testimony in this regard casts suspicion on the evidence given to establish the marriage. We concede something to the infirmity of human nature. This aged witness, testifying forty-six years after events which must have indelibly fixed themselves on her memory, and when concealment of anything, no matter how unpleasant, would do harm rather than good, still shows pride of family, and studiously avoids the condemnation of her unfortunate sister, for she can speak of her sufferings, but not of her frailties. All this may prove weakness of character, but does not tend to prove she told a falsehood when she testified to the marriage of Clark and Zulime. But she is corroborated by Madame Rose Caillavet, an elder sister, who was eighty-three years of age in March, 1849, when her deposition in this cause was taken. *She* testifies the marriage was arranged in New Orleans; that Zulime wrote to her from Philadelphia that it had taken place; that Clark afterwards acknowledged it, and frequently stated that Myra was his lawful and only child. There is nothing in this record worthy of notice to impeach this testimony. It was given by one whose life was nearly ended, and who could have no motive, as far as we can see, to tell an untruth. Like Sophie Despau, she was the sister of Zulime, and equally anxious to vindicate her good name, but this furnishes no good reason to discredit her.

In support, then, of the issue that there was a marriage between the father and mother of complainant, we have the testamentary disposition of the father; his declarations at the time of his death, and shortly before it, to Mrs. Harper and Boisfontaine, that Myra was legitimate; similar declarations at other times to Madame Caillavet, with an acknowledgment to her of the marriage; and, superadded to all this, the evidence of Madame Despau that the marriage ceremony took place in her presence; with the admission of Clark to Boisfontaine that he would have made it public but for the subsequent conduct of Zulime in marrying Gardette.

To disprove the fact of marriage, the evidence is of a negative character and wholly inferential. Concede it is true that Clark behaved so as to cause his most intimate friends to disbelieve the fact of marriage; that he held himself out to the world as a single man, and by public repute, after the time of the alleged marriage, lived with Zulime, ostensiby not as his wife, still the case of the complainant is not weakened. It was the fixed purpose of Clark to conceal this marriage, as is clearly shown by the evidence; and a man of his mental resources would be likely to use every means calculated to accomplish his purpose; and these things, instead of proving the marriage did not occur, only prove how effectually it was concealed.

But it is argued with earnestness and ability there was no marriage, because those who knew Clark intimately swear to their belief that one of his proud nature would never marry a person with whom he had previously lived unlawfully. Opinions of witnesses on such a point can have no weight in determining the issue we are trying. Men of equal position and equal pride with Clark have married those with whom they were living unlawfully, and why should not Clark do the same thing? No good reason can be given why he should not act in a matter of this kind as other men, just as sensitive and proud, have acted before him. If he seduced Zulime and could lawfully marry her, it was his duty to do it; and can we say he was too proud to marry her, and thereby repair the wrongs she suffered at his hands? To

say so would be to reflect upon his memory more than is necessary.

In denial of the marriage it is said, if Clark had not been free to do so, he would never have written a letter, stating if he could secure the affections of Miss Caton he would offer himself to her. This letter was written after his estrangement from Zulime and separation from her, but before her intermarriage with Gardette. It cannot be denied the writing of it was a base and inexcusable act, and in itself affords an additional proof, if any were necessary, how easy the descent, when a man, with a fixed purpose, is leading a life of deceit. Clark, for years, had been imposing himself on the world in a character different from his real one, and when his affections were weaned from Zulime he attempted to do what, if he had succeeded in doing, would have blackened his memory forever. But fortunately, before he died, his line of conduct was changed. Affection for his child and uncertain health, doubtless subdued him, and induced him to disclose what, as an honorable and honest man, he should never have wished to conceal. In resolving the issue of marriage or no marriage, the effect of this letter is unimportant when opposed to the direct testimony that there was a marriage, on which we have offered sufficient comments. Without pursuing the subject further, it is our conclusion from the whole record, as a matter of fact, that the father and mother of complainant were married.

Did Clark contract that marriage in good faith? If this inquiry can be answered in the affirmative, the legitimacy of Mrs. Gaines is no longer an open question. The fact of marriage being proved, the presumptions of law are all in favor of good faith. To disprove the good faith in this case "there should be full proof to the contrary, and the law will not be satisfied with *semi-plena probatio*."* Chief Justice Martin, in *Clendenning* v. *Clendenning*,† in discussing the question of the extent of the proof required to overturn the presumption of good faith, says, "the proof must be irre-

* Gaines v. Hennen, 24 Howard, 591. † 3 Martin, N. S., 442.

fragable." Testing this case by these rules, the question is of easy solution. Zulime, when quite young, was married in New Orleans to Jerome Des Granges, from whom she was not divorced at the time of her marriage with Clark. It is in evidence that Clark was a single man; and the inquiry therefore is, did he believe Zulime had the capacity of contracting marriage with him? If in good faith he believed she was free to marry him on account of the invalidity of her marriage with Des Granges, and with a *bona fide* belief of this did marry her, then, by the laws of Louisiana, such a marriage has its civil effects, and the child born of it is legitimate, and can inherit her father's estate.

We do not propose to discuss the question, whether Des Granges was or was not guilty of bigamy in marrying Zulime? That he was accused of it is very clear, and that there is evidence in the record tending to show it was true, is equally clear; but where the weight of the testimony leaves the point in dispute, the purposes of this suit do not require us to decide.

Clark had been criminally intimate with Zulime before his marriage, and on one occasion sent her, secretly, to Philadelphia, where she gave birth to a child, of which he acknowledged himself to Daniel W. Coxe as the father. Whether these improper relations were continued after the return of Zulime to New Orleans we are not informed by the record; but, in the absence of proof to the contrary, the fair presumption would be they were. It is asked why Clark should marry her if he could live with her without it? The natural answer would be, he loved her, and wished to terminate the existing disreputable connection; for we have no right, unless there is clear proof it is so, to ascribe a bad motive for a good act. It may be Zulime was unwilling longer to continue the connection, and Clark, rather than part with her, married her. But whatever were the controlling motives with the parties, there was nothing to induce Clark to enter into a marriage contract, unless he thought he had a right to do it. He was a man of high intelligence, and knew what every man of ordinary intelligence knows,

that he subjected himself to a criminal prosecution and absolute disgrace, if he married a woman who was lawfully the wife of another. Is it to be supposed for a moment—considering the political and social position he occupied, on which so much stress is laid by the defence—that he would expose himself knowingly to the penalties provided everywhere against the crime of bigamy? Clearly not.

From the very nature of the case, Clark must have believed he had a right to marry Zulime. But we are not without testimony to prove his good faith. Madame Despau swears it became known in New Orleans that Des Granges had another wife, who was living when he married Zulime, and upon this she separated from him and returned to her family. It was then arranged that Clark should marry her; but before doing so, it was thought best to procure record evidence of the first marriage of Des Granges, which was said to have taken place in New York. For this purpose she went to New York in company with Zulime, but found the registry of marriages of which she was in search was destroyed. Failing in their object they repaired to Philadelphia, where it was appointed Clark should meet them, and while there Gardette told them he was a witness to the marriage of Des Granges in New York, and the wife was then living in France. Upon this communication Clark said to Zulime, "You have no longer any reason to refuse to marry me;" to which she assented, and the marriage was solemnized. If this testimony is true, and we have said in a previous part of this opinion there is nothing to discredit this witness, then the good faith of Clark in contracting marriage with Zulime is established. And who can doubt Zulime was in equal good faith? But the determination of that point is not essential in settling the rights of the complainant in this suit. No better evidence could be furnished Clark of the invalidity of Zulime's prior marriage, and her right to marry again—short of a pronounced divorce by a decree of court—than the testimony of a witness who was present at the marriage in New York, and who knew the woman to whom Des Granges was there united was living in France. The regis-

try of marriages, if in existence, would only have proved Des Granges had been married before he married Zulime, but would have failed to prove whether the wife of the first marriage was living or dead.

But Madame Despau also testifies that Des Granges admitted his crime, and it is fair to presume, although her testimony is silent on the point, she communicated this admission to Clark. The fact that Des Granges was charged with bigamy was known to Clark, and it is reasonable to suppose, while in New Orleans, he had informed himself of the evidence to sustain it; and if he had an interview with Madame Benguerel he must have been convinced of it, for she testifies she and her husband were intimate with Des Granges, who, when charged with his baseness, admitted it, but excused his conduct on the ground that he had abandoned his first wife, and never intended to see her again. But whether Clark saw Madame Benguerel or not, he could not have failed, before he left New Orleans, to collect all the evidence in his power on this subject, and his mind was, therefore, well prepared to receive the evidence of the bigamy of Des Granges, and of Zulime's right to marry him, which Gardette furnished.

The testimony of Madame Despau is fortified, in many important particulars, by that of Madame Caillavet. If, however, the evidence we have been considering falls short of proving the good faith of Clark in contracting marriage with Zulime, the testamentary recognition by him that the issue of the marriage was legitimate relieves the question of all doubt. The child could not be legitimate unless the father married the mother in the full belief he had a lawful right to do so, and this a man of the intelligence of Clark could not help knowing. The disposition of property to take effect after death is one of the most solemn acts in the life of a man, and in itself is the highest evidence of good faith. The influence of the will of 1813 in settling the question of good faith is so far conclusive, that to overturn it there must be full proof to the contrary. There is no such proof in the record. What there is relates to the in-

consistencies in the conduct of Clark on which we have commented, and which it is unnecessary here to repeat. We find, therefore, as a further fact in this case, that Daniel Clark contracted marriage with Zulime Carriere in good faith. As Clark was in good faith when he married the mother of the complainant, it follows that she can take the estate under the olographic will of 1813.

It is conceded the property in dispute, and which the defendants admit they were in possession of, is a part of the estate of Daniel Clark left at his decease, and devised to complainant in his last will. She is, therefore, entitled to the relief sought by her bill, unless prevented by some of the special defences interposed, which we will now proceed to notice.

It is claimed as a question of law, that the decree of this court in *Gaines* v. *Relf*,* is *res judicata* both as to the present claim for the property and the civil status of the complainant; but this precise point was met and disposed of adversely in the Hennen case, and will not be further considered.

Two defences have been prominent throughout this litigation, and as they are both applicable to some of the cases now before the court, and as one opinion will in fact dispose of all the cases, we will consider in this case all substantial defences to the recovery by Mrs. Gaines of her father's estate.

In bar of the claim of the complainant, titles acquired under Relf and Chew, as executors of the will of 1811, are set up. But these titles cannot avail the defendants, because Relf and Chew, as executors of the will of 1811, had no authority to make the sales, and could, therefore, pass no interest to the purchasers. There is no question in this record of the effect of the probate of the will of 1811, while unrevoked, upon property legally sold by the executors; because the very foundation of the bill in this case is, that there was no legal sale of the property. In Louisiana, by

* 12 Howard, 472.

the law in force when these sales were made, the power of executors to make sales without the order of court terminated at the end of a year from their appointment. This is not only clear from the law itself, but also from the judicial decisions of the State. Chief Justice Martin, in *Donaldson* v. *Hull*,* says, a sale by executors, without an order of court, and by private contract, is void; and to the same effect is the case of *Lanfear* v. *Harper*.† The defendants having failed to prove that any order of court was ever given to make these sales, they are nullities, and confer no titles. And this is the decision in *Paterson* v. *Gaines*,‡ which is reaffirmed in *Gaines* v. *Hennen*.§ It is useless to discuss the point further, as we see no reason to question the correctness of the conclusion at which the court arrived in those cases.

It is insisted the defendants are protected by reason of conveyances from Relf and Chew, as attorneys of Mary Clark, the universal legatee under the provisions of the will of 1811. The invalidity of this defence has been also sustained by this court in the cases just referred to. But even if the power of attorney, on which these conveyances were predicated, was not defective, and the other proceedings were regular, still, by the law of Louisiana and the decision of her highest court, Mary Clark, as sole instituted heir, could give no title as against the real and paramount heir. The effect of the probate of the will of 1813, if Myra Clark Gaines is legitimate, and that we have found to be true, is to make her sole heir of Daniel Clark, and, as a consequence, Mary Clark could in law have no title as heir, and could convey none. Although French jurists have differed on this subject, the question is set at rest by the decision of the Supreme Court of Louisiana, in *Ripoll* v. *Morina*.‖ Sebastian Ripoll died, in 1836, in New Orleans, and left by will a large estate to Teresa Morina, his universal legatee, who was, also, his natural daughter. She was put in possession of the estate by the

* Martin, N. S., 113.
† 13 Louisiana Annual, 548.
‡ 6 Howard, 550.
§ 24 Id. 553.
‖ 12 Robinson, 560.

judgment of the Probate Court as testamentary heir. The will was contested by two sisters of Ripoll, who represented they were the only heirs of their brother; but long before the contest commenced, and while Teresa was the apparent heir, and in the undisturbed enjoyment of the property, she sold part of the real estate at its full value to *bonâ fide* purchasers. One of the questions in the case was, whether those who purchased property from the apparent heir or universal legatee, in possession of the estate as such heir or legatee, could defend against the claim of the legal and actual heir, and the court decided they could not. In discussing the question they say: "Our code, art. 2427, declares that the sale of a thing belonging to another is null," and that the purchasers of the property in dispute can, under no circumstances, acquire any greater right or any better title to it than their vendor had. As to the defence of good faith, the court decide, "that all the law has done in favor of a purchaser in good faith is to give him the benefit of the limitation by prescription, though the property so purchased may belong to another person," and refer in support of their position to the Civil Code, arts. 3442, 3450, 3451. That case is decisive of this on the point we are considering, and goes further than the necessities of this case require, because Mary Clark was never recognized by the Probate Court as heir, or put in possession of the property.

It is argued with earnestness that the estate of Daniel Clark was insolvent, and the real heir cannot have it until the debts and legacies are paid. If this defence were true in fact, which it is not (but we do not care to discuss the evidence in order to show it), it cannot avail these defendants. They are concerned to show a better title than the complainant, and if they cannot do it, are not at liberty to make a collateral issue by proving the estate in debt more or less. If the executors rightfully sold the property in controversy they are protected; but they cannot substitute themselves for the creditors of the estate, and use them as a means to get protection.

A kindred defence to this is, that the Probate Court of New Orleans, in 1841, duly approved of the sales made by Relf and Chew as executors, and that this homologation is binding upon the complainant. This court in the Hennen case said, "We do not think the accounts of Relf and Chew are put in issue by the bill of complainant, or the answer of the defendants, particularly as Relf and Chew are not parties to this proceeding."

But the objection to this defence lies deeper than this; for if it were true the accounts were duly homologated, these defendants are not benefited by it, because the Probate Court could not by a subsequent order give validity to sales made by executors, which were null and void by the law of the State when they were made. It is, however, not true that the executors' accounts were duly homologated, as the court, in its order of confirmation, say, "they are confirmed in all respects in which they are not opposed." As the opposition of Mrs. Gaines (more interested in the matter than any other person) has never been withdrawn, but is still active, the question is an open one in the Court of Probate.

Although the legal title to the property in dispute was in Daniel Clark at the time of his death, yet it is said there is an outstanding equitable title in Relf and Chew to two-thirds of it, by virtue of a partnership agreement between them and Clark, of the date of 19th of June, 1813, which will defeat, *pro tanto*, the recovery the complainant seeks to obtain by her bill.

This defence is provocative of more comments than we have time to make, or the necessities of this suit require us to make. It is extraordinary, if the agreement relied on was a valid and executed contract at the time of Clark's death, those interested to know it should have remained in ignorance of it for a period of twenty-five years. During this long time it is equally concealed from creditors, purchasers of property, and the Court of Probate. Why was no title asserted under it when the estate was inventoried? Why were not creditors informed of it, who were interested to

know the extent of the estate to which they had to look for the payment of their debts? *Ante motam litem*, nothing is heard of it; but when Mrs. Gaines attempts to "unkennel" the fraud by which she was deprived of her just rights, *it* sees the light. If Relf and Chew were the real owners of two-thirds of every piece of property which they sold, why not recite the fact of joint ownership in the conveyances which they made? Why sell all the property either as executors of the will of 1811, or as attorneys of Mary Clark? No satisfactory answers can be given to these questions, or reasonable explanation to the conduct of Relf and Chew, on the theory that the agreement thus attempted to be set up to defeat this suit was a completed contract when Clark died.

If, however, it was, and there is an outstanding equitable title in Chew and Relf to the property in litigation, the defendants cannot plead the fact in bar of the right of complainant to recover. The defendants, equally with the complainant, claim title from the same common source. This is clear from the pleadings and proof. If, therefore, both parties claim title from the same person, neither is at liberty to deny that such person had title. On this point the Louisiana authorities are uniform.* The rule is the same in equity as at law, and is well stated in *Garrett* v. *Lyle*.† The court in that case say: "We do not deny in equity as well as at law the plaintiff must recover upon the strength of his own title; but because this is the rule it does not follow he must show a good title against all the world; it is enough that he shows a right to recover against the defendants. And there are many cases in which he has this right, although another person must recover it from him."

The defendants, as a further defence to this action, say they are purchasers in good faith for value without notice, or have acquired titles from those who were, and will, there-

* Crane *v.* Marshall, 1 Martin (N. S.), 578; Bedford *v.* Urquhart, 8 Louisiana, 239; Cobton *v.* Stacker, 5 Louisiana Annual, 677; Girault *v.* Zuntz, 15 Id. 686.

† 27 Alabama, 589.

fore, be protected by a court of equity. We cannot see, in view of the discussion already given to this case, how this plea can be true; but as it cannot avail the defendants if true, it is unnecessary to discuss the evidence further in order to ascertain whether it is true or false. For the question at issue in this case is only on the legal title. The complainant insists she has that title, and if so, her right to enforce it is very clear. On the contrary, the defendants, conceding that Daniel Clark, the father of complainant, had the title when he died, say it has been divested by sales made under the will of 1811, either by the executors or Mary Clark, the instituted heir, and that they now hold it.

In deciding the issue thus presented, the defence, that although the sales were irregular, those who bought the property did it in good faith and without notice, and are protected, cannot avail the defendants unless accompanied by the plea of prescription. As we have said in a previous part of this opinion, all that the law of Louisiana has done to protect one who has bought property in good faith, although it shall turn out the property belongs to another person, is to give him the benefit of the bar of time prescribed by the code.* If the complainant was endeavoring to establish an equitable title, this court, if it saw proper to do so, could refuse to her the use of the peculiar powers of a court of chancery in aiding to establish it against the purchaser of the legal estate who had acquired it fairly and honestly. As she is not doing this, but is contesting her right to the legal estate, we cannot see how either in a court of law or equity she can lose that right because the defendants have purchased in good faith what they supposed was the legal title.

This brings us to the only remaining defence which we shall notice, and that is the bar by prescription. In this connection the question of good faith is always important. The law in its liberality so far protects every honest and fair buyer of real estate, that it limits the time in which actions

* Repoli *v.* Morena, 12 Robinson, 560.

shall be brought against him to oust him of his possession. But the title of complainant is not barred by prescription according to the law of Louisiana. This defence was made in the case of *Gaines* v. *Hennen*, so often referred to, and disposed of adversely to the defendant, and is no longer an open question in this court. The prescription relied upon by the defendants, in this case, is the same that was relied upon by the defendant in that, and as the proofs are common to both, it follows, as the plea of prescription was not available in the one, it is not in the other.

Courts, in the administration of justice, have rarely had to deal with a case of greater hardship, or more interesting character and history, than the one we are now considering. Daniel Clark, a prominent citizen of Louisiana in its early history, died in New Orleans in 1813, leaving by will his large estate to the complainant, then a child of tender years, who has never enjoyed it, but is now, after the lapse of fifty-five years from the death of her father, struggling to get it. Clark wrote this will with his own hand; lodged it as he supposed in a safe place, to be confided to one of his executors, who was also the selected tutor for his child; explained its contents, and expressed his solicitude about it to several friends, and died in the belief he had secured to his child his estate; and yet, after his death, the will cannot be found, and no reasonable mind, from the evidence in the case, can doubt that it was purloined and destroyed. Another will, written two years before, with different disposition of property, is allowed to go to probate, unchallenged by the friends of Daniel Clark, in place of the one thus destroyed, and the estate is administered under it for a period of twenty-five years, without account of administration rendered to the Court of Probate. In the meantime, the complainant remained where she was placed by her father, in the family of Samuel B. Davis, until she was married. Davis, as he swears, maintained and educated her at his expense. When he left New Orleans for the North, with the child, about a year before the death of Clark, he retained in his hands, at

the instance of Clark, twenty-three hundred and sixty dollars (for which he gave his note), the interest of which was to go towards the education of the daughter. This sum of money, small as it was, was withdrawn from him by proceedings instituted against him by the executors shortly after Clark's death, and the child lost the use of it, although these executors, intimate friends and partners in business with Daniel Clark, must have known that Clark was the father of the child, and must also have known her necessities.

To the discredit of the friends of Daniel Clark, this child grew to womanhood in utter ignorance of her rights and parentage, and did not ascertain them until 1834 (then not fully); since which time she has been endeavoring to obtain her rightful inheritance. Owing to the lapse of time, it was difficult to reach the truth, and, necessarily for many years, she groped her way in darkness; but finally she was able to show the great fraud perpetrated against her; for, in the judgment of the Supreme Court of Louisiana, she established the validity of that very will, which, forty-three years before, her father had executed in her favor. This action of that court settled what was before doubtful—her civil status—and removed the difficulty she had formerly encountered in pursuit of her rights. The questions of law and fact applicable to those rights were determined in the case of *Gaines* v. *Hennen*. After argument by able counsel, and on mature consideration, we have reaffirmed that decision. Can we not indulge the hope that the rights of Myra Clark Gaines in the estate of her father, Daniel Clark, will *now* be recognized?

The decree of the Circuit Court for the Eastern District of Louisiana is REVERSED, and this cause is remanded to that court, with instructions to enter a decree for complainant

IN CONFORMITY WITH THIS OPINION.

GRIER, SWAYNE, and MILLER, JJ., dissented.

NOTE.

At the same time with the preceding case of *Gaines* v. *New Orleans*, was decided another appeal in equity, from the same circuit with it, and depending in the main upon the same issues; the difference between the two cases being, that in the last case the controversy concerned the sale of slaves belonging to the succession of Clark, while in *Gaines* v. *New Orleans* it related to real estate. The case just named must be read in order to understand the one now reported, of an adjectitious character.

## GAINES *v.* DE LA CROIX.

1. As the law stood in Louisiana, in October, 1813, testamentary executors could only sell at public auction after due advertisement of the property; and the purchaser at a forced sale did not acquire a good title, unless the formalities prescribed by law for the alienation of property were observed.
2. A purchaser of property from an executor of a will of one date, who has at the time strong reasons to believe, and had recently declared solemnly that he did believe that a later will with different executors and different dispositions of property had been made, is not protected from liability to the parties interested under such later will, if established and received to probate, by the fact that the executor of the first will made the sale under order of court having jurisdiction of such things. He purchases at the risk of the later will's being found, or proved and established.
3. If the later will is found, it relates back as against such a purchaser, and affects him with notice of its existence and contents as of the time when he purchased.
4. Facts stated which affect such a purchaser with notice.

As we have mentioned in the preceding case, Daniel Clark died on the 16th day of August, 1813, and his last will not being found, letters testamentary on the will of 1811 were granted to Richard Relf, who remained sole executor until 21st of January, 1814, when Beverly Chew was included in the trust. De la Croix made two purchases of slaves of Relf while thus acting as sole executor. The first purchase was on the 16th of October, 1813, and the last on the 11th of December, 1813.

Opinion of the court.

The will of 1813 being established and received to probate, Mrs. Gaines filed her bill against De la Croix. De la Croix, it will be understood, was the same person so frequently mentioned in the preceding case as Dusuau De la Croix, or the Chevalier De la Croix, one of the persons whom Clark appointed executor of his will of 1813, and tutor to his daughter Myra.

The same counsel who argued the preceding case argued this.

Mr. Justice DAVIS delivered the opinion of the court.

There are points of difference between this case and that of *Gaines* v. *New Orleans*, decided at this term; but, in our opinion, they are not such as to defeat the recovery asked for by the complainant.

It is contended by De la Croix that his titles derived from the purchases from Relf are valid, because he purchased within the year, while the functions of the executors were in full force. This is true if he purchased in good faith, and the requisites of the law on the subject of the sales of succession property were complied with. The examination of these points, in connection with the decision in the New Orleans case, will dispose of this case.

The last sale conveyed no title, because it was a private one, and was forbidden by the law. Executors could only sell at public auction after due advertisement of the property, and the purchaser at a forced sale did not acquire a good title, unless the formalities prescribed by law for the alienation of property were observed.* The bill of sale of October 16th, 1813, recites that the property was sold at public auction in conformity to the order of the register of the Court of Probate. This order is not produced, and it seems the recital of it in the act of sale does not prove it.†

But Relf, as executor, did petition the Court of Probate, on the day that letters testamentary were issued to him, for leave to sell the movables and immovable property of the succession, and the order was granted for the sale to take place according to law. It may be the effect of a sale under these circumstances would be to confer a good title, if the purchaser bought in good faith; but De la Croix got the property in bad faith, and the

* Donelson *v.* Hull, 7 Martin, 113; 4 Id. 573.

† Lanfear *v.* Harper, 13 Louisiana Annual, 548.

vice of his title cannot be cured even if the sale were in all respects regular; nor can the plea of prescription help it. These sales were made shortly after the death of Clark, when everything connected with his last will was fresh in De la Croix's mind; and he knew the will, under the probate of which he was buying, was not the true will of Daniel Clark. The law imposed on him altogether a different line of conduct from what it would have imposed if he had been ignorant of the existence and contents of the will of 1813. It was his duty as one of the executors under that will, and the tutor of the testator's child —both of which trusts he accepted—to test the question in the courts of Louisiana whether that will could not be proved and established, although it could not be found. If an earnest effort to do so had been made, can we say that the courts of that day would not have reached the same conclusion that the Supreme Court of the State did twelve years ago? Every day's delay increased the difficulty of proving its validity, and yet so full was the proof that the court, as late as 1856, did not hesitate to recognize it. De la Croix doubtless acted on the assumption, that as the will of 1813 could not be found, he had a right to buy under the will which was proved. But he risked everything by so doing; for if it should afterwards be found, or if not found, established by oral proof, as he bought knowing all about it, he would be considered a buyer in bad faith, and his title would fail. As the will of 1813 is in fact *now* probated, it relates back and affects him as of the time when he purchased with notice of its existence and contents.

It is said he did not know enough about this will to be chargeable with notice. We are sorry to have it to say that there is full proof to the contrary. He knew the will produced was not the will which Clark had shown to him, because the superscription was different, and he was not named in it as one of the executors, and besides Clark had told him of a former will in which Relf & Chew were named as executors. So sure was he that Clark's last will had in some mysterious way disappeared, that only two days after Clark died he requested the Court of Probate to summon the different notaries of New Orleans, to see if a will posterior to the one produced had not been left with one of them, as he had strong reasons to believe such a will was executed, in which he was interested. If he had acted further

on his convictions produced by "these strong reasons," his memory would have been saved from the obloquy which attaches to it, and his estate from considerable loss.

It is very clear that De la Croix knew of the existence of the will of 1813, and it is equally clear he knew enough of its contents to be affected with notice. The testimony of Boisfontaine removes from the mind all doubt on the subject. He swears to being present at Clark's house a short time before his death, when Clark took a sealed packet, and handed it to De la Croix, and said, "My last will is finished; it is in this sealed packet with valuable papers. As you consented, I have made you in it tutor to my daughter. If any misfortune happen to me, will you do for her all you promised me? Will you take her at once from Davis? I have given her all my estate in my will, an annuity to my mother, and some legacies to friends." This information gave all the notice required, as it substantially communicated the contents of the will.

It is true De la Croix denied in 1834 that he knew the contents of this will, but this was after controversy had arisen, and when he was interested to sustain the will of 1811. It is a little singular that Clark communicated less freely with De la Croix than with Bellechasse and Pitot; for besides the trust to execute the will committed to them jointly, he reposed especial confidence in De la Croix by intrusting his child to his care; and yet Bellechasse swears Clark read the will to him and Pitot. Bellechasse and Pitot, as Bellechasse says, believed the real will was suppressed, and the provisional will of 1811 fraudulently substituted in its place. De la Croix must have believed the same thing when he asked for process against the notaries; and he admits that he consented to serve as executor. Now is it to be believed that these gentlemen, with the responsibilities cast upon them, which they had voluntarily assumed, and under the circumstances attending the execution and disappearance of the will of a man of the wealth and position of Daniel Clark, should never have met and consulted about it, and talked over the provisions in it? It would require a credulity not often met with to believe that no such meeting and consultation took place.

That the executors of the last will of Daniel Clark and the guardian of his child did not discharge their duties under the will, and had no realizing sense of their nature and extent, can-

not be doubted. Whether the failure to act proceeded from indifference, weakness, or something more censurable, we have no means of determining. Be this as it may, in not doing what duty to their deceased friend and their own honor required them to do, they have entailed hardship and pecuniary loss on others.

Enough has been said in this case to show that De la Croix knew of the making of this will, and also knew substantially what were its contents. If so, in law as well as in morals, he purchased the property in dispute in bad faith, and must account for it to the real owner.

The decree of the Circuit Court for the Eastern District of Louisiana REVERSED, and this cause remanded to that court with instructions to enter a decree for the complainant in conformity with this opinion and the opinion in the case of *Gaines* v. *New Orleans*, and to refer the case to a master to take proof, and ascertain the amount due.

GRIER, SWAYNE, and MILLER, JJ., dissented.

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## WILLIAMSON *v.* SUYDAM.

1. A statute authorizing the chancellor of the State to discharge trustees named in a will (the purpose of the trust being to hold real estate and to pay the rents to a person named for life, and on his death to dispose of the fee to his children), and to appoint new trustees in their place, is valid; it appearing that the act was passed with the knowledge and at the request of the original trustees.

2. The trustees having been discharged pursuant to the statute, it was competent for the legislature, by a supplemental act, to grant power to the chancellor to appoint, as such trustee, in the place of those discharged, the devisee of the life estate, and authorize him to execute the trust. Such discharge and substitution did not violate the obligation of a contract.

3. The first statute having authorized trustees to be appointed by the chancellor to divide, as soon "as conveniently may be," certain real estate which they held in trust for A. for life, remainder to his children, one moiety whereof—the statute said—shall be held by them to those uses, and the remaining moiety shall be subdivided by them into so many lots as they think most likely to effect an advantageous sale, the proceeds to be invested and the interest to be paid to tenant for life: *held*, —(the chancellor *having made* an order that the *eastern* moiety of the

estate should be sold, and a third act of assembly having authorized the trustee, under the order theretofore granted, or any subsequent order, either to mortgage or sell the premises which "the chancellor *has* permitted or *may* permit him to sell")—that the power to partition the estate was not exhausted by the first partition into an eastern and western portion, and that the chancellor might permit the substituted trustee to sell the southern moiety instead of the eastern.

4. This would be so as an original question: one, however, already settled by this court in the case on former judgment. In addition, it would be to be taken to be so at all events, the question arising in this case on a statute which has been construed in that way by the highest court of the State which passed it.

ERROR in ejectment to the Circuit Court for the Southern District of New York.

The case was thus:

Mary Clarke, who died in 1802, devised certain land, now town lots in New York City, to the Right Rev. Benjamin Moore, his wife (the daughter of Mrs. Clarke), and a third person, Mrs. Maunsell, in trust, to receive the rents, to pay the same to her grandson, Thomas B. Clarke (a man, apparently, of improvident habits) during life, and upon his death to convey it to his issue, then living, in fee; and leaving none, then to Clement C. Moore, in fee.

In May, 1811, Bishop Moore had become enfeebled in health. His son, on his father's behalf, in that month, addressed a communication to the Diocesan Convention of the State of New York, requesting it to appoint an assistant bishop for that diocese; wherein he stated, "that though the disease with which it had pleased Almighty God to visit him, was somewhat mitigated, yet, that it was impossible, he was assured, that he should ever be able to render or perform the duties of the episcopal functions." Thereupon the convention appointed an assistant. In July following, the bishop was struck by paralysis, and grew weaker until he died, in February, 1816.

In 1814, the legislature of New York, on the application of Mr. Clarke,—who had at this time two children, a third afterwards born not having as yet come into being,—passed an act, in which—reciting that the trustees had agreed by

writing to all such acts as the legislature should deem proper to make for the benefit and relief of T. B. Clarke, and did desire that some other persons might be appointed trustees—it was provided, that the Court of Chancery, on his application, might "appoint one or more trustees to execute and perform the several trusts and duties" specified in the will, in place of the testamentary trustees, "*who are hereby discharged from the trusts in the said will mentioned:*" and, further, that the new trustees should, "as soon as conveniently may be, partition and *divide*" *the land* "*into two equal parts, one moiety whereof shall be held by them to the uses and upon the trusts declared in and by the said will*, and the remaining moiety shall be subdivided by the said trustees into so many lots as they may think most likely to effect an advantageous sale thereof; and after having completed such subdivision, the said trustees are hereby authorized and required, *within a convenient time thereafter, not to exceed six months*, except at the request of the said Clarke, to sell and dispose of the said last subdivided moiety," the proceeds to be invested, the interest, excepting a certain portion, to be paid to Mr. Clarke, and the principal reserved for the trusts of the will.

In 1815, on the application of Mr. Clarke, a supplemental act was passed authorizing HIM "to execute and perform every act in relation to the real estate, with like effect that trustees duly appointed under the said act might have done, and that HE apply the whole of the interest and income of the said property to the maintenance and support of his family and the education of his children;" and further providing that "no sale of any part of the said estate shall be made by the said Clarke until he shall have procured the assent of the chancellor to such sale, who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale shall be vested in the said Clarke as trustee; and, further, that it shall be the duty of the said Clarke annually to render an account to the chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest to be applied by the said Clarke in such manner as he may think proper for his use and

benefit, and for the maintenance and education of his children."

In July, 1815, an order was made by the chancellor, on the petition of Mr. Clarke, authorizing him to sell and dispose of the *eastern moiety* of the estate, "to be divided by the line in the manner for that purpose mentioned in the said petition," the sales to be made under the direction of a master, and the proceeds to be paid to the master, and applied and invested according to the directions of the order.

In 1816, a third act was passed, authorizing Clarke, "under the order heretofore granted by the chancellor, or under any subsequent order, either to mortgage or to sell the premises which the chancellor has permitted, or hereafter may permit him to sell, and to apply the money so raised, by mortgage or sale, to the purposes required by the chancellor, under the acts" theretofore passed.

In March, 1817, the chancellor, upon the petition of Mr. Clarke, made an order that Mr. Clarke be authorized to sell the *southern moiety* of the said estate, . . . . *instead of the eastern moiety*, as permitted and directed by the orders theretofore made, and further authorizing him to mortgage all or any part or parts of the said southern moiety of the said estate, if in his judgment it would be more beneficial to mortgage than to sell the same; and to convey any parts of the southern moiety, in satisfaction of any debts due from him, upon a valuation to be agreed on between him and his respective creditors: provided, that every sale and mortgage and conveyance in satisfaction, that might be made by the said Clarke, should be approved by one of the masters of the court, &c.

In October, 1818, Clarke executed a deed of twenty lots to one McIntyre. The consideration recited in the deed is the indebtedness of the grantor to the grantee "in a large sum of money," and $3750 paid.

In this state of things, Clarke having died in 1826, leaving children, Mrs. Williamson and others, these all now brought suit against Suydam to recover two lots *in the western moiety of the estate, as first divided*, held by him under title from Mc-

Intire. The court below held the title of the defendant good. The correctness of such view was now the matter here.

To understand the case better, it is necessary to state that these statutes and what was done under them had been the subject, previous to the present case, of consideration in the State courts of New York, as, also, in this court. The present case itself had been here twice before.

Questions under the statutes first arose in the courts of New York, in *Sinclair* v. *Jackson*,* in which case the court declined to express an opinion, respecting "the constitutionality of the laws, or the efficacy of the proceedings under them." The next case was *Cochran* v. *Van Surlay*,† where the Court of Errors, by a much divided court, held, that the statutes were constitutional, and that the proceedings shown in that case had been taken in conformity to the statutes.

After this decision was made, proceedings under these statutes came before the courts of the United States, and on certificate of division were decided by this court in *Williamson* v. *Berry*,‡ *Williamson* v. *The Irish Presbyterian Congregation*,§ and *Williamson* v. *Ball*.‖

This court then decided various questions, which arose respecting the conformity of the proceedings to the requisitions of the statutes. But the decision in *Clarke* v. *Van Surley*, having been so far from unanimous, the majority of this court thought that the questions might be examined anew, and their view was different from that of the majority in the State court. The *present* case, which, as already mentioned, had been here twice before, was first decided by the Circuit Court, and in conformity to the decisions of this court just mentioned. Coming here again¶ the judgment was reversed, on the ground that *subsequently* to the cases already referred to in this court, the courts of New York had, in *Towle* v. *Forney*,** and *Clarke* v. *Davenport*,†† reiterated the decision in *Cochran* v. *Van Surley*, and thus by repeated decision had

* 8 Cowen, 579.
† 20 Wendell, 365; S. C., 15 Id. 439.
‡ 8 Howard, 495.
§ 8 Howard, 565.
‖ 8 Howard, 566.
¶ 24 Howard, 433.
** 14 New York, 426; S. C., 4 Duer, 164.
†† 1 Boswell, 96.

established in a way which, by its unanimity, had fixed what was decided a law of property, which the Federal courts must now enforce, whatever might be their own opinion or decision.

*Mr. David Dudley Field, for the plaintiff in error:*

Since this court has thus determined, that it will look only to the State courts for the exposition of statutes and documents affecting the title to land, even though it may have previously adjudged that such exposition was erroneous, and however contrary to reason that exposition may be, the plaintiffs must abstain from debating any of the questions so resolved. But two questions remain that have never been passed on by any court, and these we now make:

I. The power to partition the estate into two equal parts was *exhausted* by the partition into an eastern and western portion.

II. The discharge of the trustees by the legislature of New York was in contravention of that clause of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

These two points Mr. Field argued at length.

No opposing counsel appeared in this case. In one quite like it— *Williamson* v. *Moore*—the defendant was represented by Mr. *H. E. Davies*, who contended—

1. That it was a matter of necessity, in the condition of his health, that Bishop Moore should be discharged, and also that the two female trustees named should be discharged, and that provision by law should be made for the appointment of competent and proper trustees.

2. That both the questions now raised had been in fact decided in the State courts and in the last decision in this court.

Mr. Justice CLIFFORD delivered the opinion of the court.

The action was ejectment to recover the possession of two lots of land, situated in the city of New York, and numbered sixty-four and sixty-five, as delineated on a certain map made

by the city surveyor. Exceptions were taken by the plaintiffs to the instructions of the Circuit Court, in directing the jury to return a verdict for the defendant. Judgment was accordingly rendered for the defendant, and the plaintiffs sued out this writ of error.

Detailed statement of the material facts of the case may be found in the reported decisions of this court, when the case was before the court on two former occasions.* Accurate report of the material facts involved in the controversy is also given in the case of *Williamson* v. *Berry*,† which was substantially overruled by the decision of this court, when the case was last before the court prior to the present hearing.

Prior to her death the land in controversy belonged to Mary Clarke, who died in 1802, having devised the same to three persons in trust to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke during his natural life, and upon his death, in further trust to convey the same to his lawful issue living at his death, in fee; and if he should not leave any lawful issue at the time of his death, then, in the further trust, to convey the premises to Clement C. Moore and his heirs, or to such person in fee as he might by will appoint, in case of his death prior to the devisee of the life estate.

Admitted facts are that Thomas B. Clarke died on the first day of May, 1826, leaving three children—Catharine, Isabella, and Bayard—who, with the husbands of the two daughters, were the original plaintiffs. Two of the trustees died before the devisee of the life estate, and the survivor died on the fourth day of December, 1838. Title and right of the plaintiff to possession are complete, unless the defendant can establish a valid alienation of the property. He deraigned his title from Thomas B. Clarke, alleging that he was authorized by certain private acts of the legislature of the State of New York, and by certain orders of the chan-

* Suydam *v.* Williamson, 24 Howard, 427; Same *v.* Same, 20 Id. 427.
† 8 Id. 495.

cellor of that State, to make the conveyance. Clarke conveyed to Peter McIntire by deed of the twentieth of October, 1818, and McIntire conveyed by deed of the thirtieth of January, 1830, to Elijah Humphreys, and the plaintiff also introduced the deed from Philo T. Ruggles, one of the masters in chancery of the State, of the nineteenth February, 1845, to James H. Suydam, the defendant. By the act of the first of April, 1814, the Court of Chancery was authorized, on the application of Thomas B. Clarke, to constitute and appoint one or more trustees to execute and perform the several trusts and duties specified in the will of Mary Clarke, in the place of the testamentary trustees; and it also provided that the trustees last named "are hereby discharged from the trusts in the said will mentioned."

Provision was also therein made that the new trustees should, as soon as conveniently might be, partition and divide the land into two equal parts, one moiety whereof should be held by them to the uses and upon the trusts declared in the will, and the other moiety should be subdivided by the trustees, or the major part of them, into so many lots as they, or the major part of them, might think most likely to effect an advantageous sale thereof. Having completed the subdivision, as required, the provision was that the trustees, or a majority of them, were authorized and required, within a convenient time thereafter, not to exceed six months, except at the request of the petitioner, to sell and dispose of the last subdivided moiety, and that they should invest the proceeds as they, or a majority of them, should deem most for the interest of the parties concerned, paying the interest or income, except a certain portion of it, to the petitioner, and reserving the principal for the trusts of the will.

On the application of said Thomas B. Clarke a supplemental act was passed March 24th, 1815, authorizing and empowering the petitioner to execute and perform every act, matter, and thing in relation to the real estate mentioned in the preceding act, in like manner and with like effect that trustees duly appointed under it might have done, and that

he might apply the whole of the interest and income of the property to the maintenance and support of his family, and the education of his children; and further providing that no sale of any part of the real estate should be made by him until he should have procured the assent of the chancellor to such sale, who, at the time of giving such assent, was also required to direct the mode in which the proceeds of such sale, or so much thereof as he should think proper, should be vested in the petitioner as trustee, and that it should be the duty of the trustee annually to render an account to the chancellor, or to such person as the chancellor might appoint, of the principal of the proceeds of such sale, leaving the interest to be applied by the trustee in such manner as he might think proper, for his use and benefit, and for the maintenance and education of his children.

Pursuant to the authority therein conferred, the chancellor, on the petition of said Thomas B. Clarke, made an order, dated the third day of July, 1815, authorizing him to sell and dispose of the eastern moiety of the estate, "to be divided by the line, in the manner for that purpose mentioned in the said petition;" the sale to be made under the direction of a master, and the proceeds to be paid to the master, and applied and invested as directed in the order. Subsequently a second supplemental act was passed, approved March 29th, 1816, which authorized the petitioner, under the order heretofore granted by the chancellor, or under any subsequent order, either to mortgage or to sell the premises which the chancellor has permitted, or may hereafter permit him to sell as trustee under the will, and to apply the money so raised by mortgage or sale to the purposes required or to be required by the chancellor, under the legislative acts to which reference is made. Application was accordingly made to the chancellor, May 30th, 1816, for authority to proceed under the second supplemental act, and an order was passed on that day authorizing him to mortgage instead of selling the lands embraced in the preceding order of the court; the moneys thereby procured, and the debts therewith extinguished, to be appropriated and adjusted in the

same manner and under the same checks as was provided in the prior order.

Such power, however, proved to be unavailing, as the trustee, on the eighth day of March, 1817, represented to the chancellor that, notwithstanding that authority, he could not effect any sales or raise any money upon mortgage without a sacrifice of property greater than he felt warranted to make; that the pressure of his debts and the necessities of his family required some measures for their relief. The measures of relief suggested were that the estate should be divided by an eastern and western, instead of a northern and southern line, and that power should be granted to him to sell or mortgage the southern, instead of the eastern moiety of the estate, as directed in the prior order. Authority was accordingly given to the trustee by an order made March 15th, 1817, authorizing him to sell and dispose of the southern moiety of the estate, the same being divided by a line running east and west through the centre of Twenty-sixth Street, &c., instead of the eastern moiety of the estate, as permitted and directed by the orders heretofore made in the premises. By virtue of that order he might convey any part of the southern moiety in payment and satisfaction of his debts, upon a valuation agreed on between him and his respective creditors, but it was required that every sale, mortgage, or conveyance he might make for that purpose should be approved by a master of the court, and that a certificate of such approval should be indorsed upon every sale or mortgage that should be made by the trustee. Power was also conferred upon him in the order to receive and take the moneys arising from the premises, and apply the same to the payment of his debts, and to invest the surplus in such manner as he should deem proper to yield an income for the maintenance and support of his family.

Clarke, October 20th, 1818, conveyed twenty lots to Peter McIntire, including the two mentioned in the declaration. Consideration, as recited in the deed, is that the grantor was indebted to the grantee "in a large sum of money," and also of three thousand seven hundred and fifty dollars, lawful

money. The proofs show that the defendant was in possession, and the actual occupant of the premises at the commencement of the suit on the thirteenth day of August, 1845, and that the two lots in question are situated within the southern moiety, and were also within the western moiety as the estate was first divided.

Objections were made by the plaintiff to the three orders of the chancellor when offered in evidence by the defendant, but the court overruled the several objections, and the plaintiff excepted to the rulings. He also objected to the admissibility of the deed of Charles W. McIntire, also to the indorsement thereon of the approval of the master, and also to the admissibility of the several other deeds introduced by the defendant, but the court overruled the several objections, and the plaintiff excepted to the respective rulings, as more fully explained in the record.

Testimony was also introduced by the defendant proving that there was formerly on file in the Court of Chancery certain papers in which were the orders of the chancellor, but that they were lost, and the witness testified that he knew nothing of their genuineness, whereupon the defendant rested, and the court ruled that he was entitled to a verdict, and the verdict and judgment were rendered in his favor, and the plaintiff excepted and sued out this writ of error.

1. Questions touching the validity of the before-mentioned acts of the legislature of the State were first considered judicially in the case of *Sinclair* v. *Jackson*,* in the court for the correction of errors, but the decision turned upon another point, and the court cautiously avoided expressing any opinion as to their validity. The next case was *Cochran* v. *Van Surlay*,† decided originally in the Supreme Court of the State. Statement of the court in that case was that when the first act was passed all the parties interested in the trust estate, who were capable of acting for themselves, were before the legislature, and were applicants for the law. Be-

* 8 Cowen, 579.

† 15 Wendell, 439.

sides Clarke, the tenant for life, in his own right, and the natural guardian of his children, to whom the remainder was limited, there was Clement C. Moore, the contingent remainder-man in fee, and the trustees named in the will, who had the whole legal estate, and represented the minors as fully as they could be represented in any form.

Leading features of the acts are that they changed the trustees appointed by the will and authorized a sale of a part of the estate without the consent of the minors, who were entitled to the remainder in fee after the termination of the life estate. Pursuant to their request the act of April 1st, 1814, discharged the trustees named in the will from the execution of the trusts and authorized the court of chancery to appoint one or more trustees in their place. Subsequent act passed March 24th, 1815, authorized and empowered Thomas B. Clarke to execute and perform every act, matter, and thing in relation to the real estate, in like manner and with like effect that trustees duly appointed under the former act might have done. Decision of the court was that the court of chancery, without an act of the legislature, could have discharged the trustees named in the will and might have appointed others in their place, and that the act of the legislature was not an act beyond their constitutional power, as the mere substitution of a new trustee could neither defeat the trust nor divest the rights of those beneficially interested in the property. Critical examination of the power to sell, as conferred under the act of April 1st, 1814, and as modified under the act of March 24th, 1815, and of the power to mortgage or sell as conferred under the act of March 29th, 1816, was made at the same time, and the unqualified conclusion reached was that the several acts were valid and constitutional, although they did not extend to other cases of a like character.

Objections were also taken that the orders of the chancellor were not made in pursuance of the acts of the legislature, but those objections were overruled as unsupported in fact or as entirely unavailing, unless presented in some direct proceeding, as by appeal or by application to the chancellor

for new orders and directions in the premises. Conclusions of the court were: (1) That the acts of the legislature authorizing the sale of the property for the support and maintenance of the tenant for life, and of his family, and the education of his children, were fully warranted by the State constitution, and that they did not in any manner conflict with the Constitution of the United States; (2) That the orders of the chancellor in carrying those provisions into effect were regular and proper, and that the deeds of conveyance were sufficient to convey the title to the estate to the grantees.

Dissatisfied with the judgment the plaintiff sued out a writ of error and removed the cause into the court for the correction of errors, where the questions were again fully argued, but the judgment of the Supreme Court of the State was in all things affirmed.*

Pending that litigation certain suits were commenced in the Circuit Court of the United States for the Southern District of New York, and the justices of that court being opposed in opinion in respect to the principal question involved in the controversy, they were certified into this court for decision, and the majority of this court adopted in substance and effect the views of the minority of the court for the correction of errors.†

Same questions in respect to the same estate were subsequently presented to the Superior Court of the City of New York, and the court adopting the State decisions, held that those acts of the legislature were not inhibited by the State constitution, nor by that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts.‡

Judgment was for the plaintiff, and the defendant insisting that the views of this court, as expressed in the answers given on the occasion when certain questions were certified here by the circuit judges of that district, appealed to the Court of Appeals that the questions might be re-examined.

* Cochran *v.* Surlay, 20 Wendell, 371.

† Williamson *v.* Berry, 8 Howard, 495.

‡ Towle *v.* Forney, 4 Duer, 164.

Express decision of the Court of Appeals was that the judgment of the Court of Errors in *Cochran* v. *Surlay*, was a final determination of the court of last resort in the State, not only upon all the questions of law in the case, but upon the identical title in controversy, and that they ought not to re-examine the grounds of that decision. They also held that, as between judgments of their own courts and those of the Federal government, where there is a conflict between them, they ought to follow their own decisions, except in cases arising under the Constitution and laws of the Union.*

Present case was first decided in the Circuit Court in favor of the plaintiff, but the defendant being dissatisfied removed cause into this court by writ of error, where it was affirmed because there was no bill of exceptions.† By consent a bill of exceptions was subsequently allowed and the cause brought here on a second writ of error. Parties were again fully heard and the court came to the unanimous conclusion that the decision of the Court of Errors, sanctioned by the subsequent decision of the Court of Appeals, established a rule of property in that State which it was the duty of this court to follow in questions of real property situated in that State.‡

Plaintiff admits, in view of the ruling of this court in that case, that it will regard the decision of the State courts as rules of decision in respect to titles to real estate, that most of the questions presented in this record are closed in favor of the defendant. Where any principle of law establishing a rule of real property is settled in the State court the same rule will be applied by this court in the same or analogous cases. Conceding that the rule established in that case was to that effect, still the plaintiff contends that two questions arising in the record remain open for discussion. One is a question touching the construction of the second section of the act of April 1st, 1814, which authorized the trustees to partition and divide the estate into two equal parts for the

* Towle *v.* Forney, 14 New York, 428.

† Suydam *v.* Williamson, 20 Howard, 429.

‡ Same *v.* Same, 24 Howard, 427.

purpose before mentioned, which, as he insists, was never before a State court; and that the other is a question which belongs to this court to determine under the Constitution of the United States.

Questions not determined in the State court, because not raised and presented for decision by the complaining party in the court below, will not in general be examined in this court, but it is not necessary to place the decision in this case upon any such ground. Authority to partition is conceded, but the argument is that when the estate was divided into an eastern and western partition the power was exhausted. Assent of the chancellor was given in the first order to the sale by the petitioner of the eastern moiety, to be divided by the line in the manner for that purpose mentioned in the petition. By the second order the chancellor gave his assent that the petitioner might mortgage instead of selling the estate embraced in the former order. Third order bears date on the fifteenth of March, 1817, and by it the chancellor gave his assent that the petitioner might sell and dispose of the southern moiety of the estate, the same being divided by a line running east and west, instead of the eastern moiety as permitted and described by the previous orders. Even regarded as an original question there can be no doubt of the power of the chancellor to make that order under the act of the twenty-ninth of March, 1816, as construed in connection with the preceding acts to which it is supplemental.

Reference to the principal case* will show that the order in question was directly under the consideration of the court, and it must be regarded as a necessary intendment that the point now raised was determined adversely to the views of the plaintiff. Same remarks also apply to the case of *Towle* v. *Forney*, where this order, as well as those of prior date, were again before the court. Judgment of the court was that the title of the plaintiff in that case was valid, which affirmed the power of the chancellor to issue the orders.

* Clarke *v.* Van Surlay, 15 Wendell, 447.

Appeal was taken by the defendant to the Court of Appeals, where the judgment was affirmed.*

Careful examination was also given to that order by this court when the case was here on the last occasion before the present hearing. Thorough examination of the whole case was made at that time, and the court in conclusion say that there is no room for doubt as to what the settled opinion of the State courts is in reference to this title, and therefore that there could be no hesitation as to the proper judgment to be rendered.

Second question presented by the plaintiff is that the discharge of the trustees named in the will by the legislature of the State, was in contravention of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts.

Whenever the title of the estate conveyed has been put in issue the validity of that act of the legislature has been drawn in question, and the decision in every case, except the one first made in this court, has sustained the validity of the act. None of the adjudications in form dispose of the question, but the clear and necessary intendment of each is to that effect, especially the last decision of this court, as it reverses the former views of the court in respect to the whole merits of the controversy. All the persons interested in the will who were capable of acting for themselves were before the legislature when that act passed, and the trustees named in the will were applicants for the law.

Trustees may undoubtedly be discharged by the chancellor, even without an act of the legislature, and as the mere substitution of a new trustee could neither defeat the trust nor divest the rights of those interested, it is not possible to see how the proposition of the plaintiff can be sustained.

The rights of the trustees were not invaded, as they asked to be discharged; and the *cestuis que trust* cannot complain, for the reason that the substitution of a new trustee did not defeat or impair the trust or divest their interest. But the

* Towle *v.* Forney, 14 New York, 426.

true answer to the proposition is that there is no matter of contract involved in the substitution of new trustees, with the assent of the chancellor, in the place of those named in a testamentary devise, unless the act be one which infringes some vested right of the trustees. Nothing of the kind is pretended in this case and there is no foundation for the proposition.

JUDGMENT AFFIRMED WITH COSTS.

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## CRAWSHAY ET AL. *v.* SOUTTER AND KNAPP.

1. Where there had been a foreclosure and sale under a railroad mortgage to secure certain bonds, exceptions to the sale were refused to be entertained in favor of such of the bondholders as had been parties to a scheme under which the sale had been made for the formation of a new company, and had surrendered their bonds in exchange for stock and bonds of such new association.
2. Where as to a bondholder differently situated the decree below, in confirming the sale, had imposed the condition of payment to him by the new company of the full amount of his bonds of the old company, principal and interest, such decree was affirmed without considering the abstract validity of the exception taken by him.

THESE were two appeals from the Circuit Court for Wisconsin, one by Crawshay and Oddie and one by Vose, to review an order confirming the sale of a railroad under a mortgage. The case was shortly this:

Soutter and Knapp, surviving Bronson, were trustees for the benefit of bondholders of a mortgage called a land-grant mortgage given by the La Crosse and Milwaukee Railroad Company on a part of its road. The mortgage had been foreclosed, and as is frequent in such cases in Wisconsin, a new company, named the St. Paul, was formed by the purchasers; here the bondholders. Among the bondholders were Crawshay, Oddie, and Vose, the appellants. The two former surrendered all their bonds, and took certificates of stock. The latter (who had been appointed by his co-creditors a trustee to organize the new company), however,

yet had in his possession, bonds for $5000, for which he held certificates of the trustees entitling him to a corresponding amount of stock in the new company. A difference arose between him and his co-trustees; and the court having confirmed the sale of the old road under the mortgage, he, Crawshay and Oddie appealed from its action. The confirmation had been made subject to payment by the new company of his debt, principal and interest.

*Mr. Ryan, for the appellants; Messrs. Cary and Carlisle, contra.*

Mr. Justice DAVIS delivered the opinion of the court in the cases.

After a protracted litigation, the Circuit Court for the District of Wisconsin, at its last September Term, confirmed the sale made by the marshal in what is known as the land-grant foreclosure suit, brought by Soutter and Knapp, surviving trustees, against the La Crosse and Milwaukee Railroad Company. These appeals are brought here to review that order of confirmation, and will be considered together. Various exceptions were taken in the court below, and are renewed here, to the report of the marshal of the sale of the mortgaged premises, but it is unnecessary to notice them, as Crawshay and Oddie are not in a condition to avail themselves of them; and the rights of Vose, as owner of bonds or certificates, are protected by the order of confirmation. Crawshay and Oddie were original bondholders under the land-grant mortgage, but before filing their exceptions to the report of sale, they had surrendered their bonds to the trustees, appointed under the scheme for the adjustment of the affairs of the La Crosse company; took certificates of stock, and subsequently the bonds and stock of the St. Paul company, as provided in the agreement for organizing it. By doing this, they elected to abide by the action of the trustees, and cannot now be heard to interpose any objection to the confirmation of the sale.

Vose was one of the trustees appointed by the bondhold-

ers of the La Crosse company to adjust its affairs, and form a new company, but differences sprung up between him and his co-trustees, resulting in their refusal to co-operate with him. It is unimportant to inquire whether his co-trustees were justified in their treatment of him, because, before the confirmation of the sale by the court, the trust agreement was substantially closed. All the bondholders, except Vose, had exchanged their securities for the bonds and stock of the St. Paul company. Vose, at the time of filing exceptions to the report of the sale, was the owner of five bonds of the La Crosse company, for which he held the certificates of the trustees, entitling him to a corresponding amount in bonds and stock of the new company. It is not necessary to determine whether, by exchanging his old bonds for certificates of stock in the new company, he was not so far committed to the adjustment scheme, as to prevent his withdrawal from it, for in any aspect of the case, all rights that he could possibly have under the land-grant mortgage, were protected by the court. The order of confirmation was expressly made subject to the payment to him by the St. Paul company, of five bonds of one thousand dollars each, with all accrued and unpaid interest, upon the surrender by him of the certificates of the trustees, and all claims for dividends.

He certainly could reasonably ask no more than the payment of the principal and interest of his La Crosse bonds—if he was unwilling to take the stock and bonds of the St. Paul company with their unpaid dividends, according to the trust agreement,—and as the court obliged the St. Paul company to pay him the full amount of his La Crosse bonds, it is hard to see how he is aggrieved by the order of confirmation.

DECREE AFFIRMED.

## MINNESOTA COMPANY *v.* ST. PAUL COMPANY.

1. Where, under the statutes of Wisconsin, several mortgages had been executed by the La Crosse and Milwaukee Railroad Company, upon several divisions into which that railroad was divided, including all the rolling stock, which at the date of the mortgages respectively "had been already procured or might thereafter be procured for or used upon the said road," meaning the particular division described in the mortgage—upon a bill filed by the purchaser under a subsequent mortgage of the whole road and all the rolling stock, claiming a portion of the rolling stock against the purchaser under one of the former mortgages, on the ground that it was appurtenant to another division of the road and not to that described in such former mortgage, and also upon the further ground that it was not included in the decree of foreclosure of such former mortgages, this court (*Minnesota Co.* v. *St. Paul Co.*, 2 Wallace, 609), affirmed the decree against the defendant upon a demurrer to the bill.

   But now the case coming back after answer and full proofs, the court *held*, that in the absence of any specific apportionment in fact between the several divisions of the road the mortgages operated upon all the rolling stock in the order of their dates; and a decree below dismissing the bill was affirmed.

2. A supplemental bill dismissed as relating to matters not in their nature supplemental; and a cross-bill dismissed as rendered unnecessary by the principal decree in this case.

Two appeals from the Circuit Court for Wisconsin; the parties being in the first case the Milwaukee and Minnesota Railroad Company appellant, against the Milwaukee and St. Paul Railroad Company; and in the second, Soutter and Knapp, survivors, against the company, appellants in the first.

*Messrs. Cary and Carlisle, for the appellants; Messrs. Cushing and Stark, contra.*

Mr. Justice NELSON stated the case and delivered the opinion of the court.

The case was before the court on a demurrer to the bill, and is reported in 2 Wallace, p. 609. It involved a question as to the ownership of the rolling stock on the La

Crosse and Milwaukee Railroad, extending from Milwaukee to La Crosse, some two hundred miles.

This company mortgaged the Western Division, from Portage to La Crosse, one hundred and five miles, to Bronson, Soutter, and Knapp, on the 31st December, 1856, to secure the bondholders; and, on the 17th August, 1857, mortgaged the Eastern Division, from Milwaukee to Portage, ninety-five miles, to Bronson and Soutter to secure the bondholders on that division. The mortgage on the Western Division was foreclosed in default of payment, purchased in, and a new company formed called the Milwaukee and St. Paul Railroad, which is the defendant in this suit, and which sets up a right to the rolling stock by virtue of the purchase and title under the mortgage.

This La Crosse and Milwaukee Company also executed a mortgage on the first of June, 1858, to W. Barnes to secure another issue of bonds, which covered the whole of the road from Milwaukee to La Crosse. This mortgage was also foreclosed in default of payment, purchased in, and a company organized called the Milwaukee and Minnesota Railroad Company, and is the complainant in this suit, and which sets up a title to the rolling stock as owner of the equity of redemption of the Eastern Division, there being prior mortgages on it to Bronson and Soutter, and others; the ground of claim being, that this stock belonged to that division, and not to the Western, and was covered by this Bronson and Soutter mortgage and others. The description of the rolling stock in each of the mortgages was substantially the same, and is as follows: "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 road," &c. Each of the three mortgages mentioned was made subject, in express terms, to the lien of all prior mortgages on the road. When the question came before this court on the bill and demurrer, a majority of the court held it sufficiently appeared by the facts set forth in the bill, and which were admitted by the demurrer, that the rolling stock

belonged to the Eastern Division by some division or assignment of it, or, if not, it sufficiently appeared in the foreclosure and sale of the mortgage on the Western Division in the District Court of the United States, and under which the defendant derived title, that that court had decided the stock belonged to the Eastern Division, and hence the complainant, the Minnesota Company, as owner of the equity of redemption, claimed it had made out a title to it. The demurrer was, of course, overruled, and the cause remanded to the court below for further proceedings. On the cause coming down to that court, leave was given to the defendant to answer, which was put in accordingly, and to which there was a replication, and the parties went to their proofs. A large amount of testimony was taken on both sides, which is in the record, and the cause is now before us on the pleadings and proofs. The bill was dismissed in the court below on account of a division of opinion between the judges. It is here on appeal by the complainant, the Minnesota Company.

The proofs show that the rolling stock in dispute was purchased by the funds of the La Crosse and Milwaukee Company; that it was placed and used on the entire line of the road, embracing both divisions; and that no division of the stock had ever been made by the company between the two divisions, but was purchased out of the common funds, and used on the whole line for the common benefit. The mortgage on the Western Division was the oldest, and to which was attached priority of lien on the road by its very terms. It is manifest, therefore, if there was nothing else in the case, that an interest in and right to the use of the rolling stock became vested in the defendant, the St. Paul's Company, by the foreclosure of this mortgage and purchase, under which it acquired title to the Western Division.

It is insisted, however, that the right and title to this rolling stock were adjudicated to the Eastern Division by the court in the foreclosure suit, which opinion was entertained by a majority of the court as the case was presented in the bill and admitted by the demurrer. The question comes

before us now, however, in a different aspect, after answer, replication, and proofs, and several matters which were stated in the bill and admitted by the demurrer have been denied and disproved by the proofs. One of these matters, namely, the division of the rolling stock and assignment of the portion in question to the Eastern Division, has already been referred to and explained. Another, and most material matter, is the action of the court in the foreclosure suit, and alleged adjudication of this stock in the same to the Eastern Division, which is denied in the answer, and all the facts and circumstances bearing upon the question, very fully presented in the proofs, and upon which, it is the opinion of a majority of the court, that no such adjudication took place; that, on the contrary, the order of sale in the foreclosure suit included this rolling stock; also the advertisement of the marshal, his report of the sale, and the confirmation of the same. It is true that there is some obscurity in one or two of the preliminary orders in the foreclosure proceedings; but we think they have been explained by the proofs in the case, and the more full examination of all the orders made therein by the court. An instance is the order of the court, May 7th, 1863, soon after the order of confirmation of the sale, which was supposed to indicate the understanding of the court according to the interpretation of the complainant. It now appears that it was not intended as a final order, but temporary, providing for the custody of the property during the time allowed the Minnesota Company to prepare an answer to resist the application by the St. Paul Company for the possession of this rolling stock. The final order was not made till the 12th of June, in which this rolling stock was ordered to be delivered to the St. Paul Company, subject to other previous liens on the same; and it now appears, also, that no rolling stock was ever delivered under the order of the 7th of May, but was delivered under that of the 12th of June.

Our conclusion is, that the foreclosure of the mortgage of the La Crosse and Milwaukee Company, of the 31st of December, 1856, to Bronson, Soutter. and Knapp, which in-

cluded the rolling stock in question, a right to the use of this stock on the road passed to the St. Paul Company under the foreclosure and organization of the company in pursuance thereof.

The decree of the court below must, therefore, be AFFIRMED.

It appears that a second supplemental bill was filed by the complainant, the Minnesota Company, against the same defendant, setting up, among other things, a right to the rolling stock in controversy in the first, and also a right, as against the St. Paul Company, to compensation for the use of said rolling stock running on the Western Division.

There are also many allegations in the bill charging the St. Paul Company with a breach of the original charter in the construction of a road for the purpose of disconnecting the Western from the Eastern Division, and interrupting a through line from La Crosse to Milwaukee. It is quite apparent that the matters set forth in this bill are not the subject of a supplemental bill. The first supplemental bill set up a claim to the rolling stock under the decree in the original suit of foreclosure of the mortgage. The present bill is filled with matters of complaint, which have occurred since the original decree of foreclosure and sale, and which have no necessary connection with that decree, such as a claim for the use of the rolling stock, the right to which was in litigation in the first supplemental bill, and in respect to which no right could be set up for the use of it until the title had been determined in its favor; and, as it respects the portion of the bill relating to the violation of the charter, and attempt to divert the travel and interrupt the through line in running the road, the matter could have no possible connection with the original bill or decree, of which this is claimed as supplemental. The decree below was, therefore, right in dismissing the bill.

DECREE AFFIRMED; CASE REMANDED TO COURT BELOW.

The cross-bill, also, to the first supplemental bill, which

was founded on a second mortgage given by the La Crosse and Milwaukee Company to Bronson, Soutter, and Knapp, which was in the nature of a further assurance concerning the rolling stock, was properly dismissed. As the effect of dismissing the supplemental bill was to affirm the right of the St. Paul Company to the use of the rolling stock on the Western Division on the ground it was covered by the first mortgage, and which we have affirmed, the cross-bill was useless and of no effect.

DECREE AFFIRMED; CAUSE REMANDED TO COURT BELOW.

In the first of these two appeals, Mr. Justice MILLER dissented.

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## FLEMING *v.* SOUTTER.

Where a decree of foreclosure and sale for default in payment of an amount due, contained a clause authorizing the complainants on petition to have an order of sale in case of default as to any future instalment, successive orders of sale upon such summary proceeding by petition are regular and sufficient.

APPEALS in three decretal orders from the Circuit Court for Wisconsin.

*Messrs. Cushing and Stark, for the appellants; Messrs. Cary and Carlisle, contra.*

Mr. Justice NELSON stated the facts and delivered the opinion of the court.

These are appeals from decretal orders made in the case of Soutter, survivor, &c., *v.* The La Crosse and Milwaukee Railroad Company and others. That suit was instituted for the foreclosure of a mortgage on the Eastern Division of the road of the La Crosse and Milwaukee Company, and a decree had been entered in the Circuit Court in pursuance of a mandate from this court, in which it was directed that the

complainant shall be at liberty, when further instalments of interest should become due and unpaid, to apply for an order for the sale of the said mortgaged premises in accordance with the mandate. On the 18th September, 1866, an order was entered directing a sale of the premises on account of default in the payment of $40,000, an instalment of interest that had become due on the first of the same month, which order was entered on petition and due notice, and after argument by counsel. The first two appeals were taken from this order.

A second default was made in payment of another instalment on the first of March, 1867, and after hearing the parties on both sides, an order for a sale was made on the fifth of the same month. The third appeal is from this order.

We have examined the proceedings to which objections have been taken, and are of opinion that they are in conformity with the principal decree in the cause, and that the order should be

AFFIRMED.

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## RAILROAD COMPANIES *v.* CHAMBERLAIN.

Where a bill was filed by a Wisconsin railroad company to set aside a judgment, and a lease in the nature of a mortgage to secure the same, and another railroad corporation created by the same State, having become equitable owner of the lease and mortgage, was admitted as defendant, and also filed a cross-bill to have the judgment enforced, the Circuit Court dismissed the original bill on the merits, and also dismissed the cross-bill for want of jurisdiction, the parties being all citizens of the same State: *Held*, that this latter decree was erroneous; the proceeding being merely ancillary to the judgment in the Circuit Court, which could only be enforced in that court.

THESE were two appeals from the Circuit Court for the District of Wisconsin; one by the Milwaukee and Minnesota Railroad Company against Chamberlain, the other by the Milwaukee and St. Paul Railroad Company against both the parties to the other case.

Statement of the case.

In the first case the bill of complaint was filed by the Milwaukee and Minnesota Railroad Company against Chamberlain, to set aside a lease executed to him by the La Crosse and Milwaukee Railroad on the 26th September, 1857, of their road, with the intent to hinder and delay their creditors; and, also, to set aside a judgment which the company had confessed to Chamberlain for the sum of $429,089.72 on the 2d October, 1857, which, it was also charged, was confessed with the like intent. The Milwaukee and St. Paul Company were admitted as defendant on the ground that it had become the owner of the lease and judgment. Answers were put in by both the defendants, and proofs taken.

On the 23d May, 1865, the Milwaukee and St. Paul Company filed a cross-bill against the Milwaukee and Minnesota Company and Chamberlain, setting forth the indebtedness of the La Crosse and Milwaukee Company to Chamberlain; that the complainant had become the equitable owner of this debt for a full consideration; that the lease and judgment, the former being a security for the latter, were liens on the Eastern Division of the road, which was largely encumbered by prior mortgages, and which, together with the aforesaid judgment, far exceeded its value, and that the complainant had no adequate remedy at law. The bill then prayed that the judgment might be decreed a valid and subsisting lien on the road, appurtenances, and franchises, and that they might be decreed to be sold to satisfy it. The defendants put in an answer, and the cause went to the proofs. This was the second suit of the two above-mentioned suits. Much testimony was taken on both sides, which was found in the record; and the court below, after full consideration, dismissed the bill in the principal suit on the merits as to the Chamberlain judgment, and decreed in favor of the force and effect of that judgment; but dismissed the cross-bill for the reason that the two companies were incompetent to litigate the matter set forth in that bill on account of the residence of the parties, both being corporations of the State of Wisconsin.

Statement of the case.

*Mr. Cushing, for the appellant in the first case; Messrs. Cary and Carlisle, contra; the position of counsel being reversed in the cross-bill.*

Mr. Justice NELSON delivered the opinion of the court.

We think that the court erred in dismissing the cross-bill. It was filed for the purpose of enforcing the judgment, which was in the Circuit Court, and could be filed in no other court, and was but ancillary to and dependent upon the original suit—an appropriate proceeding for the purpose of obtaining satisfaction. The lease was in the nature of a mortgage, and held only as collateral security, and followed the judgment.*

The decree in the first suit must be affirmed, and that in the second reversed, and the cause remitted to the court below to enter a decree

IN CONFORMITY WITH THIS OPINION.

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## RAILROAD COMPANY *v.* JAMES.

In Wisconsin, a judgment is a lien from the time it is rendered, upon a railroad, and upon the rolling stock, which is a fixture by statute; and upon a bill in equity a decree for a sale to satisfy the judgment passed title to the purchaser.

THESE were three appeals from the Circuit Court for Wisconsin. The case was this:

On the 7th October, 1857, Cleveland recovered judgment for $111,727 against the La Crosse and Milwaukee Railroad Company. The legislature of Wisconsin, incorporating the road, provided that the title to lands which it might take in building its road, should, on its payment for them, "vest in the said company in fee," and provided also by general statute that rolling stock should be a fixture on any railroad, in connection with which it was used. Cleveland assigned his judgment to James. Subsequently to the entry of this judg-

* Freeman *v.* Howe et al., 24 Howard, 451.

ment, the company mortgaged its road to one Barnes, and under this mortgage the Eastern Division of the road was sold (a Western Division having been sold under liens prior to either Barnes's mortgage or Cleveland's judgment). The purchasers of this Eastern Division organized a new company under the name of the Milwaukee and Minnesota Company, and took possession of the road. James now filed his bill in the Circuit Court for Wisconsin against the Milwaukee and Minnesota Company, for the purpose of having his judgment declared a lien on the Eastern Division of the road, and the same sold in order to obtain satisfaction.

The court decreed that the judgment was a lien from the time of its rendition, and that the sum of $98,901.51 was due thereon, that the La Crosse Company had ceased to exist as a corporation, and that the Milwaukee and Minnesota Company had succeeded to its rights as to the Eastern Division, subject to all prior liens, and directed a sale by the marshal of the road from Milwaukee to Portage. A sale was made accordingly, and on a report to the court, was duly confirmed.

The three appeals now taken to this court were—

One on a petition of two stockholders in the Minnesota Company, Bright and Gunneseon, asking that the decree might be vacated, and they let in to defend;

One on a petition of the Minnesota Company to stay sale and open and vacate the decree, which was denied;

One, an appeal by the same company from the order confirming the sale.

*Messrs. Cushing and Stark, for the appellants; Messrs. Cary and Carlisle, contra.*

Mr. Justice NELSON delivered the opinion of the court.

The La Crosse and Milwaukee Company, by virtue of its charter and the proceedings under it, acquired a title in fee to the road-bed; and the rolling stock owned by it, and used and employed in connection with the road, is made a fixture by an express statute of the State of Wisconsin, and such, we

think, is the law according to the true construction of the charter, independent of the statute.* By the statute law of Wisconsin judgments are liens on real estate, and we do not doubt but that this judgment became a lien on the road from the time of its rendition, and that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by the court, passed the whole of the interest of the company existing at the time of its rendition to the purchaser.†

A great many objections have been taken to the decrees below, but those of any substance or force will be found answered by the principles above stated.

DECREES AFFIRMED.

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## JAMES ET AL. *v.* RAILROAD COMPANY.

1. Where, under the laws of Wisconsin, a mortgage by the La Crosse and Milwaukee Railroad Company upon its railroad and appurtenances had been foreclosed, a sale made and confirmed, and a new company under the name of the Milwaukee and Minnesota Railroad Company had been organized by the purchasers, being the directors who made the mortgage and others holding the bonds secured thereby, this court, upon a creditor's bill filed by judgment creditors of the mortgagor—

   *Held*, on the facts of the case, that the sale was fraudulent, and that it should be set aside, and the new company perpetually enjoined from setting up any right or title under it;—the mortgage to remain as security for the bonds in the hands of *bonâ fide* holders for value, and that the judgment creditors (the present complainants) be at liberty to enforce their judgments against the defendants therein, subject to all prior incumbrances.

2. Where the notice of the sale of a railroad under mortgage to secure railroad bonds, set forth that the sum due under the mortgage for the principal of bonds was $2,000,000, with $70,000 interest, when, in fact, less than $200,000 was outstanding in the hands of *bonâ fide* holders for value, the remainder of the $2,000,000 being either in the hands of the directors or under their control, such a notice was fraudulent, and of itself sufficient to vitiate the sale.

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* Pennock *v.* Coe, 23 Howard, 117.

† Pennock *v.* Coe, 23 Howard, 117; Gue *v.* Tide Water Canal Co., 24 Id. 257; 2 Redfield, 544 and n.; Covington Co. *v.* Shepherd, 21 Howard, 112; Macon and Western Railroad Co. *v.* Parker, 9 Georgia, 377.

Statement of the case.

APPEAL from the Circuit Court for Wisconsin; James, Brewer, Greenleaf, Justice, and others, being the appellants, and the Milwaukee and Minnesota Railroads appellee.

*Messrs. Cary and Carlisle, for the appellants; Messrs. Cushing and Stark, contra.*

Mr. Justice NELSON stated the case and delivered the opinion of the court.

The bill before us is a creditor's bill, filed by four different judgment creditors, against the defendants, to set aside as fraudulent and void against creditors the sale under a mortgage made to Barnes, 21st of June, 1858, for two millions of dollars, by the La Crosse and Milwaukee Railroad Company, which sale took place on the 21st of May, 1859, and under which the defendants' company was organized; and that the company be perpetually enjoined and restrained from exercising any control over the property or franchises mentioned in said mortgage, or from interfering in any manner with the road or its franchises; and, further, that the said company be decreed to take nothing under the sale, and that the property and franchises of the La Crosse and Milwaukee Company may be sold and applied, after discharging all prior liens, to the satisfaction of the judgments of the complainants.

The complainants consist of the firm of F. P. James & Co., who are the owners of a judgment against the La Crosse and Milwaukee Company for $26,353.51, recovered in the District Court of the United States for the District of Wisconsin, on the 5th of October, 1858, in favor of Edwin C. Litchfield, and which came to the complainants by assignment.

Nathaniel S. Bouton, who recovered in the same court a judgment against the same company for $7937.37, on the 5th of April, 1859, and which judgment came to the firm of F. P. James & Co., by assignment; Philip S. Justice and others, who recovered a judgment in the Circuit Court of Milwaukee County against the same company for $235.33, and E. Bradford Greenleaf, a judgment in the same court against the

same company for $840.06. These judgments were liens on the La Crosse and Milwaukee Railroad, subsequent to the mortgage to Barnes, already referred to, which, with the sale under it, is sought to be set aside as fraudulent and void against creditors.

The mortgage was given to secure the payment of an issue of bonds for two millions of dollars, on the 21st of June, 1858, and which were issued accordingly by the president and secretary, and were made payable in thirty years. One thousand bonds of one thousand dollars each, fourteen hundred of five hundred dollars each, and three thousand of one hundred dollars each, interest at seven per cent., payable semi-annually on the first day of January and July in each year, with coupons attached. The sale under the mortgage took place on default of the payment of the first instalment of interest, six months after it was executed. Barnes, the mortgagee, acted as auctioneer, and bid off the property himself, as trustee for the bondholders, who soon after organized the Milwaukee and Minnesota Railroad Company, one of the defendants in this suit.

As appears from the proofs at the time of this sale, there had not been two hundred thousand dollars advanced on the entire issue of the two millions of bonds; indeed, the actual amount is but little over one hundred and fifty thousand dollars. Five hundred and fifty thousand dollars of the bonds do not appear to have been negotiated at all, which were held in trust and never used, and one hundred and three thousand had been returned and cancelled, making in the aggregate six hundred and fifty-three thousand. Four hundred thousand were given to Chamberlain to secure a note of the company for $20,000, which he sold at auction, and which were bid in, principally, by the directors, at five cents on the dollar. Three hundred and ten thousand dollars of the bonds were given to secure a loan of $15,500, and which came into the hands of the same persons, or their friends, for about five cents on the dollar.

It is charged in the bill, and the proofs are very strong in support of it, that this note to Chamberlain for $20,000, and

the loan of $15,500 to secure the payment of which these bonds were given—$400,000 in amount for the first sum, and $310,000 for the second—were made by the company for the purpose, and with the intention of obtaining a division of them among the directors, at merely nominal prices. It is very fully established that this was, in point of fact, the result of the two transactions.

We have looked with some care into the proofs, and into the brief of the learned counsel for the defendants, to ascertain the portion or amount of these bonds, or, of the stock of the Milwaukee and Minnesota Company, into which some of them were converted, that are now in the hands of *bona fide* holders, and we find no evidence in the record tending to show any amount beyond the sum already mentioned, less than $200,000. These were the only outstanding bonds existing at the time of the foreclosure and sale for which value had been paid; the remainder of the two millions of dollars were either in the hands of the directors or under their control, and not negotiated, or, they were in their hands under the fraudulent arrangements we have already stated, at nominal prices. Nor, do we find that the present holders of the bonds or stock of the company are in any better or more favorable condition than those who organized the defendants.

The notice of sale set forth that the mortgage debt was two millions of dollars, and that seventy thousand dollars of interest were due.

It needs no authorities to show that such a sale cannot be upheld without sanctioning the grossest fraud and injustice to the La Crosse and Milwaukee Company, the mortgagee, and its creditors. This deceptive notice was calculated to destroy all competition among the bidders, and, indeed, to exclude from the purchase every one, except those engaged in the perpetration of the fraud. The sale, therefore, must be set aside, and the Milwaukee and Minnesota Company be perpetually enjoined from setting up any right or title under it—the mortgage to remain as security for the bonds in the hands of *bona fide* holders for value, and that the judg-

ment creditors, the complainants, be at liberty to enforce their judgments against the defendants therein, subject to all prior liens or incumbrances.

Mr. Justice MILLER dissented.

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## SMITH *v.* COCKRILL.

1. Congress having enacted in 1828, "that the forms of mesne process, and the forms and modes of proceeding in suits in the courts of the United States, held in those States admitted into the Union since the 29th of September, 1789, in those of common law, shall be the same in each of the said States, respectively, as are now used in the highest court of original and general jurisdiction of the same; in proceedings in equity, according to the principles, rules, and usages, which belong to courts in equity;" the effect of an act of 1861, admitting Kansas into the Union, and providing that "all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within that State as in other States of the Union;" and constituting the State "a judicial district," was to re-enact, as respected Kansas, the provision of the act of 1828.
2. Accordingly, the Federal courts of Kansas have a right to issue execution, and the marshal of the United States there, a right to execute it.
3. But a sale by the marshal, not conforming the mode of proceeding in levying the execution and making the sale, to the State practice, is irregular and void, and a deed by him on such sale conveys no title.

ERROR to the Circuit Court for the District of Kansas.

The suit was an action of ejectment by Cockrill against Smith, to recover the possession of several lots of land in the city of Leavenworth.

The plaintiff claimed title under a sale on a judgment against one Clark, recovered in a State court on the 4th of April, 1862. The sale took place on execution upon the judgment on the 23d of July, 1863, at which the plaintiff, Cockrill, became the purchaser, and received a deed from the sheriff of the lots in question.

The defendant, Smith, also claimed title under a sale on execution upon two judgments against Clark, recovered in

the District Court of the United States—one on the 29th of May, 1861, the other on the next day of the same month. And the sale took place under the executions by the marshal on the 8th August, 1861, and Smith became the purchaser, and received a deed from the marshal for the same lots.

Both parties thus set up title under Clark; and as Smith, the defendant below, had the elder title, if there was nothing else in the case, he would have been entitled to recover.

It was objected, however, that the deed to him from the marshal under the sale was void, for the reason that it was not made in conformity with the code of civil procedure of Kansas, which requires an appraisement of the property levied on, and that it shall be sold on the execution for two-thirds of its appraised value.

It being admitted that the property was not thus appraised, nor sold, the court below held that the sale was void, and that the marshal's deed conveyed no title to the purchaser. The correctness of this view raised the only question in the case.

*Mr. T. A. Hendricks and Mr. R. Breckenridge, for the plaintiff in error; Messrs. Clough and Wheat, with an elaborate brief of Mr. Lysander B. Wheat, setting out the statutes and authorities bearing on the case—contra.*

Mr. Justice NELSON delivered the opinion of the court.

The State of Kansas was admitted into the Union by act of Congress on the 29th January, 1861, the fourth section of which provided, "that from and after the admission of the State of Kansas, as heretofore provided, all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within that State as in other States of the Union: and the said State is hereby constituted a judicial district," &c.*

The act of 1828 provided, "that the forms of mesne process, except the title, and the forms and modes of proceed-

* 12 Stat. at Large, 128.

ing in suits in the courts of the United States, held in those States admitted into the Union since the 29th of September, 1789, in those of common law, shall be the same in each of the said States, respectively, as are now used in the highest court of original and general jurisdiction of the same; in proceedings in equity, according to the principles, rules, and usages, which belong to courts in equity, &c., except so far as may have been otherwise provided for by acts of Congress, subject, however, to such alterations and additions as the courts of the United States shall, in their discretion, deem expedient," &c.

This act was re-enacted August 1st, 1842. The act of 1828, is one of the acts extended over the State of Kansas, and which is declared "to have the same force and effect within that State as in other States of the Union." As it respects that State, it was a virtual re-enactment of it. It had the effect, therefore, to adopt as the forms and modes of proceeding, in suits in the Federal courts at common law, the same as existed at the time, and were used in the highest common law courts of the State; and by the third section of the act of 1828, writs of execution and other final process issued on judgments rendered in courts of the United States, were to be the same as used in the State.*

In the absence of this provision in the act admitting Kansas into the Union, extending the Federal laws over it, there would be great difficulty in finding any authority in the court to issue the execution, or in the marshal to execute it, but with it all difficulty disappears. The result, however, is, that the sale by the marshal in not conforming the mode of proceeding in levying the execution, and making the sale, to the State practice, is irregular and void, and the deed to Smith, the defendant, conveyed no title. The civil code of procedure of the Territory requiring the appraisal, and sale at two-thirds of the appraised value, was continued in force at the formation of the State, and, consequently, was the mode of proceeding adopted on the introduction of the pro-

* Beers v. Haughton, 9 Peters, 361; Parsons v. Bedford, 3 Ibid. 445.

cess act of 1828–1842, and to which the marshal should have conformed in making the sale.

JUDGMENT AFFIRMED.

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## UNION INSURANCE COMPANY *v.* UNITED STATES.

1. The act of August 6th, 1861, "to confiscate property used for insurrectionary purposes"—(which act declares that such property shall be the lawful subject of *prize and capture*, and that such prizes and captures shall be condemned in the *District* or *Circuit Court* . . . having jurisdiction, *or* in *admiralty*, in any district in which they may be seized, or into which they may be taken, and that the attorney-general "may institute the proceedings of condemnation"),—extended to all descriptions of property, real or personal, on land or on water.
2. The Circuit Court has jurisdiction, under that act, of proceedings for the condemnation of real estate or property on land; and such proceedings may be shaped in *general* conformity to the practice in admiralty; that is to say, they may be in the form and modes analogous to those used in admiralty. But issues of fact, on the demand of either party, must be tried by jury; such cases differing from cases of seizure made on navigable waters where the course of admiralty may be *strictly* observed.
3. Such proceedings, having forms and modes but analogous to those used in admiralty, and issues of fact being to be tried by a jury, do not necessarily constitute "a cause in admiralty."
4. Where a proceeding, under the act, to enforce the forfeiture of real estate, was carried on in a Circuit Court by libel, monition, claim interposed, and testimony taken in conformity with the practice of courts of admiralty, and without a jury anywhere, jurisdiction of the decree was taken by this court on *appeal*, but only for the purpose of reversing the decree as irregular, and directing a new trial.
5. The proceedings in cases of the seizure of real estate should, in respect to trial by jury and exceptions to evidence, be conformed to the course of proceedings by information on the common-law side of the court, in cases of seizure on land.
6. An owner of real property in New Orleans, who leased it during the late rebellion to a firm publicly engaged in the manufacture of arms for the rebel confederacy—the lease stating, in terms, that the lessees intended to establish "engines, machinery," &c., in the property leased—was presumed to have made the lease knowing the purpose for which the property was to be used, and consenting to it. And his interest in the property was held to be rightly confiscated under the act of 6th August, 1861.

Statement of the case.

7. But the presumption was held to be otherwise in regard to a party taking a mortgage from the owner before the lessees took possession, and where there was no proof of consent by the mortgagee to the use made of the premises, beyond the fact of his having taken a mortgage. And the interest of such mortgagee was held not confiscable under the act.
8. The forfeiture was incurred when the lessees went into actual use of the premises under lease, and the subsequent seizure for condemnation divested all intermediate liens.

THIS was an *appeal* from the Circuit Court of the United States for the Eastern District of Louisiana; the case being thus:

An act of Congress, of August 6th, 1861, passed during the late rebellion, and entitled "An act to confiscate property used for insurrectionary purposes," provides, in different sections, as follows:

The first section provides that property used in aid of the rebellion, with consent of the owner, shall be the "lawful subject of *prize and capture* wherever found," and makes it the duty of the President to cause it "to be seized, confiscated, and condemned."

The second section provides that such "prizes and captures shall be condemned in the District or Circuit Court of the United States having jurisdiction of the amount, OR in admiralty, in any district in which the same may be seized, or into which the same may be taken and proceedings commenced."

The third section provides that "the attorney-general, or any district attorney of the United States, in which said property may at the time be, may institute the proceedings of condemnation, and in such cases they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts."

With this statute in force, a square of ground in New Orleans, with the buildings upon it, was leased, on the 17th of September, 1861, by one Leonce Burthe to a firm, Cook & Brother, who, in October or November, established on the premises *a manufactory of arms for the rebel government*, and

continued the business until the occupation of the city by the national forces in the spring of 1862.

On the 8th of October, 1861, the Union Insurance Company of New Orleans took a mortgage from Burthe upon three undivided twenty-fifths of the property to secure the payment of a note for $3500, due from him to the company.

Subsequently, suit was instituted upon the mortgage, and in due course a decree of sale was rendered, under which the insurance company became purchasers of the mortgaged premises for $1400, and on the 26th of February, 1864, received the sheriff's deed of the property.

In April, 1864, the company obtained a judgment for $2735, being the balance due on the note of Burthe, and was about to sell the residue of the property, when further proceeding was arrested by a military order.

It appeared further from the evidence that three minors of the Burthe family were legal owners of four thirty-sixths of the property on which the gun factory was established.

The Cooks, to whom Burthe made the lease, were well-known manufacturers of arms on a large scale for the rebel government, and the lease stated the fact that they intended to establish in the property leased "engines, machinery," &c.

At the time, however, when the insurance company took its mortgage, the Cooks had not taken possession of the property, nor was it proved otherwise than as the mere taking of the mortgage proved it, that the company had consented to the use which the Cooks meant to make of the premises.

On the 4th of April, 1865, the District Attorney for the Eastern District of Louisiana, filed in the Circuit Court of the United States for that district, a libel of information against the property thus leased. The libel described the case as one of seizure and forfeiture, and after reciting the already mentioned act of Congress of August 6th, 1861, which declared the property of all persons who should knowingly use or employ it, or consent to the use and employment of it in aid of the rebellion, to be lawful subject of prize and capture, proceeded to allege that the property leased had been

so used and employed, and asked a decree for its condemnation and forfeiture to the use of the United States and the informant.

Upon the filing of this libel, notice was given, monition was published, claims were interposed, and testimony was taken in general conformity with the practice of courts of admiralty.

The Circuit Court condemned the whole property as forfeited to the United States, except the four thirty-sixths, called in the decree four twenty-fifths, of the minors.

An appeal was taken by the Union Insurance Company, and another claimant, who abandoned the prosecution of his appeal. No appeal was taken by the United States from that part of the decree which exempted the interests of the minors from condemnation.

Three points were made in this court on the appeal:

1. That the Circuit Court had no jurisdiction under the act of 1861; that the proceedings were in admiralty form throughout,—a form dispensing with jury; that the Constitution securing to the citizen trial by jury, Congress had no power to convert into a "case in admiralty," and so to bring into admiralty jurisdiction, cases which were not admiralty cases, and were not liable to be brought within that jurisdiction when the Constitution was made, and that such a purpose was not to be presumed; that it was impossible to regard the proceeding in this case—one against real estate in the midst of a great city, and under a statute of municipal forfeiture—as an "admiralty case," in any true definition of those terms.

2. That the proceeding should have been by the course of the common law, and with a jury, when the decree of the court below would have come up by writ of error, which form of bringing the matter here, and not appeal, was the proper form.

3. That on the merits the decree was wrong.

*Mr. Durant, for the appellants; Mr. Stanbery, A. G., and Mr. Ashton, special counsel of the United States, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

The first questions in this cause relate to jurisdiction.

It was urged in argument, that the act of Congress does not authorize the proceedings instituted in the Circuit Court.

The answer to this proposition must be determined by the construction of the act.

It is sufficiently obvious that the general object of the enactment was to promote the suppression of rebellion by subjecting property employed in aid of it with the owner's consent, to confiscation. It extended to all descriptions of property, real or personal, on land or on water. All alike were made subjects of prize and capture, and, under the direction of the President, of seizure, confiscation, and condemnation.

The act must be construed with reference to this general purpose. In ordinary use the words "prizes and capture" refer, doubtless, to captures on water as maritime prize; but in the section under consideration here they plainly refer to property taken on land as well as on water, and the duties prescribed to the President include the taking of this property by civil process as well as by naval or military force, and sanction proceedings for confiscation and condemnation in civil courts without regard to the mode of seizure.

The second and third sections of the statute prescribe the action to be taken in the courts. This action is described, generally, in the third section, as "proceedings for condemnation," to be instituted by the attorney-general, or any district attorney. And jurisdiction of these "proceedings" is given to the District or Circuit Court having jurisdiction of the amount, or in admiralty, in any district where the property is seized or into which it may be taken.

This language is certainly not clear. But we think that the construction which, as we understand, has been generally adopted in the District and Circuit Courts in cases of proceedings for the condemnation of real estate or property on land, is substantially correct. That construction treats the grant of jurisdiction in admiralty as a grant of jurisdiction of the "proceedings of condemnation" to the Circuit or Dis-

trict Court according to the amount in suit; with power to both courts to shape those "proceedings" in general conformity to the practice in admiralty.

Such proceedings do not necessarily constitute a cause in admiralty. When instituted for condemnation of property on land, they have relation exclusively to matters which, in their nature, are not of admiralty cognizance. But Congress may, doubtless, give jurisdiction of such proceedings to the Circuit as well as to the District Courts, and may authorize the exercise of this statutory jurisdiction in the form and modes analogous to those used in admiralty. And this, we think, was the purpose of the act.

The difficulty of construction arises from the terms in which jurisdiction is granted "to any District or Circuit Court having jurisdiction of the amount, *or* in admiralty, in any district where the property is found." It is said that the use of the disjunctive "*or*" restricts the jurisdiction in admiralty to the District Courts. And this view is certainly not without some warrant in the phraseology of the act. But when we look beyond the mere words to the obvious intent we cannot help seeing that the word "or" must be taken conjunctively; and that the sense of the law is that both the Circuit and the District Courts shall have jurisdiction "according to the amount" *and* "in admiralty."

This construction impairs no rights of parties. In cases of seizures on land the right of trial by jury is not infringed. In such cases the proceeding must be in general conformity to the course in admiralty; but issues of fact, on the demand of either party, must be tried by jury.* Where the seizure is made on navigable waters, the course of admiralty may be strictly observed.

That this construction carries into effect the true intention of Congress sufficiently appears on reference to the act of July 17th, 1862,† in which it is provided expressly that proceedings for confiscation shall conform as nearly as may be to proceedings in admiralty or revenue cases.

* The Sarah, 8 Wheaton, 394.

† 12 Stat. at Large, 591, § 7.

We think, therefore, that the Circuit Court had jurisdiction of the cause.

It remains to be considered whether the decree of the court can be reviewed here on appeal. No appeal is expressly provided by the act of 1861. The Constitution, however, gives to this court appellate jurisdiction in all cases of which the inferior courts of the United States have original jurisdiction, subject to such exceptions and regulations as Congress shall make; and the act of 1803* provides, generally, for appeals from decisions in admiralty. Some of the judges think it a reasonable construction of the act that it was not intended to except decrees under it from the appellate jurisdiction of this court; but that it was intended to apply to them the general regulations of admiralty proceedings in respect to appellate as well as to original jurisdiction; while a majority of the court is of opinion that appellate jurisdiction may be taken of the cause, because the proceedings below, though in a case of common law jurisdiction, were substantially according to the course in admiralty; but only for the purpose of reversing the decree of the Circuit Court as irregular, and directing a new trial.†

We proceed then to the questions arising upon the merits.

There is no reasonable doubt that the Cooks established their manufactory of arms on the ground leased by him to them with the full knowledge and consent of Leonce Burthe. It thus became within the express terms of the act the lawful subject of prize and capture from the time of that establishment.

The evidence in respect to the rights of the insurance company is not so clear. To the extent of the interest created by the mortgage the company may, doubtless, be properly regarded as owner. But there is no direct proof of consent to the unlawful use; and, indeed, no proof at all, except the fact of taking the mortgage, and it does not appear that the Cooks had taken possession under their lease

* 2 Stat. at Large, 244.

† The Sarah, 8 Wheaton, 391.

before the execution of the mortgage. We do not think this evidence of consent sufficient to support a forfeiture.

The counsel for the company very properly abandoned any claim under the judgment recovered for the balance due on the mortgage note. The forfeiture was incurred when the Cooks went into actual use of the premises under the lease, and the subsequent seizure for condemnation divested all intermediate liens.

The decree of the Circuit Court must be REVERSED as irregular, and the cause remanded for new trial in conformity with this opinion. The property seized having been real estate, the proceedings on the new trial must be conformed in respect to trial by jury and exceptions to evidence to the course of proceeding by information on the common law side of the court in cases of seizure upon land.*

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## ARMSTRONG'S FOUNDRY.

1. A full pardon and amnesty by the President for all offences committed by the owner of property seized under the act of Congress of August 6th, 1861, "to confiscate property used for insurrectionary purposes," and which makes property used in aid of the rebellion, with the consent of the owner, subject to seizure, confiscation, and condemnation, relieves such owner from the forfeiture of the *property* seized so far as the right accrues to the United States.
2. The proceedings under the act relating to a seizure of land, present a case of common law jurisdiction, the proceedings in which are to be conformed, in respect to trial by jury and exceptions to evidence, to the course of the common law, and a final decision in which can be reviewed here only on writ of error.

APPEAL from the Circuit Court for the Eastern District of Louisiana, the proceeding below being one for condemnation of property as used in aid of the rebellion, and resembling in its general features the case just disposed of. It was thus:

An act of Congress passed August 6th, 1861, "to confis-

* The Vengeance, 3 Dallas, 297; The Sarah, 8 Wheaton, 391.

cate property used for insurrectionary purposes,"* enacted that property used in aid of the rebellion with consent of the owner, should be the lawful subject of *prize* and *capture* wherever found, and made it the duty of the President to cause it "to be seized, confiscated, and condemned." It enacted further that "such *prizes* and *captures* shall be condemned in the District or Circuit Court of the United States having jurisdiction of the amount, or in *admiralty* in any district in which they may be seized, or into which they may be taken," &c. And the attorney-general or any district attorney was to institute proceedings of condemnation himself, or by aid of an informer.

Under this act a libel of information was filed in the Circuit Court of the United States for the Eastern District of Louisiana, in which it was charged that certain property in New Orleans, known as Armstrong's Foundry, had been seized as forfeited to the United States by reason of having been used, with the consent of the owner, in aid of the rebellion. This libel closed with the usual prayer for condemnation. A claim was interposed by John Armstrong as owner, and another claim was interposed by the Citizens' Bank as mortgagee. Armstrong also pleaded the amnesty offered by President Lincoln, and his acceptance of it and compliance with the terms. On the hearing the plea of pardon was rejected, and a decree of condemnation was rendered. Armstrong alone appealed.

Subsequently, and while the cause was pending in this court, the President of the United States granted to "the said *John Armstrong* a full pardon and *amnesty* for all offences by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows." Certain conditions were annexed. At this term Armstrong was allowed, in conformity with the usual course in admiralty cases, to plead the new matter, and to file with his plea a statement of facts agreed between his counsel and the Attorney-General, showing, among other things, that he had complied with all the conditions of the pardon granted to him.

* 12 Stat. at Large, 319.

The question now on the appeal was, whether this pardon relieved from forfeiture the *property* seized.

*Mr. Stanbery, Attorney-General, and Mr. Ashton, special counsel for the United States:*

1. "A pardon," this court declared in *Ex parte Garland*,* "reaches both the *punishment* prescribed for the *offence* and the guilt of the *offender;* and when the pardon is full, it releases the *punishment*, and blots out of existence the guilt, so that in the eye of the law the *offender* is as innocent as if he had never committed the *offence*. The effect of this pardon, then, is to relieve the petitioner from all penalties and disabilities attached to the *offence* of treason committed by his participation in the rebellion." But this is the extent of a pardon. It cannot reach a forfeiture of *property* imposed, in virtue of the unlawful predicament in which the property may be found.

Now, the act of August 6th, 1861, does not affect property with liability to condemnation as a punishment for any offence of the owners, but as a means of suppressing the insurrection, then flagrant, by depriving those engaged therein of property subject to their control, and dedicated to their uses. The property is made the "lawful subject of prize and capture wherever found." These words draw the property in question within the category of enemy property, and establish a rule of *capture*.

2. But however affecting the interest of the United States, it cannot operate to remit the moiety which accrues to the informer. He has acquired a property in his part of the penalty.†

3. Under a statute of municipal forfeiture, such as this, proceedings for the condemnation of property seized on land, without the admiralty and maritime jurisdiction of the United States, are, *ex necessitate rei*, according to the course

* 4 Wallace, 380.

† 4 Blackstone's Commentaries, 309; 2 Hawkins, 6, 392; Comyn's Digest, Pardon, F.

of the common law.* If reversed, the proceedings should follow that course.

*Mr. Humphrey Marshall, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

Upon the case presented, it is necessary to consider a single question only.

It was insisted, in argument, that the pardon pleaded by the appellant cannot avail to relieve him from the forfeiture of the property seized, because the liability to seizure arose, under the statute, from the mode in which the property was employed, and was not to be regarded as a penal consequence of the act of the owner.

We are unable to concur in this view. We think it clear that the statute regarded the consent of the owner to the employment of his property in aid of the rebellion as an offence, and inflicted forfeiture as a penalty. The general pardon of Armstrong, therefore, relieved him of so much of the penalty as accrued to the United States. We think it unnecessary to express any opinion at present in relation to the rights of the informer.

The proceedings below related to a seizure of land, and though conducted under the statute in the forms of admiralty, must be regarded as a case of common law jurisdiction, a final decision in which can be reviewed here only on writ of error

The decree of the Circuit Court, therefore, must be REVERSED as irregular, and the cause REMANDED, with directions to allow a new trial, the proceedings in which shall be conformed, in respect to trial by jury and exceptions to evidence, to the course of the common law.

Mr. Justice MILLER dissented.

* 1 Kent's Commentaries, 376; La Vengeance, 3 Dallas, 297; United States *v.* Sally, 2 Cranch, 406; United States *v.* Betsy, 4 Id. 443; The Samuel, 1 Wheaton 9; The Octavia, Id. 20; The Sarah, 8 Id. 391.

Statement of the case.

NOTE.

At the same time with the two preceding cases was decided, on appeal from the same circuit (*Mr. Durant, for the appellant*), the case of St. Louis Street Foundry; not distinguishable,—as the Chief Justice stated was the opinion of the court,—in principle from them.

It appeared in it that Cronan, in the Circuit Court, pleaded the amnesty proclaimed by President Lincoln on the 8th of December, 1863, and the oath taken by himself in pursuance of the proclamation; but there was no averment in this plea that Cronan was not within any of certain exceptions made by that proclamation.*

The CHIEF JUSTICE delivered the opinion.

The plea was properly overruled.

Upon proper pleading and proof, however, the claimant of property seized under the act of August 6th, 1861, is entitled to the benefit of amnesty to the same extent as, under like pleading and proof, he would be entitled to the benefit of pardon.

The decree of the Circuit Court must be REVERSED as irregular, and the cause remanded, with directions to allow a new trial, the proceedings in which shall be conformed, in respect to trial by jury and exceptions to evidence, to the course of the common law.

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## UNITED STATES *v.* HART.

The act of Congress of 3d March, 1863, giving to the District Court for the Territory of *New Mexico* jurisdiction over all cases which should arise in the collection district of *Paso del Norte*, in the administration of the *revenue* laws, does not warrant proceedings against lands in *El Paso*, Texas, under the "Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17th, 1862 (12 Stat. at Large, 589).

APPEAL from the Supreme Court of the Territory of New Mexico, the case being thus:

* See the Gray Jacket, 5 Wallace, 368.

Statement of the case.

An act of Congress of March 3d, 1863,* entitled "An act *to facilitate the collection of revenue* in El Paso County, Texas," &c., revives and re-enacts by its first section, a previously repealed statute, providing—

"That the District Court for the Territory of *New Mexico* shall have and exercise jurisdiction over all cases which shall arise in the collection district of *Paso del Norte, in the administration of the revenue laws,* in the same manner as if the said district was entirely within the Territory of New Mexico."

And by its second section, enacts:

"That the jurisdiction of the District Court of New Mexico shall extend over the citizens of El Paso County, Texas, only in cases not instituted by indictment; and the trial and proceedings for violations of the revenue laws in said District Court of New Mexico, shall be the same as in other District Courts of the United States invested with admiralty powers: and this act shall take effect from and after its passage."

In this state of congressional enactment, the United States filed *a libel of information* in the District Court of the United States for the third judicial district of *the Territory of New Mexico*, to subject certain real estate of Hart, situated in El Paso County, *Texas*, to condemnation, under the sixth section of the act of Congress passed 17th of July, 1862, which subjects to seizure and confiscation the property of any person within any of the States or Territories of the United States, being engaged in armed rebellion against the government of the United States, or aiding and abetting such rebellion, after public warning by the President of the United States.

The district judge entertaining jurisdiction of the case upon his construction of the above-quoted act of Congress of March 3d, 1863, such proceedings were had that, a decree was entered December 2d, 1865, condemning the property, and directing it to be sold. An appeal was taken from this

* 12 Stat. at Large, 761.

decree to the Supreme Court of the Territory, which reversed the same, and remanded the cause to the court below, directing that court to dismiss the same for want of jurisdiction in said court over the real estate in the County of El Paso, Texas. From this decree of the Supreme Court of the Territory of New Mexico, the case was now before this court on appeal.

*Mr. Robert Leech, for the appellee, and in support of the decree below*, contended that—

1. The legislation in question, while it extended the jurisdiction of the District Court of New Mexico, over the *citizens* of El Paso County, Texas, in certain *revenue* cases, manifestly conferred no jurisdiction on said court in proceedings against *real estate*, under the *Confiscation* Act of July 17th, 1862.

2. The District Court, under proceedings on libel, and as a court of admiralty, had no jurisdiction of the subject; the doctrine being settled, that in the trial of all cases of seizure on *land*, the court sits as a court of common law, and that in all cases at common law, the trial must be by jury.

Mr. Justice NELSON delivered the opinion of the court.

The Supreme Court in reversing the judgment below, held, that the act in question did not extend to, or embrace proceedings under the act of 17th of July, 1862, providing for confiscation of the property of persons engaged in, or aiding and abetting the rebellion, of the correctness of which decision we can entertain no doubt.

If the District Court below could have, under any circumstances, jurisdiction of the case, according to the practice as settled in the cases of the *Union Insurance Company* v. *United States*, *Armstrong's Foundry and the St. Louis Street Foundry*,* decided at the present term, as it has been tried on the admiralty side of the court, the proper disposition of it would

* The last preceding three cases.

be to reverse the decree, and remand the cause to the court below, with directions to enter a decree remitting it to the District Court that it might be tried on the common law side with a jury, the seizure having been made on land, and not on waters navigable from the sea. But, as the Supreme Court of the Territory has reversed the decree of confiscation for the want of jurisdiction, in the correctness of which judgment we concur, the proper disposition of it will be to AFFIRM THE DECREE, as this reaches directly the right conclusion in the case.

NOTE. Like decrees were made in the similar cases of United States *v.* Crosby, and United States *v.* Gillet, as governed by this one.

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## CAVAZOS *v.* TREVINO.

1. Where an early Spanish petition for a grant of land described the land by general boundaries, which were capable of an interpretation in two senses, one broader than the other, the terms of boundary open to question as to meaning were held to be rightly interpreted by the jury from a survey carefully made on the ground by lines and monuments, and specifying the quantity within the lines (the grant referring to the survey and specifying the quantity granted), and by practical interpretation, from occupancy and otherwise, by the parties interested in the matter.
2. In settling, in such a case, what has been granted, the quantity of land specified, as well as the boundaries named, and the survey as made—all are to be considered, and by their united light the proper conclusion is to be reached.
3. The practical interpretation which parties interested have by their conduct given to a written instrument, in cases of an ancient grant of a large body of land asked for and granted by general description, is always admitted as among the very best tests of the intention of the instrument.
4. In construing such a grant, the circumstances attendant, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the papers which were possessed by the actors themselves.
5. A document duly certified, "in the absence of a notary public, according to law," in the presence of witnesses, by the alcalde of the jurisdiction, to be a true copy, made and compared by witnesses named, of the original

record of proceedings had in the adjudication of lands granted by the government to persons named—(in which proceedings it became necessary to ascertain a particular boundary line)—was held to have been properly received in evidence in this case, under certain statutes of Texas, on a question relating to that boundary; the alcalde's official character and signature, and that of the attending witnesses, being proved, and that they were dead.

ERROR to the District Court for the Eastern District of Texas; the case being thus:

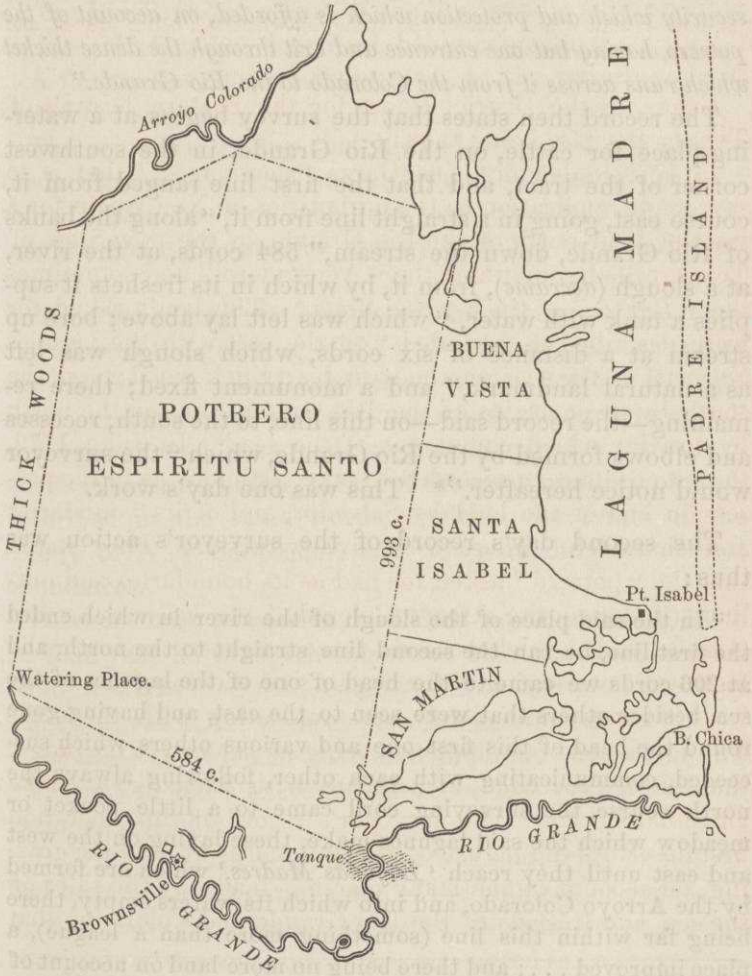
In 1776, Salvador de la Garza "denounced," that is to say, made application to the authorities of New Spain for a tract of land north of the Rio Grande, in the now State of Texas, called sometimes the "Agostadero," and sometimes the "*Potrero*" *of the Espiritu Santo.** The lands asked for were described as bounded "on the east with the lagunes (*lagunas*) of the sea; on the west by a thick wood;† on the south by the margins of the Rio Grande, and on the north by a ravine which comes out of the sea." In June, 1779, the proper officer proceeded to take testimony as to the possession had of the land by Salvador, and of its boundaries and character. There were five witnesses. They stated that the "potrero" asked for had as its boundaries and outlines (linderos), the Arroyo Colorado,‡ the *lagunes*, the Rio Grande, and a thicket-wood; three witnesses saying, "the lagunes;" one saying, "the lagunes of the sea;" and one, "the lagunes immediately communicating with the sea." The possession of the applicant being satisfactory to the judge, that officer proceeded, in company with Salvador, to make an actual survey. The surveyor's record of this operation first describes the nature of the ground as fit only for grazing, on account of the many marshes made by the tides of the sea, and freshets of the Rio Grande and Colorado; that

* Both the words, "Agostadero" and "Potrero," signify places for pasturing cattle; the latter word, perhaps, a place inclosed so as to keep them in it.

† Salvador, at an early day, had cut a passage through this wood to get to the potrero.

‡ The word "*arroyo*," or *arollo*, means a stream, sometimes a mountain stream.

Diagram.


Arroyo Colorado
THICK WOODS
POTRERO
ESPIRITU SANTO
BUENA
VISTA
SANTA
ISABEL
998 c.
LAGUNA MADRE
PADRE ISLAND
Pt. Isabel
Watering Place.
SAN MARTIN
B. Chica
584 c.
RIO GRANDE
Tanque
Brownsville
RIO GRANDE

it had in many places a sort of grass which animals would not eat, "which usually grows on salt marshes near the coast of the sea;" on which account (with others set forth), "it is only useful as regards horses and all other stock, by *the security which and protection which is afforded, on account of the potrero having but one entrance and exit through the dense thicket which runs across it from the Colorado to the Rio Grande.*"

The record then states that the survey begins at a watering-place for cattle, on the Rio Grande, in the southwest corner of the tract, and that the first line ranged from it, course east, going in a straight line from it, "along the banks of Rio Grande, down the stream," 584 cords, at the river, at a slough (*derrame*), from it, by which in its freshets it supplies a tank with water, "which was left lay above; bore up stream at a distance of six cords, which slough was left as a natural landmark," and a monument fixed; there remaining—the record said—on this line, to the south, recesses and elbows formed by the Rio Grande, which "the surveyor would notice hereafter."* This was one day's work.

The second day's record of the surveyor's action was thus:

"In the said place of the slough of the river in which ended the first line, he ran the second line straight to the north, and at 206 cords we came to the head of one of the lagunes of the sea, besides others that were seen to the east, and having gone round the head of this first one and various others which succeeded, communicating with each other, following always the north course, the surveying cord came to a little pocket or meadow which the said lagunes make, these laying on the west and east until they reach '*Lagunas Madres*,' which are formed by the Arroyo Colorado, and into which its waters empty, there being far within this line (something more than a league), a place improved . . .; and there being no more land on account of our having reached the said Lagunas Madres, and having nothing before us but water, the second line amounted to 993 cords in the whole."

* The derrame, tank, or slough, fixed as a point in the survey, was about eighteen miles above the mouth of the Rio Grande.

The third day recorded that in the place on the Colorado where it expands into the broad lagunes (Lagunes Madres), the surveyor began the third line, running up the stream, course west, &c., 584 cords, the same number with the line on the Rio Grande; a part of the line, owing to impassable ravines, thicket, &c., described, being conjectural.

A fourth line, in part conjectural, to the watering-place, closed the survey.

The surveyor, noting that he had estimated the elbows made between the first line and the Rio Grande, declared that "within the four said lines were contained 59 square leagues (*sitios de ganadas mayor*) and 11½ caballerias of land."

After the survey was completed, the attorney of the treasury advised the granting of the "59 sitios de ganadas mayor and eleven and a half caballerias of the Potrero Espiritu Santo, under the natural outlines which the surveys state," and a grant itself was made to Salvador in due time afterwards (September 26th, 1781), of the same quantity of land, described in the same words, "within the limits of the colony of New Santander, and not exceeding its natural boundaries."

Salvador took possession, and lived on the tract till 1802. In that year he died, leaving three children, to whom his estate went, as it seemed, equally, and to the rights of one of whom, Cavazos, the present plaintiff, succeeded.

Salvador appeared to have had different ranches on this tract, and to have exercised more or less possession over various parts of it.

In 1829 one Trevino, who, as it was said, truly or not so, had been but an agent of some of the children or grandchildren of Salvador, joining himself with some other parties, occupants of the soil, and, as was attempted to be proved, co-owners with the plaintiff of the undivided whole, applied to the state authorities of Tamaulipas and got grants for the parts which lie east of the line marked on the map as the surveyor's line; tracts designated as San Martin, Sta. Isabel, and Buena Vista. Cavazos, who, as already said, had suc-

ceeded to the rights of one of Salvador's three children, now brought trespass to try title to the third of a part east of the line and to recover possession, the question in controversy being the eastern boundary of the tract; and this, perhaps, being complicated by the fact that there was on *most* of the eastern side of the tract a long body of water, called the *Laguna Madre*, made by a long narrow island, running outside the shore (a place likened by counsel somewhat to Long Island Sound), and also numerous smaller lagunas, running into the coast. Whether the land ran *to* the *shore*, which brought it to the Laguna Madre, and in one sense to the *sea-shore*, and in one, to the *laguna* of the *sea*, or only *to* the little lagunas, which might in one sense be called the lagunes of the *sea*, and in another but lagunes of the sound or Laguna Madre, this was a question. One part of the strip—a part between the mouth of the Rio Grande and the Boca Chica—was *on* the sea; no lagune running beside *it*.

The plaintiff adduced witnesses to show occupancy by Salvador with more or less specific assertion of title over every part of the tract; that by the term "potrero" was meant a place so inclosed by natural boundaries as that cattle put there to graze could not easily get out of it; that the tract derived its chief advantage to Salvador from its thus being a potrero; that it could only be so by coming to the water's edge along its whole eastern line; that it was not customary in early Spanish surveys to meander along either rivers or curved shores, but to make elbows and estimate; that if the surveyor had gone to the *mouth* of the Rio Grande and then north, he would have run into the sea; and that if he had meant to run the eastern line in a convenient way, and to survey by running base lines by cardinal points, the land inclosed by the thicket, the Rio Grande, *the lagunes*, and the Colorado, he would have run the lines much as he did; and finally, to show that according to general reputation the property of Salvador was a *potrero*, a place for grazing inclosed by four natural boundaries. As matter of argument he relied on the principle of law that parties are never presumed to leave a narrow strip between land and

water merely because certain stakes or trees stand at a slight distance from the river.

The evidence of the defendants was to prove long adverse possession on their part up to the surveyor's line; that the term "potrero" did not mean so absolutely as was asserted an *inclosure* for feeding cattle; that whatever Salvador had asked for or desired, this was controlled by the survey actually made and the monuments fixed; that it was impossible to regard as unmeaning the fact, that the surveyor had made no reference to such monuments as the mouth of the Rio Grande and the shore of the Gulf of Mexico.

In the course of the trial the plaintiff excepted to the admission and to the exclusion of various testimony, and on its conclusion to instructions given and to those refused by the court. All these, and what is further necessary to be known of the case, are stated by the learned justice who gave the opinion of the court.

*Messrs. Hale and Robinson, for the plaintiff in error; Messrs. Sherwood and R. Hughes, contra.*

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiff in error brought an action of trespass in the court below to try the title to the real estate in controversy between the parties, and to recover possession. There were numerous defendants. The suit was dismissed, or judgment by default rendered as to all of them but the two who are before us as defendants in error.

The plaintiff sought to recover an undivided third of the premises, which are claimed to be a part of the tract known as the Agostodero, "and the potrero of the Espiritu Santo grant," situated between the Arroyo Colorado on the north, the Rio Grande on the south, and extending from a thick wood on the west to the lagunes of the sea on the east. The real controversy between the parties was as to the locality of the eastern boundary line of this tract.

The land in controversy lies between that boundary as claimed by the defendants in error, and the sea and lagunes communicating with the sea.

The plaintiff deraigned title by a grant from the authorities of New Spain, of the 26th of September, 1781, to Jose Salvador De la Garza, containing fifty-nine leagues and eleven and a half cabellerias of land.

The defendants claimed under a grant made by the authorities of the State of Tamaulipas, by a title of possession issued to Ignaceo Trevino, on the 26th of February, 1829, and confirmed by a final title issued by the governor on the 29th of May, in the same year. The defendants insisted that the western boundary of the land embraced in this grant was the same as the eastern boundary of the tract granted to De la Garza, as they alleged that boundary to be, while, according to the plaintiff's claim, all the land granted to Trevino was included in the prior grant to De la Garza.

The court instructed the jury substantially:

(1) That the question in controversy was the true eastern boundary of the Espiritu Santo tract, and that it was a question of fact to be determined by the jury upon the evidence before them.

(2) That it was their duty to consider all the testimony bearing upon the subject.

(3) That if those claiming under the Espiritu Santo grant had never been in possession east of the line claimed by the defendants—had acquiesced in that line, and set up no claim inconsistent with it, until within a comparatively recent period—those facts were proper to be considered by the jury.

At the request of the defendants, the court further charged—

(4) That the grant itself shows that a corner was established at the derrame or slough, 548 cords from the beginning corner, whence a line was run north by the tanque mentioned in the grant to a pocket or small potrero on the Laguna Madre, where another corner was established, and that this was to be considered the east boundary, unless another one was established by the evidence.

(5) That if Trevino and those claiming under him had held adverse possession up to the line run for the western

boundary of the San Martin grant to the time of the commencement of the action—being a period of ten years or more—in good faith under a just title, then the jury should find for the defendants.

(6) That if Trevino and those claiming under him had held adverse possession of the land in controversy for twenty years and more, before the commencement of the suit, then the jury might presume a valid grant giving title to the land claimed.

(7) That if the jury find there never was any contest before the commencement of this suit between the owners of the Espiritu Santo grant and Trevino—except as to boundary—being a dispute whether the true line was that run in 1781, or that of 1828 run for the western boundary of the San Martin grant—and that Trevino and those claiming under him had possession up to 1828, adversely to those claiming the adjoining land in the Espiritu Santo grant, and up to the commencement of the suit, the jury may presume that the land within the line of 1828 belongs to the San Martin grant.

To all these instructions the plaintiff's counsel excepted.

The plaintiff's counsel then asked the court to instruct the jury—

(1) That if they find that the Espiritu Santo grant included the land in controversy, then no adverse possession, subsequent to that grant, can authorize the presumption of another and an adverse grant.

The court refused to give this instruction, and an exception was taken.

The plaintiff's counsel thereupon asked the court further to instruct the jury—

(2) That a party in possession under an undivided grant of a tract of land, and claiming the whole under a paramount title, is in possession of the whole, and is not affected by an adverse possession of a part, claimed and held under an inferior title or without title, and that the person holding under such inferior title can have no protection from the statutes of limitation or by prescription.

This instruction was given, but at the request of the counsel for the defendants, it was modified as follows:

(3) That if Trevino and those claiming under him had exclusive possession for twenty years or more, east of the boundary line in dispute, then a grant may be presumed to him, though the Espiritu Santo grant is the elder one, and there has been possession under it west of that line.

To this modified instruction the plaintiff excepted.

The jury found for the defendants, and found further, "that the eastern boundary line of the Espiritu Santo grant of 1781, is a line commencing at the mouth of the derrame of the tanque on the Rio Grande, and thence running north to the pocket described in said grant."

The plaintiff thereupon moved for judgment, *non obstante veredicto*, for so much of the premises in controversy as lies east of the line established by the verdict, and west of the line of 1828, being a gore, containing, according to the testimony of one of the witnesses, about nine leagues of land. The court overruled the motion and the plaintiff excepted.

Exceptions were also taken by the plaintiff to the admission and to the exclusion of testimony, which will be stated specifically when we come to consider them.

It is insisted by the plaintiff in error, that the court erred in construing the documentary evidence relating to the eastern boundary of the Espiritu Santo grant, and that it adopted the theory of the defendants. We do not so understand the charge as to the latter point. It is somewhat confused both in thought and language, but its general effect is clear. It left the question to the jury, to be determined according to the evidence, without any controlling instructions upon the subject. They might consistently with the charge have found the line claimed by either party to be the true one. If any error was committed by the court against the plaintiff, it was in not recognizing, as matter of law, the line insisted upon by her, instead of submitting the question to the jury.

Did the court err in withholding this recognition in the charge?

The *denunciation*, and the identification of the line by the witnesses, describe it as bounded on the coast by the lagunes of the sea. The most important testimony is the survey, the facts attending it, and the subsequent links in the chain of title. The survey was made with great care and formality. It commenced at a watering-place on the Rio Grande, in the southwest corner of the tract. The first line was run 584 cords down the river to a slough, near a tanque, which was filled from the river during high water. This slough was designated "a natural landmark," and the denunciant was ordered to place there an artificial monument. From this point, the next day, the second line was run due north. At the end of 206 cords the surveyor came to the head of one of the "lagunes of the sea"—others were seen to the east. Having gone round the first and others that succeeded, following always the north course, the line reached a little pocket or meadow made by the lagunes. They were found to extend to the lagunes madres which were formed by the Arroyo Colorado. Having reached the lagunes madres, and there being nothing before them but water, the surveyor there terminated the line of that day, which was found to be 993 cords in the whole, in length. "The bend or little pocket before mentioned," it is said, "remained as a natural landmark." An artificial one was also placed there. Owing to natural obstacles, the other two boundary lines were designated without actually running them. The last one terminated at the beginning corner. According to the rule of the Spanish law, where a survey is intended to bound on a stream, a straight line was run from the beginning point to its termination at the slough, and the quantity of land in the bends of the river was ascertained by computation without actual measurement. The slough was about five leagues from the mouth of the river. If it were intended that the eastern boundary should be the shore of the sea, and of the lagunes connected with it, why was the first line terminated at the slough, and why was a line run due north from there? Why was not the first line extended to the mouth of the river, or to a point nearer to it, and a line run thence to the

north. The lagunes of the sea, and not the shore of the sea, is called for as the boundary on that side. The proof shows that those lagunes could form such a boundary only in part. There is no controversy that the Rio Grande is the south boundary. The proof shows also, that from the mouth of that river north it is several miles to the Boca Chica, which is the first lagune found there. For the intervening distance the shore of the sea, and not lagunes of the sea, must be the boundary according to the claim of the plaintiff in error. There is nothing which shows that the land lying between the east line as run, and the shore of the sea, and of the lagunes communicating with the sea, was included in the computation, or that the grantee had not his full quantity without it.

The attorney of the treasury advised the granting of the "59 sitios de ganadas mayor, and eleven and a half caballerias of the Potrero Espiritu Santo, under the natural outlines which the surveys state."

The grant itself was of the same quantity of land, specified in the same terms, "within the limits of the colony of New Santander, and not exceeding its natural boundaries."

In construing this grant, the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the paper, which were possessed by the actors themselves. The object and effect of such evidence are not to contradict or vary the terms of the instrument, but to enable the court to arrive at the proper conclusion as to its meaning and the understanding and intention of the parties. Viewing the subject in this light, we cannot say that the legal effect of the grant is to carry the eastern boundary of the grant to the line contended for by the plaintiff in error. Whether of itself it fixes that boundary, as is insisted by the defendants in error, is a question which in this case it is not necessary to determine. It is enough to say that the instructions on the subject given to the jury were as favorable to the plaintiff as she was entitled to ask. If there was an error, it was

not against her. There is nothing of which she has a right to complain. The quantity of land specified, as well as the boundaries named, and the survey as made, is to be considered. It is by their united light that the proper conclusion is to be reached. Together, we think, they leave little room for doubt as to the intention and effect of the grant.

The finding of the jury that the line surveyed was the east line of the Espiritu Santo grant, renders what was said by the court as to adverse possession and the presumption of a grant immaterial in the case. Right or wrong, those instructions could have done the plaintiff no injury, and, therefore, constitute no ground for disturbing the verdict and judgment.

The instruction given as to the acquiescence of the parties in respect to the line run for a long period, was correct. The practical interpretation which the parties, by their conduct, have given to a written instrument in cases like this, is always admitted, and is entitled to weight. There is no better test of the intention of the instrument. None are less likely to be mistaken. There is no danger of too large an admission. Safer testimony can hardly be presented in relation to any transaction occurring in human affairs.

The motion for a judgment *non obstante veredicto* assumed as correct a construction of the grant, the opposite of the views we have expressed. We think it was properly overruled.

Upon the trial the defendants offered in evidence a copy of the record of the original proceedings relating to the Santa Isabel, San Martin, and Buena Vista grants, in surveying which it became necessary to ascertain and fix the east line of the Espiritu Santo grant. The plaintiffs objected to the admission of this testimony, upon the ground, that at the time of the recordation of the documents there was no law which authorized them to be recorded. This objection was overruled, and the plaintiff excepted. The defendants then proved the genuineness of the signature of Domingo De la Garza, and that he was alcalde of Matamoras in 1829.

They also proved the signatures of the assisting witnesses, and that they were dead.

The plaintiff then objected to the admission of the testimony, upon the further grounds that the document did not appear to be the first copy or testimony issued to the interested party; that it was not proved to be a true or compared copy of the original protocol, and because it did not appear that the original protocol was duly signed by the proper officer. These objections were also overruled, and the plaintiff excepted.

The questions thus presented are to be decided by the light of the statutory provisions of the State of Texas which bear upon the subject. We have carefully examined those to which our attention has been called. They are found in Arts. 745, 2754, 2758, 2787, 2800, in Hartley's Digest. The result is, that we are satisfied that the testimony was properly admitted. It could serve no useful purpose, and would greatly extend this opinion, to go into a full examination of the subject. We deem it sufficient to announce the conclusion at which we have arrived.

The defendants next offered in evidence a copy, proved to be correct, from a paper on file in the archives of the city of Mexico, purporting to be a conveyance from Maria Francesco Cavazos to Miguel Paredes. The plaintiff objected to its admission, because it did not appear that Francesco Cavazos had ever executed the instrument, or authorized the instrument to be executed for her. We do not deem it necessary to examine the subject in the light of the Spanish law, to which our attention has been called. As the case was before the jury when the evidence was closed, we think it was entirely immaterial. Its admission or rejection could not change the result. If improperly admitted—a point which we do not find it necessary to consider—it did the plaintiff no injury, and, therefore, constitutes no reason for reversing the judgment. The power of attorney made by Prieto to Trevino, the will made by Trevino under that authority, and the conveyance by Prieto to De la Garza, offered in evidence by the plaintiff, and excluded by the

court, were clearly irrelevant and incompetent. The ruling of the court was correct.

The same remarks apply to the proceedings before the Supreme Court of Tamaulipas, also offered in evidence by the plaintiff. They were properly excluded by the court. The title-papers relating to the grant to Trevino were again objected to by the plaintiff upon the grounds: (1) That the land which appeared to have been granted by the authorities of Tamaulipas was within three littoral leagues of the coast of the Gulf of Mexico, and that the approbation or consent of the general executive of Mexico was not shown. (2) That the grant appeared on its face to be for more than 125,000 square varas. (3) That it appeared in the proceedings, that a controversy had arisen during the survey as to the ownership of the land affected thereby, and that it had not been settled in the usual and proper manner, but by the exercise of authority assumed by the executive officers, contrary to the colonization laws of Mexico and Tamaulipas. The court sustained the first objection, and the documents were excluded as showing a valid grant of land, but were allowed to be read in evidence to show boundary and possession. To this qualified admission of the testimony no exception appears in the record. We need not, therefore, consider the learned and elaborate argument submitted by the counsel for the defendants in error to show that the documents were admissible for all purposes, and that the objections of the plaintiff in error to their admission are untenable.

These are all the exceptions to which our attention has been called.

We find no error in the record, and the

JUDGMENT IS AFFIRMED.

## STRONG *v.* UNITED STATES.

1. The sureties of a purser, stationed at a navy yard, are liable for the defaults of their principal, in failing to disburse or account for moneys remitted to him as purser, notwithstanding the principal disbursed moneys during the period of the defalcation, which would have been disbursed by a navy agent, if there had been such an officer at that navy yard. Such disbursement does not constitute the purser making them a navy agent as distinguished from a purser.
2. The legal effect of the provisions of the act of August 26th, 1842 (5 Stat. at Large, 535)—requiring purchases of supplies for the use of the navy to be made with the public moneys appropriated for the purpose, under such directions and regulations as the executive may prescribe—was to repeal former regulations in respect to pursers, and to require new "directions and regulations" in their place. And since the enactment just mentioned (even if the case was not so before), pursers in the navy may be directed to make such purchases on public account, and to disburse any moneys for the use of the navy as appropriated by law.
3. Unofficial letters of a subordinate officer of the treasury are not admissible evidence in a suit for defalcation against a disbursing agent, to contradict, nor even to explain the adjustment of his accounts as shown in the certified transcripts.
4. Disbursing agents, being required by law to settle their receipts and disbursements with the accounting officers of the treasury, cannot introduce their private books in a suit for defalcation to contradict the official adjustment of their accounts.

ERROR to the District Court for the Northern District of Florida.

*Messrs. N. Wilson and E. M. Stanton, for the plaintiff in error; Mr. Stanbery, Attorney-General, and Mr. Ashton, special counsel for the United States, contra.*

Mr. Justice CLIFFORD stated the case, and delivered the opinion of the court.

Examination of the exceptions to the instructions of the court will first be made, as they give rise to the principal questions presented for decision.

Exception was taken by the defendant to that part of the charge of the court in which the jury were told that the Navy Department, in requiring the principal in the bond to perform duties as purser which would have been performed

by a navy agent, if there had been such an officer at that navy yard, did not constitute him a navy agent, and that the department in so doing did not require of him the performance of duties, against defaults in which his sureties had not undertaken to protect the government.

I. Argument is hardly necessary to show that the principal in the bond was not thereby constituted a navy agent, as it is clear that navy agents cannot be appointed in any other mode than that prescribed in the act of Congress providing for their appointment. Authority to appoint navy agents is derived from the third section of the act of the third of March, 1809, which provides that "no other permanent agents" than those previously mentioned in the section "shall be appointed, either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the military establishment or of the navy of the United States, but such as shall be appointed by the President with the advice and consent of the Senate."*

Prior to that time persons had been appointed, as occasion required, to act as navy agents, by the head of the department, but no such office had been created or was recognized by any act of Congress. Since that enactment navy agents have uniformly been appointed by the President by and with the advice and consent of the Senate, and it is as obvious as anything can be that they cannot be appointed in any other way.†

Such an appointment by the President, in this case, is not pretended; and it is equally clear that the evidence in the record disproves the theory that the head of the department ever intended, or attempted to confer, any such authority. On the contrary, the record proves that all the moneys in the hands of the principal in the bond were moneys remitted to him as purser, as is fully shown both by his requisitions and the treasury warrants issued by the proper officer of the treasury department.

* 2 Stat. at Large, 536.

† Armstrong *v.* United States, Gilpin, 399.

Pursuant to the requirements of law, he twice gave bond for the faithful discharge of his official duties, and the declaration in the suit was founded upon those bonds, in both of which the defendant was a surety. Alleged breach of the condition of the respective bonds is, that he failed to disburse and apply large sums of money remitted to him as purser for the use and benefit of the plaintiffs, as he, in his official character, was by law bound to do; and that he had neglected and refused to pay the balance, not so disbursed and applied, into the Treasury of the United States as public money. Verdict and judgment were for the plaintiffs, and the defendant sued out this writ of error.

II. Second objection to the charge of the court is, that the court erred in giving the instruction that the defendant, as surety, was liable for the defaults of the principal in failing to disburse or account for the moneys remitted to him as purser, notwithstanding he, the principal, had been required by the department to perform duties which would have been performed by a navy agent, if there had been one stationed at that navy yard.

Certified transcripts of the accounts of the delinquent purser, as adjusted by the accounting officers of the treasury, were introduced in evidence at the trial. They showed that the balance due to the plaintiffs, together with the interest since accrued, was the amount as found by the jury in their verdict, and that all the moneys charged in the accounts were moneys remitted to the principal in the bonds during the periods covered by the bonds, as alleged in the declaration.

Subsequent to the settlement of the accounts of the principal, he was duly requested to pay the balance, as thus ascertained, into the treasury, and the record shows that he neglected and refused to comply with that request. Witnesses were examined at the trial, and the parol proofs showed that he, the principal, was stationed at that navy yard, on the fifteenth day of April, 1850, and that for the period of nine months next ensuing there was no navy agent at that navy yard, and that he, in his character of purser,

made disbursements of moneys remitted to him as purser, which would have been made by a navy agent if there had been such an officer at that naval station. All such disbursements, however, were included in his accounts, as rendered to the department, and as settled by the accounting officers of the treasury, and the transcripts show that they were rendered and settled under the same heads as the disbursements made by him in the usual and strict course of his duty as purser, and it does not appear that he ever sustained any loss in making such disbursements, or that any just and legal credits claimed by him in that behalf have been rejected or disallowed.

Complaint of the defendant is not that the moneys disbursed and applied by his principal for the use and benefit of the plaintiffs have not been fully allowed in the adjustment of his accounts, but that the court erred in giving the instruction that he, the defendant, as surety, was legally liable for the balance of the moneys remitted to his principal, as purser, and which he, the purser, never disbursed or applied in any way for the use and benefit of the plaintiffs, and which he neglects and refuses to pay into the treasury.

Stripped of all circumlocution, the defence is, that the surety is not liable for the default of the principal, because some portion of the moneys remitted to the latter would have been remitted to the navy agent, if some person holding the office of navy agent had been stationed at that navy yard. No person holding that office was stationed there, and all the moneys in question were remitted to the principal in these bonds, as purser, and the record shows that he has never disbursed the amount claimed for the use and benefit of the plaintiffs, or paid it into the treasury as adjusted.

Pursers, under the act of the twenty-seventh of March, 1794, were warrant officers, but by the act of the thirtieth of March, 1812, they were required to be appointed by the President, by and with the advice and consent of the Senate, and the provision was that every purser before entering upon the duties of his office, shall give bond, with two or more

sufficient sureties, conditioned faithfully to perform all the duties of purser in the navy of the United States.*

Fixed salaries were prescribed for pursers in the navy by the act of the twenty-sixth of August, 1842, and the act provides that they shall not procure stores or supplies on their own account and dispose of the same to the officers and crews of the public ships for their own benefit.† Although pursers are forbidden to procure such stores or supplies on their own account, still the same section provides that all purchases of clothing, groceries, stores, and supplies of every description for the use of the navy, as well for vessels in commission as for yards and stations, shall be made with and out of the public moneys appropriated for the support of the navy, under such directions and regulations as may be made by the executive for that purpose. Such disbursements the department, under the authority of that provision, might undoubtedly direct to be made by the navy agent at navy yards where there was such an officer stationed, or by the purser assigned to that station; or the head of the department might direct the purchases to be made partly by one and partly by the other of those officers.

Terms of the provision forbidding the employment of temporary agents for the purpose of making contracts, or for the purchase of supplies, fully justify the conclusion that pursers may be employed for those purposes, or for the disbursement in any other manner of moneys for the use of the navy of the United States.‡

Paymasters of the army and pursers of the navy, as well as "the other officers already authorized by law," are excepted from the prohibition; and the clear implication from the language employed is that pursers in the navy, if so directed by the head of the department, were, under that provision, as fully competent to make contracts, purchase stores and supplies, or disburse moneys for the use of the navy, as paymasters of the army or other officers authorized by law are for the army or other branches of the public service.

* 1 Stat. at Large, 350; Id. 699; 3 Id. 350. † 5 Id. 535. ‡ 2 Id. 536.

Usage has sanctioned that construction of the provision, and the practice has been found to be so convenient that navy agents are now seldom or never employed. Allusion is not here made to purveyors of public supplies, or to military agents, because those offices have been abolished, as will be seen by reference to subsequent acts of Congress.*

Views of the defendant are that the duties of a purser are entirely different and distinct from those of a navy agent, but he fails to refer to any act of Congress which supports the proposition. Nothing of the kind is pretended, but his theory is, that the navy regulations of 1818, not only prescribe the official duties of pursers and navy agents, but mark the limits of their responsibilities and measure the extent of the obligations incurred by their sureties. Under those regulations pursers might procure clothing, groceries, stores, and supplies for the use of the navy, on their own account, and dispose of the same to the officers and seamen for their own benefit. Abuses grew out of this system, and Congress interfered and gave fixed salaries to pursers, and provided that all such purchases should be made with public money, and on public account, under such directions and regulations as the executive should prescribe for that purpose. Effect of the new law was to repeal the old regulations in relation to pursers, and to authorize new directions and regulations in their place, and the record shows that the old regulations are not applied in that branch of the public service.

Strong doubts are entertained whether the old regulations ever had any such effect as is supposed by the defendant, but if they had, it is clear that the new regulations necessarily superseded their operation in that behalf. Necessary conclusion is that none of the moneys remitted to the purser in this case were remitted for any object or purpose not comprehended within his official duties, and that the instruction of the court under consideration was correct.

III. Next exceptions to be considered are those taken by the defendant to the refusal of the court to instruct the jury

* 2 Stat. at Large, 697, 698.

as his counsel requested. Prayers refused are in substance as follows: 1. That the second bond was only intended to cover the duties of the principal as purser, and that the defendant was not responsible for any defalcation of the principal as acting navy agent. 2. That the jury must ascertain the balance referable exclusively to receipts and disbursements of the principal as purser. 3. That if the jury find it impossible to determine what portion of the indebtedness of the principal accrued as purser, then their verdict must be for the defendant.

Statement of the record is, that those requests were refused, as tending to mislead the jury, and it is clear that they might also have been refused upon the ground that the theory of fact assumed is contradicted by the record and all the evidence in the case. 1. Defendant was not sued for any defalcation of his principal as navy agent, nor did the plaintiffs introduce any evidence to sustain any such claim. Such an instruction, therefore, as that asked in the first request, was unnecessary and inappropriate, and the request was properly refused. 2. Second request was also properly refused, for the reason given by the court, and also because it erroneously assumed that there was evidence in the case tending to show that the principal disbursed moneys as navy agent as well as purser, which finds no support in the record. 3. Third request was properly refused for the same reason, as it assumed that the evidence raised the question whether some portion of the indebtedness of the principal did not accrue on account of moneys received and disbursed by him, not as purser, but in some other official character, which is a theory entirely without support.

IV. Certain exceptions were also taken by the defendant to the rulings of the court in excluding an official letter written by the fourth auditor to a Senator in Congress in respect to the accounts of the principal, and also to the ruling of the court in excluding a letter written by the chief of the Bureau of Yards and Docks to the commandant of the Pensacola navy yard, and also to the ruling of the court in excluding the private books of the principal, for the pur-

pose of showing that he, the principal, received and disbursed moneys during that period as navy agent, and to contradict his accounts current, in which he charged and credited himself as purser. Our conclusion is, that these several rulings are correct. 1. Unofficial letters of subordinate officers are not admissible in evidence, in controversies like the present, to contradict, nor even to explain the official adjustment of the accounts as shown in the duly certified transcripts; and if not, then it is clear that the letters were properly excluded as immaterial and irrelevant. 2. Disbursing agents are required to settle their receipts and disbursements with the accounting officers of the treasury, and their private books are inadmissible to control that official adjustment.

All of the exceptions are overruled, and the judgment must be

AFFIRMED.

# INDEX.


ADMIRALTY. See *Practice*, 20–22.

Things immovable, like a bridge, are not the subjects of proceedings in. *The Rock Island Bridge*, 213.

AGENT. See *Bailee, Gratuitous; Insurance*, 2.

ALIEN.

A citizen of the United States, and who, as such, was of course before the admission of a foreign republic into the Union, an alien to that republic, and so, as against office found, incompetent to hold land there, became, on the admission, competent, no office having been previously found. *Osterman* v. *Baldwin*, 116.

ATTORNEY-AT-LAW. See *Evidence*, 4.

AUCTION. See *Public Sales*.

BAILEE, GRATUITOUS.

A gratuitous bailee of money to whom it is given for the purpose of lending it on good and sufficient security, and who, lending it to a person on property worth much more than the sum, and taking a properly executed mortgage, delivers the papers to his principal without having placed them on record, is not responsible for a loss occurring after the efflux of the term for which the money was lent, by non-recording of the papers; the owner of the security having had abundant opportunity to have them recorded himself. *Turton* v. *Dufief*, 420.

BOOK OF RECORD.

The word held to be satisfied within the meaning of a recording act by sheets of paper, not bound nor fastened otherwise than by being folded together and kept in separate bundles; the sheets, however, having been subsequently bound in separate volumes. *Mumford* v. *Wardwell*, 423.

CALIFORNIA. See *San Francisco, Pueblos*.

1. Grants by Mexican governors of the public domain within the limits of California, after July 7th, 1846, though antedated, are void. *Stearns* v. *United States*, 589.
2. The proceeding in the District Court of the United States in California land cases on an appeal from the board of land commissioners, is an original suit, and the whole case is open. *Grisar* v. *McDowell*, 363.

CALIFORNIA (*continued*).

3. An appeal from a decree of the District Court to the Supreme Court, in such cases, suspends the operation and effect of the decree only when, by a judgment of the Supreme Court, the claim of the confirmee in the premises in controversy may be defeated. *Ib.*
4. The decree of the board of land commissioners in such cases, or of the courts of the United States, where it becomes final, takes effect by relation as of the day when the claim was presented to the board of land commissioners. *Ib.*
5. The statute of California which gives to mechanics a lien upon the flumes or aqueducts "which they may have constructed or repaired," provided suit be brought "within one year after the work is done," construed and held to be confined to that *part* of the canal where the work was done. *Canal Company* v. *Gordon*, 561.

CHARITABLE USES. See *Massachusetts*, 1.

COLLISION. See *Practice*, 20–1.

1. In settling the mere facts of a collision of vessels, on conflicting evidence, the Supreme Court will not readily reverse a decree made by a District Court and affirmed by the Circuit Court. *The Hypodame*, 216.
2. When a steam vessel, proceeding in the dark, hears a hail before it from some source which it cannot or does not see, it is its duty instantly to stop and reverse its engine. *Ib.*
3. The captain of a steam propellor is not a competent lookout; though the propellor be but a river propellor. The lookout should be a person specially appointed. *Ib.*
4. Vessels navigating rivers which have a usage as to the sides which ascending and descending vessels respectively shall observe, are bound to observe the usage. *The Vanderbilt*, 225.

COMMERCIAL LAW. See *Negotiable Paper*.

1. To justify the sale, by the master, of his vessel, good faith in making the sale, and a necessity for it, must both concur; and the purchaser, to have a valid title, must show their concurrence. *The Amelie*, 18.
2. A justifiable sale divests all liens. *Ib.*

CONFIRMATION.

1. Where the government directed that settlers should be "confirmed" in their "possessions and rights," and ordered a particular public officer to examine into the matter, &c., — confirmation by writing not under seal was sufficient. *Reichart* v. *Felps*, 160.
2. A probate court cannot by subsequent order give validity to sales void by the laws of the State where made. *Gaines* v. *New Orleans*, 642.

CONFLICT OF JURISDICTION.

After return of *nulla bona* to an execution from the Circuit Court of the United States against a municipal corporation of a State, bound to levy a tax to pay its debts, *mandamus* lies from such Circuit Court to compel the levy, even though the State court, after the judgment obtained in the Circuit Court, and before the application for the

CONFLICT OF JURISDICTION (*continued*).

*mandamus*, have enjoined such levy. *Riggs* v. *Johnson County*, 166; affirmed in *Weber* v. *Lee County*, 210, and in *United States* v. *Council of Keokuk*, 514, 518.

CONSTITUTIONAL LAW.

1. A statute of a State, that the masters and wardens of a port within it should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in that port, is a regulation of commerce within the meaning of the Constitution, and also, a duty on tonnage, and is unconstitutional and void. *Steamship Company* v. *Portwardens*, 31.
2. A special tax on railroad and stage companies for every passenger carried out of the State by them is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel, not a simple tax on the business of the companies, and is unconstitutional and void. *Crandall* v. *State of Nevada*, 35.
3. Congress has no power to organize a board of revision to annul titles confirmed many years by the authorized agents of the government. *Reichart* v. *Felps*, 160.
4. A statute authorizing a chancellor to appoint a devisee of a life estate in a trust for life, remainder over, to execute the trust, does not violate the obligation of a contract. *Williamson* v. *Suydam*, 723.

CONTRACT. See *Evidence*, 10; *Shrinkage of Soil*.

1. In a contract to make and complete a structure, with agreements for monthly payments, a failure to make a payment at the time specified is a breach which justifies the abandonment of the work, and entitles the contractor to recover a reasonable compensation for the work actually performed. And this, notwithstanding a clause in the contract providing for the rate of interest which the deferred payment shall bear in case of failure. *Canal Company* v. *Gordon*, 561.
2. Where a party, who, by contract, has a right to have and take security to have work finished by a certain day,—no penalty nor any right to terminate the contract for non-completion, being reserved,—permits the other side, after breach, to go on in an effort to complete the contract, he has no right to compel him to complete it in a manner which necessarily involves him in loss. *Clark* v. *United States*, 543.

CORPORATION. See *Debtor and Creditor*.

COURT OF CLAIMS.

1. The act of March 3, 1863, concerning the Court of Claims, confers a right of appeal in cases involving over $3000, which the party desiring to appeal can exercise by his own volition, and which is not dependent on the discretion of that court. *United States* v. *Adams*, 101.
2. When the party desiring to appeal signifies his intention to do so in any appropriate mode within the ninety days allowed by that statute for taking an appeal, the limitation of time ceases to affect the case; and such is also the effect of the third rule of the Supreme Court concerning such appeals. *Ib.*

COURT OF CLAIMS (*continued*).

3. It is no ground for dismissing such appeal, that the statement of facts found by the Court of Claims is not a sufficient compliance with the rules prescribed by the Supreme Court on that subject. *United States* v. *Adams*, 101.

4. But the Supreme Court will of its own motion, while retaining jurisdiction of such cases, remand the records to the Court of Claims for a proper finding. *Ib.*

5. A finding which merely recites the evidence in the case, consisting mainly of letters and affidavits, is not a compliance with the rule; but a finding that a certain instrument was not made in fraud or mistake *is* a proper finding without reporting any of the evidence on which the fact was found. *Ib.*

6. A case in the Court of Claims which involves the right of a claimant to a military bounty land-warrant under the acts of Congress of March, 3d, 1855, and May 14th, 1856, is apparently within that part of that section of the act of March 3d, 1863, which provides "that when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the government in the adjustment of such class of cases, . . . and such facts shall be certified to by the presiding justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy." *United States* v. *Alire*, 573.

DAMAGES. See *Practice*, 21.

1. Where an intruder, ousted by judgment on *quo warranto* from an office having a fixed salary, and of personal confidence, as distinguished from one ministerial, takes a writ of error, giving a bond to prosecute the same with effect and to answer all costs and damages if he shall fail to make his plea good—thus, by the force of a *supersedeas*, remaining in office and enjoying its salary—does not prosecute his writ with effect,—the measure of damages on suit on his bond by the party who had the judgment of ouster in his favor, is the salary received by the intruding party during the pendency of the writ of error, and consequent operation of the *supersedeas*. *United States* v. *Addison*, 291.

2. The rule which measures damages upon a breach of contract for wages or for freight, or for the lease of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical. *Ib.*

3. On a breach of a contract to pay, as distinguished from a contract to indemnify, the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken. *Wicker* v. *Hoppuck*, 94.

4. In a suit against a common carrier for not carrying a party according to contract, the allegation of a breach "whereby the plaintiff was subjected to great inconvenience and injury," is not an allegation of special damage. *Roberts* v. *Graham*, 578.

DEBTOR AND CREDITOR. See *Fraudulent Conveyance.*

1. Where a bank charter is forfeited on *quo warranto* and the corporation is dissolved—any surplus of assets above its debts, by general laws of equity, will belong to the stockholders. *Lum* v. *Robertson*, 277.
2. A delinquent debtor cannot in such case plead the judgment of forfeiture as against a trustee seeking to reduce his debt to money for the benefit of the stockholders. *Ib.*

DYING DECLARATIONS. See *Evidence*, 3.

EQUITY. See *Debtor and Creditor; Evidence*, 6; *Notice; Mandamus*, 1; *Public Lands*, 2; *Public Policy; Practice*, 17–19; *Tort Feasors.*

1. Where a plain defect of jurisdiction appears at the hearing or on appeal, a court of equity will not make a decree though no objections have been interposed in the first instance. *Thompson* v. *Railroad Companies*, 134.
2. Where a sale for taxes is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief. *Slater* v. *Maxwell*, 268.
3. The jurisdiction of a court of equity invoked to enforce a statutory lien, rests upon the statute, and can extend no further. *Canal Company* v. *Gordon*, 561.
4. Where a fact alleged in a bill in chancery is one within the defendant's own knowledge, the defendant must answer positively. *Slater* v. *Maxwell*, 268.
5. A paper put in after the answer filed and after part of the testimony has been taken, stating that the "plaintiffs in the cause hereby join issue with the defendants (naming them), and will hear the cause on bill, answer and proofs against the defendants," is a sufficient replication. *Clements* v. *Moore*, 299.
6. Exceptions to the report of a master in chancery cannot be taken for the first time in this court. *Canal Company* v. *Gordon*, 561.
7. Where a release is fraudulently obtained from one of two joint contractors, the releasing contractor is not an indispensable party to a bill filed by his co-contractor against the other party to the contract. *Ib.*

ESTATE. See *Remainder.*

Though a devise to trustees "and their heirs," passes, as a general thing, the fee, yet where the purposes of a trust and the power and duties of the trustees are limited to objects terminating with lives in being,—where the duties of the trustees are wholly passive, and the trust thus perfectly dry,—the trust estate may be considered as terminating on the efflux of the lives. The language used in creating the estate will be limited to the purposes of its creation. *Doe, Lessee of Poor*, v. *Considine*, 458.

EVIDENCE. See *Practice*, 11.

1. Under the plea of the general issue in actions of assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the action. *Mason* v. *Eldred et al.*, 231.

EVIDENCE (*continued*).

2. Where a statute authorized a sale of land after notice, &c., and declared that the deed of conveyance should be "*primâ facie* evidence of title," the deed being offered in evidence raises primarily the presumption that the requisite notice had been given. *Mumford* v. *Wardwell*, 423.
3. A will made a short time before a testator's death acknowledging a child as his legitimate and only daughter, is to be regarded, on a question of legitimacy, as an affirmative evidence of great weight; and in the nature of a dying testimony of the testator to the fact. *Gaines* v. *New Orleans*, 642.
4. An attorney-at-law having no power *virtute officii* to purchase for his client at judicial sale land sold under a mortgage held by the client, the burden of proving that he had other authority rests on him. *Savery* v. *Sypher*, 157.
5. Approval by the judge of a bond for prosecution of a writ of error may be inferred from the facts of the transaction. *Silver* v. *Ladd*, 440.
6. In chancery, when an answer which is put in issue admits a fact, and insists on a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved. *Clements* v. *Moore*, 299.
7. Where a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it; his estate being insolvent. *Ib.*
8. Statements, either oral or written, made by the vendor after a sale, are incompetent evidence against the purchaser. *Ib.*; *Thompson* v. *Bowman*, 316.
9. A special verdict not received by the court, nor in any way made matter of record, is of no weight as evidence for any purpose. *United States* v. *Addison*, 291.
10. The practical interpretation which parties interested have by their conduct given to a written instrument, in cases of an ancient grant of a large body of land asked for and granted by general description, is always admitted as among the very best tests of the intention of the instrument. *Cavazos* v. *Trevino*, 773.

FEE SIMPLE. See *Estate*.

FRAUDULENT CONVEYANCE.

1. A debtor in failing circumstances cannot sell and convey his land, even for a valuable consideration, by deed without reservations, and yet secretly reserve to himself the right to possess and occupy it, for even a limited time, for his own benefit. Nor will this rule of law be changed by the fact that the right thus to occupy the property for a limited time is a part of the consideration of the sale, the money part of the consideration being on this account proportionably abated. *Lukens* v. *Aird*, 78.
2. A purchaser of a stock of goods from a debtor confessedly insolvent, where the purchaser knows that the debtor's purpose is to hinder and delay a particular creditor, and also that if the debtor intended a fraud

FRAUDULENT CONVEYANCE (*continued*).

on his creditors generally, the purchase would necessarily be giving him facilities in that direction, is not responsible in equity (the sale being an open one, for a fair price, and followed by change of possession) for any part of the consideration-money which the debtor had applied to payment of his debts; but is responsible for any part which he has diverted from such payment. *Clements* v. *Moore*, 299.

INDIANA.

Under the civil code of Indiana, the "order of sale" in proceedings for the foreclosure of a mortgage comes within the function and supplies the purpose of an execution. Consequently, the code requiring executions to be sealed with the seal of the court, such order of sale, if not so sealed, is void. The sheriff could not sell without such order. *Insurance Company* v. *Hallock*, 556.

INSURANCE.

1. A taking of a vessel by the naval forces of a now extinct rebellious confederation, whose authority was unlawful and whose proceedings in overthrowing the former government were wholly illegal and void, and which confederation has never been recognized as one of the family of nations, is a "capture" within the meaning of a warranty on a policy of insurance having a marginal warranty "free from loss or expense by capture;"—such rebellious confederation having been at the time sufficiently in possession of the attributes of government to be regarded as in fact the ruling or supreme power of the country over which its pretended jurisdiction extended. *Mauran* v. *Insurance Company*, 1.
2. A policy of insurance issued by a company through an agent fully authorized, is not made a *nullity* by the fact that after the policy had been issued and delivered, the party insured signed a memorandum that it should "take effect when approved by A., general agent." And for a loss occurring before A.'s action, a recovery was had. *Insurance Company* v. *Webster*, 129.

INTERNAL REVENUE.

1. A provision in a defeasance clause in a mortgage given by a railroad company to secure its coupon bonds, that the mortgage shall be void if the mortgagor well and truly pays, &c., the debt and interest, "without any deduction, defalcation or abatement to be made of anything for or in respect of any taxes, charges or assessments whatsoever,"—does not oblige the company to pay the interest on its bonds clear of the duty of five per cent., which, by the 122d section of the revenue act of 1864, such companies "are authorized to deduct and withhold from all payments on account of any interest or coupons due and payable." *Haight* v. *Railroad Company*, 15.
2. A statute of a State requiring savings societies, authorized to receive deposits but without authority to issue bills, and having no capital stock, to pay annually into the State treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a

INTERNAL REVENUE (*continued*).

given day, imposes a franchise tax, not a tax on property. *Society for Savings* v. *Coite*, 594.

3. So under the constitution and laws of Massachusetts, as interpreted by its highest court, and by long usage, does one which enacts that every institution for saving incorporated under the laws of that commonwealth, shall pay to the commonwealth "a tax on account of its depositors" of a certain percentage "on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for the six months preceding" certain semi-annual dates named. *Provident Institution* v. *Massachusetts*, 611.
4. So does one which requires corporations having a capital stock divided into shares, to pay a tax of a certain percentage (one-sixth of one per cent.) upon "the excess of the market value" of all such stock over the value of its real estate and machinery. *Hamilton Company* v. *Massachusetts*, 632.
5. Such taxes, being franchise taxes, are valid. *See the three cases last above cited*, 594, 611, 632.
6. Consequently the fact that such savings societies or corporations so taxed have invested a part of their deposits or surplus in securities of the United States, declared by Congress, in the act which authorized their issue, to be exempt from taxation by State authority, does not exempt the body from taxation on its franchise to the extent of deposits so invested. *Ib.*

IOWA.

Under the act of Congress admitting Iowa into the Union, the "Process Act" of May 19th, 1828, became applicable to the Federal courts of that State. *United States* v. *Council of Keokuk*, 514.

JUDGMENT.

The rule of the common law (contrary to what seems decided in *Sheehy* v. *Mandeville & Jamesson*, 6 Cranch, 254) declared to be, that a judgment against one upon a contract merely joint of several persons, bars an action against the others; and that the entire cause of action is merged in the judgment. *Mason* v. *Eldred et al.*, 231.

JUDICIAL SALES. See *Public Sales.*

JURISDICTION.

I. Of the Supreme Court of the United States.

(*a*) It has jurisdiction—

1. Where a decision in the highest court of a State is against the validity of a patent granted by the United States for land, drawn in question in such court, although the other side have also set up as their case a similar authority, whose validity is by the same decision affirmed. *Reichart* v. *Felps*, 160.
2. Of appeals on judgments in *habeas corpus* cases rendered by Circuit Courts in the exercise of original jurisdiction, under the act of Feb-

JURISDICTION (*continued*).

ruary 5th, 1867 (14 Stat. at Large, 385), to amend the Judiciary Act of 1789. *Ex parte McCardle*, 318.

3. Though the original writ be lost or destroyed before it reaches the Supreme Court, if the clerk of the Circuit Court have sent here a transcript in due time. *Mussina* v. *Cavazos*, 355.
4. Or, though it describes the parties as plaintiffs and defendants in error, as they appear in the Supreme Court, instead of describing them as plaintiffs and defendants, as they stood in the court below, if the names of all the parties are given correctly. *Ib.*

(*b*) It has NOT jurisdiction—

5. Upon political questions, as *ex. gr.*, where one of the United States seeks to enjoin officers who represent the Executive authority of the United States from carrying into execution certain acts of Congress, on the ground that such execution would annul and totally abolish the existing State government of the State, and establish another and different one in its place. *State of Georgia* v. *Stanton*, 50.
6. Nor (under the 25th section of the Judiciary Act), unless it appear that one of the questions mentioned in that section was raised in the State court, and actually decided by it; that is to say, received the consideration or attention of the court; it not being sufficient that this court can see that it ought to have been raised, and that it might have been decided. *The Victory*, 382; *Hamilton Company* v. *Massachusetts*, 632.
7. Nor where a State court, in deciding a question which might properly be reviewed under that section, if the decision had been confined to matter within the purview of that section, has rested its judgment on some point in the case not within its purview, and that point is broad enough to sustain the judgment. *Rector* v. *Ashley*, 142.
8. Nor where it appears no otherwise than by the opinion of the court, as distinguished from the record (even though opinions be required by statute of the State to be filed among the papers of the case in which they are given), that the case was within the section. *Ib.*
9. Nor unless it appear by the record itself that the case was within the section. *Walker* v. *Villavaso*, 124.
10. Nor where the writ of error is made returnable to a day different from the return day fixed by statute as the day on which the term commences. *Agricultural Company* v. *Pierce County*, 246.

II. OF CIRCUIT COURTS OF THE UNITED STATES.

(*a*) They have jurisdiction—

11. Of proceedings relating to a seizure of land, under the act of August 6th, 1861, "to confiscate property used for insurrectionary purposes." *Union Insurance Company* v. *United States*, 759.

(*b*) They have NOT jurisdiction—

12. Where part-owners or tenants in common, in real estate, ask partition in equity, their co-tenants not being subject to the jurisdiction of the Federal courts. *Barney* v. *Baltimore City*, 280.
13. Nor where a conveyance of the subject of controversy, made for the

JURISDICTION (*continued*).

purpose of vesting an interest in parties competent to litigate in the Federal courts, is colorable only, and the real interest remains in the assignor. *Barney* v. *Baltimore City*, 280.

LAST WILL. See *Evidence*, 3; *Notice*, 2; *Res Judicata*, 1.

The probate of a will of later date by the mere fact of its probate annuls a prior will, so far as the provisions of the two are inconsistent, and so far as the estate was not legally administered under the earlier will. *Gaines* v. *New Orleans*, 642.

LEGAL ESTATE. See *Notice*.

LEGISLATIVE POWER. See *Constitutional Law; Practice*, 12.

A statute authorizing a chancellor to discharge trustees named in a will, and to appoint new ones, is valid if passed at the request of the trustees discharged. *Williamson* v. *Suydam*, 723.

LEGITIMACY. See *Evidence*, 3; *Louisiana*, 1–2.

LIEN. See *Admiralty*.

1. Capture *jure belli*, as prize of war, overrides all previous liens. *The Battle*, 498.
2. A justifiable sale of his ship by a master divests them. *The Amelie*, 18.

LOUISIANA.

1. By the law of that State, if a man *bonâ fide* believe a woman free to marry him, and with such a belief as this does marry her, such marriage has its civil effects; and the child born of it is legitimate, and can inherit its father's estate. *Gaines* v. *New Orleans*, 642.
2. The fact of marriage being proved, the presumptions of law are all in favor of good faith. *Ib.*
3. The power of executors to make sale of real and personal estate there, under the code in force in 1813, stated. *Ib.*; *Gaines* v. *De la Croix*, 719.
4. Where each of two parties claim title from one person as a common source, neither, by the law of that State, is at liberty to deny that such person had title. *Ib.*
5. The deed of a sole instituted heir gives no title by the law of that State as against the real and paramount heir. *Ib.*
6. Under the code of that State, which allows general and special pleas, if not inconsistent with each other, an amended answer which but specifies a particular fact in aid of the general denial, is allowable. *Andrews* v. *Hensler*, 254.
7. The fact that the code limited to one year the time in which actions could be brought for the rescission of sales of slaves on account of redhibitory defects, did not necessarily give to the purchaser the same term within which to offer to return them to the vendor. *Ib.*
8. By the law of that State, as well as of those States which have adopted the common law, a person who takes a negotiable note from one intrusted by the owner with the collection of it only, takes it subject

LOUISIANA (*continued*).
to the equities between prior parties to it; and to the consequences of that rule. *Foley* v. *Smith*, 492.

MAINTENANCE.
An owner of personal property, tortiously converted, may make a valid sale of it. He sells the property, not an action. *Tome* v. *Dubois*, 458.

MANDAMUS. See *Conflict of Jurisdiction.*

1. After judgment at law for a sum of money against a municipal corporation, and execution returned unsatisfied, mandamus, not bill in equity, is the proper mode to compel the levy of a tax which the corporation was bound to levy to pay the judgment. *Walkley* v. *City of Muscatine*, 481.
2. Mandamus from this court will not lie to reverse a judgment of a court below, refusing a mandamus against the Secretary of the Treasury, commanding him to pay a sum of money awarded to the relator by the Secretary of War, in pursuance of a joint resolution of Congress, and to compel such court below to issue one. *Ex parte De Groot*, 497.

MARRIAGE AND LEGITIMACY. See *Evidence*, 3; *Louisiana*, 1–2.

MASSACHUSETTS.

1. By the law of that State, the objects of a charity are made sufficiently certain, in a devise of the whole legal estate of real and personal property to two persons, who are to hold it in trust to "manage, invest, and reinvest the same according to their best discretion," and pay over income during certain lives; and who, or *their successors*, as trustees, are, on the efflux of the lives, to select and appoint persons, who are to be informed of the facts by the trustees, and who are to distribute the capital among permanently established and incorporated institutions, for the benefit of the poor. *Lorings* v. *Marsh*, 337.
2. The 25th section of chapter 92 of its Revised Statutes, A.D. 1860, which provides for the issue of any deceased child or children, as in cases of intestacy, "unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake," construed. *Ib.*

MERGER. See *Judgment.*

MICHIGAN.
The rule of the common law, that a judgment against one contractor upon a contract, merely joint, of several persons, bars an action against the other, is altered by statute. *Mason* v. *Eldred et al.*, 231.

MUNICIPAL CORPORATION. See *Mandamus.*

NAVY.

1. Disbursements by a purser stationed at a navy-yard, of moneys which would have been disbursed by a "navy agent," if there had been one at that yard, does not make such purser a navy agent, so as to exempt

NAVY (*continued*).

from liability the persons who are his sureties as purser. *Strong* v. *United States*, 788.

2. Since the act of August 26th, 1842 (if not before), pursers may be directed to purchase supplies for the use of the navy on public account, and to disburse moneys for the use of the navy as appropriated by law. *Ib.*

NEGOTIABLE PAPER.

The alteration of the date in any commercial paper—though the alteration *delay* the time of payment—is a material alteration, and if made without the consent of the party sought to be charged, extinguishes his liability. The fact that it was made by one of the parties signing the paper before it had passed from his hands, does not alter the case as respects another party (a surety), who had signed previously. *Wood* v. *Steele*, 80.

NEW MADRID.

Act of February 17th, 1815, for the benefit of its inhabitants, construed. *Rector* v. *Ashley*, 142.

NEW MEXICO.

Act of 3d March, 1863, giving the District Court of, an extra territorial jurisdiction, construed. *United States* v. *Hart*, 770.

NOTICE.

1. Where it is sought to affect a *bona fide* purchaser for value with constructive notice, the question is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence. *Wilson* v. *Wall*, 83.

2. A purchaser of property from an executor of a will of one date, who has at the time strong reasons to believe that a later will with different executors and different dispositions of property had been made, is not protected from liability to the parties interested under such later will, if established and received to probate, by the fact that the executor of the first will made the sale under order of court having jurisdiction of such things. He purchases at the risk of the later will's being found, or proved and established. If the later will is found, it relates back and affects such a purchaser with notice of its existence and contents as of the time when he purchased. *Gaines* v. *De la Croix*, 719.

3. Where a complainant is not endeavoring to establish an equitable title, but is asserting a right to the legal estate, it does not follow that he loses that right, because the defendant may have purchased in good faith what he *supposed* was the legal title. *Gaines* v. *New Orleans*, 642.

OREGON.

1. Under the statute of Oregon which provides, that any person *in possession* of real property may maintain a suit in equity against another,

OREGON (*continued*).

who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest, a bill will not lie on a possession without some right, legal or equitable, first shown. *Stark* v. *Starrs*, 402.

2. The act of Congress of September 27th, 1850 (known as "The Oregon Donation Act"); the act of August 14th, 1848, organizing the Territory of Oregon; the general Pre-emption Act of September, 1841; the act of May 23d, 1844 (known as the "Town Site Act"); the act of July 17th, 1854, by which the Town Site Act was extended, though with qualifications, to Oregon Territory, construed. *Ib.*

PARDON.

A full, and amnesty to the owner of property seized under the act of 6th August, 1861, as used, with his consent, in aid of the rebellion, relieves him from forfeiture of the property. *Armstrong's Foundry*, 766.

PARTNERSHIP.

1. In the absence of proof of its purchase with partnership funds for partnership purposes, property held in the joint names of several owners, or in the name of one for the benefit of all, is deemed to be held by them as joint tenants, or as tenants in common; and none of the several owners possesses authority to sell or bind the interest of his co-owners. *Thompson et al.* v. *Bowman*, 316.
2. If persons are copartners in the ownership of land, such land being the only subject-matter of the partnership, the partnership will be terminated by a sale of the land. *Ib.*

PATENT. See *Public Lands*, 2–4.

PLEADING. See *Equity*, 1, 4, 5, 7; *Evidence*, 6; *Damages*, 4; *Louisiana*, 6; *Practice*, 11.

POWERS.

Where two persons, as trustees, are invested by last will with the whole of a legal estate, and are to hold it in trust to "manage, invest, and reinvest the same according to their best discretion," and pay over income during certain lives; and, on their efflux, these persons, or *their successors*, as trustees, are to select and appoint persons, who are to be informed of the facts by the trustees, and who are to distribute the capital among permanently established and incorporated institutions, for the benefit of the poor—the power given to such two persons to select and appoint, is a power which will survive, and on the death of one in the lifetime of the testator, it may be properly executed by the other. *Lorings* v. *Marsh*, 337.

PRACTICE. See *Court of Claims*, 1–5; *Indiana; Jurisdiction.*

I. In Cases Generally.

1. Where a court has no jurisdiction of a case, it cannot award costs, or order execution for them to issue. *The Mayor* v. *Cooper*, 247.

PRACTICE (*continued*).

2. The writ of error by which a case is transferred from a Circuit Court to the Supreme Court is the writ of the latter court, although it may be issued by the clerk of the Circuit Court; and the original writ should always be sent to this court with the transcript. *Mussina* v. *Cavazos*, 355.
3. Writs of error dismissed where there were but three plaintiffs in error, while the citation presented four. *Kail et al.* v. *Wetmore*, 451.
   And so where the names in the citation were different from those in the writ of error; bonds, moreover, in both cases reciting but one person as plaintiff in error, when there were in fact three. *Ib.*
4. An appeal from a very distant State (California) dismissed at the last term for apparent want of a citation, now reinstated, it appearing that a citation had in fact been signed, served and filed in the clerk's office, and that the building in which his office was kept had been afterwards partially destroyed by fire, and a great confusion and some loss of records occasioned in consequence. *Alviso* v. *United States*, 457.
5. A writ of error not sealed until eleven days after the judgment which it would seek to reverse was rendered, cannot operate as a supersedeas. *City of Washington* v. *Dennison*, 495.
6. Nor one where there has been an omission to serve the citation before the return day of the writ. *Ib.*
7. A judgment affirmed under Rule 23 of the Supreme Court, with ten per cent. damages, it appearing from the character of the pleadings, that the writ of error must have been taken only for delay. *Prentice* v. *Pickersgill*, 511.
8. A decree in the Circuit Court dismissing a bill on the merits, reversed where the Circuit Court had not jurisdiction, and a decree of dismissal without prejudice directed. *Barney* v. *Baltimore City*, 280.
9. Where, pending a writ of error to the Supreme Court, subsequently dismissed, the defendant in error dies and the other side wishes to take a new writ, application should be made to the court below for the purpose of reviving the suit in the name of the representative of the deceased. A motion in this court to revive the writ by suggesting the death and substituting the representatives as parties to the record is not regular. *McClane* v. *Boon*, 244.
10. Refusal to grant specific prayers of a party for instruction is not error; the substance of the requested instructions being embraced in the instructions actually given. *Tome* v. *Dubois*, 548.
11. An objection of variance between allegation and proof must be taken when the evidence is offered. It cannot be taken advantage of after it is closed. *Roberts* v. *Graham*, 578.
12. State legislatures cannot abolish in the Federal courts the distinction between actions at law and actions in equity, by enacting that there shall be but one form of action, which shall be called "a civil action," in which "the real parties in interest" must sue. *Thompson* v. *Railroad Companies*, 134.
13. Though a decree have been entered "*as*" of a prior date—the date of an order settling apparently the terms of a decree to be entered there-

PRACTICE (*continued*).

after—the rights of the parties in respect to an appeal are determined by the date of the actual entry, or of the signing and filing of the final decree. *Rubber Company* v. *Goodyear*, 153.

14. The question of sufficiency of an appeal bond is to be determined in the first instance by the judge who signs the citation; but after the allowance of the appeal it becomes cognizable in the Supreme Court. It is not required that the security be in any fixed proportion to the amount of the decree; but only that it be sufficient. *Ib.*

15. The only sort of suit removable from a State court under the 12th section of the Judiciary Act is one regularly commenced by a citizen of the State in which the suit is brought by process served upon a defendant who is a citizen of another State. *West* v. *Aurora City*, 139.

16. Where a party removes, under a statute of the United States, from a State court to the Circuit Court of the United States a case depending in point of merits on the right construction of such statute, the Circuit Court cannot dismiss and remand the case, upon motion, on the ground that it has no jurisdiction because the statute is unconstitutional and void. *The Mayor* v. *Cooper*, 247.

II. In Equity.

17. Where a party desires to file a bill in original jurisdiction in equity in the Supreme Court, it is usual to hear a motion in his behalf for leave to do so. *State of Georgia* v. *Grant*, 241.

18. An objection to an amended bill in chancery because not filed with the leave of the court below (as it is contemplated by Rule 45 of the Equity Rules that such bills should be), or the objection that a replication is not in a sufficient form, under Rule 66 of the same rules, cannot be first made in the Supreme Court. *Clements* v. *Moore*, 299.

19. On an application to a court in equity to refuse confirmation of a master's sale and to order a resale—a case where speedy relief may be necessary—the court may properly hear the application, and act on *ex parte* affidavits on both sides, and without waiting to have testimony taken with cross-examinations. *Savery* v. *Sypher*, 157.

III. In Admiralty.

20. In cases of collision, if the libel have been properly amended, damages awarded exceeding those claimed by the libel originally, and while it was uncertain what the damages would be, may be awarded if within the amount of the stipulation given on the release of the offending vessel. *The Hypodame*, 216.

21. Objections to the amount of damages, as reported by a commissioner and awarded by the admiralty court, will not be entertained in the Supreme Court in a case of collision where it appears that neither party excepted to the report of the commissioner. *The Vanderbilt*, 225.

22. In an appeal where the record does not show that the sum necessary to give the Supreme Court jurisdiction was in controversy below, the court, in a proper case, will allow the appellant a limited time to make proof of the fact. *The Grace Girdler*, 441.

PRACTICE (*continued*).

IV. In Prize.

23. A libel case, charging the vessel and cargo to be prize of war, dismissed because no case of prize was made out by the testimony. But because the record disclosed strong *prima facie* evidence of a violation of certain statutes of the United States, the case was remanded, with leave to file a new libel according to these facts. *The Watchful*, 91.
24. Proceedings relating to a seizure of land under the act of August 16th, 1861, which makes property used in aid of the rebellion the lawful subject of prize and capture, are to have a general conformity to proceedings in admiralty, but should be conformed, in respect to trial by jury and exceptions to evidence to the course of the common law, and can be reviewed only on writ of error. *Union Insurance Company* v. *United States*, 759; *Armstrong's Foundry*, 766.

PRIZE OF WAR. See *Public Law*.

Captures Restored, under special facts, though there existed grounds of suspicion. See *The Sea Witch*, 242; *The Flying Scud*, 263; *The Wren*, 582.

Captures Condemned, under special facts. See *The Flying Scud*, 263; *The Adela*, 266.

PROBATE. See *Res Judicata; Last Will*.

PUBLIC LANDS.

1. The President may reserve from sale and set apart for public use, parcels of land belonging to the United States; and modify, by reducing or enlarging it, a reservation previously made. *Grisar* v. *McDowell*, 363.
2. The right to a patent once vested is equivalent, as respects the government dealing with the public lands, to a patent issued; and when issued, it relates, so far as may be necessary to cut off intervening claimants, to the inception of the right of the patentee. *Stark* v. *Starrs*, 402.
3. Patents by the United States for land which it has previously granted, reserved from sale, or appropriated, are void. *Reichart* v. *Felps*, 160.
4. A patent or instrument of confirmation by an officer authorized by Congress to make it, followed by a survey of the land described in the instrument, is conclusive evidence that the land described and surveyed was reserved from sale. *Ib.*

PUBLIC LAW. See *Insurance*, 1.

1. Neither an enemy nor a neutral acting the part of an enemy can demand restitution on the sole ground of capture in neutral waters. *The Adela*, 266.
2. The liability to confiscation, which attaches to a vessel that has contracted guilt by breach of blockade, does not attach to her longer than till the *end* of her return voyage. *The Wren*, 582.

PUBLIC POLICY.

Equity will not enforce a secret agreement made by the plaintiff with

PUBLIC POLICY (*continued*).

certain of several defendants, that if they will desist from resistance to his suit, he will, if he recovers judgment, not levy execution on their property. *Seltz* v. *Unna*, 327.

PUBLIC SALES.

1. Where land is sold for taxes, the inadequacy of the price given is not a valid objection to the sale. *Slater* v. *Maxwell*, 268.
2. Where the tract sold consists of several distinct parcels, the sale of the entire tract in one body does not vitiate the proceeding if bids could not have been obtained upon an offer of a part of it. *Ib.*
3. It is essential to the validity of tax sales and of judicial sales, that they be conducted in conformity with the requirements of the law, and with entire fairness. A perfect truth in the statement of all material facts stated, and similar freedom from all influences likely to prevent competition in the sale, should be strictly exacted. *Ib.; James et al.* v. *Railroad Company*, 752.
4. However, the rules which make void as against public policy agreements that persons competent to bid at them will not bid, forbid such agreements alone as are meant to prevent competition and induce a sacrifice of the property sold. An agreement to bid, the object of it being fair, is not void. *Wicker* v. *Hoppock*, 94.

PUEBLOS. See *San Francisco.*

Their history and nature explained. *Grisar* v. *McDowell*, 363.

PURSER. See *Navy.*

QUO WARRANTO. See *Debtor and Creditor.*

REBELLION, THE. See *Insurance*, 1; *Practice*, 24.

1. The alleged fact that a judgment in a primary State court of the South,—affirmed in the highest State court after the restoration of the Federal authority,—was rendered after the State was in proclaimed rebellion, and by judges who had sworn allegiance to the rebel confederacy, the record not disclosing the fact that the want of authority under the Federal Constitution of such primary court was in such court drawn in question and decided against—will not be regarded by this court as bringing the case within the 25th section of the Judiciary Act. *Walker* v. *Villavaso*, 124; *White* v. *Cannon*, 443.
2. The statute of July 13th, 1861, and the subsequent proclamation of President Lincoln under it, which made all commercial intercourse between any part of a State where insurrection against the United States existed and the citizens of the rest of the United States "unlawful," so long as such condition of hostility should continue, rendered void all purchases of cotton from the rebel confederacy by citizens or corporations of New Orleans, after the 6th of May, 1862. *The Ouachita Cotton*, 521.
3. Under the *proviso* of the above-mentioned statute which gave the President power in his discretion to license commercial intercourse, no one else could give licenses. *Ib.*

REBELLION, THE (*continued*).

4. The title of a purchaser from a citizen of New Orleans, who had himself purchased from the rebel confederacy after the 6th of May, 1862, was not made valid by the fact that such second purchaser was a foreign neutral, purchasing *bonâ fide* for value. *The Ouachita Cotton*, 521.
5. The time during which the courts in the lately rebellious States were closed to citizens of the loyal States, is, in suit brought by them since, to be excluded from the computation of the time fixed by statutes of limitation within which suits may be brought, though exception for such cause be not provided for in the statutes. And this independently of the Act of Congress of June 11th, 1864. *Hanger* v. *Abbott*, 532.

REMAINDER, ESTATES IN.

Estates in remainder vest at the earliest period possible, unless there be a clear manifestation of the intention of the testator to the contrary. And in furtherance of this principle, the expression "*upon* the decease of A., I give and devise the remainder," construed to relate to the time of the enjoyment of the estate, and not the time of the vesting in interest. *Doe, Lessee of Poor*, v. *Considine*, 458.

RES JUDICATA.

1. The probate of a will duly received to probate by a State court of competent jurisdiction, is conclusive of the validity and contents of the will in this court. *Gaines* v. *New Orleans*, 642.
2. A decision in one way on bill and demurrer does not preclude a decision in an opposite way on answer and proofs. *Minnesota Company* v. *St. Paul Company*, 742.

REVOCATION. See *Last Will.*

SALES. See *Maintenance; Public Sales.*

SALVORS.

Where the owners of saw-logs which in a freshet had floated far down a river, and coming thus as waifs to persons along the river, had been saved by them and sawed into boards, affirmed the acts of such persons in saving and sawing them, the salvors, on a claim by the owners to the value of the lumber, are entitled to just compensation for their work and expenses in saving it. *Tome* v. *Dubois*, 548.

SAN FRANCISCO.

1. No assignment of pueblo lands was ever made by the former government to San Francisco. Such assignment was requisite to take away from the government of the United States its right to set apart and appropriate any lands claimed under a pueblo right; or to modify by reduction or enlargement reservations previously made. *Grisar* v. *McDowell*, 363.
2. An act of Congress by which all the right and title of the United States to the land within the corporate limits of San Francisco, confirmed to the city by a decree of the Circuit Court, were relinquished and granted to that city, and the claim of the city was confirmed, subject, however,

SAN FRANCISCO (*continued*).
to the reservations and exceptions designated in the decree, and upon certain specified trusts, disposed of the city claim, and determined the conditions upon which it should be recognized and finally confirmed. *Grisar* v. *McDowell*, 363.

SHIPS, MASTERS' POWER TO SELL. See *Commercial Law.*

SHRINKAGE OF SOIL.
Where a party agrees to build an embankment for a certain sum per cubic yard, at such places as he shall be directed by another, and the place selected by this other is such that there is a natural settling of the batture or foundation while the embankment is building, and a consequent waste and shrinkage of the embankment, any system of measurement which does not allow for the embankment which supplies the place of the settling is not a correct one. *Clark* v. *United States*, 543.

SOVEREIGN. See *United States.*

STATUTES.

I. INTERPRETATION OF.

1. Where the language of a statute, read in the order of clauses as passed, presents no ambiguity, courts will not attempt, by transposition of clauses, and from what it can be ingeniously argued was a general intent, to qualify, by construction, the meaning. *Doe, Lessee of Poor*, v. *Considine*, 458.
2. The admitted rule that penal statutes are to be strictly construed, is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature. *United States* v. *Hartwell*, 385.

II. DATE OF ENACTMENT OF.

3. Whenever a question arises as to the day when a statute was enacted, resort may be had to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, the resort being always first to that which in its nature is most appropriate, unless the then positive law has enacted a different rule. *Gardner* v. *The Collector*, 499.

III. OF THE UNITED STATES, CONSTRUED. See *California*, 2–4; *Confirmation*, 1; *Constitutional Law*, 3; *Court of Claims*, 1, 6; *Internal Revenue*, 1–6; *Iowa; Jurisdiction*, 1–13; *Navy; New Madrid; New Mexico; Oregon; Practice*, 3, 4, 5, 6, 12, 13, 14, 15, 22, 24; *Rebellion*, 1–4; *San Francisco*, 12; *Sub-Treasury Acts.*

IV. OF STATES, CONSTRUED. See *Book of Record; California*, 5; *Constitutional Law*, 1, 4; *Internal Revenue*, 2–6; *Louisiana*, 3, 6, 7; *Massachusetts*, 2; *Michigan; Oregon; Texas*, 1.

SUB-TREASURY ACTS.

1. The terms employed in the sixteenth section of the Sub-Treasury Act of August 6th, 1846 (9 Stat. at Large, 59), to designate the persons made

SUB-TREASURY ACTS (*continued*).

liable under it, are not restrained and limited to principal officers. "Clerks" of a certain kind mentioned in the act may come within them. *United States* v. *Hartwell*, 385.

2. The penal sanctions of the third section of the act of June 14th, 1866, "to regulate and secure the safe-keeping of public money," &c. (14 Stat. at Large, 65), is confined to officers of banks and banking associations. *Ib.*

TAX SALES. See *Public Sales.*

TEXAS. See *Alien.*

1. Its statute of limitations construed. *League* v. *Atchison*, 112; *Osterman* v. *Baldwin*, 116.
2. Trusts of real estate may be proved there, at common law, by parol. *Osterman* v. *Baldwin*, 116.

TORT FEASORS.

Equal contributions among tort feasors is not inequitable, and may be voluntarily agreed on, although the action among tort feasors to enforce contribution where the payments have been unequal will not lie. *Seltz* v. *Unna*, 327.

UNITED STATES.

When the United States is plaintiff and the defendant has pleaded a set-off, no judgment for an excess, though ascertained to be due, can be rendered against the government. *United States* v. *Eckford*, 484.

VARIANCE. See *Practice*, 11.

VERDICT, SPECIAL. See *Evidence*, 9.

A case stated and meant to be regarded as a special verdict, treated as such, and passed on, though not presented in the best technical form. *Mumford* v. *Wardwell*, 423.