Statement of the case.

judicial one, but one of *mercy*, to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court. It was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal. Even if we were called upon to review the acts of the secretary, we see no reason to doubt their correctness, or that of the judgment of the Court of Claims in dismissing the case.

DECREE AFFIRMED.

The CHIEF JUSTICE and Mr. Justice NELSON dissented.

SUPERVISORS *v.* ROGERS.

1. The act of February 28th, 1839 (§ 8, 5 Stat. at Large, 322), providing for the transfer, under certain circumstances named in it, of a suit from one Circuit Court to the most convenient Circuit Court in the next adjacent State, is not repealed by the act of March 3d, 1863 (12 Stat. at Large, 768), providing that under certain circumstances named in *it*, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time.
2. A court of the United States has power to adopt in a particular case a rule of practice under a State statute; and where a Circuit Court is possessed of a case from another circuit, under the above-mentioned act of 1839, it may adopt the practice of the State in which the Circuit Court from which the case is transferred comes, as fully as could the Circuit Court which had possession of the case originally.

ERROR to the Circuit Court for Northern *Illinois*. The case, which involved two points, being this:

1. An act of Congress of the 28th of February, 1839,* provides, that in all suits in any Circuit Court of the United States, in which it shall appear that both the judges, or the one who is solely competent to try the same, *shall be in any way interested*, or shall have been counsel, or connected with either party so as to render it improper to try the cause, it shall be the duty of such judge, or judges, on the applica-

* § 8, 5 Stat. at Large, 322.

tion of either party, to cause the fact to be entered on the records of the court and make an order, that an authenticated copy thereof, with all the proceedings in the suit, *shall be forthwith certified to the most convenient Circuit Court in the next adjacent State*, or in the next adjacent circuit, which Circuit Court shall, upon such record and order being filed with the clerk, take cognizance thereof in the same manner as if such suit had been rightfully and originally commenced therein, and shall proceed to hear and determine the same; and the proper process for the due execution of the judgment or decree rendered therein, shall run into and be executed in the district where such judgment or decree was rendered; and, also, into the district from which such suit was removed.

A subsequent act, one of March 3d, 1863,* provides, that whenever the judge of the Supreme Court for any circuit, from disability, absence, the accumulation of business in the Circuit Court in any district within his circuit, or from his having been counsel, *or being interested in any cause pending*, or from any other cause, shall deem it advisable *that the Circuit Court should be holden by the judge of any other circuit*, he may request, in writing, the judge of any other circuit *to hold the court in such district* during a time named in such request.

With these two acts on the statute-book one Rogers had brought suit, in the Circuit Court for *Iowa*, against the supervisors of Lee County, to recover the interest due by the county on certain bonds which it had issued, and for the payment of which interest, a tax was by the statutes of the State to be levied.

Having obtained a judgment against the county, and issued execution without getting any satisfaction, he applied to the same court for an alternative writ of mandamus upon the board of county supervisors (whose duty it was, by the laws of Iowa, to levy all taxes levied), to levy a tax sufficient to pay his judgment, or to show cause for not doing so. The writ having issued, the supervisors made a return showing cause, or what they set up as such. The case sub-

* 12 Stat. at Large, 768.

sequently coming on for further proceeding, and both the judges of the Circuit Court for Iowa being interested in the matter as tax-payers of the county of Lee, the case was ordered to be transferred to the Circuit Court for the Northern District of *Illinois*.

Being now in that court, a motion was made to remand it, on the ground that the act first above quoted, the act, namely, of 1839, had been repealed by the subsequent one of 1863, and that, under this last act, if the two judges of the Circuit Court for Iowa were interested in the case, a circuit judge of some other district should have been requested to hold a court *in the Iowa circuit*, *the case* being left *there*. Instead of this the *case* had been transferred and the judge had been left in his district. *The motion was, however, denied.*

2. The case being thus in the Circuit Court for Northern Illinois, and a peremptory writ having issued thence, and the supervisors having refused to obey it, the relator's counsel moved that a writ should be issued "according to section 3770 of the code of Iowa," directed to the *marshal of the United States* for the district of Iowa, and commanding *him* to levy and collect the taxes named in the peremptory writ.

This section, 3770 of the code of Iowa, upon which the motion for the appointment of the marshal was based, is found in a chapter of the Iowa code, regulating proceedings in mandamus. It thus enacts:

"The court may, upon application of the plaintiff (besides or instead of proceeding against the defendant by attachment) direct that the act required to be done may be done by the plaintiff, *or some other person appointed by the court*, at the expense of the defendant; and, upon the act being done, the amount of such expense may be ascertained by the court, or by a referee appointed by the court, as the court or judge may order; and the court may render judgment for the amount of such expense and costs, and enforce payment thereof by execution."

The court below accordingly issued the writ to the marshal, "commanding him to levy and collect the taxes named in the said peremptory writ, and when collected to pay said

judgment, interest, and costs therein named," and in performing the said duty, requiring him to conform to the laws of the State of Iowa, for the collection of State and county taxes, as near as might be.

The case being here on error, it was alleged that the court below erred,

1. In overruling the motion to remand the cause to the Circuit Court of the United States for the District of Iowa; and,

2. In making an order for the appointment of the marshal of the United States, as a commissioner, to levy and collect the tax upon the property of Lee County.

Mr. McCrary, for the plaintiff in error, contended, that the act of 1863 was intended to supersede that of 1839. Great convenience and advantage arose to suitors, witnesses, attorneys, and others, by providing for calling a neighboring judge to try such cases. It was vastly more easy for a judge to come into an adjoining circuit than for counsel and witnesses to go by hundreds from State to State.

Several reasons might be assigned in support of the second allegation of error; but a conclusive one, he argued, was, that so far as anything appeared here, the chapter of the Iowa code on which the court acted in appointing the marshal, had never been adopted by the Federal court below as one of its rules of practice. It thus had no force in that court.* The decision in *Riggs* v. *Johnson County*† last winter, on the subject of mandamus in this class of cases, was based expressly upon the ground that the rules and practice of the court authorized the issuing of writs of mandamus to enforce the levy of taxes in these cases, and it was upon a full review of the acts of Congress concerning the practice of the courts, that this conclusion was reached.

Messrs. Grant and Dick, contra,

1. Went into a minute examination of the act of 1839, and that of 1863, contending that the provisions were able to

* Smith *v.* Cockrill, 6 Wallace, 756. † Ib. 166.

stand together, and were thus but cumulative. They gave two modes of proceeding where the judges were interested, &c. Either could be adopted, as was most convenient in the circumstances. The learned counsel contended—

2. That the chapter of the Iowa code in question, if never otherwise adopted, had been sufficiently adopted for this case, by being completely acted upon in it.

Mr. Justice NELSON delivered the opinion of the court.

I. It will be observed on a comparison of the act of 1839 with the subsequent one of 1863 that they are very different from each other in their general purpose, scope, and intent. The first provides only for the removal and trial of a suit in which the judges are disqualified to try the particular cause on account of interest, or having been counsel or connected with either party. The second act is more general, and in the events named the judge is to be invited to hold the court for a given session or term, to be named. It is true that the reasons assigned in the section for calling on the judge embrace two of those assigned in the act of 1839 for the removal to an adjacent court, namely: interest, and having been counsel; but this enumeration is not of much importance in the interpretation of the act, for after the enumeration it is added, or "from any other cause;" so that the judge would be authorized for a cause not enumerated to call in the judge to hold a session for any time specified, and during which he would no doubt be fully competent to try any cause coming even within the enumeration. The frame of the section, we think, shows that the main purpose of the provision was to procure a judge to hold a session or term of the court, and not to try a particular cause which the resident judge was incompetent to try. But the more decisive difference between the two acts is that the power conferred by the latter is permissive and discretionary, whereas the former is express and mandatory. The action of the judge in the latter act depends upon the question whether or not he *deems it advisable that the circuit judge of another circuit shall be called in;* in the former it is *made the duty of the judge, on the appli-*

cation of either party, to cause the fact to be entered in the records of the court, and to make the order of removal. In the latter act it is also discretionary with the judge requested to hold this circuit. The condition of his own circuit may render it inexpedient, or his refusal unavoidable; in the former it is the duty of the circuit to which the cause is removed to take cognizance of the same and try it as if originally brought in that court. We are of opinion therefore that there is no necessary repugnancy between the two acts, and although in some particulars the two provisions have reference to the same subject, and for the purpose of remedying a common inconvenience, there are no negative words in the latter act, and to this extent the remedy may be well regarded as simply cumulative.

II. The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment.

This depends upon a provision of the code of the State of Iowa. The provision is found in a chapter regulating proceedings in the writ of mandamus; and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, fine, and imprisonment. It is given by way of an alternative proceeding in execution of the peremptory writ in lieu of the attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State, and the peremptory mandate of the court.

This section is but a modification of the law of England and of the New England States, which provide for the execution of a judgment recovered against a county, city, or town,

against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people.

It is said that this practice prescribed for the State courts of Iowa has not been adopted by the United States circuit for that district, and hence that it is not competent for the court in the present instance to follow this mode of proceeding. But the answer is that the court having charge of the cause under the act of 1839, is fully competent to adopt it in the particular case, as its power is the same over it as if it had been a suit originally brought in the court.

JUDGMENT AFFIRMED.

Mr. Justice MILLER did not sit in this case.

LEE COUNTY *v.* ROGERS.

1. The principle of law held by this court in *Gelpcke* v. *The City of Dubuque*, (1 Wallace, 176-223)—the principle, namely, that bonds, issued by counties, cities, or towns, in Iowa, to railroad companies, for stock in such companies; and which said bodies, at the time the bonds were issued, were held, by the settled adjudications of the highest courts of the State, to possess full power, under its constitution and laws, to issue the same, are ever after valid and binding upon the body issuing them, in the hands of a *bonâ fide* holder, although the same courts may subsequently reverse their previous decisions—is not open for re-examination in this court.
2. The doctrine of *lis pendens* has no application to a case where there were three distinct and independent suits, with an interval of one year between the first and second, and of two years between the second and third.

IN error to the Northern Circuit Court of Illinois.

Rogers brought suit against Lee County, Iowa, upon the coupons of certain bonds signed by one Boyles, county judge, issued by the county under the county seal, to a certain railroad company named.*

* The suit was originally brought in the Iowa circuit, but like the last one was transferred to Illinois. The preceding case renders further allusion to this fact unnecessary.