CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERMS, 1868 AND 1869.

REPORTED BY

JOHN WILLIAM WALLACE.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. 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. EBENEZER ROCKWOOD HOAR.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE JANUARY 15, 1869, 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.
ASSOCIATES.	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.
	FIFTH.	
HON. N. H. SWAYNE, Ohio.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	1862. January 24th. PRESIDENT LINCOLN.
	SIXTH.	
"	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	
	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.

MEMORANDA.

RESIGNATION OF MR. JUSTICE GRIER.

On the 31st day of January, 1870, Mr. Justice Grier sat for the last time upon this bench. He was appointed to it on the 4th day of August, 1846. Possessed, until within three years ago, of health so remarkable as that from the time of first taking his seat, he was never absent from the court, he found himself, in the summer of 1867, without pain, and almost without consciousness of any shock, when attempting to rise from his seat, largely deprived of power of using his lower limbs. Partial paralysis had impaired his ability to move them with strength, and to depend upon them. While not affecting the brain at all, or the muscles of the upper part of his frame, it was observed by him at a later date, that the shock did affect his power to use his hand in writing, and to consult with facility the heavy books of the law. And having now attained to the age of seventy-six years, and discharged judicial duty for nearly forty, he deemed it proper, in view of these increasing physical infirmities, to inform the President of his wish to retire from the bench. The President was good enough most kindly to receive his resignation, and to address to him a letter, as follows:

Executive Mansion, December 15th, 1869.

To the Hon. Robert C. Grier.

Sir: Your letter containing the tender of the resignation of your office of Associate Justice of the Supreme Court of the United States, to take effect on the 1st day of February next, has been received by me to-day, and your resignation is accordingly accepted, to take effect on that date.

I sincerely regret the increasing physical infirmities which induce you to retire from the bench, and with the assurance of my personal sympathy and respect, desire also to express my sense of the ability and uprightness with which your judicial duties have been performed.

In looking upon your long and honorable career in the public service, it must be especially gratifying to yourself to remember, as it is my agreeable duty and privilege on this occasion thus distinctly to recognize, the great

service which you were able to render to your country in the darkest hour of her history, by the vigor and patriotic firmness with which you upheld the just powers of the Government, and vindicated the right of the nation under the Constitution to maintain its own existence.

With the hope that your retirement may be cheered by the knowledge of public gratitude, as well as by private affection,

I remain, very respectfully yours,

U. S. GRANT.

Upon the adjournment of the court, on the day when Mr. Justice GRIER last sat with it, and after his return to his own residence, his brethren waited upon him there in a body, to express their assurances of gratitude for his services, veneration for his character, and best wishes for his happiness. This was done in the form of a letter, signed by the entire bench, and read to him by the Chief Justice. The letter was as follows:

SUPREME COURT ROOM,
WASHINGTON, January 31st, 1870.

DEAR BROTHER: Your term of judicial service as a justice of the Supreme Court of the United States, will close to-day, by your resignation. We cannot permit an event so interesting to pass without expressing to you something of the feeling which it excites in us; for some of us have been long associated with you, and, though the association of others has been for briefer periods, we all honor and love you.

Almost a quarter of a century ago you brought to the labors of the court a mind of great original vigor, endowed with singular powers of apprehension and discrimination, enriched by profound knowledge of the law, and prepared for the new work before you by large experience in a tribunal of which you were the sole judge.

Already you possessed the esteem, the respect, and the entire confidence of the bar and the suitors who frequented your court, and of the people among whom you administered justice.

Transferred to a more conspicuous position, you won larger honors. The sentiments of the profession and of the people of a single city and State became the sentiments of the American bar and of the whole country.

We who have been nearest to you, best know how valid is your title to this consideration and affection. With an almost intuitive perception of the right, with an energetic detestation of wrong, with a positive enthusiasm for justice, with a broad and comprehensive understanding of legal and equitable principles, you have ever contributed your full share to the discussion and settlement of the numerous, and often perplexing, questions which duty has required us to investigate and determine.

This aid we gratefully acknowledge, and can never forget. Nor can we ever cease to remember the considerate magnanimity with which you have often recalled or modified expressions of which your own reflections have disapproved as likely to wound, unnecessarily, the sensibilities of your brethren of the bench or the bar.

Your eminent services as a judge command our respect and gratitude; your magnanimity and kindness as a man, in our official and personal intercourse, have drawn to you, irresistibly, our veneration and love.

We deeply lament that infirmities, incident to advancing years, constrain you to retire from the post you have so long and so honorably filled. But, though you will no longer actually participate in our labors here, we trust that you will still be with us in spirit and sympathy. We shall still seek aid from your counsels; we shall still look for gratification from your society. May you live many years to give us both! May every earthly blessing cheer, and the assured hope of a blessed immortality, through Christ, our Saviour, brighten each year with ever increasing radiance!

With warm affection and profound respect, we remain your brethren of the bench,

SALMON P. CHASE, Chief Justice.
SAMUEL NELSON, Associate Justice.
NATHAN CLIFFORD, " "
NOAH H. SWAYNE, " "
SAMUEL F. MILLER, " "
DAVID DAVIS, " "
STEPHEN J. FIELD, " "

The Hon. ROBERT C. GRIER,
Associate Justice of the Supreme Court of the United States.

The Chief Justice was sensibly affected during the reading of this letter, and his associates as well. Mr. Justice GRIER was even more so. Thanking them for their great kindness, he received the letter from the hands of the Chief Justice, and promised to acknowledge it in writing on the next day. On the next day, before the opening of the court, he transmitted to the Chief Justice his autograph reply, as follows:

WASHINGTON, February 1st, 1870.

To the Hon. SALMON P. CHASE, Chief Justice, the Hon. SAMUEL NELSON, and others, Associate Justices of the Supreme Court of the United States.

MY DEAR BRETHREN: Your letter, read to me by the Chief Justice last evening, quite overcame me, and I could *then* make no reply. I promised to respond in writing.

My pen, even now, cannot express the profound emotions it awakened; sentiments of esteem and affection toward each one of you; sentiments of regret, not unmingled, I trust, with resignation that increasing infirmities have compelled our separation, and sentiments of gratitude for such a testimonial from my brethren at the close of my long term of service.

In my home in Pennsylvania, whether life be long or short, you may rest assured I shall always cherish for each of you warm affection and sympathy.

That God's blessing may rest upon the Supreme Court of the United States, and upon each of its members, is the fervent prayer of your late associate and brother,

R. C. GRIER.

The Chief Justice, on the court's coming in, upon the 1st of February, mentioned the interesting proceeding and correspondence which had taken place, and stated that without reading the letters, the court would order both to be entered on the record. And they are so entered.

On the morning previous to Mr. Justice GRIER'S retirement, the following letter from the bar was delivered to him by a committee of its members:

WASHINGTON CITY, D. C., January 30th, 1870.

To the Hon. ROBERT COOPER GRIER,
Associate Justice of the Supreme Court of the United States.

DEAR SIR: As members of the bar of the United States, and particularly as members, nearly every one of us, of the bar of its Supreme Court, we cannot permit you to retire from the tribunal which you are about to leave, without expressing our deep regret that the condition of your health makes it, in your opinion, a duty to do so; and our sense of the great loss which the bar, the court, and the country will sustain.

During the twenty-three years that you have been a member of the Supreme Court of the United States, your learning and ability have given, if possible, additional authority to its judgments, and illustrated your eminent fitness for the high office which you occupied.

It is our earnest and affectionate wish that your life, with health improved by cessation from your arduous labor, may be greatly prolonged, and that your mental powers in all their vigor may remain unclouded to the last.

We remain, with the highest respect, Dear Sir,
Sincerely your friends,

THOMAS EWING (Ohio),	HENRY STANBERY (Ohio),	W. M. MEREDITH (Pa.),
REVERDY JOHNSON (Md.),	OLIVER P. MORTON (Ind.),	R. H. DANA, JR. (Mass.),
B. R. CURTIS (Mass.),	B. H. BREWSTER (Pa.),	SIDNEY BARTLETT (Mass.),
LUKE P. POLAND (Vt.),	A. G. THURMAN (Ohio),	GEO. S. BOUTWELL (Mass.),
M. H. CARPENTER (Wis.),	T. F. BAYARD (Del.),	CAUSTEN BROWNE (Mass.),
J. HUBLEY ASHTON (Pa.),	E. CASSERLY (Cal.),	H. W. PAINE (Mass.),
M. BLAIR (Mo.),	THOS. J. DURANT (La.),	J. G. ABBOTT (Mass.),
G. W. PASCHALL (Texas),	R. D. HUBBARD (Conn.),	BENJ. F. BUTLER (Mass.),
LYMAN TRUMBULL (Ill.),	E. W. STOUGHTON (N. Y.),	W. A. FIELD (Mass.),
H. L. DAWES (Mass.),	WARD H. LAMMON (Ill.),	F. F. HEARD (Mass.),
GEO. F. EDMUNDS (Vt.),	BENJ. V. ABBOTT (N. Y.),	ED. H. BENNETT (Mass.),
WM. M. EVARTS (N. Y.),	J. R. DOOLITTLE (Wis.),	BENJ. F. THOMAS (Mass.),
F. A. DICK (Mo.),	SAML. W. FULLER (Ill.),	C. N. POTTER (N. Y.),
ORVILLE HORWITZ (Md.),	D. W. VOORHEES (Ind.),	GEO. M. ROBESON (N. J.),
W. D. DAVIDGE (D. C.),	HENRY WHARTON (Pa.),	JAMES A. GARFIELD (Ohio),
JOHN WM. WALLACE (Pa.),	E. C. BENEDICT (N. Y.),	R. W. GREEN (R. I.),
WM. E. CURTIS (N. Y.),	C. VANSANTVOORD (N. Y.),	C. S. BRADLEY (R. I.),
CHAS. A. ELDRIDGE (Wis.),	H. M. WATTS (Pa.),	ABRAHAM PAYNE (R. I.),
GEO. W. WOODWARD (Pa.),	W. T. OTTO (Ind.),	GEO. H. BROWNE (R. I.),
S. S. MARSHALL (Ill.),	S. S. FISHER (Ohio),	BENJ. F. THURSTON (R. I.),
JOHN A. WILLS (D. C.),	P. MCCALL (Pa.),	W. B. LAWRENCE (R. I.),
R. M. CORWINE (Ohio),	C. INGERSOLL (Pa.),	THOS. A. JENCKES (R. I.)

M. C. Kerr (Ind.),
Wm. M. Stewart (Nev.),
N. P. Chipman (Iowa),
Wm. Loughridge (Iowa),
Jos. H. Bradley (D. C.),
William Green (Va.),
William F. Joynes (Va.),
R. M. Heterick (Va.),
W. A. Maury (Va.),
W. H. Macfarland (Va.),
L. R. Page (Va.),
S. A. Goodwin (Ill.),
I. W. Arnold (Ill.),
C. Beckwith (Ill.),
H. G. Miller (Ill.),
S. B. Gookins (Ill.),
T. Lyle Dickey (Ill.),
Robert S. Hale (N. Y.),
Amasa J. Parker (N. Y.),
D. Wright (N. Y.),
J. S. Black (Pa.),
J. M. Carlisle (D. C.),
C. Cushing (Mass.),
George Harding (Pa.),
P. Phillips (D. C.),
W. L. Sharkey (Miss.),
E. C. Larned (Ill.),
Edward Lander (D.C.),
William Johnston (D.C.),
Horace Maynard (Tenn.),
Eli K. Price (Pa.),
George W. Biddle (Pa.),
Edward Shippen (Pa.),
W. M. Tilghman (Pa.),
Craig Biddle (Pa.),
Edward Olmstead (Pa.),
James T. Mitchell (Pa).,
Hor. G. Jones (Pa.)
W. H. Ruddiman (Pa.),
Wm. D. Kelley (Pa.),
Edward E. Law (Pa.).
David Paul Brown (Pa.),
Isaac Hazlehurst (Pa.),
A. J. Fish (Pa.),
Henry Flanders (Pa.),
F. C. Brewster (Pa.),
Francis Jordan (Pa.),
F. C. Brightly (Pa.),
Leonard Myers (Pa.),
M. W. Acheson (Pa.),
H. B. Wilkins (Pa.),
James Veech (Pa.),
Sam. A. Purviance (Pa.),
Thomas McConnell (Pa.),
James J. Kuhn (Pa.),
T. P. Carpenter (N. J.),
F. Frelynghuysen (N.J.),
Cortland Parker (N. J.),
T. D. Lincoln (Ohio),
James H. Parsons (R. I.),
Robert McKnight (Pa.),
T. M. Marshall (Pa.),
George Shiras, Jr. (Pa.),
Robert Woods (Pa.),
John P. Penney (Pa.),
John H. Hampton (Pa.),
James K. Kerr (Pa.),
Hill Burgwin (Pa.),
W. Bakewell (Pa.),
William Schley (Md.),
R. J. Brent (Md.),
George W. Dobbin (Md.),
A. W. Machen (Md.),
William F. Giles (Md.)
John H. Thomas (Md.),
George M. Gill (Md.),
F. W. Brune (Md.),
Thos. Donaldson (Md.),
John H. B. Latrobe (Md.),
J. Nevett Steele (Md.),
Wm. Hy. Norris (Md.),
S. Teakle Wallis (Md.),
Geo. Wm. Brown (Md.),
Samuel Tyler (Md.).
P. Vredenburgh (N. J.),
B. Williamson (N. J.),
J. W. Scudder (N. J.),
P. D. Vroom (N. Y.),
Jos. P. Bradley (N. J.).

To this letter Mr. Justice Grier was pleased to return an acknowledgment, as follows:

Carroll Row, Washington,
February 2d, 1870.

Gentlemen: I am obliged to you for the expressions contained in your letter.

It has been the privilege of the Supreme Court of the United States to have had, from the organization of the Federal Government, an able and learned bar. That privilege, conspicuous during my term of office, and continuing to its close, happily survives it. May such a privilege never depart from that great court, nor from any court of our land!

A well-read and able bar must always exist if courts are themselves to be distinguished. No court has ever been greatly eminent without such a bar. The upright, fearless, able, and learned lawyer is as much a minister of justice as the court to which he speaks. And in the same degree in which there are such men to aid, enlighten, and inform the courts of any country, will that country have, in the main, a jurisprudence worthy of honor, with security in public and private right.

I shall retain a recollection, as long as I retain recollection at all, of the advantage and pleasure which, during my time upon the bench, I have de-

rived from that learning and those abilities which have so well maintained the earlier eminence of the bar of the Supreme Court; and a not less agreeable one, gentlemen, of that social intercourse with you, by which official and personal relations have been united in unbroken harmony.

Official relation has ended! To a continuation of such personal intercourse as my now imperfect health allows, I look forward with hope and with satisfaction.

I remain, Gentlemen, with high respect,

Your obliged friend,

R. C. GRIER.

To the Hon. THOMAS EWING and others.

ROBERT COOPER GRIER was born March 5th, 1794, in Cumberland County, Pennsylvania, where his father, the Rev. Isaac Grier, at that time resided; his mother was the daughter of the Rev. Robert Cooper, of the same county, both of the Presbyterian Church. His father removed from Cumberland to Lycoming County, in the same State, in the autumn of 1794, where he bought a farm, and built a house on it, a little below the mouth of Pine Creek, on the west bank of the Susquehanna River. While resident there, he preached to three congregations, for a very small compensation, deriving the means of his support mainly from a grammar-school which he taught, and the proceeds of his farm. He was a superior Greek and Latin scholar, and every way competent as an instructor in those languages. And his amiable and excellent character, his benevolence and faithfulness as a pastor, gained for him the affections of all who knew him. Few men in a like sphere have been more beloved; and the many excellencies of the father's character were not lost upon the son. The latter, at the age of six years, began to learn Latin under the instructions of his father, and, by the time he had reached his twelfth year, had mastered the usual course of Latin and Greek as they were then taught in ordinary schools. He continued his studies, under his father's direction, till 1811, when he went to Dickinson College, at Carlisle, and entered the junior class half advanced. In the meantime, in 1806, his father had removed to Northumberland, Pennsylvania, having been invited to take charge of the academy at that place; and there also he served three congregations in his capacity of clergyman, but supporting his family mainly, as formerly, by the revenue derived from his labors as a teacher. His method

of conducting the academy did honor to his talents. It grew under his care into a highly respectable establishment, and obtained a high character in that district of country. This reputation, and the thoroughness of the course of instruction pursued, was the means of elevating the academy into a college, under an ample charter, with power to confer degrees in the usual form in like institutions. This enlargement called for more of the *machinery* of education than the institution had before possessed; and the library of the well-known Rev. Dr. Joseph Priestley, originally of England, who had passed the latter part of his life in Northumberland, and not long before had died there, together with his philosophical apparatus, were procured for the college.

In the meantime, the subject of this notice continued at Dickinson College. His aptitude for the languages and early instruction had placed him far ahead of all competitors in that branch. He was so thoroughly master of the Latin that he could write it with facility. Nor was he much less well acquainted with Greek. And, though indifferent to, and never troubling himself about college honors, his superior ability and acquirements were not questioned. His instructor in chemistry was Doctor Cooper, formerly a judge in the interior of Pennsylvania, then Professor of Chemistry in Dickinson College, and afterwards President of Columbia College, South Carolina, whither he had been invited by the State, and known throughout the country for his extensive literary and scientific attainments, and with whom our student was always a favorite. He graduated at Dickinson in 1812, but taught grammar-school in the college till 1813, when he returned to Northumberland to aid his father in his college duties, now become onerous by the addition of numerous students, and the increasing offices of the enlarged institution.

It is not perhaps surprising that with this early and thorough training in the languages, he should have never intermitted the study of them; and that at the present day he should continue to be, as for nearly fifty years he has been, a daily reader and very critical student of the New Testament in its original Greek.

Shortly after our young friend's return to Northumberland, his father's health began to fail. Disease continued to enfeeble and distress him up to the date of his death, which occurred in 1815. And few men have lived more beloved, or died more lamented.

His virtues and many excellencies of character did not perish; they left their impress long on the community in which he had lived, and descended upon his son—a goodly inheritance, and one that passeth not away.

The well-known acquirements of the son pointed to him, young as he then was (not twenty years of age), as the successor of the father, and he was accordingly, soon after the death of the former, appointed principal of the college; and in this new situation the extent and variety of his duties go to show how much may be accomplished where resolution and will are combined with ability. He graduated the classes, delivered lectures on chemistry, taught astronomy and mathematics, Greek and Latin, and studied law, all at the same time.

His instructor in the law was Charles Hall, Esq., late of Sunbury, Northumberland County, a gentleman eminent in the profession, under whom he was admitted to the bar in 1817, and began practice in the same year.

His professional career, which proved very successful, began in Bloomsburg, Columbia County, Pennsylvania. There he continued, however, but a short time, for we find him settled in Danville, in the same county, in 1818. Here his practice rapidly increased, and was soon extended to four or five of the surrounding counties, and there he continued till 1833, when he was appointed by the governor of Pennsylvania, then Mr. Wolf, President Judge of the District Court of Alleghany County.

And here it may not be improper to state certain events, very well known and justly appreciated in the place and neighborhood where they took place, and which evince the excellent qualities of heart of the subject of our note. At his father's death, he found himself the oldest of many brothers and sisters, including himself eleven in number, most of them young and helpless; and they, together with his widowed mother, were entirely dependent upon him for their support. Well and faithfully did he perform the duties that this condition of things called for. He possessed but little of this world's goods, but he had health, energy, talent, and a profession. He bent himself to the task, and with these materials, fairly brought into requisition under the guidance of a sound and affectionate heart and a willing mind, he overcame all difficulty. His brothers were well and liberally educated, and settled in business or professions. His sisters lived with him till they were married; and his mother, till she died. As a son and brother, as well as in

all subsequently formed domestic relations, he has been distinguished by the kindest and tenderest affections; and no man is more beloved by his family and friends. If it be true that the recollection of kind and benevolent actions warms the heart into peace with itself, then may our friend well rejoice in the past, and look to the future in the thankfulness of hope.

Returning to our narrative. His brothers and sisters being all settled in life, he married, in the year 1829, Miss Isabella Rose, the daughter of John Rose, Esq., a native of Scotland, who emigrated to this country in 1798. Mr. Rose had been admitted to the bar in Europe, but never practised, or sought practice here. He was a gentleman of education and accomplishments, and possessed of considerable estate. He bought a beautifully situated farm on the banks of the Lycoming Creek, then about two miles above Williamsport, in Lycoming County, upon which he resided till his death, and which, now on the very edges of that populous and increasing place, at present belongs to Judge Grier. This stream is celebrated for the fine trout with which it abounds, some distance from its mouth. And this we mention more particularly, as the Judge made for many years, and indeed until the infirmity which compelled his resignation obliged him to relinquish this gratification, an annual excursion to his farm and fishing-ground, to enjoy the pleasures of trout-fishing. He early became a disciple of Isaac Walton, and was faithful to his preceptor to the last hour of his ability to wade through the clear waters of a fishing-brook. Nothing was suffered to interfere with this excursion; and when the month of June arrived, he was sure to find his way to the creek, with a few select companions, and all the necessary apparatus for catching and cooking his favorite fish, together with all manner of generous accompaniments to give zest to the luxury. This fishing-ground is in the midst of the eastern ridges of the Alleghany Mountains, into which the stream penetrates, and until lately was surrounded with dense forests in their primitive state. The invigorating air of the woods, the beauty and wildness of the scenery, contrasted with that to which he was accustomed in the labors of the Bench and the Circuit, the continued exercise and pleasure of the sport, sometimes not without adventure, all had their charm. And the Judge used to return to his professional duties somewhat sunburned and weatherbeaten, but with recovered powers, and renovated frame, ready for another year of labor.

His appointment to the District Court of Alleghany County was made May 4th, 1833. He removed to Pittsburg in October of the same year, residing in Alleghany City.

On the 4th of August, 1846, he was nominated one of the Justices of the Supreme Court of the United States, in the place of the Honorable Henry Baldwin, deceased, and was unanimously confirmed by the Senate the next day. In 1848 he removed to Philadelphia, in which city he continues to reside.

The professional career of Judge Grier, while at the bar, was marked by high integrity of purpose and fidelity to his client, qualities not unusual in the profession; but with him there was a benevolence not so universal, and generosity towards those who sought his services with but limited means of remuneration, that procured him many clients of this description; and for many he went through with repeated and arduous conflicts, without money.

In the conducting of his case, he was not apt to trouble himself much about its mere technicalities; he regarded mainly the principles involved in it, and arguing it upon this basis, his views were clear and logical, and always delivered with great distinctness and force.

While presiding in the District Court at Pittsburg, he had the confidence of all the bar, which was one of the ablest in the State. There was a deference paid to his decisions highly honorable, and an attachment to himself personally, not often found to exist in the same degree between the bar and the bench. If the cause before him had merits, its advocate had nothing to fear; if doubtful, he was sure of a fair and candid hearing; but if without merits, or if tinctured with fraud, it behooved him to take care of it, for he was sure to receive neither aid nor quarter from the court.

With the jury, his charge was everything; they had entire confidence in his integrity and learning, and knew that he only aimed to arrive at justice. Their verdict was responsive to his instructions. And when exception was taken to his charge or opinion, nothing was withheld by selfish regard to pride of opinion, or petty doubt as to the unnecessary action of a higher tribunal. His view of the law was fairly stated, and sent up as delivered, without addition or diminution, upon its own merits to stand or fall. Feeling the consciousness of power within himself, and loving justice above all things, he feared not, but rather desired the examination of his opinions by those who had

the power, together with the responsibility, of sustaining or reversing them. Every judicial opinion affects the property, the reputation, or the person of some one, to a greater or less extent; and as a faithful judge, he rather rejoiced in the detection of his error, if there was one, than that it should be suffered to exist to the injury of another.

After the elevation of Judge Grier to the Supreme Court, his judicial reputation soon became established throughout the country. His opinions bear testimony to the correctness of the professional estimate of their value. With very little quotation, they show, not the less, extensive learning and research. A persevering seeking of the principle lies at the basis of the particular point under discussion—and this discovered, it is never lost sight of. They are confined, invariably, to the issues of the case. They contain no dicta. They form no essays. The conclusion arrived at is pronounced with the boldness of a fearless spirit, regardless of all consequences, save the one aim of bringing the truth to light, and giving effect to the law. His arguments will stand the test of strict scrutiny. They are always clear in their statements and course; marked, perhaps, more by the quality of strength, than by any effort after ornament, though by no means deficient in illustration; which was readily supplied by his well-stored mind. They are not much encumbered by exhibition of the details of mental process, and their freedom from citations, except of cases in courts of *authority* —chiefly the Supreme Court—has been remarked on by those acquainted with his habits, and who know that his reading was unintermitting, as it was also nearly universal. The observations made by a venerable and very eminent living lawyer of another great judge of Pennsylvania, long since departed, are entirely applicable to the subject of our sketch. "Those who study his opinions, while they may remark that he was unusually sparing of references to authority, will find that it was the result of selection and not of penury. With the leading cases under every head—those which may be called 'the lighthouses of the law,' he was familiar, and knew their bearings upon every passage into this deeply indented territory; but for the minor points, the soundings that are marked so profusely upon modern charts of law, he trusted too much to the length and employment of his own line to oppress his memory with them."

A reporter may be permitted to add that his opinions were

singularly capable, from their *form*, of being easily and effectively reported. By this is meant, that instead of setting out with the assumption or statement of principles of law, and then "working up" to them through the course of the opinion by the invocation or interpellation of the facts—thus presenting principles of law intertissued with details of fact through the whole texture of the opinion, and so—if the case has been already stated by the reporter, as it ought to be, in the opening of the report—making the opinion seem in a great degree a repetition of what the reader has just read, and if the case have not been so stated by the reporter, leaving the reader without any conception of the facts except one argumentative in form, and neither consecutive, complete, nor clear—the opinions of the learned Judge we speak of cast themselves always in another mould. They proceed upon a case already completely conceived and arranged—a case which is sometimes written out by the Judge himself in the opening of the opinion for adoption by the reporter, and sometimes only mentally had by him, and left to the reporter to be gathered up and written out—and *on* that case, as presupposed and known, they enunciate in a form more or less apothegmatic and abstract, the principles of law which apply to the controversy.

The form has nothing to do with the ability or merits of the opinion, for in both forms opinions of great ability and merit may be found. And in putting a case to a jury, or when writing on the circuit for a court below and for the parties only—where court and parties were *already* possessed of the case—the subject of our notice usually adopted the first as the proper one. But in writing for a court of last resort, where he was to be reported, and where he wrote for the law and for science as much as for a court below and for the parties to the controversy, he invariably used the last. And reporters know that it is the only form which they can handle so as to do credit either to themselves or the Bench.

In the case of such a person as we have attempted to describe, it will be readily believed that neither elevation to place nor retirement from it could work alteration in the MAN. The same modest worth that graced him in youth and early manhood, while he was yet unknown, continued to adorn him in riper years, distinguished by conspicuous positions. The same essential dignity which marked him in office, belongs to him in retire-

ment from it. In all situations, the same kindness of disposition to all, the same attachment to friends, and affection for those dependent upon him; a lover of his country, and, by the very necessity of his nature, a religious man—long a member of the church in the principles of which he was educated, and some time participating in its government—but liberal in his views, regarding the spirit rather than the letter of his creed; happy in his domestic relations, in the attachment of many friends, and highly honored, as he is, by his country—his life affords an example of the triumph of right principles, unshrinking integrity, persevering industry, and fidelity to truth and to himself.

DEATH OF THE HON. E. M. STANTON.

THE resignation of Mr. Justice GRIER, already mentioned, having been accepted by the President, the Honorable EDWIN MACY STANTON was nominated by him to the Senate on the 20th of December, 1869, and immediately confirmed to fill the prospective vacancy. Four days after this appointment Mr. Stanton departed this life, never having taken his seat upon the bench.

Mr. Stanton was born in Steubenville, Ohio, on December 19th, 1814. After graduating at Kenyon College, Gambier, Ohio, in 1834, he studied law, and began the practice of it at Cadiz, Ohio, where he soon acquired reputation for ability in the argument of questions of law before courts, as well as for his force, skill, and judgment in the trial of cases by jury. He next removed to Steubenville, and in 1848, established himself at Pittsburg, Pennsylvania, practising in the courts of Pennsylvania and Ohio, and in the Supreme Court at Washington. At this time he came prominently before the public as counsel in the Wheeling Bridge case. In 1857, he removed to Washington, D. C., where his ability in the management of cases arising under the patent laws, brought to him constant and profitable practice. In the next year, he was sent by the Government of the United States to California, as special counsel to argue land cases involving the validity of grants from Mexico, and to look generally after the immense interests of the United States in lands acquired by the conquest and cession. Returning to Washington, he was appointed, in December, 1860, Attorney-General, by Mr. Buchanan; insurrection throughout the South now being imminent. In this new position, he was associated with the Honorable Joseph Holt, Secretary of War, and with General Dix, Secretary of the Treasury, and his sagacity and vigor, with that of the two eminent persons just named, largely contributed to save the Government from the total ruin with which it was then menaced. He remained in the office of Attorney-General till March 4th, 1861, when, upon the accession of President Lincoln, he resumed the practice of the law. But Mr. Stanton's great services in the critical times which immediately preceded that 4th of March, had already attracted the attention, and won the admiration of the new President,

and, upon Mr. Cameron's retirement from the post of Secretary of War in President Lincoln's Cabinet, in January, 1862, about a month before the capture of Fort Donelson revived the drooping spirit of the North, Mr. Stanton was chosen to succeed him. He remained in this position until May, 1868, when he resigned. By his incessant and arduous mental and physical labors during the rebellion, Mr. Stanton seriously impaired his health, and retired, temporarily, from active life in order to recruit his shattered constitution. Recently, however, he had resumed the practice of law, and on December 20th, 1869, he was, as has been already stated, nominated by the President, and confirmed by the Senate, as Associate Justice of the Supreme Court of the United States, to fill the vacancy caused by the resignation of Mr. Justice Grier, to take effect on February 1st, 1870.

He died December 24th, 1869, during a recess of the court.

An official announcement of Mr. Stanton's decease was thus made by President Grant:

"The painful duty devolves upon the President of announcing to the people of the United States the death of one of its most distinguished citizens and faithful servants, the Hon. EDWIN M. STANTON, which occurred in this city at an early hour this morning. He was distinguished in the councils of the nation during the entire period of its recent struggle for national existence, first as Attorney-General, then as Secretary of War. He was unceasing in his labors, earnest and fearless in the assumption of the responsibilities necessary to his country's success, respected by all good men, and feared by wrong-doers. In his death the bar, the bench, and the nation sustain a great loss, which will be mourned by all."

A meeting of the members of the bar of the Supreme Court of the United States was held in the room of the court, in the Capitol, on the 13th day of January, 1870, when the Hon. George F. Edmunds, of Vermont, was appointed chairman, and R. M. Corwine, of Ohio, secretary.

The Attorney-General, J. M. Carlisle, Esq., and the Hon. Robert S. Hale having been appointed a committee to draft and report resolutions, reported, at an adjourned meeting, on the 17th of January, these following, which were unanimously adopted:

"EDWIN M. STANTON, for many years a leading and honored member of this bar, formerly Attorney-General of the United States, and Secretary of War during the war for the preservation of the Republic, recently nominated and confirmed to fill a prospective vacancy on the bench of the Su-

preme Court of the United States, distinguished by his professional abilities and attainments, and still more distinguished and endeared to the country he contributed so greatly to save, by his energy, patriotism, and integrity, having, on the 24th day of December, 1869, laid down a life devoted to the cause of his country and worn out in her service, the members of the bar of the Supreme Court of the United States, assembled to render honor to his memory, as an expression of their regard and reverence for his public and private virtues, and of his most useful and patriotic career, have

"*Resolved*, That we desire to express our profound and thorough appreciation of the private worth and public merits of Mr. STANTON; of the loss sustained by the National Judiciary in his death, and of the measureless debt of gratitude due to him from the citizens of a country saved from destruction in great degree by his untiring labors, large comprehension, and unswerving integrity.

"*Resolved*, That the Attorney-General be requested to lay this expression of our feeling before the court, and to move that the same be entered upon the minutes of the term.

"*Resolved*, That our chairman communicate a copy of these proceedings, and of such action as the court may take thereon, to the widow and children of our deceased brother, with the assurance of our sympathy and respect."

Upon the coming in of the court, on the morning of January 17th, 1870, to which day it had, previously to Mr. Stanton's death, adjourned, the Attorney-General addressed it as follows:

May it please your Honors:

Since your last adjournment, the emblems of public mourning have been again displayed in the Capitol of the nation, under circumstances which press upon the attention of this court with a peculiar and touching solemnity. A great man—great by the acknowledgment alike of those who feared or hated him, and of those by whom he was trusted and honored; a lawyer, a statesman, selected and confirmed, though not commissioned, as an Associate Justice of the Supreme Court of the United States—has passed away from among us. EDWIN M. STANTON, in the maturity of life, with a capacity for public service already demonstrated, in the security of established fame, seemed to our mortal vision about to enter upon a new and long career of honor and usefulness. But such was not the will of heaven: "*Dis aliter visum.*"

It has seemed to his brethren of the bar a fit occasion to express their regard for his memory, and they have charged me with the official and grateful duty of presenting to your honors the resolutions which have been adopted at their meeting this morning.

Of Mr. STANTON as a lawyer, it is enough to say that he had risen to the foremost rank in his profession. He had adequate learning, untiring industry, a ready and retentive memory, clear comprehension of principles, the power of profound and cogent reasoning, and unquestionable integrity; and he gave to the cause of his clients a vigor, energy, and zeal which deserved and commanded success.

But it is not of the lawyer, eminent as he was in the science and practice of the law, that men chiefly think as they remember him. His service to mankind was on a higher and wider field. He was appointed Attorney-General by Mr. Buchanan, on the 20th of December, 1860, in one of the darkest hours of the country's history, when the Union seemed crumbling to pieces without an arm raised for its support; when "without" the public counsels "was doubting, and within were fears;" when feebleness and treachery were uniting to yield whatever defiant rebellion might demand; and good men everywhere were ready to despair of the Republic. For ten weeks of that winter of national agony and shame, with patriotism that never wavered, and courage that never quailed, this true American, happily not wholly alone, stood manfully at his post, "between the living and the dead," gave what nerve he could to timid and trembling imbecility, and met the secret plotters of their country's ruin with an undaunted front, until before that resolute presence, the demons of treason and civil discord appeared in their own shape, as at the touch of Ithuriel's spear, and fled baffled and howling away.

His published opinions as Attorney-General fill but nine pages, but the name that was signed to them had, in that brief time, become known throughout the land as the synonyme of truth, honor, and fidelity.

Although of a different political party, he was called by Mr. Lincoln into his Cabinet, in 1862, as the Secretary of War. But it was at a time when all party divisions had become insignificant, and all party ties trivial, compared with those great duties which engrossed the thoughts and demanded the care of every patriot. He brought to his great trust a capacity for labor that seemed inexhaustible; unflinching courage, indomitable will, patience, and steady persistence which no fatigue could weary, and no mistakes or misfortunes divert; a trust in the people that never faltered, an integrity which corruption never dared to approach, and a singleness of purpose which nothing could withstand. That purpose was to crush the rebellion—and woe to that man who came, or seemed to come, between that purpose and its execution! Coming from civil life, I suppose there is no sufficient evidence that he was, or ever became, a master of the art of war; but the problem before him was to find those who were, and to bring all the resources of the country with unstinted measure to their support.

We might address him as one of those

> "Chief of men, who, through a cloud,
> Not of war only, but detractions rude,
> Guided by faith and matchless fortitude,
> To peace and truth thy glorious way has plowed."

Undoubtedly he had faults and failings. He was said to be despotic and overbearing, and he may have been sometimes unjust; but his work was done in a time when there was little chance for deliberation, and when "the weightier matters of the law" left no time for "tithing mint and anise and cummin." He felt that the life of the nation was in his hands, and, under that fearful responsibility, he could not always adjust with delicate hand, the balance of private rights and wrongs. It is said that his manners were sometimes discourteous and offensive. Who can wonder that that wea-

ried and overburdened man, with such pressure on brain and nerve, was sometimes irritable and unceremonious in his intercourse with shirking officers and peculating contractors, and the crowd of hungry cormorants and interminable bores who perpetually sought access to him; and sometimes confounded with such, those who deserved better treatment? But the American people knew that he was honest, able, and faithful. He never stopped for explanation, or condescended to exculpate himself.

I have thought it one of the highest and finest traits of his character, that he bore in grim silence all accusations, and stood manfully between his chief and popular censure for acts which he had neither originated nor approved. It was perhaps the highest triumph of his official career, and the final proof of how justly his confidence in his countrymen was bestowed, that he conducted and carried through the military draft—that severest trial to a free people—when the country, in the time of her direst need, ceasing to entreat, commands the services of her sons. He had his reward; and, like the President whom he served—

> "Ill thought, ill feeling, ill report lived through,
> Until he heard the hisses changed to cheers,
> The taunts to tribute, the abuse to praise,
> And heard them with the same unwavering mind."

He saw the rebellion crushed and the integrity of the nation vindicated. The people, who had learned to know that he was a tower of strength in the time of civil war, who had felt that their cause would never be abandoned or betrayed by him, and to whom his presence in office gave a sense of protection and security, have hailed with joy the prospect which so lately opened of transferring him to a new post of duty in this high tribunal. They knew that the statesman who had found in the Constitution all the powers necessary for its own maintenance, would, as a jurist, not fail to find there all the powers needful for the protection, throughout the entire country, of that civil liberty which it was ordained to secure. But he was already worn out in their service, and gave his life for them as truly as any one who ever perilled it on the field of battle.

Mr. Chief Justice, the lesson of this life is a lofty one. The time is soon coming when men will recognize the high natures who, in this period of civil strife, have arisen above the ordinary level of mankind, and are entitled to their gratitude and honor. Upon those towering peaks in the landscape, the eye will no longer discern the little inequalities and roughnesses of surface. Already upon the canvas of history some figures are beginning to emerge. They are not those of self-seekers, or of those who were greedy of power or place, but of the men who, in the time of public trial and public danger, with none but public objects, have done much for their country and mankind. Among these can his contemporaries fail to discern—will not posterity surely recognize—the lineaments of EDWIN M. STANTON? A restored country is his monument.

> "Nothing can cover his high fame but Heaven!
> No pyramids set off his memories
> But the eternal substance of his greatness,
> To which I leave him."

Mr. Attorney-General then submitted the proceedings of the meeting of the bar, as already given, and moved, in accordance with one of their resolutions, that they should be entered upon the minutes of the term.

The Chief Justice said in reply:

The court unites with the bar in acknowledging the private worth, the professional eminence, and the illustrious public services of Mr. STANTON, and in the sorrow that the country has been deprived, by his premature decease, of the great benefits justly expected from his remarkable attainments and abilities in the new sphere of duty to which he had been called.

We all anticipated, from his accession to the bench, increased strength for the court and most efficient aid in its deliberations and decision. We indulged the hope that his health, impaired by oppressive anxieties and arduous labors as the head of the Department of War, would be fully restored under the influence of the calmer and more regular course of this tribunal, and that prolonged life would afford him many opportunities of establishing additional claims upon the gratitude and honor of his country in the upright performance of judicial duty.

But Providence has ordered otherwise. He was not even permitted to become in fact a member of this court. He had hardly been nominated and confirmed to fill the vacancy which will occur a few days hence, through the prospective resignation of our honored brother Mr. Justice GRIER, when death entered upon the scene and closed his earthly career.

Our deepest sympathies are with his family and friends in their bereavement. We mourn their loss as our own loss, as the loss of the profession which he adorned, and of the country which he served.

The proceedings of the bar, the address of the Attorney-General, and this response, will be entered upon the minutes, and, as a further mark of respect, the court will now adjourn without transacting any business.

The court thereupon adjourned.

TABLE OF CASES.

DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1868.

THORINGTON *v.* SMITH.

1. A contract for the payment of Confederate States treasury notes, made between parties residing within the so-called Confederate States, can be enforced in the courts of the United States, the contract having been made on a sale of property in the usual course of business, and not for the purpose of giving currency to the notes or otherwise aiding the rebellion.
2. Evidence may be received that a contract payable in those States, during the rebellion, in "dollars," was in fact made for the payment in Confederate dollars.
3. The party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract, in lawful money of the United States.

APPEAL from the District Court for the Middle District of Alabama, the case being this:

In November, 1864, Thorington being the owner of a piece of land adjoining the city of Montgomery, Alabama, sold it to Smith and Hartley, all parties being then resident of Montgomery. At the time of this sale the late rebellion was still in active operation and had been so for more than three years. Alabama, or this part of it, was at the time in the occupation of the military and civil authorities of the rebel States, and the Federal government exercised no authority there. There was no gold or silver coin in use, nor any notes of the United States, such as made the circulation

of the loyal portion of the country. The only currency in any ordinary use, or in which current daily business could be at all carried on, were treasury notes of the Confederate States, notes in form and general aspect like bank bills, and by which the Confederate States of America promised to pay the bearer the sum named in them, "two years after the ratification of a treaty of peace between the Confederate States and the United States of America."

"The whole State of Alabama," said the testimony in the case, "was in a revolutionary condition, politically and financially. The value of all kinds and species of property was changing from week to week, and from day to day, and there was no standard of value for property. A large advance frequently took place in the price of property of different kinds within a day or two, say one hundred to two hundred per cent. Speculation pervaded the whole community, and individuals asked whatever they thought proper for any and everything they had to sell. There was no standard value or regular price for real estate at the time mentioned. Prices changed with the fortunes of war. As the prospects grew dark the prices advanced. While, however, the Confederate States treasury notes were the general and really the only currency used in the common transactions of business, there were occasional instances where sales of property were made on the basis of gold and of notes of the United States."

The Confederate notes, though in fact imposed upon the people of the Confederate States, by its government, were never declared by it to be a legal tender.

The price agreed to be paid by Smith and Hartley, for the land which they purchased was $45,000. Of this sum $35,000 were paid at the execution of the deed in Confederate States treasury notes; and for the residue a note was executed thus:

MONTGOMERY, November 28th, 1864.

$10,000.

One day after date, we, or either of us, promise to pay Jack Thorington, or bearer, ten thousand *dollars*, for value received

in real estate, sold and delivered by said Thorington to us this day, as per his deed to us of this date: this note, part of the same transaction, is hereby declared as a lien or mortgage on said real estate situate and adjoining the city of Montgomery.

W. D. SMITH.
J. H. HARTLEY.

The rebellion being suppressed in 1865, the Confederate States treasury notes became, of course, worthless, and Thorington, in 1867, filed a bill in the court below against his purchasers, who were still in possession, for the enforcement of the vendor's lien, claiming the $10,000 in the only money now current, to wit, lawful money of the United States.

The answer set up, by way of defence, that the negotiation for the purchase of the land took place, and that the note in controversy was made, at Montgomery, in the State of Alabama, where all the parties resided, in November, 1864, at which time the authority of the United States was excluded from that portion of the State, and the only currency in use consisted of Confederate treasury notes, issued and put in circulation by the persons exercising the ruling power of the States in rebellion, known as the Confederate government.

It was also insisted that the land purchased was worth no more than $3000 in lawful money; that the contract price was $45,000; that this price, by the agreement of the parties, was to be paid in Confederate notes; that $35,000 were actually paid in those notes; and that the note given for the remaining $10,000 was to be discharged in the same manner; and it was asserted on this state of facts, that the vendor was entitled to no relief in a court of the United States.

On the hearing below, a witness, who negotiated the sale of the land, was offered to show that it was agreed and understood that the note should be paid in Confederate States treasury notes, as the $35,000 had been. This witness described the note, however, as one payable at *thirty* days.

The court below, admitting the evidence to prove that the

note was in fact made for payment in Confederate States treasury notes, and sustaining, apparently, the view of the purchasers that the contract was illegal because to be paid in such notes, dismissed the bill.

The questions before this court upon the appeal, were these:

1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

2. Can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, made for the payment of any other than lawful dollars of the United States?

3. Did the evidence establish the fact that the note for ten thousand dollars was to be paid, by agreement of the parties, in Confederate notes?

A point as to the measure of damages was also raised at the bar.

The case was twice argued.

Mr. P. Phillips, for the appellant (a brief of Mr. Chilton being filed):

1. There is no reason to suppose that the contract was entered into for the *purpose* of giving currency to the Confederate notes, and thus aiding the rebellion. And the question is not whether the issuing of these notes was illegal, but whether an agreement to receive them in payment of property, made the contract between the parties illegal. If there was no illegal design, the contract was not immoral.* The contract, therefore, was legal.

The only question is, what must we hold it to mean.

The note now here on its face is clear and distinct. The promise to pay "ten thousand dollars" has a well-understood, well-defined meaning. Whether made in Massachusetts or Alabama the rules applicable to its construction are

* Orchard *v.* Hughes, 1 Wallace, 75.

the same. The issue presented by the answer is, that this contract did not represent the truth; that, in point of fact, the agreement was for a payment in an *illegal currency* of a mere nominal value. It is difficult to conceive of a more palpable contradiction of the legal effect of a contract than the admission of evidence to sustain this defence.

The cases are numerous where the struggle has been made to introduce parol evidence to explain the meaning of words, regarded by the court of doubtful import: such as "current funds," "current bank notes," "currency." But where, as in this case, a party has promised to pay so many "dollars," no authority will sanction evidence of an agreement that dollars meant not what the law says it meant, but something very different, to wit, Confederate treasury notes. All the authorities are the other way.*

2. This question, as applicable to the condition of things set up in the answer, was considered in *Roane* v. *Green*,† the court holding that it was not competent to prove by parol, on such a note, that Confederate treasury notes was the payment agreed on. In fact, as these notes were never made a legal tender by the rebel government nothing but coin would, even under *it*, be a discharge of the debt.

Indeed in all these cases of alleged contemporaneous agreements, it may be asked why the verbal condition, if bargained for, was not put in writing also? If the rest of the agreement was sufficiently important to authorize written evidence of its execution, why except the remainder? The obvious inference must be, that all that the parties did in fact agree to was put in due written form, and that all collaterals and appendages, concerning which there was mere conversation, was precisely what they could not agree upon. This, of course, is not always the true inference, but it is of necessity the legal inference.

3. The parol evidence offered, if competent, is insufficient.

* Baugh *v.* Ramsey, 4 Monroe, 155; Pack *v.* Thomas, 13 Smeedes & Marshall, 11; Williams *v.* Beazley, 3 J. J. Marshall, 577; Morris *v.* Edwards, 1 Ohio, 189.

† 24 Arkansas, 212.

There was but one witness, and he misdescribes the note in one feature of it, the time namely that it had to run: a most important feature in view of the changes in values at the time when the note was given.

4. Another point not raised below, perhaps, but to which, if the court should think that the contract can be enforced, but not payment demanded in our now recognized currency, we would direct attention, is this. Confederate money is now wholly worthless. Payment in it is no payment at all. What, then, is the measure of damages? The peculiar circumstances of this case perhaps take it out of the rule announced in *Thompson* v. *Riggs*,* that the value of the money at the time the note was payable is the criterion. The value of gold as marked by these treasury notes, fluctuated daily and hourly, and was different in different parts of the State. While it was 20, 30, or 40 to 1, these treasury notes had an exchangeable power of 2, 3, or 4 to 1 in the different species of property. It may well be that the vendor should have agreed that if the note was paid at maturity, it might be extinguished in these notes; but it by no means follows that in default of payment he was willing to be compensated by the value of these notes in gold.

If, therefore, the date of the maturity of the note is adopted for the purpose of ascertaining the damage, the measure should be, not the value as compared to gold, but rather its relative value in property.

No opposing counsel on either argument.

The CHIEF JUSTICE delivered the opinion of the court.

The questions before us upon this appeal are these:

(1.) Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

(2.) Can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, made

* 5 Wallace, 663.

for the payment of any other than lawful dollars of the United States?

(3.) Does the evidence in the record establish the fact that the note for ten thousand dollars was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States, by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered. It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States, was established at Montgomery in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months, four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was, by the central authority thus organized, and under its direction, that civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National government.

What was the precise character of this government in contemplation of law?

It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government.

Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11 Henry VII, c. 1,* relieves from penalties for treason all persons who, in defence of the king, for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch.†

But this is where the usurper obtains actual possession of the royal authority of the kingdom: not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the restoration.

* 2 British Stat. at Large, 82.

† 4 Commentaries, 77.

The better opinion doubtless is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the statute of Henry the Seventh. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason,* in the year following the restoration. But such a judgment, in such a time, has little authority.

It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized state. No obligations of a National character were created by it, binding after its dissolution, on the States which it represented, or on the National government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during

* 6 State Trials, 119.

the war of 1812. From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of this court in *United States* v. *Rice*,* "the British government exercised all civil and military authority over the place." "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose." It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming* v. *Page*,† that, although Tampico did not become a port of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the National forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance, that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives

* 4 Wheaton, 253.

† 9 Howard, 614.

of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible.

It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the

domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer.

The second question, Whether evidence can be received to prove that a promise, made in one of the insurgent States, and expressed to be for the payment of dollars, without qualifying words, was in fact made for the payment of any other than lawful dollars of the United States? is next to be considered.

It is quite clear that a contract to pay dollars, made between citizens of any State of the Union, while maintaining its constitutional relations with the National government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence does not modify or alter the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence.

We have already seen that the people of the insurgent States, under the Confederate government were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an

invading belligerent. The rules which would apply in the former case would apply in the latter; and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word dollar had the same meaning as under the government of the United States; that the Confederate notes were never made a legal tender, and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract. But, it must be remembered that the whole condition of things in the insurgent States was matter of fact rather than matter of law, and, as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this use gave them a sort of value, insignificant and precarious enough it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency. In the light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essen-

tially different in both respects; and it seems to us that no rule of evidence properly understood requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar is used in the contract before us. Our answer to the second question is, therefore, also in the affirmative. We are clearly of opinion that such evidence must be received in respect to such contracts, in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for ten thousand dollars, to enforce payment of which suit was brought in the Circuit Court, was to be paid, by agreement of the parties, in Confederate notes.

It follows that the decree of the Circuit Court must be REVERSED, and the cause remanded, for further hearing and decree, in conformity with this opinion.

NOTE.

At the same time with the foregoing case was decided another, as to its chief point, like it; an appeal from the Circuit Court for the Northern District of Georgia. It was the case of

DEAN *v.* YOUNELL'S ADMINISTRATOR.

A bill had been filed below to set aside a deed of land for fraud and inadequate consideration. The allegations of fraud were founded wholly upon the circumstance, that the land was sold for Confederate notes. The bill set up also a lien in favor of the vendor of the complainant. The vendor, whose lien was set up, was not made a party, nor was there any allegation of notice to the grantor of the complainant of the alleged lien for purchase-money; nor was there any averment that the complainant was induced to take the Confederate notes by fraudu-

lent misrepresentations of the decedent. A demurrer was interposed in the court below (Erskine, J., presiding), and being sustained, the bill was dismissed.

The CHIEF JUSTICE delivered the opinion of this court, to the effect, that the vendor whose lien was set up not having been made a party, and there not being any allegations of notice to the grantor of the complainant, of the alleged lien for purchase-money, no ground of relief was shown by the bill as to this lien.

And that upon the principles of *Thorington* v. *Smith*, just preceding, the fact that the land was sold for Confederate notes, did not, in the absence of all averment that the complainant was induced to take them by fraudulent misrepresentations of the decedent, afford ground for the interposition of a court of equity. The decree was accordingly AFFIRMED.

THE EAGLE.

1. Since the decision (A. D. 1851) in the *Genesee Chief* (12 Howard, 443), which decided that admiralty jurisdiction was not limited in this country to tide waters, but extended to the lakes and the waters connecting them; the previous act of 1845 (5 Stat. at Large, 726), entitled "An act *extending* the jurisdiction of the District Courts to *certain* cases upon the lakes and navigable waters connecting the same," and which went on the assumption (declared in the *Genesee Chief* to be a false one) that the jurisdiction of the admiralty was limited to tide waters, has become inoperative and ineffectual, with the exception of the clause which gives to either party the right of trial by jury when requested. The District Courts, upon whom the admiralty question was exclusively conferred by the Judiciary Act of 1789, can, therefore, take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, bays, and rivers navigable from the sea.
2. The court observes also, that from the reasons given why the act of 1845 has become inoperative, the clause (italicized in the lines below of this paragraph) in the ninth section of the Judiciary Act of 1789, which confers exclusive original cognizance of all civil causes of admiralty jurisdiction upon the District Courts, "*including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas,*" is equally inoperative.

Statement of the case.

ERROR to the Circuit Court for the Eastern District of Michigan. The case being thus:

1. The Constitution declares that the power of the Federal courts shall extend to "all cases of admiralty and maritime jurisdiction." And the Judiciary Act of 1789 gives to *all* the District Courts "*exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction*, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."

At the time when this act of 1789 was passed, admiralty jurisdiction, according to the ideas then generally entertained by both courts and bar, could be exercised only upon waters within the ebb and flow of the tide.* Accordingly in 1845, Congress, by a statute,† entitled "An act *extending* the jurisdiction of the District Courts to *certain* cases upon the lakes and navigable waters connecting the same," enacted thus:

> The District Courts of the United States shall have, possess, and exercise the same jurisdiction in "matters of *contract* and *tort*, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the *coasting trade*, and employed in the business of commerce and navigation between ports and places in *divers* States and Territories, upon the lakes and the navigable waters connecting the same, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce on the high seas."

About six years after this statute was passed, the case of *The Genesee Chief*‡ came before this court. And in that case it was decided that the impression that admiralty jurisdiction in this country was limited to tide waters was a mis-

* The Thomas Jefferson, 10 Wheaton, 428; The Steamboat Orleans, 11 Peters, 175.

† 5 Stat. at Large, 726.

‡ 12 Howard, 443.

take, and that the lakes and waters connecting them were within it.

After this decision, the language of certain cases* seemed to indicate that the act of 1845 was to be regarded as *limiting* the exercise of this jurisdiction to those cases in which the act had meant, by way of extending the jurisdiction, to *grant* it.

In this state of statutory law and of judicial remark upon it, the tug Eagle, in September, 1864, was towing a brig and a barge from the head of the St. Clair River through the Detroit River; the brig being on her way from Saginaw, in Michigan, to Buffalo, in New York. The tug, getting a mile or so over the line which separates the British side of the river from ours, and out of the usual course of navigation, was sailing in shoal water, when the brig grounded and the barge, which was attached to her, ran into her stern and seriously damaged her. Thereupon the owners of the brig filed a libel in the District Court for Eastern Michigan, "in a cause of collision" against both tug and barge. It set forth that the brig was "a vessel of twenty tons and upwards, duly enrolled and licensed at the port of Buffalo, State of New York, and used in navigating the waters of the Northwestern lakes and the rivers connecting said lakes, and engaged in the business of commerce and navigation thereupon." And also that the tug and barge were also both "vessels of more than twenty tons burden, enrolled and licensed for the coasting trade, and used in navigating the waters of this State and the adjoining States, and now lying, or soon will be, at the port of Detroit, and within the admiralty and maritime jurisdiction of this court."

The answers denied knowledge of these facts stated about the brig, and called for proof, but admitted the tug and barge to be enrolled and licensed.

The answer for the barge further laid the whole blame on the tug, asserting that the sole cause of the disaster was

* *Ex. gr.* Allen *v.* Newberry, 21 Howard, 245; Maguire *v.* Card, Ib. 248; The Hine *v.* Trevor, 4 Wallace, 556.

her going out of the proper course of navigation; while the answer for the tug stated there was no fault with *her*, and denied that the libellants had any claim "enforceable in this court sitting in admiralty for said alleged damage."

Two questions were thus raised: the first, of merits; the second, of jurisdiction. The District Court dismissed the libel as to the barge and condemned the tug. This decree being confirmed by the Circuit Court, the case came here on appeal, where the question of merits was briefly urged, the point of jurisdiction being really the only question. It was admitted, that by the law of Canada, where this damage was done, no lien or any action exists against a wrongdoing vessel, or any right or lien *in rem*.

Mr. Newberry, for the tug, appellant:

1. This is an action for a tort, not one on contract; and the tort was committed in Canada. Confessedly the Canadian law gives no lien. It can exist only under our laws. But the laws of the United States can have no extra-territorial operation. Neither, if the vessel was out of our jurisdiction when the tort was committed, can a lien arise by her coming into our lines. An admiralty lien subsists from the moment the claim arises, or subsists not at all. It is a right *in* the thing, *jus in re*, and not *jus ad rem;* and attaches by operation of then existing law. If there is no such law in force at the time and place of the damage done, no lien can attach. Indeed, the rights of the parties must, in all cases, especially in actions of tort, depend upon the law of the place where the alleged rights accrued. In *Smith* v. *Condry*,* two American vessels collided in the port of Liverpool. The defence set up certain rights of parties under the law of the place of collision. This defence was sustained, and the court held, "that when a collision occurs in an English port, the rights of the parties depend on the law in force at that place."

2. In addition to these points of general law, it should be noted that neither the tug, brig, or barge had the proper

* 1 Howard, 28.

characteristics to bring them within the act of 1845. In *The Genesee Chief*, Taney, C. J., speaking for the court, states that the general jurisdiction of admiralty was limited by the act of 1845. In *Allen* v. *Newberry*,* Nelson, J., speaking also for the court, says, that "the act confines the jurisdiction to cases mentioned in it." And in *The Hine* v. *Trevor*,* Miller, J., says, that the jurisdiction on the lakes and waters connecting them is governed by that statute, though he said that it was not so, as was often erroneously thought in the West, upon the *rivers*. Now the libel, while alleging that the tug was "enrolled and licensed" at the time of the libel filed, does not allege that she was so "for the coasting trade," or enrolled and licensed at all when the damage occurred. Nor is there *proof* that the tug was enrolled and licensed for the "coasting trade;" nor that she was employed in the business of commerce and navigation between ports and places in different states and territories, &c., "at the time," &c., or indeed at any time. There is no proof on that subject. The burden of proof is on the libellant to prove the alleged facts. On the other hand, the tug was a tow-boat, towing obviously from the lower end of Lake Huron to the upper end of Lake Erie. Both termini are within the waters of the State of Michigan, and such employment did not require the tug to go into the waters of any other State than Michigan. She was clearly, as to her occupation, within the case of *Allen* v. *Newberry*.‡

Mr. G. B. Hibbert, *contra*, submitted an able brief, presenting with learning and force much the same views as are presented by the court; a brief of *Mr. W. A. Moore* being also filed.

Mr. Justice NELSON delivered the opinion of the court.

On the question of merits we concur with the conclusion of the courts below. We shall only examine the questions of law.

The summary of them, as stated by the learned counsel,

* 21 Howard, 246. † 4 Wallace, 556. ‡ 21 Howard, 246.

is (1) There is no law in force in the Province of Canada, the place where the tort was committed, that gives a lien upon the vessel for the alleged damages; (2) The laws of the United States have no extra-territorial force in a foreign territory to create a lien; and (3) The admiralty lien is a right in the thing—*jus in re*, and not *jus ad rem*—and the lien must depend upon the law of the place where the alleged right occurred.

It is apparent from the grounds upon which the learned counsel has placed his claim to a reversal of the decree below, that he has entirely misapprehended the scope and effect of the decision of this court in the case of *The Genesee Chief*,* and the several cases following it.†

The leading case obliterated the limit, that had been previously adopted and enforced in the jurisdiction in admiralty, to tide-waters; and held that, according to the true construction of the grant in the Constitution, it extended to all public navigable waters, whether influenced by the tide or not. The Chief Justice, in delivering the opinion, observes: "It is evident that a definition (of the grant in the Constitution) that would, at this day, limit public rivers in this country to tide-water rivers, is utterly inadmissible. We have thousands of miles of public navigable waters, including lakes and rivers, in which there is no tide; and, certainly, there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public waters used for commercial purposes and foreign trade. *The lakes, and the waters connecting them*, he observes, are undoubtedly public waters, and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

It follows, as a necessary consequence of this interpretation of the grant in that instrument, the District Courts, upon whom the admiralty jurisdiction was exclusively conferred by the Judiciary Act of 1789, can take cognizance of

* 12 Howard, 443.

† Jackson *v.* The Magnolia, 20 Ib. 296; and The Hine *v.* Trevor, 4 Wallace, 555.

all civil causes of admiralty jurisdiction upon the lakes, and waters connecting them, the same as upon the high seas, bays, and rivers navigable from the sea. These waters fall within the same category, and are subject to the same jurisdiction, and hence the circumstance that a portion of them lie within the limits of another sovereignty constitutes no objection to the exercise of this power. Before the limit of tide-water was removed by the judgment in the case of *The Genesee Chief*, this jurisdiction was constantly exercised in cases of marine torts upon the high seas, bays, and rivers in which the tide ebbed and flowed, occurring in any part of the world, and, in respect to which an American ship was concerned; and, since that judgment, occurring upon any bay or public river as far as navigable, irrespective of the tide.

Since the recent acts of Parliament, in England, removing the ancient restrictions by the common law courts upon the admiralty jurisdiction, it seems to be exercised as freely and broadly as in this country. The case of *The Diana** arose out of a collision on the great Holland Canal in 1862. An exception was taken to that jurisdiction founded upon the old objection, but was overruled by Dr. Lushington. So, in the case of *The Courier*,† which was a collision on the Rio Grande, in foreign waters. And *The Griefswald* the same.‡

It is insisted, however, that, if the court will take jurisdiction for a collision occurring on foreign waters, and within foreign territory; *the local law* of the place of collision should govern; and hence, the law of Canada in the present case; and *Smith et al.* v. *Conary*, in this court, is cited as an authority for the doctrine. The collision in that case occurred in the port of Liverpool, while the vessel of the defendant was coming out. The defendant set up in defence, that by the statute law of England he was compulsorily obliged to take on board of his ship a Liverpool pilot, which he did; that she was exclusively in his charge when the accident occurred; and that this law, as construed by the courts of England,

* 1 Lushington, 539. † Ib. 541. ‡ Swabia, 430.

excused the owner and master of the vessel; and this was agreed to by the court, and applied to the case, the Chief Justice giving the opinion. All vessels entering into, or departing from, a domestic or foreign port, are bound to obey the laws and well-known usages of the port, and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford. The same question was recently before Dr. Lushington in the case of a collision between the American ship Annapolis and a Prussian barque, at the same port, and the American ship was discharged on the ground as in the case above cited.* These are exceptional cases, and furnished no rule to the court below for the trial of the collision in question. It was tried there, as it should have been tried, according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law.

An objection is also taken, that the case was not brought within the requirements of the act of 1845, so as to give the District Court jurisdiction—that is, it was not shown that the vessels were of the burden of twenty tons and upwards, or enrolled and licensed for the coasting trade, or employed, at the time, in the business of commerce and navigation between ports and places in different States.

These facts were substantially set forth in the libel, and the answers did not set up any specific exception on this ground, nor does it seem to have been taken by the respondents at all in the progress of the trial below. The objection, we think, untenable.

This act of 1845, as is apparent from several of the cases before the district courts whose districts lie contiguous to the lakes, has occasioned a good deal of embarrassment in administering their admiralty jurisdiction since the decision in the case of *The Genesee Chief*. It is quite clear, under this decision, in the absence of that act, the district courts would possess general jurisdiction in admiralty over the

* 1 Lushington, 295.

lakes, and the waters connecting them; and, hence, there would be no more difficulty in the administration of the law than in cases upon the high seas, or bays, or rivers navigable from the sea.

At the time it was passed, tide-water was the limit of admiralty jurisdiction, and the act was intended to remove this restriction upon the court, as it respected these lakes, and to extend the jurisdiction to them, thereby making these waters an exception as to the tide-water limit. The power conferred by the act, however, was not *that* of general admiralty jurisdiction, but was limited to cases of "*contract and tort*, arising in, upon, or concerning steamboats, and other vessels, of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between ports and places of different States." The better opinion, we think, is, that the act does not embrace, but necessarily excludes, cases of prize. These are neither cases of contract or tort, and the vessels engaged in making the seizure, as prize of war, which are ships of the navy, or privateers, are not employed at the time, in the business of commerce and navigation. We think it also a matter of grave doubt if the act confers jurisdiction in cases of salvage, jettison, or general average. These are not matters of contract, according to the most eminent commentators on the subject,* and they certainly are not cases of tort.

One question, and a very important one, is, whether, since the decision of *The Genesee Chief*, which opens the lakes and the waters connecting them to the general jurisdiction of the district courts in admiralty, they can entertain this jurisdiction in cases outside of *that* conferred by this act? If the affirmative of this question should be sustained, although the system would be disjointed and incongruous, yet it would, in its result, remedy most of the difficulties and inconveniences now existing. But the opinions of the judges of this court, as expressed in several cases, though the ques-

* 1 Story's Equity Jurisprudence, § 490; 3 Kent, p. 246.

tion has never been directly before the court for decision, are, that the act should be regarded as restrictive of the general jurisdiction of these courts. This was the opinion expressed by the Chief Justice in the case of *The Genesee Chief*, and has been followed by other justices in this court, who have had occasion to express any opinion in the subject. The history and operation of this act of 1845, are peculiar.

It is "an act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same." At the time it was enacted it had the effect expressed and intended, and so continued for some seven years, when the case of *The Genesee Chief* was decided. From that time, its effect ceased as an enabling act; and has been no longer regarded as such. It is no longer considered by this court as conferring any jurisdiction in admiralty upon the district courts over the lakes, or the waters connecting them. That is regarded as having been conferred by the grant of general admiralty jurisdiction by the ninth section of the act of 1789 to these courts. The original purpose of the act, therefore, has ceased, and is of no effect; and, in order to give it any, instead of construing it as extending the jurisdiction in admiralty, it must be construed as limiting it—the very reverse of its object and intent, as expressed on its face.

In the case of *The Hine* v. *Trevor*,* it is said by the learned Justice, in delivering the opinion of the court, that the jurisdiction in admiralty on the Western rivers did not depend on the act of 1845, but was given by the original act of 1789; and he intimated further, that the jurisdiction on the lakes was also founded on this act, though governed in its exercise by the act of 1845. The case then before the court did not arise on the lakes, but on the Mississippi River; and the remarks made in respect to the jurisdiction upon the lakes, was in answer to an impression very general, as is said, among the profession in that section of the country, and even of the learned Judge whose judgment the court was

* 4 Wallace, 555.

reviewing, that the jurisdiction upon the rivers depended on this act of 1845. That case, not at all involving the question of jurisdiction upon the lakes, but simply upon the interior rivers, did not receive that full deliberation in respect to this question, which, in the present case, is called for. We have now examined it with care, and given to it our best consideration, and are satisfied, that since the decision of the case of *The Genesee Chief*, the court must regard the district courts as having conferred upon them a general jurisdiction in admiralty upon the lakes and the waters connecting them, by the ninth section of the original act of 1789; and the enabling act of 1845, therefore, has become inoperative and ineffectual as a grant of jurisdiction; and, as it was an act, on the face of it, and as intended, in its purpose and effect, to extend the admiralty jurisdiction to these waters, we cannot, without utterly disregarding this purpose and intent, give effect to it as a limitation or restriction upon it. We must, therefore, regard it as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it. The saving clause in this act, as to the concurrent remedy at common law, is, in effect, the same as in the act of 1789, and is, therefore, of necessity, useless and of no effect.*

The ninth section of the Judiciary Act of 1789 confers exclusive original cognizance of all civil causes of admiralty jurisdiction upon the district courts, "*including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.*"

When this clause first came under the consideration of the courts, there was a good deal of difficulty in determining whether the words, *including all seizures*, &c., were intended as being comprehended within the grant of general admiralty

* See The Belfast, 7 Wallace, 624, 644.

jurisdiction, or as, simply, within the cognizance of the district courts, as the words were ambiguous, and might be construed as either within the cognizance of the district courts or within the class of cases of general admiralty jurisdiction. The difference was material; as if not within the general admiralty jurisdiction, the parties were entitled to a trial by jury; otherwise not. This question was first decided in the case of the *United States* v. *La Vengeance*,* the court holding that the cases were included within the general admiralty jurisdiction. The point was contested in several subsequent cases, but the court adhered firmly to its first decision.† The act, notwithstanding these decisions, was still effectual and necessary to sustain the general jurisdiction, as the limit of tide-waters then prevailed in the admiralty courts, and the jurisdiction given by the act extended to waters which were navigable from the sea, irrespective of the tide. The seizures, also, in many instances, would be made within the body of a county—*infra corpus comitatus*—within which the admiralty jurisdiction was not yet admitted. (*Waring* v. *Clarke*, 5 How., 441.)

But since the decision in the case of *The Genesee Chief*, this clause, above recited, is no longer of any force. The general jurisdiction in admiralty exists without regard to it; and if any effect should be given, instead of extending, as was intended, it would restrict it; and, for the reason given in respect to the act of 1845, it has become useless and of no effect.

DECREE AFFIRMED WITH COSTS AND INTEREST.

* 3 Dallas, 297.

† The Sally, 2 Cranch, 406; The Betsey, 4 Id. 443; The Samuel, 1 Wheaton, 9; Ib. 20; The Sarah, 8 Id. 391.

MILLS *v.* SMITH.

1. Under the recording acts of Illinois, which enact that deeds shall take effect as against creditors and subsequent purchasers from the time that they are filed of record, it is necessary, in order to defeat a subsequent purchaser for value, of an unrecorded title, that he have notice of the previous conveyance, or of some fact sufficient to put a prudent man upon inquiry.
2. A recital in the record of another deed, made seventeen years after a first one unrecorded, between the original grantor, and that the heir-at-law, of the original grantee—the grantor having already sold to a second purchaser whose deed is recorded—'that a sale had been made to such original grantee, but no deed given, or if given, lost,' is not constructive notice to a third person purchasing of such second grantee.
3. If either such second grantee, or purchaser from him, have been a purchaser in good faith, without notice, then such purchaser is protected.
4. Courts of the United States are not bound to give instructions upon specific requests by counsel for them. If the court charge the jury rightly upon the case generally, it has done all that it ought to do.
5. If a court below have given such proper instructions on the questions of law in a case, and submitted the facts to the jury, there is no remedy in this court for a mistake of the jury.

ERROR to the Circuit Court for the Northern District of Illinois: the case was this:

In 1818, the United States issued to one Parmely, a soldier of the war of 1812, and then residing in Connecticut, a patent for a tract of land in Illinois. In 1837, he sold the land to Edwin Lacy, and receiving payment in full for it, executed and delivered to Lacy, at the time, a regular deed. *This deed, however, was never recorded*, and at Lacy's death, in 1848, his family had no information respecting the deed, or the location of the land. Lacy left one son and only heir named Andrew.

On the 14th of August, 1854, a certain Benjamin Lombard, a dealer in military bounty lands, went to Parmely, in Connecticut, and having had some conversation with him as to whether any former deed had been made by him, obtained from him for the consideration of $19.56, a quit-claim deed to James Lombard. Benjamin Lombard took also from Parmely (indorsing it on the deed), an affidavit proving

Parmely's identity with the original patentee, and stating "that the deed which he has this day given for his bounty land is the only deed ever given by him for the said claim whatsoever." *This deed was recorded August* 28, 1854.

On the 14th of November, 1854, a brother of Lacy, the original purchaser, having heard of Lombard's visit to Parmely, and of his obtaining a quit-claim deed for the tract, which he had understood, years prior, had been sold to his deceased brother Edwin, applied to Parmely and obtained a deed conveying the land to Andrew Lacy, son and only heir of Edwin Lacy, deceased. This deed contained *a recital and statement to the effect that the land had been sold to Edwin Lacy, in his lifetime, and about October* 1*st*, 1850, *and paid for;* that no deed had been given, or, *if there had been, that it was lost. This deed was recorded November* 25, 1854.

Andrew Lacy died soon afterwards, and by his will his title to the land went to one Mills.

James Lombard sold his right in the tract, for which he had got the deed already mentioned from Parmely, to a certain Smith, on the 7th December, 1855; the deed not being recorded until October 12th, 1858.

Mills now brought ejectment against Smith, and on the trial the original deed from Parmely to Edwin Lacy (the fact of having made which, or any like which Parmely by affidavit on the back of his deed to Lombard had denied), accidentally turned up.

The question was whether, under the recording acts of Illinois, which enact that deeds shall take effect, as against creditors and subseq uent purchasers, from the time that they are filed of record, the title was to be regarded in Mills, or whether in Smith?

The only important witnesses were Parmely himself and Benjamin Lombard, who had procured the deed for James Lombard. Both testified in regard to the facts of the case as already given; Parmely testifying that before he made the deed to James Lombard, Benjamin Lombard, a stranger to him, had hunted him out, and represented to him that there was no deed to Edwin Lacy *on record;* a representa-

tion which led him, Parmely, to believe that he might never have made a deed to Edwin Lacy, but only have handed over to him the patent issued by the government; that this Lombard stated to him that the town where the land lay wanted to get soldiers' rights, and would give $17 a deed, but no more; that the land had been sold for taxes, and that the right of redemption had expired, but that the town would give something. "I told Mr. Lombard," the witness continued, "that I had disposed of the land to Edwin Lacy, who was then dead, and that I did not know that I could give anybody else a deed. Mr. Lombard said that he did not know whether I could or not. If I would only give him a deed he would give me the money." The deed was then executed; Lombard, according to Parmely's testimony, himself drawing the affidavit, indorsed on it, and reading it to Parmely, who did not examine it to see if it was read correctly or not.

Benjamin Lombard's testimony went to prove that Parmely had assured him repeatedly that he had never before made a deed to the land to any one; that although he had been negotiating a trade for it with Edwin Lacy, the trade had fallen through from Lacy's not doing as he agreed to do; that Andrew Lacy, the son and heir, had been to him to get a deed, which he, Parmely, refused to give him, for the same reason that he had not conveyed the land to Edwin Lacy, namely, that no consideration had been paid.

The court below (Davis, J.) charged the jury in substance as follows: refusing to give instructions in pursuance of specific requests; considering that these did but request in a specific form, instructions which in substance had been already given in a general one.

GENTLEMEN OF THE JURY: It is not controverted, on the part of the defendant, that the title as shown in the plaintiff would be a good, legal, subsisting title, independent of the recording laws.

Now as respects the defendant's title. The deed of 1837, from Parmely to Lacy, not being recorded at the time the deed was made by Parmely to Lombard, the first question to be de-

termined is, was Lombard a *bonâ fide* purchaser within the meaning of the recording laws? Those laws provide that every deed shall take effect from the time it is filed for record, as against creditors and subsequent purchasers without notice. This deed, not having been recorded, from Parmely to Edwin Lacy, in August, 1854, the first question for you to determine is, was Lombard a purchaser without notice of the previous conveyance made to Edwin Lacy, and had he paid value for the land? The evidence upon that point consists of the testimony of Parmely and Benjamin Lombard. Of course, Benjamin Lombard being the agent of James Lombard in his purchase, notice to Benjamin is notice to James.

It is necessary that James Lombard, or Benjamin Lombard, should have had notice of the previous conveyance to Edwin Lacy, or of some fact sufficient to put a prudent man upon inquiry. In other words, there must have been good faith on his part when he made the purchase.

And the question for you to determine upon all the testimony is, whether there was any knowledge brought home to Benjamin Lombard that there had been a transfer, legal or equitable, made of this land to Edwin Lacy? If that fact was brought home to him, or if any fact that would warrant a prudent man in coming to the conclusion that there was a valid transfer, then he could not be said to be a purchaser in good faith; and of course the registry laws did not protect him in the purchase. If he was a purchaser in good faith, then it makes no difference whether Smith was or was not, because his purchase protects Smith—he having purchased from him; but if he was not a purchaser in good faith, the next question is, did Smith purchase in good faith? The same rule is applicable substantially to him as to Benjamin Lombard, the agent of James Lombard. It is necessary that he should have purchased the land and paid the money for it without knowledge of this previous deed. If he knew of the existence of this previous deed to Edwin Lacy, or had knowledge of any fact which would satisfy a prudent man, so as to put him upon inquiry that there was a valid sale made to Edwin Lacy before he paid the purchase-money, then he could not be considered a purchaser in good faith.

But it is contended, on the part of the plaintiffs, that inasmuch as there was a deed from Parmely to Andrew Lacy on

record on the 25th of November, 1854, and as that recited that he had made a conveyance or transfer of the land to Edward Lacy many years before, that was constructive notice to the defendant of the conveyance. I am hardly prepared to admit that as a rule of law. If he had read this deed or the record of it, or saw it; if, in other words, he had actual notice, then, as a matter of course, he would be bound by it, so far as such recital could bind him; but I hardly think that the fact it was simply on record would be constructive notice to him, so as to prevent him from being a *bonâ fide* purchaser.

Parmely, when the recital was made, had no title to the land, according to the record, because the deed to James Lombard was recorded the 28th of August, 1854, before this deed was made to Andrew Lacy, and it would be a hard rule, it seems to me, to hold that the recital in a deed attempting to convey land which the man had no right to convey, would operate as constructive notice to a third party. Therefore, the court instructs you that it was necessary that Smith should have had actual notice of this previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land, before he paid the purchase-money. If he had, then he would not be a purchaser protected by the registry laws; if he had not this notice, then he would be protected, whether Lombard was a *bonâ fide* purchaser or not, because the rule you will understand to be this, as counsel on both sides admit, that the defendant can protect himself by showing that Lombard is a *bonâ fide* purchaser without notice, or that he himself is a *bonâ fide* purchaser without notice.

Gentlemen, you will see that the question turns entirely on the view you take, from the evidence, upon the fact whether these two persons are purchasers in good faith, without notice; that is, Benjamin Lombard and the defendant. If either of them is a purchaser in good faith, then the defendant is protected. You must find that they both had knowledge, before you can find a verdict for the plaintiff. If they both had knowledge of this pre-existing title, then, as a matter of course, the plaintiff's title stands good, otherwise not.

VERDICT AND JUDGMENT ACCORDINGLY.

Mr. E. S. Smith, for the plaintiff in error, contended that the

testimony of Lombard was incredible, and was in fact denied by Parmely; that Lombard was not a purchaser for value, but a prowling hunter of old soldiers' rights; that the court ought to have charged specifically that a deed obtained upon such false representation was absolutely void, and that notice of a sale was sufficient, independently of notice of a deed; that the charge as to the effect of the recital did not come up to the testimony, for that it was plain that Lombard had been looking through the records, and had seen the recital on them of a former deed.

Mr. H. M. Wead, contra, argued that no one could read the evidence and fail to arrive at the conclusion that neither had notice of the prior conveyance to Andrew Lacy, because the existence of that conveyance was not known until after the commencement of this suit; that if either Lombard or Smith were innocent purchasers, then Smith was to be protected; that it was well settled, both in England and in this country, that if a person purchased for a valuable consideration with notice, he might shelter himself under the first purchaser.*

Mr. Justice GRIER delivered the opinion of the court.

The counsel, in their arguments in this case, seem to have forgotten that this court have no right to order a new trial because they may believe that the jury may have erred in their verdict on the facts. If the court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this court for any supposed mistake of the jury.

On examining the charge of the court below, we find a clear exposition of the legal questions arising in the case.

The jury were properly instructed that the deed of Parmely, the patentee, to Edwin Lacy, in 1837, would confer a good legal title on the plaintiff independently of the recording laws. But as this deed was not recorded, the question to be

* Leading Cases in Equity, by Hare and Wallace, pages 50 and 99, and cases there cited.

determined was, whether the defendant, who claimed title under the same patentee, through a deed dated 14th of August, 1855, and recorded, was a *bonâ fide* purchaser without notice, and had paid value for the land. It was contended that a *recital* in a deed from Parmely to one Andrew Lacy, after the deed to James Lombard was recorded, and under which the defendant claims, would operate as constructive notice to a third party. But the court instructed the jury that it was necessary that the purchaser should have actual notice of the previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land. In conclusion, after various propositions for specific instructions, amounting substantially to the instructions already given, the court summed up by telling the jury, that they would see that the question turned entirely on the view which they might take from the evidence, upon the fact whether Benjamin Lombard, Jr., and the defendant were purchasers in good faith, without notice. "If either of them is a purchaser in good faith," said the court, "then the defendant is protected. You must find that they both had knowledge before you can find a verdict for the plaintiff. If they both had knowledge of this pre-existing title, then, as a matter of course, the plaintiff's title stands good, otherwise not."

We see no error in these instructions.

After having thus correctly submitted the case to the consideration of the jury, the court were not bound to answer a catechism of questions which could only confuse their minds and lead to erroneous conclusions.

JUDGMENT AFFIRMED.

STANSBURY v. UNITED STATES.

1. The act of August 23d, 1842, declaring that no officer of the government drawing a fixed salary, shall receive additional compensation for any service, unless it is authorized by law, and a specific appropriation made to pay it, is not repealed by the twelfth section of the Act of August 26, the same year.

2. An agreement by the Secretary of the Interior to pay a clerk in his department for services rendered to the government by labors abroad—the clerk still holding his place and drawing his pay as clerk in the Interior—was, accordingly, held void.

APPEAL from the Court of Claims, the case being thus:

A statute of the United States, passed August 23, 1842,* enacts as follows:

"No officer, in any branch of the public service, or any other person, whose salary, pay, or emoluments, is, or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or any other service or duty whatever, *unless the same shall be authorized by law*, and in the *appropriation therefor explicitly set forth*, that it is for such additional pay, extra allowance, or compensation."

A subsequent statute,† one of the 26th August, in the same year, enacts by its twelfth section, as follows:

"That no allowance or compensation shall be made to any clerk or other officer, by reason of the discharge of duties which belong *to any other clerk* in the same or any other department; and no allowance or compensation shall be made for any *extra* services whatever, which any clerk or other officer may be required to perform."

With these two enactments in force, Stansbury, *being at the time a clerk in the Department of the Interior*, was appointed in 1851, by the Secretary of the Interior, at that time Mr. Stuart, an agent to proceed to Europe and prepare for the department an account of the London Industrial Exhibition. In this employment, he was engaged in London, and subsequently at Washington, in the preparation of his report, for a term of seventeen months; but during all the time of this service, held his place and drew his pay as a clerk in the Interior Department. The secretary promised, in writing, to pay his expenses and allow him a reasonable compensation for his services. The actual expenses of the agency were

* § 2; 5 Stat. at Large, 510. † Ib. 525.

paid, but on his return, the Secretary of the Interior, now Mr. McLelland, declined to pay him anything more. He accordingly brought suit to recover from the United States the value of his services. The Court of Claims decided that the claim was within and barred by the act of August 23d, 1842, and was not removed therefrom by the act of the following 26th, and ordered judgment to be entered for the United States.

Mr. Caverly, for the appellant:

If the act of 23d August had, at its passage, any reference to clerks in the departments, it has been repealed so far as it related to them by the subsequent enactments of the 26th August. It is repealed, because these latter enactments prescribe a rule involving the same subject-matter; and make, in fact, an independent rule for clerks or other officers in the departments; refusing pay to them for doing the duties of *other* clerks or officers, and refusing pay to them for *extra* services of any kind. While the latter act declares that a clerk shall have no pay for services done in the place of another, and no *extra* allowance whatever, it also, in its legitimate effect, declares that a clerk may have pay on a special contract in a distinct service, foreign to clerkships and *extra* allowances. These statutes were never intended to prevent the holding of two distinct offices at the same time the one entirely foreign to the other.* The statute of August 23d, 1842, is in derogation of private rights, and is, especially as against an equitable, meritorious claim, to be construed strictly.†

Mr. Stansbury having been commissioned to perform a distinct agency in a foreign country, such agency is to be regarded as inconsistent with a clerkship here. His clerkship for the time was *in fact* suspended during his nine months absence. If his family, during that period, have received his pay as clerk, there may have been a mistake in law of the department. But that does not preclude Mr. Stansbury

* Converse *v.* United States, 21 Howard, 470.

† Smith *v.* Spooner, 3 Pickering, 230.

from asking remuneration for the services which he did perform.

It is a fair presumption of law, that the Secretary of the Interior, in creating an agency to perform the service in question acted legally. It would not become the government to appoint Mr. Stuart to be Secretary of the Interior, and hold him forth to the world as worthy of public trust, and then to turn around and repudiate his contracts, and deprive innocent individuals of reasonable pay for services performed for the government, in violation of a contract officially made by him.

If, however, that government officer mistook his powers in sending Mr. Stansbury abroad, it was a mistake of the government. Her officer may have been ignorant of the law, but the government cannot now, by any principle of law, go behind her own act to avoid payment of the just obligation which her act induced.

Mr. Talbot, for the Attorney-General, contra:

Mr. Justice DAVIS delivered the opinion of the court.

The appellant insists that the written promise of the Secretary to pay him the value of his services, is a binding obligation on the government. But this is not so, for no authority of law existed for the promise. The secretary could not pay the claim, because there was no appropriation to pay it, and he was not authorized by Congress to create an agency to perform the service in question. He undoubtedly acted in good faith with Stansbury, and supposed that Congress would approve the mode he adopted for obtaining useful information, and ratify his proceedings; and his promise, under the circumstances, must be considered as a dependent one, to take effect, if Congress appropriated money to enable him to comply with it. Congress having failed to make the appropriation, the secretary was justified in refusing to pay the claim.

But he was justified in his refusal on another ground. The payment of the claim was forbidden by positive law.

The second section of the act of August 23d, 1842, declares

that no officer of the government, drawing a fixed salary, shall receive additional compensation for any service, unless it is authorized by law and a specific appropriation made to pay it. When Stansbury was appointed in 1851, this law was in force, and afforded notice to all *employees* of the government, of the policy of Congress on the subject to which it relates. The law was passed to remedy an evil which had existed, of detailing officers with fixed pay to perform duties outside of their regular employment, and paying them for it, when the government was entitled, without this double pay, to all their services. The law prohibited, and was intended to do so, the allowance of such claims as these, made by public officers, for extra compensation, on the ground of extra services.

But the appellant insists, if the above act embraced clerks in the departments, its operation has been withdrawn from them by the twelfth section of the act of 26th of August, 1842. It is difficult to see how this conclusion is reached, because this section refuses to pay clerks or other officers in the departments for doing the duties of other clerks or officers, and refuses, further, to pay them for extra services of any kind.

There is no inconsistency between the provisions of the two acts, which were passed within a few days of each other, and were parts of a system, intended for the guidance of those in the employ of the government. These provisions furnished notice to all in authority, that in no event could clerks in the departments be paid for doing the work of their fellow-clerks, nor could they be paid for any other service, unless it was authorized by law, and followed by an appropriation to pay for it.

Stansbury's appointment was not authorized by law, nor was there any appropriation to pay for the services which he expected to render the department.

It follows, therefore, that the transaction between Secretary Stuart and himself was in violation of the statute, and cannot be the foundation of an action.

JUDGMENT AFFIRMED.

REESIDE *v.* UNITED STATES.

Under the act of 28th February, 1861, which authorizes the Postmaster-General to *discontinue*, under certain circumstances specified, the postal service on any route, a "*suspension*" during the late rebellion at the Postmaster-General's discretion, of a route in certain rebellious States, with a notice to the contractor that he would be *held responsible for a renewal* when the Postmaster-General should deem it safe to renew the service there, was held to be a *discontinuance;* and the mail carrier's contract with the government calling for a month's pay if the postmaster discontinued the service, it was adjudged that he was entitled to a month's pay accordingly.

APPEAL from the Court of Claims, the case being thus:

In 1859, and subsequently, Reeside made certain contracts with the Postmaster-General to carry the mail until 30th June, 1862, over certain parts of *Arkansas*, *Mississippi*, *and Louisiana*. Each contract contained a provision that the Postmaster-General might *discontinue or curtail* the service, in whole or in part, whenever the public interests required it, he allowing *one month's pay on the amount of the service dispensed with.* Early in 1861, as is known, the late rebellion in the Southern States broke out; the States above particularly mentioned, joining in it. In view of the condition of things, Congress enacted,* on the 28th February, 1861:

"That whenever, in the opinion of the Postmaster-General, the postal service cannot be safely continued, or the post-office revenues collected, or the postal laws maintained on any post route, by reason of any cause whatever, the Postmaster-General is hereby authorized to *discontinue* the postal service on such route, or any part thereof, and any post-offices thereon, till the same can be safely restored," and shall report his action to Congress.

And it was part of the case, as found by the court below, that on the 15th April following, "a state of actual war"

* 12 Stat. at Large, 177.

existed between the United States and the States in which the contracts were to be executed.

On the 27th of May, 1861, the Postmaster-General issued an order *suspending* the service on all the routes till further order, from and after May 31st. Reeside requested the Postmaster-General, instead of suspending the service, to annul the contracts. But this the Postmaster-General refused to do, and Reeside was informed that he would be held responsible under the contracts and be ordered to renew the service whenever, in the opinion of the Postmaster-General, it would be safe to do so.

No special notice of the discontinuance was ever served on him.

On the 13th July, 1861, Congress authorized the President, under certain circumstances which it set forth, to issue a proclamation declaring any one of several Southern States, which it named (and which included the three through which Reeside's contract called on him to carry the mail), or any part of it, to be in insurrection against the United States, and enacted that *thereupon* all intercourse should cease between the same and the citizens thereof and the citizens of the rest of the United States. On the 16th of August following, the President did issue such a proclamation, and declared these three States, along with some others, to be in insurrection, and prohibited the intercourse.

Reeside resided in Washington, and the case showed that it would have taken him twenty days to have gone to Arkansas, and to have disposed of his property on his several routes. No part of his stage property was removed from them.

Reeside, who had been paid up but to the 1st of June, 1861, and whom the Postmaster-General considered entitled to nothing more, now filed a petition in the court below, setting forth that taking into consideration the distance from the seat of government (where, as already said, he resided) to the place of service, he was entitled to receive a reasonable notice before suspending the mail service on the

several routes where he was the contractor, and that he was entitled, at all events, to his mail pay for one month.

The court below dismissed the claim; and hence this appeal.

Messrs. Fuller and Carlisle, for the appellant:

The contracts had a term of thirteen months to run, when their further execution was *suspended* by order of the Postmaster-General. And the question is, whether the claimant is entitled to compensation, and if so, the measure of it?

Under the act of February 28th, 1861, the Postmaster-General might have *discontinued* the service, or under the contract, he might have annulled the service, and put an end to the contract. But he did neither. He simply suspended the service for the time being, leaving the contract unimpaired and in full force. For he notified to the claimant that he would be held responsible, and be ordered to renew the same whenever, in the opinion of the Postmaster-General, it should be safe to do so.

Hence, we submit that Reeside is not bound to accept one month's extra pay, which his petition asks for, as the measure of his arrearages, but is entitled to ask his full contract price for the thirteen months.*

The Postmaster-General must have regarded the disturbed condition of the country, at the date of his order, as temporary; and thought that within the thirteen months the condition of public affairs would be such that the postal service would be resumed on the routes, else he would not have declined, upon the request of Reeside, to terminate the contract.

But if not entitled to pay for the thirteen months, Reeside may certainly claim pay till the 16th August, 1861; for the execution of the contract did not become impossible until the sovereign power declared all intercourse between the loyal and disloyal States illegal, which was this said 16th of August.

* Clark v. Marsiglia, 1 Denio, 317.

If, however, the contract continued neither for the whole term, nor until the sovereign power prohibited intercourse, then it must be because it was discontinued under the clause of the contract giving power to discontinue. This is the worst view for the appellant; but even under *it*, the right of one month's pay is clear.

Mr. Hoar, Attorney-General, and Mr. Talbot, contra:

The case shows, that from the 15th day of April, 1861, six weeks before the date of the order complained of, "a state of actual war" existed between the United States and the States in which those contracts were to be executed.

The execution of the contract had become impossible by acts of the public enemies, owing to the ouster of the United States from its actual sovereignty over the territory through which the claimant's mail routes ran; and it had become so on the 16th of April, 1861, while the appellant was paid to the 1st of June of that year.

The order of suspension was a mere recognition on the part of the Post-Office Department of this state of war.

The suspension, caused by the war, cannot be held to be a suspension by the Postmaster-General, such as would give rise to a claim for one month's pay. Whether or not this suspension may of itself have operated as a final release of the contractor from his obligation to complete his contract, was not the duty of the Postmaster-General finally to determine. It was proper for that officer to decline to decide that question against his principal, the United States, as he did, by refusing formally to release the contractor from the obligations of his contracts.

Reply:

The finding by the court below of "a state of actual war" on the 15th of April, is less a fact than an inference of law from the general history of the times. This court can take notice of this history and draw conclusions, as well as the court below.

Mr. Justice NELSON delivered the opinion of the court.

Upon the facts of this case it is difficult to see how the government can avoid the payment of the month's pay upon any principle of justice or equity. The Postmaster-General, representing in this department the government, refused to put an end to the contracts; but insisted upon a suspension only at his pleasure, and at the same time gave notice that the contractor would be held responsible for a renewal when he (the Postmaster-General) should deem it safe to renew them. Of course, the stage property must be kept on hand at the expense of the contractor, ready to render the service when ordered; and, according to the views of the government, without either remuneration or any allowance for the same, not even the one month's extra pay on the amount of service dispensed with, which, in express terms, is provided in the contract.

The only answer given to all this is, that a civil war existed between the United States and the States within which these mail routes lay, and that all intercourse with them was illegal upon the principles of international law. Assuming this to be so, the government would have been justified in putting an end to the contracts; and, in the absence of any interference on the part of the government, the contractor might also have terminated them. But the government did interfere, and forbid the annulment or termination of the service, and insisted, notwithstanding a state of civil war, that the contract should continue, and the service be renewed at the pleasure of the Postmaster-General. The truth is (and this affords an explanation of the otherwise extraordinary dealings with this contractor) that, although a state of war existed between the United States and several of the Southern States, or portions of them, the territorial limits within which it existed was not well defined. Even as late as July 13th, 1861, an act of Congress was passed authorizing the President, under the particular circumstances stated therein, to issue a proclamation declaring any one of these States, or any part of it, to be in a state of insurrection against the United States, and thereupon all intercourse should cease

between the same and the citizens thereof, and the citizens of the rest of the United States.* This proclamation was not issued till the 16th of August following, when certain States, including Arkansas, Mississippi, and Louisiana, were first declared to be in a state of insurrection within the act, and all intercourse with the loyal States was prohibited.†

This intercourse was but partially interrupted at the time these contracts were suspended; and although a disloyal feeling prevailed, and was apparently increasing, yet the policy of the government was to conciliate the people, and separate them, if possible, from the leaders; and one of the means used for this purpose was to continue these mail and postal accommodations so long as any hope existed of preventing the rebellion or continuing peaceful relations. The suspension of these contracts, instead of putting an end to them at once, and the demand upon the contractor to keep his stage property on hand ready to render service, doubtless grew out of this policy.

The act of 28th February, 1861, provided that whenever, in the opinion of the Postmaster-General, the postal service cannot be safely continued, &c., for any reason, he was authorized to discontinue the service till the same could be safely renewed. It was, doubtless, under this act that he suspended the service in the present case. But this act had no effect to control the legal import of the contracts, nor did it confer any greater power than he possessed under them. According to their terms, he had the power to discontinue or curtail the service on any route for any cause, allowing one month's pay.

It may, we think, be well doubted if the Postmaster-General had the power under this act to discontinue the service, and still hold the contractor to renew it. It simply confers power "to discontinue," for any cause, "the postal service on said route, or any part thereof, and any post-offices thereon, till the same can be safely restored, and shall report his action to Congress." Nothing is said as to the duty or rights

* 12 Stat. at Large, 257.

† Ib. 1262, appendix.

of contractors; and, in the absence of any provision on the subject, it would seem to be unreasonable to hold him responsible to renew the service at any future indefinite period. But it is unnecessary to decide this point.

DECREE REVERSED, and cause remanded, with directions to allow one month's pay under the contracts.

FURMAN v. NICHOL.

1. A cause can be removed from a State court into this court under the twenty-fifth section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right, which he asserted that it gave him, was denied to him by the State court, provided the record show, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand.
2. It need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did.
3. The provision in section 12 of the charter of 1838 of the Bank of Tennessee, "that the bills or notes of said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the State, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State," made a contract on the part of the State with all persons, that the State would receive for all payments for taxes or other moneys due to it, all bills of the bank lawfully issued, while the section remained in force. The guaranty was not a personal one, but attached to the note if so issued; as much as if written on the back of it. It went with the note everywhere, as long as it lasted, and although after the note was issued, Section 12 were repealed.
4. Section 603 of the Tennessee code of 1858, which enacted that besides Federal money, controllers' warrants, and wild-cat certificates, the collector should receive "such bank notes as are current and passing at par," did not amount to a repeal of the above quoted 12th section; the words of the code having no words of negation, the two enactments being capable of standing together, and implied repeals not being to be favored.
5. This decision does not apply to issues of the bank while under the control of the insurgents.

Statement of the case.

ERROR to the Supreme Court of Tennessee, the case being this:

In 1838 the legislature of Tennessee chartered a bank, enacting as follows:

"A bank shall be, and is hereby established in the *name and for the benefit of the State*, to be known under the name and style of 'The Bank of Tennessee,' and the faith and credit of the State are hereby *pledged* for the support of said bank."

The capital of the bank, which was five million dollars, consisted chiefly of the school fund of the State and of surplus revenue of the Federal government. The deficiency was to be made up by funds raised on the faith of the State. The dividends which the bank should make were to be applied to common schools and academies, and the bank itself was to be managed in aid of internal improvements. Any losses arising to the trust funds used to make the capital were to be made good by the State. The governor was to nominate to the General Assembly, for confirmation or rejection, twelve directors, to serve for two years, as officers to manage its affairs.

The twelfth section of the charter contained this important provision:

"That the bills or notes of said corporation originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes, and other moneys due to the State."

The bank went into operation with branches in different parts of the State, and was employed largely in various ways as the fiscal agent of the government.

In May, 1858, the legislature of the State passed an act to revise the statutes of the State, and so established its "code." In this code were certain enactments, thus:

"*Section* 603. The collector shall receive, in discharge of pub-

lic taxes and other dues to the State, besides the constitutional and lawful currency of the United States,

"1st. *Such bank notes as are current at par in this State.*

"2d. Warrants issued by the comptroller.

"3d. Certificates from the county court for killing a wild-cat."

"*Sect.* 41. All public and general acts passed prior to the present session of the General Assembly, and all public and special acts, *the subject whereof are revised in* this code, are hereby *repealed.*"

"*Sect.* 42. Local, special, and private acts, *and acts of incorporation* heretofore passed, are *not repealed*, unless it be *herein so expressed.*"

From the character of its organization, the newly incorporated bank was capable of being placed much under the control of the governor and legislature of the State; and at the outbreak of the late rebellion in Tennessee, *May 6th*, 1861, it passed into the control of the rebel agents, who then managed to possess themselves of the State government. They issued its notes to an indefinite amount, advanced immense sums to the rebel State authorities; and when the Federal army were approaching with superior power, left the bank, carrying with them its coin, and all its assets, except real estate and some uncollected debts. The bank was thus ruined, and its bills became largely depreciated.

In February, 1865, the rebel powers being now driven away, the people of the State reorganized the State government, and declared, in their amended constitution, that "all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th day of May, 1861," were null and void; and an act of the legislature in the following June, repealed by express terms, the already quoted twelfth section of the chartering statute of 1838, which made the notes of the bank receivable in payment of taxes. Finally came an act of February 16, 1866, by which the directors were directed to take in payment of debts due to it its notes, "which were issued prior to the 6th day of May, 1861, and studiously to refuse and exclude all issues *or reissues* after that date; also all issues signed by G. C. Torbett; also, all *reissues* made after the 6th day of May, 1861, as utterly void."

Statement of the case.

In this state of things, with these statutes, relative to the subject of the sort of money in which taxes, &c., might or might not be paid upon the statute-book—and with other statutes of the State in force, which made the privilege of merchandising taxable, and enacted that any one who wished to engage in that calling must obtain a license from the clerk of the county court where he proposed to carry on the business, and give bond that he would pay a certain percentage on the invoice cost of all goods brought into his mercantile establishment for sale during the year—one Francis Furman, of Nashville, who had obtained, in August, 1865, from the county clerk, a license as a wholesale merchant for the ensuing year, and now purposed forming a partnership before the expiration of his license (a purpose which made it necessary for him to discharge his obligation to the State for the business of the store up to that time), appeared, on the 3d of August, 1866, before the clerk of his county, with Green, his proposed partner, and tendered to the clerk the amount due the State for taxes, in the notes and issues of the Bank of Tennessee, *issued prior to the 6th of May*, 1861, and tendered also the bond as required by law, and demanded that a license be issued to them as wholesale merchants. But the clerk declined to comply with this request, because these notes were depreciated, and informed the parties that he would not issue the license, unless the taxes were paid in par funds.

Thereupon Furman & Green applied to one of the circuit courts of the State for a mandamus to compel the clerk to receive their bank notes.

Their petition, after setting forth the charter of the bank, and particularly the provisions of the *twelfth* section, the ownership of the notes, and that they were issued in conformity with the section just named; *and issued "prior to the 6th day of May*, 1861," alleged the tender to the defendant, his official character, and his refusal to receive them, "because the same were not at par," and issue the license; adding that the "said charter was a *contract* made with the people of the State, and *every person into whose possession the*

said notes and issues of the said bank might come, that the same should be received by all collectors of taxes, and in payment of all dues to the State of Tennessee, and it is not in the power of the legislature of the said State of Tennessee, to impair or annul the validity or binding force of said contract." The petition referred to the act of February, 1866, by which the directors were directed to take in payment of debts due to it notes issued prior to May 6th, 1861, and to exclude reissues made after that day, and it made the act part of it, so far as the act might be in conflict with their rights. *But the petition did not state at what time the notes had come into the hands of the petitioners.*

The county clerk demurred:

1. Because the petition did not show a contract between the State of Tennessee and *petitioners*, or either of them, that the notes in question should be received in payment of State taxes; and,

2. Because it failed to show ownership of the notes *before* the passage of the Tennessee code, 1858, with its section 603; *or* before the repealing act of 1865.

The local Circuit Court thought the demurrer bad and awarded the mandamus, but the Supreme Court of the State on appeal considered it good, and reversed that decree; the judgment having been in these words, and without any assignment of reasons.

"The court being of opinion that there is error in the judgment of the court below, in overruling the demurrer in this cause, doth order and adjudge that the said judgment be reversed, and the demurrer sustained, and the petition dismissed."

The case was now brought here on appeal, under the 25th section of the Judiciary Act, which gives this court jurisdiction to review decrees in the highest court of the State, "where is drawn in question the validity of the statute of, or an authority exercised under any State, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity."

Argument for the tax-payers.

Two questions were here argued:

1. Whether under the 25th section just quoted, jurisdiction existed in this court?

2. Whether the act of incorporation amounted to a contract with these petitioners; their petition not showing that they had themselves received the notes prior to either the statute of 1858, making the code having section 603; or the act of 1866, repealing the 12th section of the original charter.

Messrs. B. R. Curtis, R. L. Caruthers, and G. Hoadley, for the appellants:

1. *As to jurisdiction.* That it exists, is plain, since the decision in *The Bridge Proprietors* v. *Hoboken Company*,* a case decided so late as 1863. There the court says:

"The true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the constitution was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Now here, if any one will observe the character of the petition and of the demurrer, it will be as obvious without argument as with it, that the question raised and decided was, by necessary intendment, none other than the constitutionality of the act of repeal, as against the plaintiffs, in violation of the contract with the State to receive the notes for taxes, and the decision in favor of its validity.

2 *On merits.* The 12th section of the act of incorporation of the Bank of Tennessee was, until repealed, a contract between the State and every bill-holder of the bank, obliging the former to receive the bills for taxes. The contract which we assert arises out of a law. Whatever negotiability and virtue the legislature intended the bills should have, that they do have. Now, what did the legislature intend? The bills were to be receivable by all tax collectors of the State for all moneys due it. Receivable from whom? From the bearer, of course. The design was to aid the bank substantially, by inspiring the greater confidence in its bills; and this confidence could be inspired in no way so well as by

* 1 Wallace, 143.

attaching to the *bills* a special virtue, the quality, to wit, that they should be receivable in payment of all debts due the State; so receivable generally and from every one. We have at this time a currency of government notes known as "greenbacks." The act of Congress authorizing them enacts that they shall be a legal tender for all debts, public and private (except for two named), and be receivable in payment of all loans made to the United States. And, as we know at this time, this provision of the statute is printed on the back of the notes. No one would doubt that the contract of the Federal government, in regard to these issues, attaches to the bill. But why does it so attach? Not in virtue of the mechanical fact of its being printed on the note, but in virtue of the statute authorizing the notes, and giving to them the advantages which it does. The same thing exists here. If the 12th section of the charter of the Bank of Tennessee had been printed on all notes of the bank, it would be conceded that the privilege followed the bills and attached to them in the hands of every holder. But the printing of the law on the back of the bill is nothing. It is the law itself, its having been enacted and enrolled in the Capitol, which gives the distinctive virtue.

The section 603 of the code did not repeal the twelfth section of the charter. It could repeal it only by a feeble implication. Implied appeals are not favored. Courts, indeed, would be slow to pronounce in favor of an implied repeal of a section, which gave value and credit to the issues of a bank, that was, perhaps, daily increasing in circulation, and that had been established with the funds, and for the benefit of the State itself, to supply a circulating medium to pass from hand to hand of the people as money.

If section 603 of the code repealed impliedly section 12 of the charter, of what use was the express repeal of the same section by the act of 1865?

The case is then decided by *Woodruff* v. *Trapnall*,* as well as by numerous later cases.†

* 10 Howard, 206.

† Curran *v.* State of Arkansas et al., 15 Howard, 304, Hawthorne *v.* Calef,

Argument for the State.

In *Woodruff* v. *Trapnall*, where the facts, though resembling ours, were immeasurably stronger than they, the court says:

"The guaranty included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved, 'This note shall be received by the State in payment of debts.' And that the legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument."

Messrs. Maynard and Harrison, contra:

1. *As to Jurisdiction.*—It is nowhere averred in the petition, as it ought to have been in order to bring the case within the twenty-fifth section, that the State had passed a law impairing the obligation of a contract. Nor can this be inferred by any necessary intendment from the record. The court below does not assign any reasons why it sustained the demurrer. The record indicates that the main question in that court was, upon a construction of the act of 1838; a question, namely, whether there was any contract arising out of the twelfth section, as contended for by the plaintiffs, and as to the *legal effect* of plaintiffs in error taking the bank issues tendered, *after* the act of 1858 and the act of 1865.

If the court decided (as we may remark that in fact it did) that there was no contract, none at least running with the note, created by that act, the matter involved the construction of a Tennessee statute by a Tennessee court, not the validity of any statute; and the matter is not revisable here.* But looking to the record in a less favorable light, we must assume that the court may have decided the case upon either one of the causes set down in the demurrer, viz., that there was no contract, or that the plaintiffs in error were not entitled to maintain their petition, because they failed to show that they became the holder of the bank issues prior to the

2 Wallace, 10; McGee *v.* Mathis, 4 Id. 143; Von Hoffman *v.* City of Quincy, Ib. 535.

* Railroad Company v. Rock, 4 Wallace, 177.

act of 1865, or lastly, that they were not entitled to maintain their suit, because they did not show they became the holder of said notes, the issues of the Bank of Tennessee, before the passage of the act of 1858.

It may have decided on any one of these grounds, and not have decided in favor of a law passed by the State and asserted by the party against whom the decision was given, to have impaired the obligation of a contract. If this is so, then there is no jurisdiction under the twenty-fifth section.

The decision would have gone off upon the construction given to these several statutes of Tennessee, particularly to section twelfth of the charter. But when the construction alone, and not the validity of a State statute, is involved in the decision of the State court, no jurisdiction exists under the twenty-fifth section.* Independently of all which the judgment was right—as we show hereafter.

2. *On merits.*—Obviously there was no contract with the *bank*, and none with persons who had not yet received the notes. There is no guaranty on the face of the note, nor anything, anywhere, operating like a covenant running forever, with the land. Whatever contract existed arose from a statute. So long as section 12 remained on the statute-books unqualified and unrepealed, there was a proposition of the bank of this sort. It was first to the persons to whom the notes were first offered by the bank. To them the State in effect said: "If you will receive these notes from the bank, we will receive them from you." And the proposition was, in fact, repeated whenever the notes were offered to new parties by the original takers, and a contract was made whenever by those new parties the notes were accepted.

Thus, if section 12 remained unrepealed and unmodified, and so long as it did so remain, the notes would go on circulating with all the rights in their holders given by section 12, not because of a guaranty running with the note, for none was on it, but because as long as the proposition was continued and accepted, a separate contract was made. But

* Commercial Bank *v.* Buckingham, 5 Howard, 317.

the State had a right, without doubt, to repeal or to modify its propositions, and if, after the modification or repeal, any person took the notes, he took them with a knowledge of what was done, and gave credit accordingly.

Now, unquestionably, the act of 1865 did repeal the twelfth section of the charter, and, unless the party shows (which these petitioners do not pretend was the fact in their case), that he got the notes prior to the repeal, he makes no case against the State.

2. Independently of this, these petitioners allege that the notes they tendered were issued prior to May 6th, 1861. This is not enough. The notes, when tendered, having been below par, as the petition shows, the petitioners should have alleged that the notes were issued prior to May, 1858, when section 603 of the code came into force. Admitting the view of the other side, that the contract attached to the note in every one's hands, and always, it will not apply to any notes after the legislature in any way took away the privilege given by section 12.

Now the contract was modified by section 603 of the code. We need not and do not argue that this section *repealed* section 12 of the charter. It is enough if it amounts to a certain modification of it. And this it did. It was in *pari materia* with section 12. It was in a code, that is to say in a statute, making a *corpus juris*, or body of the law, in which all previous provisions on any given subject were comprehended, arranged, enlarged, diminished, qualified, first enacted, or repealed. The section 603 first of all adverts to one class of money in which, independently of State power, taxes were payable, viz., constitutional and lawful money of the United States, and then makes a comprehensive enumeration, specifying, generally and particularly, both the sorts of money and the sorts of things in which, by its authority, the same taxes might also be paid. One of the provisions—"such bank notes as are current and passing at par"—included, by pre-eminence, as a matter of then existing fact, all notes of the Bank of Tennessee; for the notes of no bank circulated so largely or were so much confided in. It

probably meant specially to include them. It gave the notes certainly the same value as did section 12 of the charter, qualifying, however, by a familiar principle of legal hermeneutics, the privileges whenever the notes should cease to be at par, a condition not in the least anticipated at that time, but one to which, unhappily, and by extraordinary events, have since arrived to them.

The fact that we assert section 603 to be but a *modification* of section 12 of the charter, answers the question of the other side as to the act of 1865 repealing expressly that section 12. After the act of 1865, the notes of the Bank of Tennessee were not receivable at all; not even if they were at par. Before it and after the enactment of the code, they were receivable *if* at par.

3. There is no allegation in this petition that the notes tendered were lawful issues of the bank. The general allegation in the petition that the notes tendered were issued prior to the 6th of May, 1861, was not sufficient, because they may have been *reissued* after the 6th of May, 1861. It is evident from the act of February 16, 1866, made part of the petition, that notes of the bank, *although dated prior to 6th of May*, 1861, *were reissued after that date.* This court will not validate the acts of rebels and robbers who seized on the bank and reissued notes in this unlawful manner.

4. We have already said that the contract was one derived from statute and given to the person who took the note during the existence of the statute. The repealing act of 1865 put an end to the contract. After that date the notes lost their privilege.

5. If *Woodruff* v. *Trapnall* went to the extent of covering with the privileges of section 12 all the isssues of this bank, we should ask, in view of the dissent by four very able judges of that day, including Grier, J., happily surviving, to review this case. We should insist that the taxing power of the State could not be irremediably annulled by a legislature assuming to bind the State to receive mere paper in payment of its revenues; that the treasury could not thus be helplessly committed to what might prove as worthless as South

Sea certificates, or Confederate paper; that the taxing power unlimited and unrestrained, was vital, and could not be annihilated by being traded away; that power could not be constitutionally given to dishonest officers to bind the people of the State to the burden of redeeming multiplied millions of their promises, leaving the government, meanwhile, with no available source of revenue. But *Woodruff* v. *Trapnall* is not this case. The bank there was merely a money-making money agent of the State. The capital was borrowed on the credit of the State, and all dividends belonged to it. Here the capital consisted of certain trust funds, and was itself a sacred fund, set apart by the constitution of the State, and invested by public-spirited men, so as to be profitable for the purposes of the trust. The bank was used as a fiscal agent and public depositary in promotion of the general objects of the trust. The provision of the twelfth section was merely a regulation to govern the revenue officers of the State; a rule directory to the revenue officers and an authority to them, protecting them from liability should they receive the paper and loss ensue. It was not a contract with the holders of the bank paper, superadded to such contract, as the officers of the bank might think proper to make and express in language upon the paper itself.

In *Woodruff* v. *Trapnall*, it was admitted that the State might repeal the provision giving virtue to the notes, and that "the emissions of the bank subsequently are without the guarantee." As in this case, the plaintiffs do not allege a tender of notes issued prior to the enactment of section 603, that is, prior to 1858, but only of those issued prior to May 6th, 1861, they have not brought themselves within the provisions of the section.

Mr. Justice DAVIS delivered the opinion of the court.

The main question involved in this suit is of more importance than difficulty; but before we proceed to discuss it, it is necessary to consider the point of jurisdiction which is raised by the defendant in error. The circumstances under which this court is authorized to review the decisions

of State tribunals has been so often considered and decided, that there is hardly anything left to do, but to apply the already well-settled legal principles which govern this class of cases, to a particular record, in order to decide, whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through with the various adjudications of this court on this subject. It is enough for the purposes of this suit to say, that a cause can be removed from a State court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him, was denied to him by the State court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits.

Furman and Green, conceiving themselves aggrieved by the conduct of the county clerk in refusing their tender of the amount due the State for taxes in the notes and issues of the Bank of Tennessee issued prior to the 6th May, 1861, applied to the local Circuit Court for a mandamus to compel the county clerk to accept payment of the notes in discharge of Furman's obligation, and to issue to them a license as wholesale merchants. The application for the writ proceeded on the theory that the State had, in the passage of the act creating the Bank of Tennessee, in 1838, made a

contract with its people to receive these notes in payment of State taxes, and that it was not in the power of a subsequent legislature to impair the binding force of this contract.

The proceeding was an effort on the part of the plaintiffs in error to test the question of the validity of the authority of a public officer of the State, exercising authority under the State, on the ground that such authority was repugnant to that provision of the Federal Constitution which forbids a State to pass any law impairing the obligation of a contract. The purpose of the petition, the issue which it presented and sought to have determined, were as plainly to be seen, as if the words of the particular constitutional provision relied on had been inserted in it, and the obnoxious legislation spread out at length. All courts take notice, without pleading, of the Constitution of the United States, and the public laws of the State where they are exercising their functions.

It is insisted that the petition should have averred that the State had impaired, or by some act attempted to impair, the obligation of a contract, but this does sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes and entitled to have them received for taxes, by virtue of a contract with the State; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the legislature to impair the validity of this contract.

The mandamus was asked for to enforce a contract—to act directly on Nichol, the clerk and collector, who was exercising an authority under the State. What is plainer than that this proceeding impeached this authority, in its application to their case, because of legislation construed by this officer as depriving Furman of his right to pay his State taxes in notes of the Bank of Tennessee. If so, then the petitioners, insisting on the protection of the Constitution, drew in question both the validity of State legislation and the authority of the State officer; and unless the record discloses that the Supreme Court of Tennessee denied relief,

on other than Federal grounds, it is perfectly manifest that we are compelled to take jurisdiction of this cause.

But to proceed a step further. The cause was heard on the petition and a demurrer, admitting its truth, but denying its sufficiency.

There were three principal defences to the relief asked, specified in the demurrer, as was required by the Tennessee code of practice.

These were, first, that the twelfth section of the act incorporating the Bank of Tennessee, did not constitute a contract. Secondly, that there was no contract, because the said twelfth section was repealed by implication by section 603 of the code of 1858, and there was no averment that the notes were issued before that time. The third and last defence was, that the petition did not show that the plaintiffs became the owners of the notes before the direct repeal of the twelfth section by the legislature, in 1865. What possible difference can it make, in deciding the question of jurisdiction, on which of these three grounds the Supreme Court of Tennessee based their judgment? The right and duty of this court to hear and determine this case does not depend on our ability to prove that the Supreme Court of Tennessee was wrong in its judgment. Whether that judgment was right or wrong, it is reviewable here, if it necessarily drew in question the validity of a State statute, or of an authority exercised under it, on the ground of the repugnancy of the statute to the Constitution of the United States. That it did do this there would seem to be no doubt.

The defence really amounts to this, either that the alleged contract did not exist, or if it did, that there has been no legislation that impairs it.

Whether it be true or false, depends on the construction to be given the laws of the State, which are claimed as proving the making of the contract and its violation.

If so, this court decides for itself, whether the construction which the court below gave to these different statutes was correct or incorrect; and we are required to reverse, under the twenty-fifth section of the Judiciary Act, if we find that,

under an error of construction, that court has adjudged that no contract has been impaired. To do otherwise, would be to surrender to the State courts an important trust confided to this court by the Constitution.

Without pursuing the subject any further, it is clear from the record that the Supreme Court of Tennessee, in dismissing the petition for mandamus, necessarily adjudged that there was not at the time such a contract as the plaintiff, Furman, claimed authorized him to make the tender to the clerk, of the notes of the Bank of Tennessee. The jurisdiction of this court is, therefore, complete, and the case must be decided on its merits.

The State of Tennessee, through its legislature, in 1838, thought proper to create a bank "in its name and for its benefit." It was essentially a State institution. The State owned the capital and received the profits; appointed the directors, and pledged its faith and credit for its support. This would seem to have been enough to establish the credit of the institution on a firm basis, and to inspire confidence in the value of its notes, so that they would obtain a free circulation among the people as money. But the legislature, in its anxiety to insure for these notes a still greater confidence of the community, went further, and provided that they should be receivable at the treasury of the State, and by all tax collectors and other public officers, in all payments for taxes and other moneys due the State.

It will be readily seen, that nothing could have been better calculated to accomplish the purpose the legislature had in view than the incorporation of this guaranty into the charter of the bank. It assured the free circulation of their notes, gave them a credit over the issues of other banks, and furnished a security to those who held them against any serious loss, if, in the vicissitudes of trade, the bank itself should become embarrassed; for, annually, they would be enabled to use the notes at their par value in the payment of their taxes.

That this guaranty was, until withdrawn by the State, a

contract between the State and every note-holder of the bank, obliging the State to receive the notes for taxes, cannot admit of serious question.

The State was engaged in banking, and like other corporations engaged in the same business, desirous of using all legitimate means to increase the profits of the enterprise. The profits of a bank of issue depend in a great measure on the ability of the bank to keep its currency afloat. The longer the bills are withheld from redemption the greater the remuneration to the corporation. Every additional guaranty thrown around the bills, affecting their security and increasing the uses to which they can be put, affords necessarily additional inducements for the people in whose hands they fall to keep them, and not return them to the counter of the bank for redemption in specie. What so natural as that the intelligent legislators of 1838, knowing all this, should say to every person discounting a note, or taking it in the ordinary transactions of life, "If you will not return this note for redemption, we will take it from you for taxes? It is true you can demand specie for the bills, and so can the State demand specie for taxes, but if you will forego your right the State will do the same, and consent to receive from you, in lieu of specie, for the taxes due her, the notes of the bank." In such a transaction the benefit is mutual between the parties. The bank gets the interest on the notes as long as they are unredeemed, and the holder of the bills has a ready and convenient mode of paying taxes. The State did, therefore, in the charter creating the Bank of Tennessee, on good consideration, contract with the bill-holders to receive from them the paper of the bank for all taxes they owed the State. Until the legislature, in some proper way, notifies the public that the guaranty thus furnished has been withdrawn, such a contract is binding on the State, and within the protection of the Constitution of the United States.

An attempt is made to restrict the operation of this guaranty to the person who, in the course of dealing with the bank, receives the note, and not to extend it further.

Such an interpretation would render the guaranty of comparatively little value, and defeat the object which we have attempted to show, the legislature designed to accomplish by it. The guaranty is in no sense a personal one. It attaches to the note—is part of it, as much so as if written on the back of it; goes with the note everywhere, and invites every one who has taxes to pay to take it.

The quality of negotiability is annexed to the notes in words that cannot be misunderstood, and which indicate the purpose of the legislature, that they should be used by every one who is indebted to the State.

It is contended that the promise of the State was withdrawn in 1858, by section 603 of the code of that year—not in express terms, but by necessary implication. Courts do not favor repeals by implication, and never sanction them if the two acts can stand together. The provision of the code, which is deemed inconsistent with the continuance of the promise of the State, directs the kind of funds which collectors shall, after that time, receive for taxes. The legislature thought fit to confer upon the people the privilege of paying their taxes in the issues of other banks that were at par. As these issues were in circulation at the time, it was doubtless thought a wise policy to allow the people to pay their taxes in them, and as long as they were at par the State could not be the loser. This policy was adopted for the convenience of the people. There are in the statute no words of negation, saying that no funds other than those specified in the section shall be received. But we are to construe the different sections of the code together in order to arrive at the meaning of the legislature. In doing this, we find that where acts of incorporation are not expressly repealed, they are, in terms, saved from repeal by section 42 of the code. As there was no attempt in the code to interfere with the charter of the Bank of Tennessee, it follows that it was saved from repeal, and of course, that the guaranty contained in the twelfth section of the act of its incorporation was still continued. That the legislature so understood it receives additional confirmation from the consideration, that

this guaranty was expressly withdrawn in 1865. Why withdraw it then if it was withdrawn in 1858?

The effect of the repealing act of 1865 remains to be considered. It is true the State had the right at any time to withdraw its guaranty, but it is equally true that it must be done in such manner as not to impair the obligation of its contract with the note-holders of the bank. That this repealing act operated on all the issues of the bank after its date cannot be doubted, but the question with which we have to deal is, what effect did it have on the notes of the bank issued prior to its passage? It is conceded that these plaintiffs are entitled to the relief they ask, if the defendant was obliged to receive the notes which were tendered. The tender was made in the notes of the bank, issued prior to the 6th day of May, 1861, which were in conformity to its charter, and were payable to bearer. It does not appear when the notes came to the hands of the plaintiffs—whether before or after the repealing act—but it is a fair presumption, in the absence of any averment to the contrary, that it was after the date of that act.

It is insisted, as the bank during the rebellion was under the control of the usurping government, and was used by it for unlawful purposes, that it should have been stated that the notes tendered were the lawful issues of the bank. But it would seem the pleader had this state of things in his mind, and wished to avoid the issue it involved, for he avers that the notes were issued prior to the 6th day of May, 1861, the time when the State endeavored to sever its relations with the Union. The presumption is that the bank, before that time, issued its notes properly; and, in addition, it is stated, as we have seen, that they were issued in conformity with the twelfth section of its charter. It follows from this statement, necessarily, that they were the lawful issues of the bank. If the defendant wished to contest this point he should have answered, and not by his pleading, admitted the truth of the petition and all legal inferences that could be drawn from it.

This case is, therefore, not embarrassed by the changed

relation of the State after 1861; and the discussion of the principles which settle this case are not intended by the court to apply to the issues of this bank while under the control of the insurgents, because such a case is not before us, and it will be time enough to decide the important questions which it would present when it arises, if it ever should arise.

It is contended that the repealing act took from those persons who did not at the time hold the paper of the bank, the right to acquire it afterwards, and use it to discharge their debts to the State.

This construction of the contract would limit the obligation to the person, and withdraw it from the paper. If, as we have endeavored to show, the guaranty attached to the paper itself, and could not be withdrawn from it, then it follows that the notes in circulation at the time of the repeal are not affected by it, and carry with them the pledge of the State to be received in payment of taxes by every *bona fide* holder.

It would seem to be unnecessary to discuss any further the principles which lie at the foundation of this case, as they were settled in *Woodruff* v. *Trapnall*, heretofore decided by this court. The mere statement of that case will show its similarity to this. In 1836, the State of Arkansas, in the charter of a bank (owned and controlled by the State), declared that the notes of the institution should be received in payment of all debts due the State. Some years afterwards this provision of the charter was repealed. After its repeal, Trapnall, acting in behalf of the State, sued out an execution upon a judgment which the State had obtained against Woodruff, a defaulting treasurer. Woodruff met the demand of the writ by a tender (which was refused) of the notes of the bank, but whether he got these notes before or after the repealing act was passed, did not appear. On this state of things, Woodruff, to test his right to pay his debt in the paper of the bank, applied for a writ of mandamus against Trapnall, which was denied him by the State court. The case was brought here, as this is, under the twenty-fifth section of the Judiciary Act, and this court held that the

undertaking of the State to receive the notes of the bank, constituted a contract between the State and the holders of the notes, which the State was not at liberty to break; and that the tender of notes issued prior to the repealing act was good. It was also held, that it made no difference whether the debtor had the notes in his possession when the repealing act was passed or not.

It will thus be seen that *Woodruff* v. *Trapnall*, and this case, in all important features, are alike.

An attempt has been made to distinguish the cases, because in the Tennessee bank trust funds were embarked in the enterprise; but if the State thought proper to use them in this manner, it took care to pledge its faith to supply any deficiency that should arise through the mismanagement of the bank. It is difficult to see how the employment of these funds made the bank any less a State institution, for it was created expressly for the benefit of the State, who had the exclusive management of it, and agreed to support it. But if we concede that the State did wrong in using these funds in banking, can that *tend* even to justify her in breaking her promise to the note-holders of the bank?

Enough has been said to show, as the result of our views, that section 28 of the charter of the Bank of Tennessee constituted a contract with the holders of the notes of the bank, and that it was not in the constitutional power of the legislature to repeal the section so as to affect the notes which, at the time, were in circulation.

JUDGMENT reversed, and the cause remanded, with directions to enter a judgment

AWARDING THE WRIT OF MANDAMUS.

MEMPHIS CITY *v.* DEAN.

1. A question which is pending in one court of competent jurisdiction cannot be raised and agitated in another by adding a new party and raising a new question as to him along with the old one as to the former party. The old question is in the hands of the court first possessed of it, and is

to be decided by such court. The new one should be by suit in any proper court, against the new party.

2. A contract by a city corporation with an existing gas company, by which the corporation conferred upon the company the exclusive privilege for a term of years, and till notified to the contrary, of lighting the city with such public lamps as might be agreed on, and also the right to lay down its pipes and extend its apparatus through all the streets, alleys, lanes, or squares of the city, and which declared that "still further to encourage the company, it would take fifty lamps to begin with, to be extended hereafter as the public wants and increase of the city might demand, and such as might be agreed upon by the company and the city corporation," the company, in consideration of these grants, concessions, and privileges, binding itself to furnish to the city gas at half the price they charged their private consumers, does not give a right to the gas company exclusive of the city corporation's right to subscribe to the stock of a new gas company, whose object was to introduce gas into the same city.

APPEAL from the Circuit Court for the Western District of Tennessee, the case being thus:

In 1849 the State of Tennessee incorporated a company called the Memphis Gaslight Company. The charter provided as follows:

Sec. 3. It shall be the duty of said company to establish, within three years from the 1st of January, 1850, a gas manufactory within the city of Memphis, of sufficient capacity, to supply its corporate authorities and inhabitants with such public and private gaslights as may be required.

Sec. 4. To enable said company to establish said works, they are hereby authorized and empowered to lay down pipes and extend conductors and other apparatus through all or any of the streets, lanes, or alleys of the said city.

Sec. 5. The said company shall have the privilege of erecting, establishing, and constructing gasworks, and manufacturing and vending gas in the said city, by means of public works, for *the term of fifty years.* A reasonable price per thousand feet for gas shall be charged in the case of private individuals, *to be regulated by the prices in the other Southwestern cities;* and for public light such sums as may be agreed upon by the company and the public authorities of Memphis.

Another section provided, that if, at the end of twenty

years, the city resolved to buy the gasworks, it might do so; and a mode of fixing a fair price was prescribed for taking into consideration the value of the said gasworks, and the lands, buildings, utensils, *rights*, and interests, and everything thereunto appertaining.

The company being duly organized and set in operation, entered, in 1852, into a contract with the city authorities, by which these conferred upon it the *exclusive* privilege for twenty years, and until thereafter notified to the contrary, of lighting the city with such *public* lamps as might be agreed upon between the parties, and also the right to lay down its pipes and extend its conductors and other apparatus through *all or any* of the streets, alleys, lanes, or squares, and to exercise all the rights granted by its charter, without any other charge or tax by the city than upon the estimated value of their house and lot and one hundred dollars per annum.

The contract proceeded: "Still further to encourage the company, the city agree *to take fifty lamps to begin with, to be extended hereafter as the public wants and increase of the city may demand*, and such as may be agreed on by the company and the city; and the company, on its part, agree, in consideration of the said several grants, concessions, and privileges, to furnish the city, for the use of its public lamps, gas, at one-half the price they charged their private consumers."

In 1866, the State passed an act incorporating another gaslight company, to wit: "The Memphis Gayoso Gaslight Company," which established an office in Memphis, and went to work to lay down its gaspipes and extend its conductors and other apparatus through the streets of the city. The old company hereupon filed a bill in one of the State courts of chancery against the new company, setting forth the above facts, asserting that the privilege of furnishing gas to the city conferred by the act of 1849, incorporating the old company, was, by its very nature and purpose, an exclusive one, and that under the contract of 1852, it had been the intent of the city not only to vest in the old company the exclusive privilege of furnishing the public lights to the city, but, in fact, also to license it exclusively for a term of twenty years,

to make and sell gas for lights to the inhabitants by means of public works, and praying accordingly an injunction to the new company against laying pipes or establishing new works. On this bill, in the State court, a *preliminary* injunction was granted by the chancellor, so far as to restrain the new company from laying gaspipes so near to the pipes of the old company as to cause any injury to them, but denied so far as the bill sought to restrain the new company from proceeding with its works; the chancellor not seeing, as he said, that any exclusive privilege had been conferred on the old company.

Immediately after the decree, the city authorities of Memphis passed an ordinance authorizing the mayor to hold an election to test the sense of the voters of the city as to subscribing $250,000 to the stock of the new company; whereupon, on the following day, and before any election was held, Dean, a citizen of New York (the present appellee, and a large stockholder in the old company), filed a bill in this case in the court below, against the new company, and also against the city of Memphis, setting forth the act of incorporation of the old company, the company's organization and successful operation, with a statement of the outlays and trouble which organizing and putting it in such operation had cost; setting forth the contract of 1852; the act of incorporation of the new company; that this new company was laying down pipes and disturbing the ground where the pipes of the old one lay, and was injuring them; that it was asserting the right to manufacture gas by public works and sell the same to the inhabitants of Memphis in competition with the said company, and that this last had the exclusive privilege of supplying the corporate authorities and inhabitants with such public and private gaslights as might be required, which grant the General Assembly could not constitutionally revoke.

The bill set forth also the act of the city government authorizing an election, the bill in connection with that point, proceeding as follows:

"And the complainant apprehends that the influence of the

corporate authorities will be exercised upon the voters of the city, very few of whom comparatively are purchasers of gas, favorably to the said project, and that the said authorities will proceed to subscribe to the stock of the new company, and issue the bonds as contemplated in the said ordinance, and thus the defendants will consummate a great wrong to the complainant, to the great injury of the franchise of the old one."

Finally, the bill complained that the old company, of which the complainant alleged himself to be, perhaps, the largest stockholder, declined, at his request, to proceed in the courts against the rival company, and against the corporate authorities of Memphis, alleging that they had already filed a bill in the Chancery Court of the State, against the company, and obtained a partial injunction, but that they refused to proceed further.

The prayer was for an injunction restraining the city authorities from holding the election intended, or from subscribing to the stock, or issuing bonds, &c., and enjoining the new or Gayoso Company from laying pipes in the streets of Memphis, and from manufacturing gas and selling the same to the inhabitants.

To this bill the new or Gayoso company pleaded:

1. That it was not true, as alleged, that the Memphis or old company had refused to take the necessary legal steps to assert, and maintain the rights of complainant, but that, on the contrary, they had filed a bill in the State Chancery Court, wherein the same relief was sought as in the present bill, &c., &c.

2. That the said cause instituted in the said Chancery Court *was then still pending;* that the same identical matters were presented for adjudication as in the present bill; that the said court had full and ample jurisdiction; that a partial injunction had been obtained, and that the Gayoso or new company was still bound by the said partial injunction, *and was still subject to the further order of the said Chancery Court in the premises*, &c., &c. The record of the prior suit was tendered with the pleas, and substantiated the facts set forth in

them. The new company and the city of Memphis also put in answers. These admitted the facts stated by the bill as to the incorporation of the respective companies and their organization under the laws. They admitted also the contract between the old company and the city authorities, but they denied that the said contract gave any exclusive privilege except as to the *public* lamps. They also denied the power of the city to grant any such exclusive right, even if it had purposed to do so.

The cause was set down for hearing by consent of parties on the bill and exhibits, and on the answer of the new company and exhibits, and the answer of the city. And the court, after hearing, determined that the complainant was entitled to the relief prayed for, and decreed perpetual injunctions against the new company and the city, thus annihilating the new company. The cause was now before this court on appeal.

The questions considered by the court were:

1. Admitting that Dean, a mere individual stockholder in the older Memphis Gaslight Company, would have had a right to represent by himself, as he here assumed to do, the interest of the entire corporation, if the corporation had not itself brought suit in the State court, how far that suit, yet pending, precluded the institution of the present action; the suit in the State court being against the new corporation alone, and the present one being against both it and the city of Memphis?

2. It being decided that the suit in the State court against the new company did preclude the institution of the present one though against it *and the city*, whether—technical objections being disregarded—the contract of 1852 estopped the city from subscribing to stock in the new company.

Mr. F. P. Stanton, for the appellants:

1. Admitting that Dean, to establish an exclusive right in the old company, might have instituted suit against the new one, if the old company had refused to do so, yet here the pleas disclosed that there was no such refusal, but on the

contrary, the commencement of a suit. The injunction granted there was in full operation when Dean filed his bill in the court below; and it is evident that he went into the Federal court, in order to evade the jurisdiction of the local one; to appeal, in fact, from the decision of the State chancellor, who had refused to recognize the monopoly claimed by the old company. He made the mayor and aldermen parties to the proceeding, probably because he supposed that would enable him to avoid the plea of a prior action pending. But the fact of additional parties being included in the second suit does not alter the application of the principle. The test is the identity of the matters in issue, the rights claimed, and the relief sought. In both cases, the foundation of the proceeding is the same. Both rely upon the monopoly claimed by the elder gas company, the exclusive right said to be granted in their charter, to make and sell gas in Memphis. The proceeding against the city authorities depends wholly on this claim; for unless the exclusive right claimed can be established, there is no pretence of any right in a citizen of New York to interfere with the proposed acts of the mayor and aldermen. If that exclusive right can be established, then the injunction against the city would be useless, inasmuch as an injunction against the new company would suspend their work, in spite of the people or public authorities of Memphis.

2. The matter of exclusive right under the charter had been therefore passed on primarily, or was pending in the State court, a competent tribunal. This court would not interfere. Nothing therefore remained for the complainant but the contract of 1852, and it was plain from the terms of that contract, that under *it* all exclusive right was confined to supplying the public lamps, and this for but a limited term. Until the city should violate the contract, which it was not alleged that it had yet done, no right of action could lie against it.

Messrs. McRea and Humes, contra:

1. The plea denying the allegation of the bill that the old or

Memphis Gaslight Company had refused to take the necessary legal steps to assert and maintain the rights of the complainant, and the assertion in the plea that there was a former suit depending for the same cause of action, are answered by the fact that the suit begun in the State court by the old company, was brought against the new or Memphis Gayoso Gas Company alone. That bill only set up the claim of the old company to the exclusive privilege, and only asked an injunction to stop the progress on the streets of the rival company. The action of the other defendant—the city authorities—was taken after the disposition of the other cause in the State court, and was a new grievance. The present bill alleged that without reference to any exclusive privilege in the old company under its charter, the action of the city authorities is a fraud upon the contract made by them with the complainant's company; that the action of the board gives strength and credit to the other defendant, which enables it to prosecute its wrongs. This is enough to take the case from the objection of a prior suit pending, or *res judicata;* and to leave us the benefit of the principle *quia timet;* as a preventive remedy, one most beneficial to both parties, and to be therefore encouraged.

2. The contract of 1852 is exclusive not only of the right to supply public lamps for a certain term, but also of the right to *encourage* a rival to come into the city within the term, for after beginning with fifty lamps, it promises in order "*still further to encourage the company*," that as the city extends itself, it will increase the number of lamps for which gas shall be furnished. It gives the old company, moreover, "the right to lay down its pipes and extend its conductors and other apparatus through *all* of the streets, alleys, lanes, or squares of the city." This is necessarily exclusive. Gas-pipes must be laid down so as to occupy an inclined plane, and cannot be laid otherwise. This necessity arises from two causes: first, the gas being lighter than common air, its tendency is to rise, and hence the difficulty and great pressure required to force it through pipes descending from the reservoir. Secondly, the gas, in its passage from the works

or reservoir, carries with it vapor of water; this vapor, in its passage through the pipes underground, is condensed, and if no provision were made, the water would eventually obstruct the pipes and stop the passage of the gas. Therefore drip-boxes are placed at intervals to collect the liquor caused by condensation. The pipes must all incline into these drip-boxes to enable the water to drain into them. Thus the network of pipes is placed in a plane inclining to the drip-boxes and the reservoirs. Hence the absolute necessity that the company should have the exclusive use and occupation of the streets.

Moreover, the subtle character of gas renders it difficult to convey it through pipes without serious loss from leakage, and requires that the pipes should be laid on solid earth and remain perfectly undisturbed. The easement of the old company in the streets of the city would obviously be impaired by yielding to another company the same easement, and the charter of the latter must impair and destroy the obligation of the contract, made in 1852, with the former.

[In addition to the points thus raised, the counsel on both sides argued largely—asking the opinion of this court upon it—the question of the exclusive right of the old or Memphis Company under its *charter; Mr. Stanton* relying on the constitution of Tennessee, which he stated in section 22 of its declaration of rights declared "that perpetuities and *monopolies* were contrary to the genius of a free State, and should not be allowed," and on the *Bridge Proprietors* v. *Hoboken Company*, and *The Turnpike Company* v. *The State*,* late cases in this court, and to earlier ones, referred to in these cases, to show that neither on principle nor authority could the claim be sustained; and *Messrs. McRae and Humes* referring to the *Binghamton Bridge Case*,† to show that grants of exclusive privileges by legislatures were entirely legal, and that no strained or artificial construction would be made to defeat them if intended to be given; and that here the nature of the enterprise, one new, great, and hazardous in 1849, re-

* 1 Wallace, 116; 3 Id. 210.

† 3 Id. 74.

quiring to be encouraged and "still further encouraged," the facts that the charter was, by its words, but a limited term; that the *duty* of supplying the city and its inhabitants was made a condition of the privileges granted, imposed, and assumed, and so implied a correlative obligation to take; that the price of the gas was to be reasonable and regulated by the price in other and larger cities, where it might cost much less to manufacture; that the works were called "public works;" that the legislature had reserved a right to compel the old corporation to sell out on paying fair value for its property and *rights*, a reservation which would have been useless if they could set up another company, and a reservation which, to suppose was inserted with such a purpose secretly entertained, to set up such other company, would be discreditable to the city against which such supposition was raised.]

Mr. Justice NELSON delivered the opinion of the court.

The judgment of the court in the case of *Dodge* v. *Woolsey*,* authorizes the stockholder of a company to institute a suit in equity in his own name against a wrong-doer, whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their stock, in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused. This refusal of the board of directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company. There must be a clear default, therefore, on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf, or for himself and other stockholders who may choose to join. The plea in abatement in the record is founded upon this view of the law. It not only denies the refusal, but

* 18 Howard, 331–345. See also Bronson *v.* La Crosse Railroad Co., 2 Wallace, 283.

avers the institution of a suit in a court of competent jurisdiction, and in which the ground of complaint is substantially the same as set forth in the complainant's bill. This is a plea to the person of the complainant. Pleas to the person, says Mr. Daniel,* like pleas to the jurisdiction, do not necessarily dispute the validity of the rights, which are made the subject of the suit, but object to the plaintiff's ability to sue, or the defendant's liability to be sued respecting them. And Judge Story† observes, "They object to the plaintiff that he is by law disabled to sue in a court of justice, or that he cannot institute a suit alone, or that he is not the person he pretends to be, or that he does not sustain the character he assumes." These are properly pleas in abatement, or at least in the nature of abatement.‡

It is insisted, however, on the part of the learned counsel for the appellee, that the suit in the State court did not cover all the grievances set forth in his bill, as the directors were required to proceed against the city of Memphis, which was not a party defendant in that suit, but is in the present one. The charge in his bill is, that the city authorities passed an ordinance authorizing the mayor to hold an election to test the sense of the voters of the city as to the propriety of subscribing $250,000 to the stock of the Memphis Gayoso Company, and he apprehends that the influence of the corporate authorities will be exercised on the voters favorable to the company, and will proceed to subscribe to its stock; and further, that the city had entered into a contract with complainant's company to furnish the lamps of the city with gas for twenty years, and that this action of the city is in violation of that contract; and the bill prays that the city may be enjoined from holding the election or subscribing to the stock. This is the branch of the case relied on to show that the suit in the State court was not a compliance with, or a fulfilment of, the request of the complainant to the directors of the Memphis Gaslight Company to institute legal proceedings.

* 1 Chancery Practice, 744. † Equity Pleading, 545.

‡ Ib. 549, and note 2.

Opinion of the court.

But, admitting all this to be true, it furnishes no valid ground for making the Memphis Gayoso Gas Company a party, and agitating over again the same question which was pending in the State court, namely, whether or not the Memphis Gaslight Company had an exclusive right to furnish the city of Memphis with gas. There is no necessary connection between that suit, or the subject-matter involved in it, and the one against the city. The former turns upon a construction of the charter of the Memphis Gaslight Company. The latter, upon a written contract between this company and the city. The question here has no connection with that of the exclusive privileges of the company under the charter. If any suit was desired, or advisable, against the city, it should have been a separate one, founded on the contract.

Besides, the suit against the city was premature. Until the question was decided whether or not the Memphis Gayoso Gas Company was valid, and had a right to establish itself in the city of Memphis, the suit against the city was founded on a hypothetical case. If held by the State court, on the final hearing, that the Memphis Gas Company had the exclusive right, the existence of the other company must cease, and the suit against the city would be superfluous.

The suit is premature, also, for the reason it is founded on a contingency, that a majority of the voters of the city will vote in favor of a city subscription to the stock. The bill seeks to enjoin the city from holding the election, for fear a majority may favor subscription; and then, that the city will subscribe. The complainant should have waited till after the result of the election, and, if it had been against making any subscription, no suit would have been required; if in favor, it would have been time enough to have filed the bill.

But, over and beyond all these objections, we are satisfied that there is nothing in the provisions of the contract that can be made available to estop the city from subscribing to the stock. It secures to the complainant's company the ex-

clusive privilege of supplying the public lamps in the streets of the city with gas for twenty years, at one-half the price which is charged to private persons. This is the essence of the contract. There are other details to enable the company to fulfil its portion of the stipulations, such as the privilege of laying down their pipes in the streets, and of exercising all the rights under the charter within the limits of the city, without any other tax or charge than upon the estimated value of their house and lot, and one hundred dollars per annum. The city agrees to take fifty public lamps to begin with, to be extended thereafter according to the public wants. All the obligations, whatever they may be, to be found in the contract on the part of the city are binding upon it, and if broken, the courts will afford the proper remedy. The establishment of another company therein will not change its nature or obligation, much less abrogate it. To this extent the city is bound, but no further. There is neither an express or implied obligation not to take stock in any other company.

The idea that the subscription to the stock of the new company would aid or encourage its establishment in the city, and hence would operate as a violation of the contract, finds no support in that instrument.

The result of our opinion is, that the only question that it was competent for the complainant, as a stockholder of the Memphis Gaslight Company, to compel the directors to present to a court of justice, was that involving its exclusive right, under the charter, to furnish the city of Memphis with gas; and as that had been presented to a court of competent jurisdiction, in a suit then pending, he is disabled, according to the settled rule on this subject, from instituting a suit in his own name in another court.

DECREE BELOW REVERSED, remitted to the court below, with directions to dismiss the bill.

Statement of the case.

UNITED STATES *v.* SPEED.

1. The War Department, by its proper officers, may make a valid contract for the slaughtering, curing, and packing of pork, when that is the most expedient mode of securing army supplies of that kind.
2. Such a contract, when for a definite amount of such work, is valid, though it contains no provision for its termination by the Commissary-General at his option.
3. The act of March 2d, 1861, requiring such contracts to be advertised, authorizes the officer in charge of the matter to dispense with advertising, when the exigencies of the service requires it; and it is settled, that the validity of a contract, under such circumstances, does not depend on the degree of skill or wisdom with which the discretion thus conferred is exercised.
4. Where the obligation of one party to a contract requires of him the expenditure of a large sum in preparation to perform, and a continuous readiness to perform, the law implies a corresponding obligation on the other party to do what is necessary to enable the first to comply with his agreement.
5. Where the defendant agreed to pack a definite number of hogs for plaintiff, and made all his preparations to do so, and was ready to do so, but the defendant refused to furnish the hogs to be packed, the measure of damages is the difference between the cost of doing the work and the price agreed to be paid for it, making reasonable deductions for the less time engaged, and for release from the care, trouble, risk, and responsibility attending its full execution.

APPEAL from the Court of Claims. The case was thus:

By an act of 14th April, 1818,* "the Commissary-General and his assistants shall perform such duties in purchasing and issuing of rations as the President shall direct;" "supplies for the army (unless in particular and urgent cases the Secretary of War should otherwise direct) shall be *purchased* by contract, on public notice," &c., "which contract shall be made under such *regulations* as the Secretary of War may direct." One of the *regulations* prescribed by the Secretary of War, and which made Rule No. 1179 in the Army Regulations of 1863, is thus:

"Contracts for *subsistence stores* shall be made after due *public*

* 3 Stat. at Large, 426, §§ 6, 7.

notice, and on the lowest proposals received from a responsible person who produces the required article. *These agreements shall expressly provide for their termination at such time as the Commissary-General may direct.*"

By an act of March 2, 1861,* it is provided, that

"All purchases and contracts for supplies or services in any of the departments of the government, except for personal services, *when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service*, shall be made by advertising a sufficient time previously for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service may be procured by open purchase or contract at the places, and in the manner in which such articles are usually bought and sold, or such services engaged between individuals."

These statutes and regulations being in force, the Secretary of War, through the Commissary-General, authorized Major Simonds, at Louisville, in October, 1864, and during the late rebellion, to buy hogs and enter into contracts for slaughtering and packing them, to furnish pork for the army.

On the 27th of October, Simonds, for the United States, and Speed, made a contract, by which the live hogs, the cooperage, salt, and other necessary materials, were to be delivered to Speed by the United States, and he was to do the work of slaughtering and packing. The contract was agreed to be subject to the approval of the Commissary-General of Subsistence.

No advertisements for bids or proposals was put out before making the contract, nor did the contract contain a provision that it should terminate at such times as the Commissary-General should direct.

After the contract was made, Simonds wrote—as the facts were found under the rules, by the Court of Claims, to be—to the Commissary-General, informing him substantially of its terms; but no copy of it, nor the contract itself, was pre-

* 12 Stat. at Large, 220.

sented to the Commissary-General for formal approval. The Commissary-General thereupon wrote to Simonds, expressing his satisfaction at the progress made, and adding: "The whole subject of pork-packing at Louisville is placed subject to your direction under the advice of Colonel Kilburn."

The claimant incurred large expenditures in the preparation for fulfilling his contract. He also kept, during the whole season, the full complement of hands necessary to have slaughtered the whole 50,000 hogs within the customary season. During the season, there were furnished to the claimant 16,107 hogs; but owing to the high price of hogs, Simonds, with the approval of the Commissary-General, gave up the enterprise, and refused to furnish the remainder of the 50,000 hogs.

Upon these facts the Court of Claims held,

1st. That the Secretary of War, through the Commissary-General, might authorize such a contract to be made without a resort to the advertisement and bids proposed.

2d. That the letter of the Commissary-General was a virtual approval of the contract.

3d. That the contract was an engagement on the part of the United States to furnish 50,000 hogs to the claimant, to slaughter and pack at the stipulated price, and that their failure in part to perform the same entitled the plaintiff to recover damages.

4th. That the true measure of damages was the difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deductions for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract.

The court awarded damages accordingly to the claimant, and the United States appealed.

Mr. Dickey, Assistant Attorney-General, for the appellant:

1. Where Congress has intended that the government shall embark in the business of manufacturing any of the *materiel* of war, it has made special provision by law for its doing so.

It has established armories and navy-yards, and provided for the making of arms and the building of vessels; but nowhere can be found any enactment authorizing any officer or class of officers to embark the government in the business of curing pork or bacon, or in the business of raising corn, or hogs, or cattle, or horses, or mules, or asses for the army.

2. The contract is not binding upon the United States, because it contains no provision "for the termination" of the contract "at such times as the Commissary-General may direct."

This contract, containing no such provision, is a contract made in violation of the statute of 1818, and is not binding upon the United States.

3. If the want in this contract of the provision for its termination at such time as the Commissary-General shall direct, does not vitiate the contract, it must be held that the contract will be treated as *containing* the *clause*, inasmuch as the law requires that it should contain the clause. Pork-packing and curing bacon is not within the scope of the powers of the Secretary of War and of his subordinates, and if the contract is regarded as containing this provision, then there is an end of this case, for in that case it was no violation of the contract for Simonds, with the approbation of the Commissary-General, to terminate the contract at any time.

4. This contract is not binding upon the United States, because there was no advertisement for proposals before the contract was made, as required by the act of March 2, 1861. The Court of Claims do not find that any public exigency required "the immediate delivery of the article, or performance of the service;" on the contrary, the very nature of the contract shows that immediate delivery or immediate performance was not contemplated.

5. Where a contract is made subject to the approval of the Commissary-General, it is not binding on the United States until it is so approved, after the commissary has full knowledge of all the provisions and defects of the contract. It is not sufficient that he be informed "substantially

of its terms," as was the fact in this case. This does not show that the Commissary-General was informed that this contract contained no clause for its termination at the will of the Commissary-General; nor that the Commissary-General was informed that the contract was made privately without advertisement for proposals, as required by law and the regulations.

6. By the terms of the contract, the United States were not bound to furnish to the claimant any given number of hogs. The true construction of the contract is, that claimant agreed to slaughter the "hogs presented" by the United States, for the price per hundred pounds specified, up to the number of 50,000 hogs.

7. Assuming the contract valid and binding upon the United States, and that it required the United States to furnish the full 50,000 hogs, and that it could not be terminated by the Commissary-General without the consent of the claimant, still the facts found do not show a statement of case enabling claimant to have an action for a breach of the contract by the United States. Though the "claimant incurred large expenditures in the preparation *for* fulfilling his contract," yet it does not appear that he *completed* the *necessary preparation* to fulfil his contract, or that he was ever *ready at any time* to slaughter *a single hog*. He kept, it is true, all "the hands necessary," but it required *other things* beside hands, and it does not appear that any one of these things was provided.

The covenants or undertakings in this contract are clearly mutual and dependent, and before claimant can recover for the breach alleged, he must show a readiness, a willingness, and an offer on his part to perform.

8. The rule for the measure of damages is not a correct rule as applied to the facts found. It does not appear that the claimant's hands were kept in idleness, or even unprofitably employed. For aught that appears, they and the other expensive preparations were in fact more profitably employed in slaughtering hogs for other parties, which work could not have been performed if the government contract

had not been abandoned. In fact, the abandonment of the contract by the government may have been a source of profit to claimant rather than of loss.

Mr. C. F. Peck, contra.

Mr. Justice MILLER delivered the opinion of the court.

The counsel for the appellant urges eight separate objections to this judgment, which we must notice in the order they are presented.

1. Pork-packing and curing bacon is not a business within the scope of the powers of the Secretary of War, or his subordinates.

If by this is meant that the War Department has no authority to enter into the business of converting hogs into pork, lard, and bacon, for purposes of profit or sale as individuals do, the proposition may be conceded. But, if it is intended to deny to the department this mode of procuring supplies when it may be the only sufficient source of supply for the army, the proposition is not sound. The Commissary Department is in the habit, and always has been, of buying beef cattle and having them slaughtered and delivered to the forces. Is there no power to pay the butchers who kill for their services? That is just what the claimants contracted to do with the hogs which the government had purchased of other parties, and it is for this butchering and curing the meat that the government agreed to pay. The proposition places a construction altogether too narrow on the powers confided to the War Department in procuring subsistence, which in time of war, as this was, must lead to great embarrassment in the movement and support of troops in the field.

2. The contract is not binding, because it contains no provision for terminating it at the discretion of the Commissary-General.

This objection is based on Rule 1179 of the Army Regulations of 1863. But that has reference to contracts for the regular and continuous supply of subsistence stores, and

not to contracts for services or labor; and it is required because the post or force to be supplied may be suddenly removed or greatly diminished. It has no application to a contract for a certain amount of supplies, neither more nor less, or to do a specific job of work requiring skilled labor. While the commissary might have insisted on a provision in this contract that he should only be required to pay for packing as many hogs as he chose to furnish, for which he might in that event have been charged a higher price, he did not do so, and cannot have the benefit of it as though he had.

3. This answers also the third point, namely: that the agreement is to be treated as though that provision were in it.

4. That it is not binding on the United States, because there was no advertisement for proposals to contract.

This objection is founded on the act of March 2, 1861.*

But that statute, while requiring such advertisement as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance.

It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise.†

5. The contract was not approved by the Commissary-General.

The agreement contains a provision that it is subject to the approval of that officer. The Court of Claims finds that, while no copy of the agreement was presented to the Com-

* 12 Stat. at Large, 220.

† Philadelphia & Trenton Railroad Co. *v.* Stimpson, 14 Peters, 448; Martin *v.* Mott, 12 Wheaton, 19; Royal British Bank *v.* Turquand, 6 Ellis & Blackburn, 327; Maclae *v.* Sutherland, 25 English Law and Equity, 114; Ross *v.* Reed, 1 Wheaton, 482.

missary-General for formal approval, Major Simonds wrote him a letter informing him substantially of its terms, to which he replied, expressing his satisfaction at the progress made; and the court further finds as a conclusion of law that the letter of the Commissary-General was a virtual approval of the contract. We are of opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer; and inasmuch as neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did.

6. That by the terms of the contract the United States were not bound to furnish any given number of hogs.

Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs requires an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant. But the last article of the agreement seems to be an express promise to furnish all the hogs mentioned in the contract.

7. That plaintiffs have not proved that they were ready and willing to perform.

But the Court of Claims find this readiness, for they say that "claimants incurred large expenditures in preparation for fulfilling their contract, and during the whole season kept the full complement of hands necessary to have slaughtered the whole 50,000 within the customary season."

8. The rule for the measure of damages is not the correct rule as applied to the facts.

What would be the true rule is not pointed out. And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work and what claimants were

Statement of the case.

to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract.

The leading case on this subject in this country is *Masterton* v. *Brooklyn*,* and that fully supports the proposition of the Court of Claims.

EX PARTE YERGER.

1. In all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.
2. The second section of the act of March 27th, 1868, repealing so much of the act of February 5th, 1867, as authorized appeals from the Circuit Courts to the Supreme Court, does not take away or affect the appellate jurisdiction of this court by *habeas corpus*, under the Constitution and the acts of Congress prior to the date of the last-named act.

ON motion and petition for writs of *habeas corpus and certiorari*, the case being thus:

The Constitution ordains in regard to the judiciary as follows:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States," &c.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

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* 7 Hill, 62.

It makes provisions, also, in regard to the writ of *habeas corpus*, thus:

"The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

With these provisions in force, as fundamental law, the first Congress by the 14th section of the act of September 24th, 1789,* to establish the judicial courts of the United States, after certain enactments relating to the Supreme Court, the Circuit Courts, and the District Courts of the United States, enacted:

"That all the before-mentioned courts shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and 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 and inquiry into the cause of commitment: *Provided*, That writs of *habeas corpus* shall in *no case extend to prisoners in jail unless 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.*"

By statute of 1833,† the writ was extended to prisoners confined under any authority, whether State or National, for any act done or omitted in pursuance of a law of the United States, or of any order, process, or decree of any judge or court of the United States; and by an act of 1842,‡ to prisoners, being subjects or citizens of foreign states, in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations.

The writ was, however, much further extended, by an act of the 5th February, 1867,§ entitled "An act to 'amend' the

* 1 Stat. at Large, 81. † 4 Id. 634. ‡ 5 Id. 539. § 14 Id. 385.

Judiciary Act of 1789, above quoted." This act of 1867, provided:

"That 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, 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*," &c.

And after providing for the awarding and hearing of the writ, the act proceeds:

"From the final decision of any judge, justice, or courts inferior to the Circuit Court, *appeal* may be taken from the Circuit Court of the United States for the district in which the said cause is heard, and from the judgment *of said Circuit Court to the Supreme Court of the United States.*"

Finally, by an act of March 27th, 1868,* passed after an appeal in a particular case, the subject of much party discussion, under the above-quoted act of 1867, from the Circuit Court to the Supreme Court of the United States, had been argued before this latter court, had been taken into advisement by it—a history more particularly set forth in *Ex parte McCardle*†—Congress passed an act providing by its second section:

"That *so much of the act*, approved February 5th, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24th, 1789,' *as authorized an appeal* from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court *on appeals* which have been or may hereafter be taken, be, and the same is hereby, repealed."

In this state of constitutional and statutory provisions, a writ of *habeas corpus* upon the prayer of one Yerger, addressed to the Circuit Court of the United States for the Southern District of Mississippi, was directed to certain military officers

* 15 Stat. at Large, 44. † 7 Wallace, 509.

holding the petitioner in custody, commanding them to produce his body, and abide the order of the court.

In obedience to this writ, the petitioner was brought into court by Major-General R. S. Granger, who made return in due form, certifying the cause of detention to be, that the petitioner had been arrested, and was held for trial, upon a charge of murder, by a *military commission*, under the act of Congress of the 2d of March, 1867, "to provide for the more efficient government of the rebel States."

Upon this return, the petitioner was ordered into the custody of the marshal, and the court proceeded to hear argument. It was admitted on the part of the United States, that the petitioner was a private citizen of the State of Mississippi; that he was being tried by the military commission, without a jury, and without presentment or indictment by a grand jury; and, that he was not, and never had been, connected with the army and navy of the United States, or with the militia in active service in time of war or invasion.

Upon this case, the Circuit Court adjudged that the imprisonment of the petitioner was lawful, and passed an order that the writ of *habeas corpus* be dismissed, and that the prisoner be remanded to the custody of the military officer by whom he had been brought into court, to be held and detained for the purposes, and to answer the charge set forth in the return.

To obtain the reversal of that order, and relief from imprisonment, the petitioner now asked for a writ of *certiorari* to bring here for review the proceedings of the Circuit Court, and for a writ of *habeas corpus* to be issued, under the authority of this court, to the officers to whose custody he was remanded.

The questions therefore were:

1. Whether the action of the Circuit Court was to be regarded as the cause of the commitment, to which the act of 1789 applies the writ of *habeas corpus;* and whether, if found unlawful, relief might be granted, although the original imprisonment was by military officers for the purpose of a trial before a military commission.

Argument in favor of jurisdiction.

2. If the court possessed this jurisdiction, had it been taken away by the 2d section of the act of March, 1867?

Upon the suggestion of the Attorney-General, made in view of the importance of the questions which would probably arise, if the case was brought to hearing, the court ordered preliminary argument upon the jurisdiction of the court to issue the writ prayed for; the only question, therefore, raised in the present stage of the case.

Messrs. P. Phillips and Carlisle, in support of the motion, conceding that this court could grant the writ only in the exercise of the appellate jurisdiction, yet argued, that the writ of *habeas corpus*, being a bulwark of freedom, demanded a liberal interpretation of clauses in the Constitution and statutes relating to it, so as to allow and preserve the writ, rather than to withhold or destroy it; that the grant of the writ as here invoked was in the exercise of an appellate power; that, as was decided in *Ex parte Milligan*,* in the face of a powerful argument by Mr. Stanbery to the contrary, proceeding in *habeas corpus* was a suit, a process of law, by which the party sought to obtain his rights. The proceeding in the Circuit Court was therefore a suit; and, undoubtedly, there had been an order in it; an order, namely, that the writ of *habeas corpus* be dismissed, and the prisoner remanded to answer the charge set forth in the return. Yerger, the prisoner in this case, was, therefore, at this time, in the possession of the military authorities, in virtue of an order of the Circuit Court. The review by this court of such an order, was an exercise of appellate power, and of no other power.

It was, therefore, unnecessary to invoke such cases as *In re Kaine*.†

But if the exercise of the power which was asked, were not the exercise of a power in review of a decision of the Circuit Court, that case would still authorize this application. What was that case? Kaine was arrested as an alleged fugitive from justice, and brought before *a United States Com-*

* 4 Wallace, 2. † 14 Howard, 103.

missioner, who made an order committing him to custody, to abide the order of the President. A writ of *habeas corpus* was then issued by the Circuit Court of the United States for the Southern District of New York. Kaine was brought before that court. After a hearing, the writ was dismissed, and Kaine was remanded and continued in the custody of the marshal under the arrest and commitment *by the process of the commissioner*.

An application was finally made in this court for a writ of *habeas corpus* and a *certiorari* to the Circuit Court, in order to review the order made by that court, remanding the prisoner to the custody of the marshal.

On the hearing of this motion, the writ was refused, not because of any doubt of the jurisdiction of the court to award the writ, but because a majority of the court was of opinion that on the *merits* the prisoner was not entitled to his discharge. No member of the court expressed an opinion that the court did not have power, in the exercise of its appellate jurisdiction, to award the writ in order to "inquire into the cause of the commitment" made by the Circuit Court, and to review the judgment of that court; which, this court considered, had been made by the order of remand to the commissioner; though no power might exist in this court to review directly the act of the commissioner himself. On the contrary, the jurisdiction was plainly asserted.

In *Ex parte Wells*,* convicted of murder, and whose sentence was commuted by the President to imprisonment for life, a *habeas corpus* was issued by the Circuit Court. On the return, the position taken by the prisoner that the pardon was absolute and the condition void, was overruled. The writ was dismissed and the prisoner remanded. On application to this court for *habeas corpus* to reverse this proceeding, all the judges, but Curtis and Campbell, JJ., maintained the jurisdiction. Curtis, J., refers to his denial of the jurisdiction in Kaine's case. It will be seen that this denial is placed on the ground that "the custody of the prisoner was at no time

* 18 Howard, 307.

changed." He admits "that when a prisoner is brought into court, he is in the power and under the control of the court; but unless the court make some order, changing the custody, the original custody continues."

The question being, whether the order remanding to custody made by the Circuit Court is the "cause of commitment" referred to in the act of 1789, and so subject to the appellate jurisdiction, by means of the *habeas corpus*, the turning-point in the opinion of the dissenting judge is, whether the Circuit Court has made an order, when the prisoner is produced, changing the original custody. If it has, then it is admitted, that when he is remanded to the original custody, the order or judgment effecting this is the "cause of commitment," and may be reviewed in this court under the provisions of the act of 1789.

The entry in this case is precisely of that character which gives jurisdiction according to the test made by Curtis, J.

When the prisoner was brought into court, he was ordered into the custody of the marshal of the district, and there he remained until he was remanded.

No judge of this court, since its organization, except Baldwin, J., has ever doubted the jurisdiction in such a case as this. That judge fell into the error of holding that the appellate jurisdiction of this court could only be exercised by appeal or writ of error. This opinion was given by him on an application for mandamus (in *Ex parte Crane*), but the court granted the writ.

Independent of authority, it is clear, on principle, that the exercise of the appellate power is not limited to any particular *form*. When the object is to revise a judicial proceeding the *mode* is wholly unimportant, and a writ of *habeas corpus*, mandamus, certificate of division, writ of error, appeal, or *certiorari* may be used, if the legislature so determine.*

On the second point, the counsel contended that the act of 1867 did not repeal the act of 1789, but, on the contrary, recognized it. Its title was "to amend" that act. It

* 2 Story's Commentaries on the Constitution, 570.

gave powers in addition to those given by the old act; including an appeal to this court. A repeal is not to be presumed where the language left the intention of the legislature doubtful.* The act of 1868 took away nothing but the appeal here. But even if the act of 1867 repealed the act of 1789, and the act of 1868 repealed that of 1867, the old act would be revived; a repeal of a repealing statute reviving the original statute.

Mr. Hoar, Attorney-General of the United States, contended that the addressing of the writ to General Granger would be an exercise of original jurisdiction alone. He does not hold the prisoner under any order or decree of the Circuit Court, but holds him by military power. The order of remand made no new commitment, and issued no new process as an instrument for it, but only pronounced the old process valid, and consequently the continuance of the commitment under it legal. The custody was at no time changed. Certainly, when a prisoner is brought into court upon the return of a *habeas corpus* and *subjiciendum*, he was then in the power and under the control of the court. The court might admit him to bail, and might also take order for the future production of the prisoner without bail; but in all cases, until the court made some order changing the custody, either for the care or security of the prisoner, or founded on the illegality of his commitment, the original custody continued. In this case no such order was made. It might as well be said, when a child is left in possession of his father after a hearing on *habeas corpus* seeking to get him out of it, that the father holds his child by judgment of the court, as here that the prisoner is in General Granger's custody by judgment of the Circuit Court. In the case of the child, the father holds the child in virtue of his parental right, which the court perceiving, has asserted. So in the case of the petitioner, the court has simply let him alone; left him where it found him.

This being the case, the writ will not lie; for certainly this

* City of Galena *v.* Amy, 5 Wallace, 705.

court cannot exercise appellate control over the proceeding of a military commission.

The decision *In re Kaine* has no bearing. The refusal was on merits. Any admission or assertion of jurisdiction in such a case is of no value. Some judges are fond of *dicta* and irrelative assertion and argument. When denying an application on merits, they will concede that they have jurisdiction, and *vice versâ*. But the point adjudged is the only matter of value, and *In re Kaine*, this point was, that the case was without merits. *Metzger's case*,* on the other hand, seems much in point. It was the case of an application for the writ by a prisoner committed to the custody of the marshal by the district judge, at his chambers, under the French treaty of extradition.

This court refused the writ on the ground that there is no form in which an appellate power can be exercised by it over the proceedings of a district judge at his chambers. The court say: "He exercises a special authority, and the law has made no provision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently, cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have the power to confer it."

The *habeas corpus* issued with the *certiorari* as an adjunct to the appellate power, is only permitted where the custody of the prisoner is an essential part of the judgment or decree from which the appeal is taken.

The repeal by the statute of March 27th, 1868, of so much of the act of February 5th, 1867, as granted appellate power to this court in cases of this nature, was intended and should be construed as taking away, not the whole appellate power in cases of *habeas corpus*, but the appellate power in cases to which that act applied. It did not mean merely to substitute a cumbrous and inconvenient form of remedy for a direct and simple one.†

* 5 Howard, 176 † Ex parte McCardle, 7 Wallace, 506.

Opinion of the court.

Reply.—1. The prisoner *was* in the custody of General Granger. The *habeas corpus* below took him out of that custody. He went into the custody of the court; the custody was changed into its charge completely. If the court had liberated him, would he not have been liberated by decree of the court? Why, when instead of being liberated, he is sent away into the custody of General Granger, is he not so sent by decree of the court? If General Granger were sued by Yerger for false imprisonment, could not, and would not the order of remand be pleaded in bar? In all cases of judicial decree, the decree does but pronounce an old right valid, and continue an original title. A. sues B. to recover land which B. and his ancestors for generations have owned and been possessed of. The court gives judgment for B. Does B. not hold the land by decree of the court? Yet the court has only left him where he was. Perceiving a right to it, the court has asserted it. The case of Kaine was subsequent to that of Metzger, and a peculiar case at best, and controls it.

2. The argument of the Attorney-General confounds "appeal," a specific form of remedy given by the act of 1867, with "appellate power," which existed in another form, and was conferred by a prior act. But after all, it only asks that the appellate power may be considered as repealed in cases to which that act (the act of 1867) applied. But this act is more comprehensive than any act whatever.

The CHIEF JUSTICE delivered the opinion of the court.

The argument, by the direction of the court, was confined to the single point of the jurisdiction of the court to issue the writ prayed for. We have carefully considered the reasonings which have been addressed to us, and I am now to state the conclusions to which we have come.

The general question of jurisdiction in this case resolves itself necessarily into two other questions:

1. Has the court jurisdiction, in a case like the present, to inquire into the cause of detention, alleged to be unlawful, and to give relief, if the detention be found to be in fact

unlawful, by the writ of *habeas corpus*, under the Judiciary Act of 1789?

2. If, under that act, the court possessed this jurisdiction, has it been taken away by the second section of the act of March, 27, 1868,* repealing so much of the act of February 5, 1867,† as authorizes appeals from Circuit Courts to the Supreme Court?

Neither of these questions is new here. The first has, on several occasions, received very full consideration, and very deliberate judgment.

A cause, so important as that which now invokes the action of this court, seems however to justify a reconsideration of the grounds upon which its jurisdiction has been heretofore maintained.

The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.

In England, after a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679,‡ "for the better securing of the liberty of the subject," which, as Blackstone says, "is frequently considered as another Magna Charta."§

It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors.

Naturally, therefore, when the confederated colonies became united States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words:

"The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to ap-

* 15 Stat. at Large, 44. † 14 Id. 385.

‡ 3 British Stat. at Large, 397; 3 Hallam's Constitutional History, 19.

§ 3 Commentary, 135.

plicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.

We find, accordingly, that the first Congress under the Constitution, after defining, by various sections of the act of September 24, 1789, the jurisdiction of the District Courts, the Circuit Courts, and the Supreme Court in other cases, proceeded, in the 14th section, to enact, "that all the beforementioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."* In the same section, it was further provided "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 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."

That this court is one of the courts to which the power to issue writs of *habeas corpus* is expressly given by the terms of this section has never been questioned. It would have been, indeed, a remarkable anomaly if this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess.

But the power vested in this court is, in an important particular, unlike that possessed by the English courts. The jurisdiction of this court is conferred by the Constitution,

* 1 Stat. at Large, 81.

and is appellate; whereas, that of the English courts, though declared and defined by statutes, is derived from the common law, and is original.

The judicial power of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority, and to large classes of cases determined by the character of the parties, or the nature of the controversy.

That part of this judicial power vested in this court is defined by the Constitution in these words:

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

If the question were a new one, it would, perhaps, deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction, extend the original jurisdiction to other cases than those expressly enumerated in the Constitution; and especially, in view of the constitutional guaranty of the writ of *habeas corpus*, to cases arising upon petition for that writ.

But, in the case of *Marbury* v. *Madison*,* it was determined, upon full consideration, that the power to issue writs of mandamus, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.

It was pronounced in 1803. In 1807 the same construction was given to the provision of the 14th section relating to the writ of *habeas corpus*, in the case of *Bollman and Swartwout*.†

The power to issue the writ had been previously exercised

* 1 Cranch, 137. † 4 Id. 100.

in *Hamilton's case** (1795), and in *Burford's case*† (1806), in neither of which cases does the distinction between appellate and original jurisdiction appear to have been made.

In the case of *Bollman and Swartwout*, however, the point was brought distinctly before the court; the nature of the jurisdiction was carefully examined, and it was declared to be appellate. The question then determined has not since been drawn into controversy.

The doctrine of the Constitution and of the cases thus far may be summed up in these propositions:

(1.) The original jurisdiction of this court cannot be extended by Congress to any other cases than those expressly defined by the Constitution.

(2.) The appellate jurisdiction of this court, conferred by the Constitution, extends to all other cases within the judicial power of the United States.

(3.) This appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make.

(4.) Congress not only has not excepted writs of *habeas corpus* and *mandamus* from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs.

We come, then, to consider the first great question made in the case now before us.

We shall assume, upon the authority of the decisions referred to, what we should hold were the question now for the first time presented to us, that in a proper case this court, under the act of 1789, and under all the subsequent acts, giving jurisdiction in cases of *habeas corpus*, may, in the exercise of its appellate power, revise the decisions of inferior courts of the United States, and relieve from unlawful imprisonment authorized by them, except in cases within some limitations of the jurisdiction by Congress.

It remains to inquire whether the case before us is a

* 3 Dallas, 17.

† 3 Cranch, 448.

proper one for such interposition. Is it within any such limitation? In other words, can this court inquire into the lawfulness of detention, and relieve from it if found unlawful, when the detention complained of is not by civil authority under a commitment made by an inferior court, but by military officers, for trial before a military tribunal, after an examination into the cause of detention by the inferior court, resulting in an order remanding the prisoner to custody?

It was insisted in argument that, "to bring a case within the appellate jurisdiction of this court in the sense requisite to enable it to award the writ of *habeas corpus* under the Judiciary Act, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this court."

This proposition seems to assert, not only that the decision to be revised upon *habeas corpus* must have been made by a court of the United States, subject to the ordinary appellate jurisdiction of this court, but that having been so made, it must have resulted in an order of commitment to civil authority subject to the control of the court making it.

The first branch of this proposition has certainly some support in *Metzger's case*,* in which it was held that an order of commitment made by a district judge at chambers cannot be revised here by *habeas corpus*. This case, as was observed by Mr. Justice Nelson in *Kaine's case*,† stands alone; and it may admit of question whether it can be entirely reconciled with the proposition, which we regard as established upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress.

But it is unnecessary to enter upon this inquiry here. The action which we are asked to revise was that of a tribunal whose decisions are subject to revision by this court in ordinary modes.

* 5 Howard, 176. † 14 Ib. 103.

We need consider, therefore, only the second branch of the proposition, namely, that the action of the inferior court must have resulted in a commitment for trial in a civil court; and the inference drawn from it, that no relief can be had here, by *habeas corpus*, from imprisonment under military authority, to which the petitioner may have been remanded by such a court.

This proposition certainly is not supported by authority.

In *Kaine's case* all the judges, except one, asserted, directly or indirectly, the jurisdiction of this court to give relief in *a case* where the detention was by order of a United States commissioner. The lawfulness of the detention had been examined by the Circuit Court for the Southern District of New York upon a writ of *habeas corpus*, and that court had dismissed the writ and remanded the prisoner to custody. In this court relief was denied on the merits, but the jurisdiction was questioned by one judge only. And it is difficult to find any substantial ground upon which jurisdiction in that case can be affirmed, and in this denied.

In *Wells's case*,* the petitioner was confined in the penitentiary, under a sentence of death, commuted by the President into a sentence of imprisonment for life. He obtained a writ of *habeas corpus* from the Circuit Court of the District of Columbia, was brought before that court, and was remanded to custody. He then sued out a writ of *habeas corpus* from this court, and his case was fully considered here. No objection was taken to the jurisdiction, though there, as here, it was evident that the actual imprisonment, at the time of the petition for the writ, was not under the direction of the court by whose order the prisoner was remanded, but by a different and distinct authority.

In this case of *Wells*, Mr. Justice Curtis again dissented, and, on the point of jurisdiction, Mr. Justice Campbell concurred with him. The other judges, though all, except one, were of opinion that the relief asked must be denied, agreed in maintaining the jurisdiction of the court. Judge Curtis,

* 18 Howard, 308.

who regarded the question as left undetermined in *Kaine's case*, admitted that the jurisdiction was asserted in this, and stated the ground of judgment affirming jurisdiction to be that, "as the Circuit Court had had the prisoner before it, and has remanded him, this court, by a writ of *habeas corpus*, may examine that decision and see whether it be erroneous or not."

Since this judgment was pronounced, the jurisdiction, in cases similar to that now before the court, has not hitherto been questioned.

We have carefully considered the argument against it, made in this case, and are satisfied that the doctrine heretofore maintained is sound.

The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction.

That intent, in respect to the writ of *habeas corpus*, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the Circuit and District Courts is original; that given by the Constitution and the law to this court is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it.

As limited by the act of 1789, it did not extend to cases of imprisonment after conviction, under sentences of competent tribunals; nor to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some court of the United States, or required to be brought into court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended, first in 1833,* to prisoners confined under any authority, whether State or National, for any act done or omitted in pursuance of a law of the United

* 4 Stat. at Large, 634.

States, or of any order, process, or decree of any judge or court of the United States; then in 1842* to prisoners being subjects or citizens of foreign States, in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and finally, in 1867,† to 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 brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in the light of it that we must determine the true meaning of the Constitution and the law in respect to the appellate jurisdiction of this court. We are not at liberty to except from it any cases not plainly excepted by law; and we think it sufficiently appears from what has been said that no exception to this jurisdiction embraces such a case as that now before the court. On the contrary, the case is one of those expressly declared not to be excepted from the general grant of jurisdiction. For it is a case of imprisonment alleged to be unlawful, and to be under color of authority of the United States.

It seems to be a necessary consequence that if the appellate jurisdiction of *habeas corpus* extends to any case, it extends to this. It is unimportant in what custody the prisoner may be, if it is a custody to which he has been remanded by the order of an inferior court of the United States. It is proper to add, that we are not aware of anything in any act of Congress, except the act of 1868, which indicates any intention to withhold appellate jurisdiction in *habeas corpus* cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial

* 5 Stat. at Large, 539. † 14 Id. 385.

to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are.

We are obliged to hold, therefore, that in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

This conclusion brings us to the inquiry whether the 2d section of the act of March 27th, 1868, takes away or affects the appellate jurisdiction of this court under the Constitution and the acts of Congress prior to 1867.

In *McCardle's case*,* we expressed the opinion that it does not, and we have now re-examined the grounds of that opinion.

The circumstances under which the act of 1868 was passed were peculiar.

* 7 Wallace, 508.

Opinion of the court.

On the 5th of February, 1867, Congress passed the act to which reference has already been made, extending the original jurisdiction by *habeas corpus* of the District and Circuit Courts, and of the several judges of these courts, to all cases of restraint of liberty in violation of the Constitution, treaties, or laws of the United States. This act authorized appeals to this court from judgments of the Circuit Court, but did not repeal any previous act conferring jurisdiction by *habeas corpus*, unless by implication.

Under this act, one McCardle, alleging unlawful restraint by military force, petitioned the Circuit Court for the Southern District of Mississippi for the writ of *habeas corpus*. The writ was issued, and a return was made; and, upon hearing, the court decided that the restraint was lawful, and remanded him to custody. McCardle prayed an appeal, under the act, to this court, which was allowed and perfected. A motion to dismiss the appeal was made here and denied. The case was then argued at the bar, and the argument having been concluded on the 9th of March, 1869, was taken under advisement by the court. While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing act under consideration was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constitutional majority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.

It is quite clear that the words of the act reach, not only all appeals pending, but all future appeals to this court under the act of 1867; but they appear to be limited to appeals taken under that act.

The words of the repealing section are, "that *so much* of the act approved February 5th, 1867, as *authorizes* an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may be hereafter taken, be, and the same is hereby repealed."

These words are not of doubtful interpretation. They repeal only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court. They affected only appeals and appellate jurisdiction authorized by that act. They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the act of 1789. They reach no act except the act of 1867.

It has been suggested, however, that the act of 1789, so far as it provided for the issuing of writs of *habeas corpus* by this court, was already repealed by the act of 1867. We have already observed that there are no repealing words in the act of 1867. If it repealed the act of 1789, it did so by implication, and any implication which would give to it this effect upon the act of 1789, would give it the same effect upon the acts of 1833 and 1842. If one was repealed, all were repealed.

Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act. It is true that exercise of appellate jurisdiction, under the act of 1789, was less convenient than under the act of 1867, but the provision of a new and more convenient mode of its exercise does not necessarily take away the old; and that this effect was not intended is indicated by the fact that the authority conferred by the new act is expressly declared to be "in addition" to the authority conferred by the former acts. Addition is not substitution.

The appeal given by the act of 1867 extended, indeed, to cases within the former acts; and the act, by its grant of additional authority, so enlarged the jurisdiction by *habeas corpus* that it seems, as was observed in the McCardle case, "impossible to widen" it. But this effect does not take from the act its character of an additional grant of jurisdiction, and make it operate as a repeal of jurisdiction theretofore allowed.

Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of *habeas corpus*, were repealed by the act of that year, and that the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867.

We could come to no other conclusion without holding that the whole appellate jurisdiction of this court, in cases of *habeas corpus*, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto, has been taken away, without the expression of such intent, and by mere implication, through the operation of the acts of 1867 and 1868.

The suggestion made at the bar, that the provision of the act of 1789, relating to the jurisdiction of this court by *habeas corpus*, if repealed by the effect of the act of 1867, was revived by the repeal of the repealing act, has not escaped our consideration. We are inclined to think that such would be the effect of the act of 1868, but having come to the conclusion that the act of 1789 was not repealed by the act of 1867, it is not necessary to express an opinion on that point.

The argument having been confined, by direction of the court, to the question of jurisdiction, this opinion is limited to that question. The jurisdiction of the court to issue the writ prayed for is affirmed.

Statement of the case.

NAILOR *v.* WILLIAMS.

1. Where a question is asked of a witness, which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it is not error of which a revising court can take notice. It works him no injury.
2. If it does work the objecting party injury, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of the sort mentioned.
3. Where there is nothing in the bill of exceptions which enables a revising court to say that questions objected to have exceeded the reasonable license which a court, in its discretion, may allow in cross-examination, no error is shown.

APPEAL from the Supreme Court for the District of Columbia, the case being this:

Several negroes had been convicted in Virginia of heinous crimes and sentenced to death; but being reprieved by the governor of Virginia, were sold by that State to two persons, Williams and Davis, upon Williams's giving bond to transport them beyond the limits of the United States. Williams did not so transport them, but took them to Louisiana, and was there indicted, convicted, and sentenced to a heavy fine, under a statute of Louisiana, for bringing negroes convicted of crimes into that State. The negroes themselves, however, were not confiscated, but were sold by Williams for a large sum, to be thereafter received. In this state of facts, Davis (his partner in the purchase from the State of Virginia) assigned, in 1847, by instrument of writing, all his interest in the slaves to one Nailor, party to this suit, and Williams having received the purchase-money for the slaves, Nailor thereupon sued him below in *assumpsit* to recover his share of the proceeds, and called two witnesses to prove the genuineness of Davis's signature to the instrument of assignment, and Williams's acknowledgment of the claim now set up by Nailor.

One of them testified that the assignment was shown in

the latter part of the year 1867 by the plaintiff to Williams, and that Williams, after reading it, said that when the claim for the negroes was allowed, and the money obtained for them, he (the plaintiff) should receive one-half thereof by virtue of said assignment. This witness, on *cross-examination*, was asked:

"Was not the said plaintiff, at the date of said assignment, engaged in trading in negroes?"

The question was objected to, and the objection was overruled. This was the ground of an exception.

The next witness was asked on cross-examination:

"Was not he (the witness), at the date of the said assignment, engaged in aiding the plaintiff in trading in negroes?"

This question too was objected to, and the objection was overruled; and this constituted a second exception.

On these two exceptions the case was brought here.

The bills of exception *did not show what answers the witnesses gave to the questions above-mentioned, or whether, in fact, they answered the questions at all.*

Messrs. Brent and Phillips, for the plaintiff in error:

Nothing could be more irrelevant than the general inquiry made of the witness, which is the subject of the first exception. At the date of the transaction, the buying and selling of slaves as chattels was lawful, and the inquiry did not propose to connect itself with the consideration of the assignment from Davis to Nailor in any way or with any matter testified to in chief. The only tendency and object of the inquiry was to excite in 1867, the prejudices of the jury against a plaintiff who, twenty years before, might have dealt in slaves.

The same objections exist with increased force to the similar inquiry regarding the business of the witness, and his aiding the plaintiff in negro trading, and which makes the subject of the second exception. The purpose of the question was, really, to impeach the credibility of the witness

by a collateral inquiry into his business twenty years ago, in matters irrelevant to the subject before the jury, and by means unknown to any legitimate or recognized mode of impeaching a witness in a court of justice.

Mr. Bradley, contra.

Mr. Justice MILLER delivered the opinion of the court.

If a question is asked of a witness on the stand, the answer to which is pertinent and legal testimony, and the court refuses to permit the witness to answer, this is error which a revising court will correct, because the injury to the party consists in the refusal of the court to permit the answer to be given, and he can do nothing more to prove the wrong done him than to show that he asked a legal question, the answer to which, by the action of the court, was denied him.

But where a question is asked which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, the injury done the party is by the answer, and notwithstanding the erroneous ruling of the court, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it works him no injury. If it does, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of which a revising court can take notice.

For this reason, and also because there is nothing in the bill of exceptions which enables us to say that the questions themselves exceeded the reasonable license which a court, in its discretion, may allow in cross-examination, we are of opinion that no error is shown by these bills of exception.

As they constitute the only matters alleged against the judgment of the court below, it is

AFFIRMED.

Statement of the case.

WARING *v.* THE MAYOR.

The Bay of Mobile being included within the statutory definition of the port of Mobile, contracts for the purchase of cargoes of foreign merchandise before or after the arrival of the vessel in the said bay, where the goods by the terms of the contract, are not to be at the risk of the purchaser until delivered to him in said bay, do not constitute the purchaser an "importer," and the goods so purchased and sold by him, though in the original packages, may be properly subjected to taxation by the State.

ERROR to the Supreme Court of Alabama; the question involved arising upon that clause of the Constitution which ordains that "no State shall lay any imposts on *imports*, or exports, except what may be absolutely necessary for executing its inspection laws."

The facts were these:

The city of Mobile is situated on the west bank of the Mobile River, a short distance above its entry into the Bay of Mobile. The bay stretches about thirty miles below the city, and is connected with the Gulf of Mexico by a narrow strait. The town of Mobile, by an act of Congress passed 22d July, 1813,* was designated as the only port of entry for a collection district bounded by West Florida on the east, and Louisiana on the west, and comprising the bays, inlets, and rivers emptying into the gulf. The Bay of Mobile is a part of this district. Vessels anchor twenty-five miles below the city, and are unladen there upon lighters, which bring their cargoes to the town. Those coming from Great Britain frequently bring a cargo of salt, and cargoes of this kind are generally sold in advance of their arrival, or as soon as they reach the bay, before bulk is broken, or they are unloaded.

In this state of commercial practice one Waring was in the habit of buying and selling salt thus imported. His custom was to purchase the entire cargo, which came in sacks, before the goods were entered at the custom-house, and usually before the arrival of the vessel, or while it was

* 3 Stat. at Large, 35.

in the lower bay. When it arrived in the lower bay, he furnished his own lighters, and took the cargo from off the vessel. Until the time of such delivery the risk remained in the shippers. The consignees made the entries, presented the invoices and bills of lading, made the necessary deposit of coin for the estimated amount of the duties, and procured the permits; and when the duties were finally liquidated as required by law and the regulations of the Treasury Department, they adjusted and paid the balance.

When Waring sold the salt he sold it in the original packages, to traders, in large quantities and for re-sale.

In the year 1866, the corporate authorities of Mobile imposed a tax for municipal purposes upon all sales of merchandise in that city, and claimed of Waring a tax upon the sales of salt that he had made for six months preceding the date of the ordinance, under its conditions. He refused to pay, assigning for a reason that the salt disposed of by him was an import from a foreign country, and that the sales being made by him in the way they were, in the original packages, were still an "import;" and thus under the clause of the Constitution above quoted, he was not liable. The mayor arrested and fined him. The chancellor on a bill filed declared the tax illegal. The Supreme Court of the State on appeal held otherwise. They did not regard Waring as an importer, and considered that the constitutional prohibition upon the States to levy duties or taxes on imports had no application to him.

Waring accordingly brought the cause here for review.

Mr. J. A. Campbell, for Waring, the plaintiff in error (a brief of Mr. P. Hamilton being filed):

This court has decided, in *Brown* v. *State of Maryland*,* that under no form or pretence can any State levy any tax upon an article imported into or exported from that State; that all such proceedings by the State are absolutely null; that till articles imported from abroad have lost their character of "an import," and have become incorporated with

* 12 Wheaton, 419; and see Almy *v.* California, 24 Howard, 169.

the great mass of property, within the State, they are not subject to the jurisdiction of State authority. We rest upon the doctrine of these cases, and contend that, on the facts of this case, the right of interference by the State of Alabama had not arisen, as to this property or its proceeds.

The learned counsel then proceeded to argue—

That as the cargoes were purchased before their arrival or while the vessel was in the lower bay, and as the same were brought by Waring to the city, where they were weighed and the duties settled and paid, that he was to be regarded as an importer, and that his sales of the salt, in the original packages, were exempt from State taxation, under that clause of the Constitution which ordains, that no State shall "lay any imposts or duties on imports."

That this prohibition is universal, and applies to the thing imported, and has no reference to the person who may be the importer.

That this is a prohibition which Congress cannot waive or impair, except on condition that the tax be paid into the common treasury of the Union.

That the tax in this case was designed for municipal purposes, and had no reference to any inspection laws, and has no sanction from the consent of Congress.

That the port of entry was the city of Mobile, and that the salt was landed as the property of Waring.*

Mr. P. Phillips, contra, maintained—

That the city of Mobile is not the port of entry, but that the port is defined in the act of 22d July, 1813, and includes the whole bay, with the rivers, creeks, and inlets emptying into the Gulf of Mexico.

That whether the cargoes were contracted for before or after the arrival of the vessel in the bay was unimportant, as in either case, they remained wholly at the risk of the shipper or his consignee, until they were safely delivered to the lighters of Waring in the Bay of Mobile.

* United States *v.* Vowell, 5 Cranch, 368; Meredith *v.* United States, 13 Peters, 486; Arnold *v.* United States, 9 Cranch, 104; Conard *v.* Insurance Company, 1 Peters, 386; 6 Id. 263.

Recapitulation of the case in the opinion.

That until this delivery, neither the condition nor the weight or number of the sacks could be ascertained, and until this was done, it remained uncertain what was to be paid.

That the rule is the same in the civil as in the common law, "*Res perit domino.*" Here the risk of Waring did not attach, *until the importation had become complete* by the arrival of the vessel at her destined port. He could in no sense be regarded as the owner until his risk commenced.*

The case of *Brown* v. *Maryland*, so much relied on by opposite counsel, maintains the right of the *importer* to sell free from all State intervention, but it also decides that when the importer has sold, the subject of the sale is taxable in the hands of the purchaser, and it is of no sort of consequence whether it retains the original form in which it was imported or not. Merchandise, in the original package, once sold by the importer, is taxable as other property.†

If the act of importation was complete, which it here was, before Waring became the owner of the goods, there was necessarily an importer. The exemption from State taxation applied to *him*. It cannot be applied to his vendee, without a double exemption; such an exemption would be absurd.

Mr. Justice CLIFFORD delivered the opinion of the court.

Merchants and traders, engaged in selling merchandise in the city of Mobile in the State of Alabama, are required by an ordinance passed by the corporate authorities to pay a tax to the city equal to one-half of one per cent. on the gross amount of their sales, whether the merchandise was sold at private sale or at public auction; and if they were so engaged the six months next preceding the 1st day of April, 1866, they were also required, within fifteen days thereafter, to return, under oath, to the collector of taxes, the gross amount of their sales during that period of time; and the

* 1 Troplong Com. de la Vente, 86–88; Magee *v.* Billingsley, 3 Alabama, 689; Tarling *v.* Baxter, 6 Barnewall & Cresswell, 360; Simmons *v.* Swift, 5 Id. 857.

† Pervear *v.* Commonwealth, 5 Wallace, 479.

Recapitulation of the case in the opinion.

provision was, that if any such merchant or trader neglected or failed to make such return, he should be subject to such a fine, not exceeding fifty dollars per day, as the mayor of the city might impose for each day's failure or refusal.

Sales of merchandise were made by the complainant within that period to a large amount, and he was duly notified that he was required to make return, under oath, of the gross amount of such sales, and having neglected and refused to comply with that requirement within the time specified in the ordinance, the mayor of the city caused a summons to be issued and duly served, commanding the complainant to appear before him, as such mayor, to answer for such neglect, but he refused to obey the commands of the summons, and thereupon a warrant was issued, and he was arrested and brought before the mayor to answer for such contempt; and, after hearing, he was sentenced to pay a fine of fifty dollars for a breach of the before-mentioned ordinance. Subsequently, a second notice of a similar character was given, and the complainant still neglecting and refusing to make the required returns, he was again summoned to appear before the mayor to answer for the neglect, but he refused a second time to obey the commands of the precept, and, thereupon, such proceedings were had that he was again found guilty of contempt and was sentenced to pay an additional fine of fifty dollars.

Regarding these proceedings as unwarranted, the complainant filed a bill in equity against the mayor and tax-collector of the city, in the local Chancery Court, in which he prayed that the respondents might be enjoined from collecting the fines adjudged against him, and from any attempt to collect the tax, and that the tax might be adjudged to be null and void. Proofs were taken and the parties were heard, and the final decree of the Chancellor was, that the complainant was entitled to the relief asked, and that the injunction should be made perpetual; but that decree, on the appeal of the respondents to the Supreme Court of the State, was, in all things, reversed, and the Supreme Court entered a decree that the bill of complaint should be dismissed. Whereupon

Recapitulation of the case in the opinion.

the complainant in the Chancery Court sued out a writ of error, under the 25th section of the Judiciary Act, and removed the cause into this court.

Exemption from State taxation in this case is claimed by complainant upon the ground that the sales made by him were of merchandise, in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were in the lower harbor of the port.

By the terms of the act of the 22d of July, 1813, it is provided, "that from and after the 1st day of August next, the town of Mobile shall be and the same is hereby established *the sole* port of entry for the district, including the shores, waters, and inlets of the bay and river Mobile, and of the other rivers, creeks, inlets, and bays emptying into the Gulf of Mexico, east of the said river Mobile, and west thereof, to the eastern boundary of the State of Louisiana."*

Mobile is the sole port of entry of the district, and next to New Orleans, is the largest cotton market in the United States, but vessels of large draft cannot cross the inner bar, and, consequently, are compelled to anchor in the lower harbor, some twenty or twenty-five miles below the city. Small vessels, such as can cross the inner bar, go up to the wharves to discharge and receive cargo, but large vessels, such as are usually employed to transport cotton, find their only anchorage in the lower harbor, where they are unloaded on their arrival, and where they receive their cargoes for the return voyage. Loading and unloading are accomplished by means of lighters, which sometimes are furnished by the ship and sometimes by the shipper, for the purpose of loading, and sometimes by the importer, and sometimes by the vendee of the merchandise, for the purpose of unloading, and for transporting the same to the private stores of the purchasers or the public warehouses.†

Ships frequently go there in ballast for cargoes of cotton,

* 3 Stat. at Large, 35.

† The Bark Edwin, 1 Clifford, 325; Same Case, 24 Howard, 389.

and those going there for that purpose from Liverpool frequently carry salt, using it in many cases as ballast instead of the articles more usually employed, which do not pay freight. Such shipments are made by the owners or charterers of the vessel, and the salt, whether stowed as cargo or used as ballast, is usually consigned to the agents of the vessel. Purchases of salt imported under such circumstances were made by the complainant to a very large amount, and the record shows that he sold the salt at his place of business in the city to traders and large consumers in the original packages. The contracts to purchase were made before the goods were entered at the custom-house, with the consignees of the salt, sometimes before and sometimes after the arrival of the vessel at the anchorage in the lower harbor, but the terms of the contract in all cases were that the risk should continue to be in the shipper until the salt was delivered to the complainant over the side of the vessel into his lighters. He agreed to furnish the lighters and to bring them alongside of the vessel, and the contract was that the salt, when it was transshipped into the lighters of the complainant, became his property, and he assumed the risk and expense of transporting the same to the wharf and from thence to his own warehouse or place of business; but if the goods were lost before such delivery the agreement to purchase was not obligatory.

Viewed in the light of these conceded facts the defendants contend that the complainant was not the importer of the salt; that the salt was imported by the owners of the vessel, and that the sale of the salt as made by the consignees to the complainant was a sale of imported merchandise.

Goods imported from a foreign country are required to be entered at the custom-house of the port where the vessel voluntarily arrives with intent to unlade the cargo, and the settled law is that no one but the owner or consignee, or in case of his sickness or absence, his agent or factor, is authorized to discharge that obligation.*

* The Mary, 1 Gallison, 206; The Boston, Ib. 239; United States *v* Lyman, 1 Mason, 482; 1 Stat at Large, 655; Conrad *v.* Pacific Insurance Co., 6 Peters, 262; Gray *v.* Lawrence, 3 Blatchford, 117.

Opinion of the court.

Importers of foreign merchandise must conform to the requirements of law and the regulations of the Treasury Department. American ships are forbidden to bring goods from any foreign port into the United States unless the master thereof shall have on board a manifest in writing, signed by the proper person, describing the goods and the vessel, and containing the name of the port where the goods were taken on board, and the name of the port for which the same are consigned or destined.*

Masters commanding any such ships, laden with such goods, on their arrival within four leagues of our coast, or within any of the bays, harbors, ports, or inlets thereof, are required, upon demand, to produce such manifest to such officer of the customs as shall come on board their ship, for his inspection, and it is made the duty of the said officer of the customs to certify the fact of compliance with that requirement and the day when it was so produced. Next requirement is that the master shall, within twenty-four hours after the arrival of any such ship at any port established by law, or within any harbor, inlet, or creek thereof, repair to the office of the chief officer of the customs and make a report of the arrival of the vessel. He may, if he sees fit, present his manifest at the same time, but if he omits so to do, the requirement is that he shall, within forty-eight hours, make a further report in writing to the collector of the district, which report shall be in form and shall contain all the particulars contained in the manifest.†

Imported goods may be entered for consumption or for warehousing, but it will not be necessary to refer to the course of proceeding when the goods are deposited in warehouse, as all the importations in this case were entered for consumption. Such entry must be in writing and must be made to the collector of the district within fifteen days after the required report is filed by the master. The form of the entry is prescribed by law and by the regulations of the Treasury Department, and the provision is that the owner

* 1 Stat. at Large, 644. † 1 Ib. 649.

or consignee making the entry shall also produce to the collector and naval officer, if any, the original invoice or invoices of the goods, or other documents received in lieu thereof or concerning the same, in the same state in which they were received, with the bills of lading for the importation.*

Goods imported in any ship or vessel from any foreign port or place are required to be landed in open day, and the express provision of law is that none such shall be landed or delivered from such ship or vessel "without a permit from the collector and naval officer, if any, for such unlading and delivery."† Congress therefore has prescribed the rule of decision, and while that provision remains in force, no goods brought in any ship or vessel from any foreign port or place, unless falling within some exceptional rule, can lawfully be unladen or delivered from any such ship or vessel within the United States without a permit from the collector for such unlading or delivery; and the 62d section of the same act provides "that all duties on goods, wares, and merchandise imported shall be paid *or secured to be paid* before a permit shall be granted for landing the same;" which shows to a demonstration that all the salt in this case was imported before the property in the same became vested in the complainant.‡

Authority to grant a permit does not exist until the duties are paid or secured to be paid, and the duties are never paid or secured to be paid before the goods are imported, nor before they are entered for consumption. Before the permit is received by the inspector on board the ship or vessel, no one has authority to remove the hatches or to break bulk, but the cargo is under the charge of the officer of the customs. Following the notice of the arrival of the vessel and the exhibition of the manifest, the next step is to make the entry, which should always be accompanied by the invoice and bill of lading. Examination of the entry is usually made by the entry clerk, and if found to be correct, the collector proceeds to estimate the duties "on the invoice, value, and quantity," and if the estimated amount of duty is paid *or se-*

* 1 Stat. at Large, 656. Gen. Reg. (1857), 145.
† Ib. 665. ‡ Ib. 673.

cured to be paid as required by law, the collector certifies the invoice and grants a permit in due form for the delivery of the cargo, first designating the packages, one in ten, to be sent to the public store for examination, and marking the same on the entry, invoice, and permit.*

Reference need not be made to the subsequent proceedings of the appraisers, weighers, and gaugers, preparatory to the liquidation of the duties, as no one pretends that any of those acts can be performed before the goods are imported.

In order to obtain a permit to discharge the salt into the lighters in this case, the proof is full to the point, that a deposit of coin had to be made at the custom-house by the consignees, and that the duties were finally paid by them as liquidated, after the true weight of the salt was ascertained by the return of the weighers. They made the entries, presented the invoices and bills of lading, made the necessary deposit of coin for the estimated amount of the duties, and procured the permits; and when the duties were finally liquidated as required by law and the regulations of the Treasury Department, they adjusted and paid the balance.

Whether the contracts to purchase were made before or after the vessel arrived in the bay is quite immaterial, as the agreement was, that the risk should continue to be in the owner or consignees until they delivered the salt into the complainant's lighters, alongside of the vessel. Delivery, under the terms of the contract, could not be made before the vessel arrived, nor before the salt was legally entered at the custom-house, as the hatches could not be removed for any such purpose until the permit was received from the collector.

Undoubtedly goods at sea may be sold by the consignees to arrive, and if they indorse and deliver the bill of lading to the purchaser, and he accepts the same under the contract as the proper substitute for the actual delivery and acceptance of the goods, the effect of the transaction is to vest a perfect title in the purchaser, discharged of all right of stop-

* Gen. Reg. (1857), 145.

page *in transitu* on the part of the vendor and indorser of the bill of lading.*

Nothing of the kind, however, was done in this case. On the contrary, the agreement was, that the loss, if before the delivery of the goods into the lighters, should fall on the shippers. Influenced by these considerations the court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the importers, and the second vendor of the imported merchandise.

Opposed to that view is the suggestion that goods are not regarded as having been imported into the United States until the vessel transporting the same from the foreign market has arrived at some one of our maritime ports with the intent to unlade the cargo. Where the voyage *is not ended*, and *there is no obstruction to prevent its being continued*, the rule in that behalf is as contended by the complainant. Decided cases to that effect are quite numerous and decisive, as applied in controversies involving the inquiry, whether the goods imported in a given case are affected by a new law or the repeal of an old one, whereby import duties are increased or diminished.†

Well-founded exceptions, however, exist to that general rule, and among the number is one created by the 85th section of the principal collection act.‡

By that section it is provided that where a ship or vessel shall be prevented by ice from getting to the port or place at which her cargo is intended to be delivered, the collector of the district may receive the report and entry of such ship or vessel, . . . and grant a permit for unlading or landing the goods imported, at any place within his district,

* Audenried *v.* Randall, 16 American Law Register, 664; Newsom *v.* Thornton, 6 East, 41; Pratt *v.* Parkman, 24 Pickering, 42.

† United States *v.* Vowell, 5 Cranch, 372; Schooner Mary, 1 Gallison, 209; The Boston, Ib. 245; United States *v.* Arnold, 1 Ib. 353; Same *v.* Lindsey, 1 Ib. 365; Harrison *v.* Vose, 9 Howard, 381; United States *v.* Lyman, 1 Mason, 482; Meredith *v.* United States, 13 Peters, 494.

‡ 1 Stat. at Large, 694.

which shall appear to him most convenient and proper. Variations from the usual course of proceedings in such matters are also necessarily made at all the ports and places where lighters are required in loading and unloading ships and vessels engaged in commerce and navigation.

More than half a century has elapsed since the act of Congress was passed establishing the town of Mobile the sole port of entry for that district, and the record furnishes abundant reason to conclude that the course of proceedings throughout that entire period, in respect to imported goods brought there from foreign countries in ships and vessels whose draft was such that they could not cross the inner bar, has been the same as that heretofore described. Permanent as the obstruction to navigation is, the case is much stronger even than the one for which provision is made in the principal collection act, and after such long acquiescence by all interested in the course pursued by the officers of the customs, the court is of the opinion that the proceedings may well be sustained.

Congress has the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and the Constitution also provides 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, with a view to raise a revenue for State purposes. The State of Maryland passed a law requiring all importers of foreign articles, enumerated in the law, and other persons selling the same by wholesale, before they should be authorized to sell the imported articles, to take a license, for which they were required to pay fifty dollars, and in case of refusal or neglect, the provision was, that they should forfeit the amount of the license tax and be subject to a fine of one hundred dollars.* Subsequently an importing merchant, resident in the State, refused to pay the tax, and the State court sustained the validity of the State law, and imposed on him the penalty

* Brown v. Maryland, 12 Wheaton, 437.

therein prescribed. Dissatisfied with the judgment he removed the cause into this court by writ of error, and this court held, Marshall, C. J., giving the opinion of the court, that the State law was a tax on imports, and that the mode of levying it, as by a tax on the occupation of the importer, merely varied the form in which the tax was imposed without varying the substance; that while the articles imported remained the property of the importer in his warehouse in the original forms or packages in which they were imported, a tax upon them was too plainly a duty on imports to escape the prohibition of the Constitution, but the court admitted that whenever the importer has so acted upon the thing imported that it has become incorporated and mixed with the mass of property in the country, it must be considered as having lost its distinctive character as an import, and as having become subject to the taxing power of the State.

Sales by the importer are held to be exempt from State taxation because the importer purchases, by the payment of the duty, a right to dispose of the merchandise as well as to bring it into the country, and because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the State.*

But the sales of the goods imported in this case were made by the shippers or consignees, and the complainant was the purchaser, and not the first vendor of the imported merchandise, and it is settled law in this court that merchandise in the original packages once sold by the importer is taxable as other property.†

When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then

* Brown *v.* Maryland, 12 Wheaton, 443; Almy *v.* California, 24 Howard. 173.

† Pervear *v.* Commonwealth, 5 Wallace, 479.

finds the articles already incorporated with the mass of property by the act of the importer.

Importers selling the imported articles in the original packages are shielded from any such State tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

DECREE AFFIRMED.

WOODRUFF *v.* PARHAM.

The term "import," as used in that clause of the Constitution which says, that "no State shall levy any imposts or duties on *imports* or exports," does not refer to articles imported from one State into another, but only to articles imported from foreign countries into the United States. Hence, a uniform tax imposed by a State on *all* sales made in it, whether they be made by a citizen of it or a citizen of some other State, and whether the goods sold are the produce of that State enacting the law or of some other State, is valid.

ERROR to the Supreme Court of Alabama. The case being thus:

The Constitution thus ordains:

"Congress shall have power to regulate commerce with foreign nations and among the several States."

"No State shall levy any imposts or duties on *imports* or exports."

"The citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States."

With these declarations of the Constitution in force, the city of Mobile, Alabama, in accordance with a provision in its charter, authorized the collection of a tax for municipal purposes on real and personal estate, *sales at auction*, and sales of merchandise, capital employed in business and income within the city. This ordinance being on the city statute-book, Woodruff and others, auctioneers, received, in the course of their business for themselves, or as consignees and

agents for others, large amounts of goods and merchandise, *the product of States other than Alabama, and sold the same in Mobile to purchasers in the original and unbroken packages.* Thereupon, the tax collector for the city, demanded the tax levied by the ordinance. Woodruff refused to pay the tax, asserting that it was repugnant to the above-quoted provisions of the Constitution. The question coming finally, on a case stated, into the Supreme Court of the State, where the first two of the above-quoted provisions of the Constitution were relied on by the auctioneers as a bar to the suit, the said court decided in favor of the tax. And the question was now here for review.

Messrs. J. A. Campbell and P. Hamilton, for the plaintiffs in error:

The question is: Can a State tax imports into it from other States of the Union?

That question has been answered by Chief Justice Marshall in *Brown* v. *Maryland.** The question there was the propriety of a license tax imposed by the State upon the merchant, as a prerequisite of the right to sell the imported article. After discussing the general principles involved in the constitutional prohibition upon the State to levy imposts or duties on imports or exports, and deciding that this tax, though indirect in form, was, in fact, a duty on imports, and therefore illegal, he remarks:

"It may be proper to add, that we suppose the principles laid down in this case, *apply equally to importations from a sister State.*"

It is true, the remark of the Chief Justice was not directly upon the point in judgment, but it was upon a matter of almost identical character; and when regard is had to the history of the times immediately preceding the establishment of the Constitution, and to the causes which led to its formation—the conflicting commercial claims of the several States, and the evils thereby produced, calling for the estab-

* 12 Wheaton, 449.

lishment of uniform laws, and the creation of a National legislation which should be uniform, the land throughout—the force of the remark falling from that eminent judge, and announced as the conclusion of the court, carries with it the weight of judicial authority.

That opinion has been declared, in *Almy* v. *California*,* to be the judgment of the court.

In that case, California, for purposes of revenue, directed a stamp tax to be imposed on bills of lading for the transportation, from any point or place in that State to any point or place without the State, of gold or silver in any form. The master of a ship, then lying in that State, refused to pay for the stamp on a bill of lading, signed by him, for the transportation from California to New York of some gold placed on his vessel, and was indicted for this violation of the law. The question then was: Is this stamp act, so required to be paid by State authority, an impost or duty on an export, within the meaning of the constitutional prohibition upon the State? It was held, by a unanimous bench, that the tax fell within the terms of the prohibition. As in this case, so in that, the transportation was between States: it was from the State of California to the State of New York. The transaction had no relation to commerce with any foreign nation. It was between two States; they alone were concerned.

The transaction was an export from one State to another State. It was, nevertheless, held to be *a case of export;* and, therefore, protected against any interference or regulation by mere State authority. If that be so, imports and exports being placed by the terms of the fundamental law upon a footing of perfect equality, as to State imposition, the import in this case is equally protected with the export in that, and the State law is equally void.

Upon the authority of the two cases cited, the argument is exhausted. The one is the complement of the other: the two cover the whole ground of import and export into and

* 24 Howard, 169.

from a State. They establish the rule, that no matter in what form, whether by license or by stamp duty, or by any other device, a tax may be sought to be imposed by the authority of the State upon commerce not wholly internal, the attempt is illegal, and against the theory of National sovereignty and National control, which is established over the whole field of affairs external to a State; and that this rule applies whether the portion external to the State which seeks to tax is connected with, or internal to a sister State, or concerns the business of a purely foreign nation. In either event, the power to tax that commerce does not exist; it belongs alone to the General Government, to which alone is intrusted the regulation of all those affairs which are not purely internal, and within the State.

And this would seem to result from the language used in the Constitution in the grant of power to regulate commerce; for the grant to Congress is universal.

The prohibition upon the States is correlative. They may not coin money, or make anything but gold and silver coin a tender; they may not make any law to impair the obligation of a contract; they may not lay imposts or duties on imports or exports; they may not lay any duty of tonnage; and may not make any agreement with themselves, or with foreign powers.

The incidental powers in relation to bankruptcy, post-offices, post-roads, piracies, useful inventions, and kindred matters, are all intrusted to the General Government.

These grants to the one, and prohibition on the other, seem clearly to indicate where the whole power of regulation over matters purely external to a State, or common to all, was intended to be placed.

The question here is not of pilotage, of quarantine, of police regulations, or of any power which partakes of the character of either. On the part of the State, it is an attempt to tax an article brought into it from another State, for purpose of sale: it is, so far as commerce is concerned, a burden upon the article of import, because it is a subject of commerce, and is used in commerce: it is, therefore, in

its operation, a regulation of commerce; and, it is, in its form and effect, so far as the State can make it, universal—having a uniform operation over the whole country; for it operates, so far as the city tax is concerned, on all articles of import; and, so far as the State is concerned, on all liquors coming from all the States.

Passing by the *License Cases*,* where nearly every judge gave an opinion, and where it may be difficult to say what was adjudged, we come to the recent case of *Crandall* v. *Nevada*,† where the right of the citizen of a State to protection, in his property and privileges, as a subject of the National government, against injurious legislation by a State government, is emphatically declared, and taking the various decisions of the court together we must admit that the right of the citizen of each State to frequent the ports of the other States, with his person and property, is a right of National origin and protection, and subject alone to National regulation; that no State regulation, for whatever purpose established, can in the smallest degree impair that right; and that all such State legislation, in the presence of this higher right, inhering in the citizen, and springing from the National organization, falls idle and powerless.

The power existing in Congress to regulate, its abstaining from legislation on the subject, is as expressive an enactment as the most positive declaration could be. It is a declaration that the commerce between the States shall be free.

Mr. P. Phillips, contra:

If the exemption now contended for were sustained, goods manufactured in the State would be subject to the tax, while goods of the same character manufactured in another State would go free.

The Constitution cannot be construed to present such a result. When it declared that "the citizens of each State shall be entitled to all the privileges and immunities of

* 5 Howard, 504.

† 6 Wallace, 35; and see Gibbons *v.* Ogden, 9 Wheaton, 186; Sinnot *v.* Davenport, 22 Howard, 227.

citizens of the several States," it provided for harmony by securing *equality*.

While it might be admitted, that a State cannot lay a *discriminating* tax, for the purpose of aiding its domestic manufactures, it would be strange, if its taxing power was so restricted, as to work a discrimination against its own manufacturers.

But the claim as made in this case is broader still, for the goods so brought from another State may have been imported from foreign countries. Such goods, when sold by the importer, were subject to taxation by the State in which they were thus imported and sold. When, then, goods thus subject to State taxation are carried to another State for resale, by what change are they withdrawn from this power?

The individual States possess an independent and uncontrollable authority, to raise their own revenue, for the supply of their own wants, and with the single exception of duties on imports or exports retain that authority in the most absolute and unqualified sense.*

The prohibition against taxing "imports or exports" refers exclusively to foreign commerce. Its object, as shown by the debates, was to secure those States, which from geographical position, could not import for themselves, from the exercise of the taxing power of the States whose ports they would be compelled to use.†

In the case of *Pierce* v. *New Hampshire*,‡ a barrel of gin was purchased in Massachusetts, brought coastwise to Dover, and then sold. The vendor was indicted under a State statute. The defendant sought to protect himself by asking a charge to the jury, that the law was invalid, because this gin was an *import*, and thus beyond the power of State taxation. This charge was refused and the party was convicted.

On appeal to the Supreme Court of the State the same question was made. It was again overruled, and the judgment affirmed. On writ of error to this court, it was again

* Federalist, No. 32.

† Madison Papers, 3d vol. 1445; License Cases, 5 Howard, 575.

‡ 5 Howard, 554.

renewed, and was discussed at some length by both sides. The judges gave separate opinions, but they concurred in affirming the judgment. This result could not have been reached if the gin had been an "import" within the meaning of the prohibition.

The expression relied on from the opinion in the case of *Brown* v. *Maryland*, that "we *suppose* the principles laid down apply equally to importations from a sister State," was not overlooked. McLean, J., speaks of it as "a *remark* which must have been made with less consideration than the other points ruled in the case." The opinions of Catron, Woodbury, and Daniels, JJ., are equally emphatic as to the construction of this prohibition.

The opinion of Taney, C. J., distinguishes this case from that of *Brown* v. *Maryland*, which related to foreign commerce, and thus concludes:

"Upon the whole the law of New Hampshire is, in my judgment, valid. For although the gin was an *import from another State*, and Congress had clearly the power to regulate such importation; yet as it had not done so, *the traffic may be regulated by the State as as it is landed in its territory.*"

Now it is certain that if the gin was an "import" within the meaning of the prohibition, the question could in no wise be affected by the action or non-action of Congress, and his affirmance of the judgment was only possible on the ground that he held it not to be an "import."

This question has been frequently before the Supreme Courts of the States, and with the exception of the decision in Louisiana, they have uniformly held the view here presented.*

The case from Louisiana is rested solely upon the authority of *Almy* v. *California*. The opinion in this case was delivered by the Chief Justice.

It is true that the record showed that the bill of lading

* State *v.* Pinckney, 10 Richardson, 474; Cumming *v.* Savannah, R. M. Charlton, 26; Harrison *v.* Vicksburg, 3 Smedes & Marshall, 581; Beall *v.* State, 4 Blackford, 107; Padelford *v* Savannah, 14 Georgia, 438.

taxed by California was for gold shipped to New York; but in the argument of the case no reference is made to the question now discussed, neither in the opinion is there any reference to it, nor to the decision in the License case. On the contrary, all the illustrations used in the opinion refer to the case of foreign commerce; and whether goods shipped from one State to another were to be regarded as "exports" within the prohibition is not touched upon. This case can therefore have no influence in deciding the present controversy.

But this is not a tax on "imports" in any sense of the term. A tax on the *proceeds of sale* is in the nature of a tax on income, or on occupation measured by income, and that a portion of such income may be derived from imported goods can make no difference in testing its validity.*

Mr. Justice MILLER delivered the opinion of the court.

The case was heard in the courts of the State of Alabama upon an agreed statement of facts, and that statement fully raises the question whether merchandise brought from other States and sold, under the circumstances stated, comes within the prohibition of the Federal Constitution, that no State shall, without the consent of Congress, levy any imposts or duties on imports or exports. And it is claimed that it also brings the case within the principles laid down by this court in *Brown* v. *Maryland*.†

That decision has been recognized for over forty years as governing the action of this court in the same class of cases, and its reasoning has been often cited and received with approbation in others to which it was applicable. We do not now propose to question its authority or to depart from its principles.

The tax of the State of Maryland, which was the subject of controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of

* License Cases, 5 Howard, 576, 592. † 12 Wheaton, 419.

the Constitution to which we have referred extends, in its true meaning and intent, to articles brought from one State of the Union into another.

The subject of the relative rights and powers of the Federal and State governments in regard to taxation, always delicate, has acquired an importance by reason of the increased public burdens growing out of the recent war, which demands of all who may be called in the discharge of public duty to decide upon any of its various phases, that it shall be done with great care and deliberation. Happily for us, much the larger share of these responsibilities rests with the legislative departments of the State and Federal governments. But when, under the pressure of a taxation necessarily heavy, and in many cases new in its character, the parties affected by it resort to the courts to ascertain whether their individual rights have been infringed by legislation, and assert rights supposed to be guaranteed by the Federal Constitution, they, in every such case properly brought before us, devolve upon this court an obligation to decide the question raised from which there is no escape.

The words impost, imports, and exports are frequently used in the Constitution. They have a necessary correlation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument.

In the case of *Brown* v. *Maryland*, the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown* v. *Maryland* was decided—namely, in 1827—it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country,

the Chief Justice used the word country as a synonyme for United States.

But the word is susceptible of being applied to articles introduced from one State into another, and we must inquire if it was so used by the framers of the Constitution.

Leaving, then, for a moment, the clause of the Constitution under consideration, we find the first use of any of these correlative terms in that clause of the eighth section of the first article, which begins the enumeration of the powers confided to Congress.

"The Congress shall have power to levy and collect taxes, duties, imposts, and excises, . . . but all duties, imposts, and excises shall be uniform throughout the United States."

Is the word impost, here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former. But if we give to the word imposts, as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word export the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts.

It is also to be remembered that the Convention was here giving the right to lay taxes by National authority in connection with paying the debts and providing for the common defence and the general welfare, and it is a reasonable inference that they had in view, in the use of the word imports, those articles which, being introduced from other nations and diffused generally over the country for consumption, would contribute, in a common and general way, to the sup-

port of the National government. If internal taxation should become necessary, it was provided for by the terms taxes and excises.

There are two provisions of the clause under which exemption from State taxation is claimed in this case, which are not without influence on that prohibition, namely: that any State may, with the assent of Congress, lay a tax on imports, and that the net produce of such tax shall be for the benefit of the Treasury of the United States. The framers of the Constitution, claiming for the General Government, as they did, all the duties *on foreign* goods imported into the country, might well permit a State that wished to tax more heavily than Congress did, foreign liquors, tobacco, or other articles injurious to the community, or which interfered with their domestic policy, to do so, provided such tax met the approbation of Congress, and was paid into the Federal treasury. But that it was intended to permit such a tax to be imposed by such authority on the products of neighboring States for the use of the Federal government, and that Congress, under this temptation, was to arbitrate between the State which proposed to levy the tax and those which opposed it, seems altogether improbable.

Yet this must be the construction of the clause in question if it has any reference to goods imported from one State into another.

If we turn for a moment from the consideration of the language of the Constitution to the history of its formation and adoption, we shall find additional reason to conclude that the words imports and imposts were used with exclusive reference to articles imported from foreign countries.

Section three, article six, of the Confederation provided that no State should lay imposts or duties which might interfere with any stipulation in treaties entered into by the United States; and section one, article nine, that no treaty of commerce should be made whereby the legislative power of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or

importation of any species of goods or commodities whatsoever. In these two articles of the Confederation, the words imports, exports, and imposts are used with exclusive reference to foreign trade, because they have regard only to the treaty-making power of the federation.

As soon as peace was restored by the success of the Revolution, and commerce began to revive, it became obvious that the most eligible mode of raising revenue for the support of the General Government and the payment of its debts was by duties on foreign merchandise imported into the country. The Congress accordingly recommended the States to levy a duty of five per cent. on all such imports, for the use of the Confederation. To this, Rhode Island, which, at that time, was one of the largest importing States, objected, and we have a full report of the remonstrance addressed by a committee of Congress to that State on that subject.* And the discussions of the Congress of that day, as imperfectly as they have been preserved, are full of the subject of the injustice done by the States who had good seaports, by duties levied in those ports on foreign goods designed for States who had no such ports.

In this state of public feeling in this matter, the Constitutional Convention assembled.

Its very first grant of power to the new government about to be established, was to lay and collect imposts or duties on foreign goods imported into the country, and among its restraints upon the States was the corresponding one that *they* should lay no duties on imports or exports. It seems, however, from Mr. Madison's account of the debates, that while the necessity of vesting in Congress the power to levy duties on foreign goods was generally conceded, the right of the States to do so likewise was not given up without discussion, and was finally yielded with the qualification to which we have already referred, that the States might lay such duties with the assent of Congress. Mr. Madison moved that the words "nor lay imposts or duties on imports" be placed in

* 1 Elliot's Debates, 131–3.

that class of prohibitions which were absolute, instead of those which were dependent on the consent of Congress. His reason was that the States interested in this power, (meaning those who had good seaports), by which they could tax the imports of their neighbors passing through their markets, were a majority, and could gain the consent of Congress to the injury of New Jersey, North Carolina, and other non-importing States. But his motion failed.* In the Convention of Virginia, called to adopt the Constitution, that distinguished expounder and defender of the instrument, so largely the work of his own hand, argued, in support of the authority to lay direct taxes, that without this power, a disproportion of burden would be imposed on the Southern States, because, having fewer manufactures, they would consume more imports and pay more of the imposts.† So, in defending the clause of the Constitution now under our consideration, he says: "Some States export the produce of other States. Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware; and Rhode Island, those of Connecticut and Massachusetts. The exporting States wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The States whose produce was exported by other States, were extremely jealous lest a contribution should be raised of them by the exporting States, by laying heavy duties on their own commodities. If this clause be fully considered it will be found to be more consistent with justice and equity than any other practicable mode; for, if the States had the exclusive imposition of duties on exports, they might raise a heavy contribution of the other States for their own exclusive emoluments."‡ Similar observations, from the same source, are found in the 42d number of the Federalist, but with more direct reference to the power to regulate commerce.

Governor Ellsworth, in opening the debate of the Connecticut Convention on the adoption of the Constitution, says: "Our being tributary to our sister States, is in consequence of

* 5 Madison Papers, 486. † 3 Elliot's Debates, 248. ‡ 2 Id. 443-4.

the want of a Federal system. The State of New York raises £60,000 or £80,000 in a year by impost. Connecticut consumes about one-third of the goods upon which this impost is laid, and consequently pays one-third of this sum to New York. If we import by the medium of Massachusetts, she has an impost, and to her we pay tribute."* A few days later, he says: "I find, on calculation, that a general impost of five per cent. would raise a sum of £245,000," and adds: "it is a strong argument in favor of an impost, that the collection of it will interfere less with the internal police of the States than any other species of taxation. It does not fill the country with revenue officers, but is confined to the sea-coast, and is chiefly a water operation. . . . If we do not give it to Congress, the individual States will have it."†

It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. The only allusion to imposts in the Articles of Confederation is clearly limited to duties on goods imported from foreign States. Wherever we find the grievance to be remedied by this provision of the Constitution alluded to, the duty levied by the States on foreign importations is alone mentioned, and the advantages to accrue to Congress from the power confided to it, and withheld from the States, is always mentioned with exclusive reference to foreign trade.

Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by *this clause*, the right of one State to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine,

* 2 Elliott's Debates, 192. † 2 Id. 196.

we shall be well satisfied with the wisdom of the Constitution as thus construed.

The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown* v. *Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.

It is said, however, that, as a court, we are bound, by our former decisions, to a contrary doctrine, and we are referred to the cases of *Almy* v. *State of California* and *Brown* v. *Maryland*, in support of the assertion.

The case first mentioned arose under a statute of California, which imposed a stamp tax on bills of lading for the transportation of gold and silver from any point within the State to any point without the State.

The master of the ship Rattler was fined for violating this law, by refusing to affix a stamp to a bill of lading for gold shipped on board his vessel from San Francisco to New York. It seems to have escaped the attention of counsel on both sides, and of the Chief Justice who delivered the opinion, that the case was one of inter-state commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. In the language of the court, citing *Brown* v. *Maryland*

as governing the case, the statute of Maryland is described as a tax on foreign articles and commodities. The only question *discussed* by the court is, whether the bill of lading was so intimately connected with the articles of export described in it that a tax on it was a tax on the articles exported. And, in arguing this proposition, the Chief Justice says that "a bill of lading, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to *a foreign country*, and consequently a duty upon that is, in substance and effect, a duty on the article exported." It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce, and there is no reason to suppose that the question which we have discussed was in his thought. We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made.*

The case, however, was well decided on the ground taken by Mr. Blair, counsel for defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*,† and with the authority of Congress to regulate commerce among the States. We do not regard it, therefore, as opposing the views which we have announced in this case.

The case of *Brown* v. *Maryland*, as we have already said, arose out of a statute of that State, taxing, by way of discrimination, importers who sold, by wholesale, foreign goods.

Chief Justice Marshall, in delivering the opinion of the court, distinctly bases the invalidity of the statute, (1.) On the clause of the Constitution which forbids a State to levy imposts or duties on imports; and (2.) That which confers on Congress the power to regulate commerce with foreign nations, among the States, and with the Indian tribes.

* The Victory, 6 Wallace, 382. † Ib. 35.

The casual remark, therefore, made in the close of the opinion, "that we suppose the principles laid down in this case to apply equally to importations from a sister State," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question, even if the remark was intended to apply to the first of the grounds on which that decision was placed.

But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the Constitution which he supposed to be violated by the Maryland statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case.

If the court then meant to say that a tax levied on goods from a sister State which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition.

It may not be inappropriate here to refer to the *License Cases.**

The separate and diverse opinions delivered by the judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have here argued was before the court and seemed to require solution. But no one can read the opinions which were delivered without perceiving that none of them held that goods imported from one State into another are within the prohibition to the States to levy taxes on imports, and the language of the Chief Justice and Judge McLean leave no doubt that their views are adverse to the proposition.

We are satisfied that the question, as a distinct proposition

* 5 Howard, 504.

necessary to be decided, is before the court now for the first time.

But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?

The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void. There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another.

JUDGMENT AFFIRMED.

Mr. Justice NELSON, dissenting.

I am unable to agree to the judgment of the court in this case. The naked question is, whether a State can tax the sale of an article, the product of a sister State, in the original package, when imported into the former for a market, under the Constitution of the United States? If she can, then no security or protection exists in this government against obstructions and interruptions of commerce among the States; and, one of the principal grievances that led to

the Convention of 1787, and to the adoption of the Federal Constitution, has failed to be remedied by that instrument. And hereafter (for this is the first time since its adoption that the clause in question has received the interpretation now given to it), this inter-state commerce is necessarily left to the regulation of the legislatures of the different States. We think we hazard nothing in saying, that heretofore the prevailing opinion of jurists and statesmen of this country has been that this commerce was protected by the clause—the subject of discussion—namely: "No State shall, without the consent of Congress, lay any imposts or duties *on imports or exports*, except what may be absolutely necessary for executing its inspection laws."

An attempt was made by the State of Maryland, in 1821, to lay a tax upon foreign imports, but which was pronounced unconstitutional by this court after an elaborate argument of counsel and a very full and carefully considered opinion of Chief Justice Marshall, concurred in by the whole court, and he closed it by saying: "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State." A tax was attempted by the State of California, in 1857, upon an export from that State to the State of New York, but was pronounced unconstitutional by this court, the opinion delivered by the late Chief Justice. He observed: "If the tax was laid on the gold or silver exported (it was in form a stamp tax on the bill of lading), every one would see that it was repugnant to the Constitution of the United States, which, in express terms, declares that 'no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'" Again he observes: "In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be misunderstood."

It is now said, however, that this clause relates only to foreign commerce, and is no prohibition against taxation upon commerce among the States; and, as we have already

said, if this be so, it is left to the unrestricted imposition by a State of duties, or tax, upon all articles imported into the same from sister States. In looking at this clause, it will be seen that there is nothing in its terms, or connection, that affords the slightest indication that it was intended to be confined to the prohibition of a tax upon foreign imports. Surely, if this had been intended, it must have occurred to the distinguished members of the Convention, it would be quite important to say so that the prohibition might not be misunderstood, especially when we take into consideration the eminent men who not only discussed and settled the terms and meaning of the clause, but to whom the whole instrument was committed for special and final revision. It would have been easy to have made the clause clear by affixing the word "foreign" before the word "imports." Then the clause would read "foreign imports," that now is affixed, by construction, a pretty liberal one of the fundamental charter of the government.

The same clause also provides: "No State shall, without the consent of Congress, lay any duty of tonnage," &c. Does this also relate to tonnage employed in foreign trade? If so, then it will be competent hereafter for the States to levy a tax upon the tonnage of vessels employed in carrying on commerce among the States, including the tonnage employed in the coasting trade. But, independently of the terms of the clause and the connection in which it is found, why should not the prohibition extend to *imports and exports* of commerce among the States? At the time of the Convention and formation of the Constitution the States were independent and foreign to each other, except as bound together by the feeble "league of friendship" in the Articles of Confederation in 1777, the second article of which provided, that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled." And the only specified restraint then submitted to in respect to their commercial relations is found in the third section of the article, namely:

"No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain." There is another provision relating to commerce among the States in the fourth article, to which we shall hereafter refer.

Now, as is seen, at the time the delegates assembled in 1787 to form the Constitution, they represented States that for all the substantial purposes of government were foreign and independent, and especially so in respect to all commercial relations among them, or with foreign countries. Looking at this condition of things, and to the delegates in the Convention representing such constituencies, is it reasonable or consistent with proper rules of construction to suppose, in the absence of any indication from the words of this clause prohibiting the tax on *imports or exports*, the members used the terms with exclusive reference to foreign countries—that is, countries foreign to the States—and not in reference to the States themselves? We again ask, if this distinction was intended, why was not the clause so framed as to indicate it on its face, and not left to mere conjecture and speculation?

Again, at the time the Convention was assembled, as it has been ever since and now is, the commerce among the States was many fold greater, and vastly more productive of wealth, independence, and happiness of the people, than all the foreign commerce of the country. Its magnitude and importance, therefore, invited protection and encouragement far beyond that of foreign commerce, and could not, and did not, escape the particular care and attention of the members of the Convention. Besides the clause in question, it is provided in the ninth section that "no tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." And in the clause conferring

upon the Federal Government the general power over commerce, it is given, in terms, "to regulate commerce with foreign nations and among the several States." The two are placed upon the same footing without any discrimination. The power is equally broad and absolute over the one as over the other. No distinction is made between foreign and inter-state commerce, and why should the specific prohibitions to be found in the Constitution in relation to this subject receive a different interpretation in the absence of any words indicating any such distinction? Take, as an example, the prohibition upon the Federal Government: "No tax or duty shall be laid on articles exported from any State." Is this clause, also, to receive the narrow and strained construction given to the one in question, and be applied only to exports to a foreign country? If so, then Congress may tax all exports from one State to another. If the terms in the clause before us do not embrace inter-state commerce, then the above clause does not. As was said by the Chief Justice in *Brown* v. *Maryland*,* "There is some diversity in the language, but none is perceivable in the act which is prohibited." Now, this is a prohibition or limitation upon the general commercial power conferred upon Congress, but if it only applies to foreign commerce, it loses more than half its efficiency as heretofore supposed to belong to it.

We will now recur to a provision in the Articles of Confederation to which we have heretofore alluded. It is the fourth section: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States shall be entitled to all the privileges and immunities of free citizens of the several States, and the people of each State shall have free ingress and regress to and from any other State, and *shall enjoy therein all the privileges of trade and commerce, subject to the same restrictions as the inhabitants thereof, respectively.*"

It will be seen the last clause of this article contains the doctrine of my brethren in the case before us.

* 12 Wheaton, 445.

The people of one State have the right of egress and regress to and from any other for the purposes of trade and commerce, and the articles may be taxed by the State into which they are carried; but there must be no discrimination. We have gone back to the Articles of Confederation, and have incorporated into the Constitution, by construction, a provision which the framers of that instrument had rejected as wholly inadequate for the protection of inter-state commerce. Instead, therefore, of adopting this article into that instrument, they adopted a more complete and thorough security to the enjoyment of the privileges of this commerce—"no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports."

Why this change? If there had been no diversity of soil or climate in the States of the Confederacy, or in the mineral riches of the earth, any commercial regulation among them would have been of little importance. Foreign trade and commerce would have been their only dependence for a market of their surplus productions. The products would, as a general rule, have been common among all the States. But the fact was otherwise. From the diversity of soil and climate the Middle and Eastern States were mostly grain-growing States, and their surplus products were flour, pork, beef, butter, and cheese, with a modicum of the manufacture of woollens.

The Southern States were cotton, tobacco, and rice-growing States. It was the exchange of these commodities that constituted the bulk of inter-state commerce.

Virginia and North Carolina looked to the Middle and Eastern States for their products in exchange for tobacco, tar, rosin, and turpentine; South Carolina and Georgia for their cotton and rice. Now, the provision in the Articles of Confederation securing egress and regress for the purposes of trade and commerce furnished no protection to either State. New York and Pennsylvania could lay a tax upon all sales of cotton, tobacco, or rice within these States, which would be a tax without any discrimination; and yet it would be in fact, in its operation and effect, exclusively upon these

Southern products. So in respect to the wheat, flour, pork, beef, butter, and cheese, when shipped to these Southern States. Each State not producing the article sold, the general tax would not affect their people. We have no doubt the case before us falls within this category.

Alabama is a cotton-growing State, and depends upon the Northern States bordering on the Mississippi and Ohio Rivers for most of her corn, wheat, and flour. She cannot be, therefore, a State largely engaged in the manufacture of whiskey. The tax, so far as regards her own people, is probably nearly nominal. We see from the above view why this non-discriminating article in the Confederation was not incorporated into the Constitution. It was entirely worthless as a protection against the taxation of the inter-state commerce.

The same results will follow, applying the principle to commerce among the States as it exists at the present time. The State of Pennsylvania supplies New York with the article of coal from her mines which is consumed in that State. The trade is very great, and is increasing every year as the facilities for the conveyance of the article by railroads into the interior of the State are multiplied. According to the judgment of the court in the present case, the State of New York may tax these sales if she makes no discrimination. She may, therefore, pass a law imposing a tax on all sales of coal in the State, as the State of Alabama has done in respect to sales of whiskey. Such a law may be passed and enforced without imposing any burden upon her own people, as there is no coal of any comparative value in the State but what is brought into it from abroad. So, in turn, Pennsylvania can tax the salt and plaster of New York, carried into that State, with like impunity to her people. Massachusetts may tax the grain and flour of the West, carried into the State, by a like law, as she does not raise a sufficient supply for home consumption, and a general tax upon all sales would not harm her people. In like manner she can tax the cotton and rice of the Southern States, and sugar of Louisiana, and those in turn can tax her cotton, woollen manufacture, and shoes carried into those States.

The lumber of Wisconsin can be taxed at Chicago, its principal mart, by a general law of Illinois, without any serious prejudice to the interests of the people of that State. The gold dust and gold and silver bars of California carried to New York can be taxed upon a like principle without prejudice to her people.

We have extended this discussion much further than we had intended, and will close it by referring to the views expressed by Judge Story on this clause of the Constitution. After stating the history of the clause in the Convention, he observes, in his valuable Commentaries on the Constitution:* "So it seems that a struggle for State powers was constantly maintained, with zeal and pertinacity, throughout the whole discussion. If there is wisdom and sound policy in restraining the United States (referring to the prohibition upon it in respect to articles exported from the State) from exercising the power of taxation unequally in the States, there is, he observes, at least equal wisdom and policy in restraining the States themselves from the exercise of the same power injuriously to the interests of each other. A petty warfare of regulation is thus prevented which would rouse resentments and create dissensions to the ruin of the amity of the States. The power to enforce their inspection laws is still retained, subject to the revision and control of Congress. So that sufficient provision is made for the convenient arrangement of the domestic and internal trade whenever it is not injurious to the general interests."

Judge Story entertained no doubt but that this clause applied to the domestic and internal commerce of the States, as well as to the foreign. We have, therefore, the deliberate opinions of Marshall, and Taney, and Story concurring in this construction—great names in this and in every country where jurisprudence is cultivated as a science, and especially eminent at home as expounders of our constitutional law.

* Vol. i, § 1016.

Statement of the case.

NOTE.

At the same time with the preceding case was decided another from the same court, much like it in general principle; the case of

HINSON *v.* LOTT.

1. The principal of the preceding decision affirmed and applied to a case, where, although the *mode* of collecting the tax on the article made in the State was different from the mode of collecting the tax on the articles brought from another State into it, yet the amount paid was, in fact, the same on the same article in whatever State made.
2. The effect of the act being such as just described, it was held to institute no legislation which discriminated against the products of sister States, but merely to subject them to the same rate of taxation which similar articles paid that were manufactured within the State; and accordingly that it was not an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States.

THE case was this: With the same provisions of the Constitution as are quoted in the last case in force (*supra*, p. 123) the State of Alabama passed a statute, approved February 22d, 1866, which, by its 13th section, enacted:

"Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers *introducing any such liquors into the State for sale* shall first pay the tax-collector of the county into which such liquors are introduced, a tax of *fifty cents per gallon upon each and every gallon thereof.*"

Two subsequent sections, the 14th and 15th, provided the mode of enforcing the collection of the tax thus imposed.

Previous sections of the statute, it ought to be mentioned, laid a tax of fifty cents per gallon on all whiskey and all brandy from fruits *manufactured in the State*, and in order to collect this tax, enacted that every distiller should take out a license and make regular returns of the amount of distilled spirits manufactured by him. On this he was to pay the fifty cents per gallon.

With this statute in force, Hinson, a merchant of Mobile, filed a bill against the tax-collector for the city of Mobile, and State of Alabama, in which he set forth that he had

Statement of the case.

on hand five barrels of whiskey consigned to him by one Dexter, of the State of Ohio, to be sold on account of the latter in the State of Alabama, and that he had five other barrels, purchased by himself in the State of Louisiana, and that he had brandy and wine imported from abroad (upon which he had paid the import duties laid by the United States, at the custom-house at Mobile), all of which liquors he now held and was offering for sale in the same packages in which they were imported, and not otherwise; that the tax-collector was about to enforce the collection of State and county taxes on the said liquors, for which he set up the authority of the 13th, 14th and 15th sections of the already quoted act of the Alabama legislature. Hinson insisted that this act was void as being in conflict with the Constitution of the United States, and prayed an injunction. The defendant demurred.

On final hearing, in the Supreme Court of Alabama, that court gave an elaborate opinion. Referring to the clause of the Constitution, which says, that "Congress shall have power to regulate commerce with foreign nations and among the several States," it admitted that opinions were to be found in the reports of the Federal courts that the power was exclusive; but that the better opinions were otherwise; and while, if Congress exercised this power, all conflicting legislation would give way, yet, subject to the superior power in Congress, the States might legislate. It proceeded:

"There is no act of Congress with which a State tax upon liquor, introduced from other States, can interfere, and, therefore, it is permissible for the State to impose a tax upon the sale of liquor introduced from another State. Such a tax is not only constitutional, but it is obviously just and proper, for a tax to the same extent is imposed upon liquor manufactured in the State.

"It is admitted that the law under consideration is broad enough to apply to liquors imported from foreign countries, but it is void only so far as it is in collision with the acts of Congress on that subject."

Accordingly, the relief prayed was granted as to all but the State tax, and relief as to that was granted as to goods

imported from abroad, but the State tax of fifty cents per gallon on the whiskey of Dexter, of Ohio, and that purchased by plaintiff in Louisiana was held to be valid.

The case was now here for review. And *was argued (like the last one, though being after it, less fully) by Mr. J. A. Campbell, for the plaintiff in error, and by Mr. P. Phillips, contra:* little reference being made to other sections of the statute than the 13th.

Mr. Campbell contended that this 13th section of the act in question was a plain violation of the Constitution; as well of that provision of it which says that "no State shall levy any imposts on imports," as of that other which declares "that the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States." Moreover, the State act regulated inter-state commerce.

Mr. Justice MILLER delivered the opinion of the court.

In the argument of this case no reference has been made to any other section than the 13th of the statute in question.

If this section stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State or by retail in smaller quantities, would be subject to a heavy tax, while the same class of liquors manufactured in the State would escape the tax. It is obvious that the right to impose any such discriminating tax, if it exist at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to liquors, it can be done with reference to all the products of a sister State, and in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union.

We have decided, in the case of *Woodruff* v. *Parham*, im-

mediately preceding, that the constitutional provision against taxing imports by the States does not extend to articles brought from a sister State. But if this were otherwise, and we could hold that as to such articles the rule laid down in *Brown* v. *Maryland*, concerning foreign imports, applied, it would prevent but a very little of the evil which we have described; for, under the decision in that case, it is only while the goods so imported were held in the original unbroken condition in which they came into the State, and in the hands of the first importer, that they would be protected from State taxation. As soon as they passed out of his hands into use, or were offered for sale among the community at large, they would be liable to a tax which might render their use or sale impossible.

But while the case has been argued here with a principal reference to the supposed prohibition against taxing imports, it is to be seen from the opinion of the Supreme Court of Alabama delivered in this case, that the clause of the Constitution which gives to Congress the right to regulate commerce among the States, was supposed to present a serious objection to the validity of the Alabama statute. Nor can it be doubted that a tax which so seriously affects the interchange of commodities between the States as to essentially impede or seriously interfere with it, is a regulation of commerce. And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power, all conflicting State laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further.

That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the States until some regulation on the subject had been made by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States; and

looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever.

The question of the nature of the power to regulate commerce and how far that power is exclusively vested in Congress, has always been a difficult one, and has seldom been construed in this court with unanimity. In the very latest case on this subject, *Crandall* v. *Nevada*,* the Chief Justice and Mr. Justice Clifford held that a tax on persons passing through the State by railroads or other public conveyances was forbidden to the States by that provision of the Constitution *proprio vigore*, and in the absence of any legislation by Congress on the subject; while a majority of the court, preferring to place the invalidity of the tax on other grounds, merely expressed their inability, on a review of the cases previously decided, to take that view of the question. But in that case the opinion of the court in *Cooley* v. *The Port Wardens* was approved, which holds that there is a class of legislation of a general nature, affecting the commercial interests of all the States, which, from its essential character, is National, and which must, so far as it affects these interests, belong exclusively to the Federal government.

The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.

But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same act of fifty cents per gallon on

* 6 Wallace, 35.

all whiskey and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come in the light of these earlier sections of the act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States.

DECREE AFFIRMED.

Mr. Justice NELSON dissented. See his opinion in the preceding case, *supra*, p. 140.

PROPELLER MOHAWK.

1. Where insurers, to whom the owners have adandoned, take possession, at an intermediate place or port, of goods damaged during a voyage by the fault of the carrier, and there sell them, they cannot hold the carrier liable on his engagement to deliver at the end of the voyage in good order and condition.
2. Facts stated which amount to such action on the part of the insurers.
3. Insurers, so accepting at the intermediate port, are liable for freight *pro rata itineris* on the goods accepted.
4. The explosion of a boiler on a steam vessel is not a "peril of navigation" within the term as used in the exception in bills of lading.

5. The court expresses its satisfaction that it could, in accordance with principles of law, decide against a party who had bought, and was prosecuting a claim, that the original party was not himself willing to prosecute; it characterizes such a purchaser suing as "a volunteer in a speculation."

APPEAL from the Circuit Court for the Northern District of Illinois, the case being thus:

On the 31st of October, 1860, two parties, owners of it, shipped on board the propeller Mohawk, the vessel being then at Chicago, and as was admitted in a stipulation of record, "in good and seaworthy condition," two consignments of wheat, amounting to 20,200 bushels, to be delivered at Buffalo in good order and condition, dangers of navigation excepted, upon payment of freight and charges. The property was insured by an insurance company at the last-named place for $20,000. The propeller proceeded on her voyage, and after the same had been more than half completed, grounded on the 7th of November on the St. Clair Flats, near Detroit. In the effort to get her off she became disabled by the bursting of her boiler, and afterwards sunk, and was compelled to suspend her voyage for a few days to make necessary repairs.

All the wheat but 1100 bushels got wet and was damaged by the sinking of the propeller. Upon information then given to the consignee and insurers at Buffalo, the agent of the owners of the wheat immediately abandoned it to the underwriters as for a total loss, and the latter then accepted the abandonment and paid the loss to the owners as for a total loss.

On the 11th of November, the underwriters ordered their agent at Detroit to take possession of the damaged wheat, and to sell it as it lay in the vessel at the flats, and the agent thereupon did sell the damaged portion of it to one Phelps, for $1200, and took his note therefor, at 30 days. A delivery into lighters to the purchaser began on the same day. The next day (the 12th) the agent reported the sale, and on the 13th received a telegram from his company acknowledging the advices, and approving thereof. After the sale had been

thus made, the company hearing that the master intended to claim freight, directed the agent to have nothing to do with the grain, unless the owners of the vessel would relinquish all claim for freight. It was arranged, however, between the agent and the master, that as the sale was a good one, it should stand, and that the freight should be left for after consideration. The whole of the damaged portion of the cargo, amounting to 19,100 bushels, was delivered by the propeller to the purchaser, Phelps, and the residue, 1100 bushels, was retained on board, and carried by the propeller to Buffalo, where it arrived safely. On *that residue* the insurance company tendered full freight and all other lawful charges, including a sum to cover general average charges; but refused to pay either *pro rata* or full freight on the wheat delivered on the flats. The master accordingly refused to deliver the 1100 bushels; the value of it being less than the freight on it and the *pro rata* freight on the larger quantity sold; and he asserting that he was entitled to freight on the entire shipment, either in full, or *pro rata*.

Soon after this (though with how correct a knowledge of facts was a matter, as it seemed, subsequently disputed by counsel), the counsel of the insurance company on the one hand, and of the shippers on the other, agreed upon a statement of facts, and on it the company brought suit in the Superior Court of Buffalo, to test the liabilities of the shippers upon the facts as then supposed. The insurance company, however, acting herein against the urgency of their agent at Detroit, "who never expressed but one opinion, which was, that the carriers were liable and ought to be sued," after some time discontinued this suit.

After this, that is to say, in July, 1862, and through the same agent, the claim of the company on the carriers was sold to one Barrell, for about $2300.

Libels were now filed, August, 1862, in the District Court of Illinois in the names of the owners of the wheat, claiming damages for the non-delivery of it. After hearing, the libels were dismissed. Thereupon an appeal was taken to the Circuit Court.

Barrell now presented his petition to that court, stating that the underwriters had assigned their interest in the cargo to him, and that he was equitably interested and entitled to intervene, and have the benefit of both of the above libels. On this petition the Circuit Court consolidated both causes, and made order that he be subrogated to all the rights of the libellants, and that he have leave to file an amended libel. He did accordingly file such a libel, alleging the shipping of the cargo on board the Mohawk; that the propeller left port *in good and seaworthy condition*, and that after the voyage was more than half completed she was carelessly grounded on the St. Clair Flats. He also alleged the abandonment, and averred that the underwriters had suffered damages on account of the injury to the wheat, as well as for the non-delivery of the 1100 bushels detained by the propeller; and that he, as assignee of the insurance company, was entitled to recover therefor.

To this libel answer was made, denying negligence in grounding the vessel; admitting the non-delivery of the 1100 bushels of wheat, and asserting a right to hold it for freight; both that earned on the wheat actually delivered at St. Clair Flats, and on the 1100 bushels transported to Buffalo; abandonment was admitted; any assignment from the insurance company was denied; and the character of that transaction set forth with allegations, in substance, that it savored of *maintenance*. The substance of this answer was also proved.

The note at thirty days for $1200, given by the purchaser Phelps, was still in possession of the insurance company.

The Circuit Court affirmed the decree of the District Court, and the case was now here, on the action of Barrell, for review.

The appellant made two claims:

1. To have damages for injury to the cargo by the sinking of the propeller.

2. To have the 1100 bushels which the propeller had re-

tained, or their value, upon paying the freight earned on that parcel only.

Mr. S. W. Fuller, with whom was Mr. Roe, for the appellant:

The first and chief question is, whether the carriers, having lost the body of the wheat through an explosion of a boiler, their own fault, they are discharged from obligation to pay the loss, owing to the insurers, who in this matter are the owners, having directed the sale of that portion of the wheat, in the circumstances of this case?

The moment of the disaster was, of course, an exigent one. The thoughts of all parties were directed obviously, and in an amicable spirit and mode of action, to saving the cargo, or of doing the best by it that circumstances allowed. In regard to everything but the matter of freight, all parties were of one mind; and the difference about this was adjusted in the same spirit which seems to have animated them in everything that was done, a spirit of present effort for the benefit of all concerned. A remission was accordingly made until a future time of the only question of difference arising. But this did not interfere with the common effort for the common advantage. It is in this way, that upon the evidence we see the parties; and upon it, we see them in no other. Least of all do we discover in what they do an attempt to fix liabilities where none existed, or to discharge them where they did. No doubt, it was the right and duty of the carrier to transport the cargo to Buffalo, according to the terms of the bills of lading, in order to earn and become entitled to freight; but the disaster to the propeller, whereby the wheat was damaged, having rendered it necessary and proper for all concerned, to join in saving as much of it as could be, the effort of the insurance company to help him, neither entitled him to full freight, nor released him from liability for loss occasioned by his negligence. Whatever acceptance was made, was in some sort compulsory and for the carrier's benefit.

We have assumed that the explosion was through the carrier's fault. Certainly it was so. An explosion is not a

"danger" incident to navigation, any more than the breaking of a chain on quiet water, or the falling of a mast when there is no wind.* It occurs either from defect in the boiler, or from negligence in the engineer. Perils arising on the sea are not necessarily perils arising from the sea.

But if the vessel is not liable for the whole value of the wheat, it ought surely to demand freight upon only what it has delivered. All our preceding observations apply to this part of the case.

Mr. Beckwith, contra:

1. The insurers accepted and took possession of the damaged wheat and sold it to Phelps, and requested the propeller to deliver the property at the St. Clair Flats; they then took his note for the price. The sale was then completed, and the purchaser invested with title as against the insurers. How can they set up a claim of any kind for the non-delivery of the wheat, even supposing that the explosion did happen through their own fault,—after thus taking it off the carrier's hands and preventing his delivery of it? But

2. The explosion was not through the carrier's fault. The *immediate* cause of damage was the sinking of the vessel; the vessel was sunk by the explosion of its boiler; the boiler exploded in an effort to set afloat the grounded vessel; and the vessel was grounded in the channel of the St. Clair Flats, without fault of its officers or men. It is admitted that the propeller left port *in good and seaworthy condition;* and she continued her voyage until she was grounded. Nothing had occurred, in the meantime, to disturb the good and seaworthy condition in which she set out. The admission applies as well to the condition of the boiler at the time of leaving; and, as nothing is shown to have occurred after the vessel left port to render the boiler defective, it is wrong *to presume* that the explosion occurred from a defect in the boiler.

3. Independently of all this, another matter, in its nature preliminary, though here put last, deserves attention from

* Bulkley *v.* Naumkeag Steam Cotton Company, 24 Howard, 386, affirming The Bark Edwin, 1 Sprague, 477.

the bench. Barrell's standing in court is that of a volunteer purchasing and prosecuting a claim which his alleged assignor declined to prosecute or insist upon. The assignment did not transfer a legal title, and has merely an equitable operation. In considering the *locus standi* of the assignee, equitable considerations will therefore govern. The assignment savors of *maintenance;* the right thereunder is claimed by a volunteer; and in a court of equity the appellant would not, for these reasons, be entitled to relief.* And in such a case, where a court of admiralty is called on to aid a party standing upon an equitable right, it will follow the rules of equity, and deny relief.†

Reply.—As to the question of the appellant's status. The law subrogated the insurance company to the rights of the owners of the damaged cargo, and, in ignorance, the insurance company sold to the appellant a claim, which it regarded as worthless. Then, after suits had been brought in the names of the owners of the cargo, the court, for economy and convenience, allowed the two suits to be consolidated, and the real owner of the claim to be admitted to prosecute the suit. In this there was nothing champertous; nothing but what was sanctioned in *Cobb* v. *Howard et al.*‡ As Grier, J., said, in the *Propeller Monticello* v. *Mollison.*§

"The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit at the instance of any merely equitable claimant."

Both the 34th and 43d rules in admiralty justify what was done.

Mr. Justice NELSON delivered the opinion of the court. The insurance company, having accepted the abandon-

* Ward *v.* Van Bokkelen, 2 Paige, 289.

† Brig Ann Pratt, 1 Curtis, 342.

‡ 3 Blatchford, 524.

§ 17 Howard, 155.

ment of the wheat by the owner, after the disaster to the vessel, became subrogated to all the rights of the shipper, and might have left the responsibility upon the master to refit his vessel, or procure another, and forward the wheat to its port of delivery, according to the contract in the bill of lading. The vessel could have been refitted within a short time; and this port was but a few days' navigation from the place of the disaster. Besides, it occurred in the track of vessels from Chicago, and other ports on the upper lakes, and there could have been but little difficulty in procuring the shipment in another vessel.

But no choice was left to the master, whether to refit his vessel or send on the cargo in another, or to communicate with his owners, who were in Buffalo, as to the proper course to be pursued. The second day after the disaster, the agent of the insurance company appeared with instructions to take possession of the damaged wheat, and sell it as it lay in the vessel. Possession was given up accordingly, and the wheat sold on the same day, the sale perfected, and a delivery into lighters commenced to the purchaser. After this, the company fearing that the master would charge freight upon this damaged wheat, countermanded the original order to sell, unless the master would relinquish it. This he declined to do, but suggested to the agent the sale was a favorable one, and that the question of freight might remain for after-consideration; which was agreed to.

We think it quite clear that the counter order, not to sell, came too late. The wheat had been turned over into the possession of the agent, who had sold it, and a portion had been delivered from the vessel to the purchaser. The agent had received complete possession and control of the wheat, and thereby rescinded the contract in the bill of lading for further shipment; and it required the assent of both parties to revive it. This counter order, however, and the action under it, are significant of the intent of the insurance company in accepting the delivery of the wheat. It was to receive the possession in discharge of any further responsibility of the vessel. The only thing in controversy was the claim

of freight, and, undoubtedly, if the counter order had not been too late, unless the master had consented to give up the freight, he could have been compelled to forward the wheat as per bill of lading, or be answerable for the refusal or neglect.

In cases where the disaster happens in consequence of one of the perils within the exception in the bill of lading, or charter-party, the only responsibility of the vessel is to refit, and forward the cargo, or the portion saved, or if that is impracticable, to forward it in another vessel, and the owner is then entitled to freight. If part of the cargo is so far damaged as to be unfit to be carried on, the master may sell it at the intermediate port, as the agent of the shipper, for whom it may concern, and carry on the remainder. In this class of cases the vessel is only responsible for carrying on the cargo, being exempt from any damage by the exception in the contract of affreightment. And it is perfectly settled, that if the shipper voluntarily accepts the goods at the place of the disaster, or at any intermediate port, such acceptance terminates the voyage and all responsibility of the carrier, and the master is entitled to freight *pro rata itineris.**

The same rule, as it respects the effect of the voluntary acceptance of the goods at the place of the disaster, or intermediate port, applies in case the ship is disabled or prevented from forwarding them to the port of destination by a peril or accident not within the exception in the bill of lading.†

The only difference between the cases is, that inasmuch as, in the latter, the vessel is responsible for all the damages that have resulted from the misfortune to the cargo, the proofs of the acceptance of the goods at the intermediate port, in order to operate as a discharge of the vessel, should be clear and satisfactory. The mere acceptance in such

* Welsh *v.* Hicks, 6 Cowen, 504; Abbott on Shipping, 554–5, and note; 1 Parsons on Shipping, 239, n. 2; Ib. 273; Maude & Pollock, Law of Shipping, 239, 221.

† Osgood *v.* Groning, 2 Campbell, 471; Liddard *v.* Lopes, 10 East, 526; The Newport, Swabia, 335, 342; Abbott on Shipping, 452, 453–5; Hadley *v.* Clarke, 8 Term, 259; Spence *v.* Chodwick, 10 Queen's Bench, 517.

cases, and nothing else passing between the parties, ought not to preclude the shipper of his remedy. It should appear from the evidence and circumstances attending the transaction that the acceptance was intended as a discharge of the vessel and owner from any further responsibility—what would be equivalent to a mutual arrangement, express or implied, by which the original contract in the bill of lading was rescinded. The ground of the exemption from responsibility of the vessel, in both cases, is the voluntary acceptance of the goods at the intermediate port. Applying these principles to the present case, we think the court can come to but one result. It falls within the second class of cases above referred to, as the explosion of the boiler was not a peril within the exception in the bill of lading.*

The acceptance, as we have already seen, was the voluntary act of the insurance company, without any solicitation or interference on the part of the master; and what would seem conclusive of the intent of the company in the transaction is, that they refused to bring a suit against the carrier to recover for the damaged wheat, although urged to it by the parties who afterwards took an assignment of the subject of litigation. Some $2300 was paid for a claim which, if real and substantial, amounted to $20,000.

What is still further evidence of the understanding of the insurance company of the effect of the acceptance and sale is, that they brought a suit to recover the value of the one thousand one hundred bushels of sound wheat, in the Superior Court of Buffalo alone; but even this was subsequently discontinued. The suit in the present case has been instituted by a volunteer, on a speculation; and we are not sorry that, upon the application of the principles of law governing it, the experiment must fail.

As to the freight, the cases we have above referred to establish that the master is entitled to freight *pro rata itineris* in all cases where there has been a voluntary acceptance of

* Bulkley *v.* Naumkeag Steam Cotton Company, 24 Howard, 386; S. C. 1 Clifford, 322–324; 1 Sprague, 477.

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the goods at the port of disaster. The rate is to be ascertained by comparing the portion of the voyage performed with the entire length of it.*

In the present case the goods were carried something more than half the distance; and, upon the facts as admitted in the record, the freight would exceed the value of the one thousand and one hundred bushels of wheat at the port of delivery at the time it arrived.

No balance is shown to be due to the libellant on the wheat. The libel, therefore, was properly dismissed by the court below.

Decree affirmed.

McKee *v.* United States.

1. The military authorities had no power under the act of July 13th, 1861, to license commercial intercourse between the seceding States and the rest of the United States. *The Ouachita Cotton case* (6 Wallace, 521) affirmed.
2. Such trade was not authorized in March, 1864, by regulations prescribed by the Secretary of the Treasury in pursuance of the said act, but, on the contrary, was at that time forbidden by the then existing regulations of the treasury.
3. Even supposing such trade to have been licensed in March, 1864, in pursuance of the act of July 13th, 1861, the license would not have authorized a purchase by a citizen of the United States from any person then holding an office or agency under the government of the so-called Confederate States; all sales, transfers, or conveyances by such persons being made void by the act of July 17th, 1862.

Appeal from the District Court for Southern Illinois, condemning certain cotton claimed by John H. McKee. The case was this:

Congress, by act of July 13th, 1861,† passed soon after the outbreak of the late insurrection against the United States, enacted that it might be lawful for the President, by proclamation, to declare that the inhabitants of any State or part of a State where such insurrection was existing were

* 1 Kent's Commentaries, 230. † 12 Stat. at Large, 257.

in a state of such insurrection, and that "thereupon all commercial intercourse by and between the same and citizens thereof and citizens of the rest of the United States should cease, and be unlawful so long as such condition of hostility should continue." The same act contained a proviso that the *President* might license and permit commercial intercourse with any such part of the section so declared in a state of insurrection as he, in his discretion, might think most conducive to the public interest; and that such intercourse, so far as by him licensed, should be carried on in pursuance of *rules and regulations prescribed by the Secretary of the Treasury.*

In March, 1864, a date to be noted in the present case, the only regulations prescribed by the secretary on the subject forbade the trade; these prescribing that "*commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited.*"

By section 5 of the subsequent act of July 17th, 1862,* it was enacted:

"That to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States."

The enumeration of persons includes any person hereafter holding *an office or agency under the government of the so-called Confederate States* of America. And the section thus concludes:

"And all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

* 12 Stat. at Large, 590.

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In this state of the statutes and treasury regulations, one A. W. McKee, a resident of the then rebel portion of Louisiana, and from October till the autumn of 1864 the general agent of the Treasury Department to purchase and dispose of cotton in the State of Texas, and that part of Louisiana lying west of the Mississippi River, regions then in insurrection against the United States and within the military lines of the Confederacy, was the owner of certain cotton, the subject of the present appeal, and had it in a storehouse there on the bank of the Red River.

While thus stored within the Confederate lines, it was purchased of him there, and paid for on the 4th of March, 1864, by John H. McKee, a loyal citizen of the United States, resident at New Orleans, then in possession and under control of the government; this McKee, the purchaser, being no relative of his by blood, though an adopted son of an uncle. There was some evidence, not satisfactory, however, tending to show that the purchaser, McKee, had a license to trade in insurgent territory, issued by agents of the treasury in proposed conformity with the requirements of the act of July 13th, 1861. But, however this might have been, it seemed to be conceded that he had permission from the military commander of the forces of the United States in that department to pass through the Federal lines into the rebellious region, and bring away any property that he might purchase there; and there was even evidence tending to show that these authorities had actually granted him a license to trade.

The cotton had not yet been removed by J. H. McKee from the storehouse in which it was at the time of the purchase, when, in twelve days after the purchase, the region being now overrun by the Federal army, it was seized by a flotilla of the United States, and, in the face of protest by the purchaser, brought to Cairo and condemned.

The propriety of this condemnation was now the question on appeal.

Mr. R. M. Corwine, for the appellant; Mr. Hoar, Attorney-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is a familiar principle of public law, that unlicensed business intercourse with an enemy during a time of war is not permitted. Congress, therefore, in recognition of this principle, when it declared, on the 13th day of July, 1861, that commercial intercourse between the seceding States and the rest of the United States should cease and be unlawful, after the proclamation of the President that a state of insurrection existed, *authorized* the President, in his discretion, to license trade. But in so far as it was licensed, it was to be conducted in accordance with the regulations prescribed by the Secretary of the Treasury. The President proclaimed the fact of insurrection, and provided for a limited commercial intercourse, and the Secretary of the Treasury fixed the manner in which this intercourse should be carried on. Under this act of Congress, the proclamation of the President, and the trade regulations established in pursuance of it, can the purchase of the property in question be protected?

It was made on the 4th of March, 1864, while the war was flagrant, by John H. McKee, a citizen of New Orleans, of A. W. McKee, a resident of Upper Louisiana, and the general agent of the Treasury Department of the Confederate States, to purchase and dispose of cotton in the State of Texas, and that part of Louisiana lying west of the Mississippi River.

Permission had been given the claimant, by the commanding officer of the Department of the Gulf, to pass through the United States lines into Upper Louisiana and bring away any property that he might purchase there. But who authorized him, while there, to make the purchase? There is no sufficient proof in the record that any treasury officer clothed him with this authority, and it is very clear that the power of the military extended no further than to protect him in going into the lines of the enemy and bringing from there any property rightfully acquired. If, as is contended, and as the evidence tends to show, the military authorities went further and granted him also a license to trade, the answer

is, that this court held in *The Ouachita Cotton case*, reported in 6th Wallace, that such a license was void.

But even if McKee had obtained the express permission of one of the treasury agents to go into the Confederate lines and buy cotton, it would not protect him, because the agent would have been acting outside the limits of his authority, as the regulations of the department, in force at the time, strictly prohibited commercial intercourse with localities beyond the lines of military occupation by the United States forces.

There is another view of this case, which is decisive of it, if the proof was ample that the claimant had a license in conformity with treasury regulations, issued under the act of Congress of July 13th, 1861, to trade generally within insurgent territory, for the reason that such a license could give him no right to buy property of A. W. McKee, who held an important official position from the government of the Confederate States.

Section 5 of the act of Congress of July 17th, 1862, prohibited a person occupying the position of A. W. McKee from selling his property, and it follows, as he had no capacity to dispose of it, that the claimant could acquire no title to it.

All licenses to trade issued under the act of July 13th, 1861, are controlled by the provisions of the act of July 17th, 1862, and must be restricted to a permission to trade with those persons who are not within the prohibitions of the latter act. It is a well-settled principle of law, that in case of the repugnancy between two statutes, the latter one must prevail over the former. In that particular in which the prior and the latter act cannot consistently stand together, the latter act must be taken, *pro tanto*, as a modification or repeal of the former.

Decree affirmed.

PAUL *v.* VIRGINIA.

1. A State statute which enacts that no insurance company not incorporated under the laws of the State passing the statute, shall carry on its business within the State without previously obtaining a license for that purpose; and that it shall not receive such license until it has deposited with the treasurer of the State bonds of a specified character to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed, is not in conflict with that clause of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," nor with the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States."
2. Corporations are not citizens within the meaning of the first of these clauses. They are creatures of local law, and have not even an absolute right of recognition in other States, but depend for that and for the enforcement of their contracts upon the assent of those States, which may be given accordingly on such terms as they please.
3. The privileges and immunities secured to citizens of each State in the several States, by this clause, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured by it in other States.
4. The issuing of a policy of insurance is not a transaction of commerce within the meaning of the latter of the two clauses, even though the parties be domiciled in different States, but is a simple contract of indemnity against loss.

ERROR to the Supreme Court of Appeals of the State of Virginia. The case was thus:

An act of the legislature of Virginia, passed on the 3d of February, 1866, provided that no insurance company, not incorporated under the laws of the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed. The bonds to be deposited were to consist of six per cent. bonds of the State, or other bonds of public corporations guaranteed by the State, or bonds of

individuals, residents of the State, executed for money lent or debts contracted after the passage of the act, bearing not less than six per cent. per annum interest.

A subsequent act passed during the same month declared that no person should, "without a license authorized by law, act as agent for any foreign insurance company" under a penalty of not less than $50 nor exceeding $500 for each offence; and that every person offering to issue, or making any contract or policy of insurance for any company created or incorporated elsewhere than in the State, should be regarded as an agent of a foreign insurance company.

In May, 1866, Samuel Paul, a resident of the State of Virginia, was appointed the agent of several insurance companies, incorporated in the State of New York, to carry on the general business of insurance against fire; and in pursuance of the law of Virginia, he filed with the auditor of public accounts of the State his authority from the companies to act as their agent. He then applied to the proper officer of the district for a license to act as such agent within the State, offering at the time to comply with all the requirements of the statute respecting foreign insurance companies, including a tender of the license tax, excepting the provisions requiring a deposit of bonds with the treasurer of the State, and the production to the officer of the treasurer's receipt. With these provisions neither he nor the companies represented by him complied, and on that ground alone the license was refused. Notwithstanding this refusal he undertook to act in the State as agent for the New York companies without any license, and offered to issue policies of insurance in their behalf, and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted, and convicted in the Circuit Court of the city of Petersburg, and was sentenced to pay a fine of fifty dollars. On error to the Supreme Court of Appeals of the State, this judgment was affirmed, and the case was brought to this court under the 25th section of the Judiciary Act, the ground of the writ of error being that the judgment below was against a right set up under that clause

of the Constitution of the United States,* which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" and that clause† giving to Congress power "to regulate commerce with foreign nations, and among the several States."

The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the States of the Union other than Virginia. And the business of insurance was then, and still is, a lawful business in Virginia, and might then, and still may, be carried on by all resident citizens of the State, and by insurance companies incorporated by the State, without a deposit of bonds, or a deposit of any kind with any officer of the commonwealth.

Messrs. B. R. Curtis and J. M. Carlisle, for the plaintiff in error:

The single question is, whether under both or either of the clauses of the Constitution relied on by the insurance agent, the act of the legislature of Virginia in the particulars complained of, is unconstitutional.

I. A corporation created by the laws of one of the States, and composed of citizens of that State, is a citizen of that State within the meaning of the Constitution.‡

Legislation imposing special and discriminating restrictions upon the carrying on of lawful business in one State by citizens of other States was expressly forbidden by an article of the Confederation,§ by which it is provided, that "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants, &c., shall be entitled to all the privileges and immunities of free citizens in the several States, . . . and the people of each State shall have free ingress and egress to and from any other State, *and shall enjoy therein all the privileges of trade and commerce, subject to the same*

* Art. IV, § 2. † Art. I, § 8.

‡ Louisville Railroad Co. *v.* Leston, 2 Howard, 497.

§ Article IV, § 1; 1 Stat. at Large, 4.

duties, impositions, and restrictions as the inhabitants thereof respectively."

It cannot be supposed that the Constitution—one of whose objects was to secure a more perfect Union—was intended to be less efficient in these respects than the Articles of Confederation had been. The defect in the article of the Confederation was not that it imposed too great restrictions upon the powers of the States, but that it was wholly without the protection and support of a supreme Federal power.

But insisting less upon this first head, we come to one which we deem conclusive.

II. *The power conferred on Congress "to regulate commerce," does not exclude the commerce carried on by corporations.*

(*a.*) The terms are broad enough to include it.

(*b.*) The state of facts existing at the time of the formation of the Constitution forbids the supposition that the commerce of corporations was excluded. From the time when commerce began to revive in the middle ages, corporations had been a great and important instrument of commerce. This fact is too conspicuous to be overlooked. The East India Company, founded 1599, and made perpetual in 1610, had, in its pursuit of commerce, conquered and held vast possessions. Every commercial people, from Wisby round to Venice, had employed these associations as the instruments of commerce. Morellet, a French writer on commercial subjects, whose book was published in 1770, gives a list of a large number of these companies. Postlethwaite, whose Dictionary of Trade appeared in 1774, does the same. We need but refer to The Merchant Adventurers' Company, in the time of Edward IV, to The Russian Merchants' Company, to The Levant Company, The Virginia Company, The Turkey Company, The Greenland Company, The Hudson Bay Company, The Hamburg Company, The Great Dutch East India Company. And when the Constitution was proposed, some of the States to be united under it, as *ex. gr.* Massachusetts and Plymouth, had their origin, and settlement, and growth under the charters of trading corporations. In 1776 Adam Smith,

whose Wealth of Nations was extensively read and admired, speaks of them largely.

Even if it was not then known that corporations had been extensively employed as instruments of commerce, still if the terms of the Constitution were broad enough to include *all* instruments, all would be included. How much more, when the use of this instrumentality was then known, conspicuous, and of vast importance. The truth is, that the Constitution has no reference to the particular instruments to be employed. These instruments may be greatly varied, according to the views of interest and expediency of those who carry on commerce.

Single persons, general partnerships, special partnerships, associations not incorporated, but having some of the incidents, corporations technically, all these alike are agencies of commerce. The Constitution has no reference to the modes of association by which the commerce should be carried on. This was of no more importance than whether sails or steam were used in the matter.

Indeed, it seems absolutely necessary to hold commerce carried on by corporations to be included. No systematic and uniform plan would be otherwise secured, and we should have worse confusion than before the Constitution was adopted.

2. *The business of insurance is commerce.* It is intercourse for the purpose of exchanging sums of money for promises of indemnity against losses. The term "*commerce*," as used in the Constitution, has been authoritatively construed to have a signification wide enough to include this subject. In *Gibbons* v. *Ogden*,* Chief Justice Marshall said, "Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations in all its branches."

The contract of insurance is inseparable from commerce in modern times. It has become its indispensable handmaid. Indeed the right to sell merchandise, and the right to insure

* 9 Wheaton, 189.

it, would seem in the nature of things to be inseparable. And so necessary an incident to commerce in its narrowest sense as the contract of insurance, must fall within the principles directly applicable to that commerce itself.

In *Almy* v. *California*,* Chief Justice Taney speaking of a tax on a bill of lading, uses this language:

"A tax or duty on a bill of lading, though differing in form from a tax on the article shipped, is in substance the same thing."

Suppose the statute required a license to sell bills of exchange; in other words to exchange an *absolute* promise to pay a sum of money in New York for money paid therefor. Is there any difference as respects this matter, between an absolute promise and a conditional one? Both alike are known and indispensable instruments of commerce; both traffic for pecuniary values.

3. *It is commerce between the States.* A corporation in New York sends its agents to Virginia, we may suppose to sell goods or exchange. Is not that commerce of this kind? This is obvious.

4. *The statute of Virginia amounts to a regulation of commerce.* It prescribes the terms and conditions on which this branch of commerce may be carried on, and makes it penal to prosecute it without a compliance with those terms.

III. Is it within the power of a State to make such a regulation of commerce? The scope of the statute is not to secure uniform rights, but to destroy them. It is discrimination all through; and discrimination by States in favor of their own citizens and against the citizens of sister States. It is easy to see where such assumptions lead. In *Crandall* v. *Nevada*, the court declared unconstitutional a tax of one dollar laid by a State on passengers passing through it, as was evident, because it involved a power to lay a tax of thousands, and to prohibit travel wholly. They acted on what was said by Marshall, C. J., in *Brown* v. *Maryland*, that the power to tax involves the power to destroy. It is

* 24 Howard, 169–174.

easy to see where such assumptions as are here pretended to be rightful would lead. Each State can prevent every other from trading by their agencies, which are the great instruments of modern commerce, and we are back to the evils of the Confederation.

IV. In no view can such a statute be regarded as a police regulation, or as otherwise falling within the scope of the reserved powers of the States. It concerns only the exercise of a business not only lawful and permitted, but encouraged, and by this statute attempted to be protected for its own citizens. It does not at all concern the manner or the circumstances of the exercise of that business, but only the persons who shall exercise it, and discriminates between them only in respect of their being citizens of the State of Virginia, or of other States in the Union.

If it be suggested that the State has the right in this manner to protect its citizens against unsubstantial or irresponsible corporations created by other States, it may be answered that the same power and the same policy must exist in respect of partnerships of natural persons, citizens of other States, having their chief establishments there, in any other trade or commerce, and attempting to establish agencies in the State of Virginia. If, as we maintain, the statute in question is a regulation of commerce between Virginia and other States of the Union, it is upon a subject which must, in its nature, be exclusively Federal. It is plainly not one of those subjects upon which the States may legislate in the absence of legislation by Congress. It concerns nothing less than the equal right of the citizens of all the States to carry on a lawful trade or commerce in each State upon equal terms with the citizens thereof. Nothing can be more purely Federal in its nature, or more obviously beyond the reach of invidious State legislation.

Messrs. Conway Robinson and R. Bowden, for the State of Virginia, contra:

I. A corporation is a mere legal entity and can have no legal existence outside of the dominion of the State by which

it is created. This was decided in *Bank of Augusta* v. *Earle*,* and the case was referred to with approval by Taney, C. J., in delivering the judgment of the court in *Covington Drawbridge Company* v. *Shepherd*.† In this last case, the Chief Justice, in referring to a preceding case, says, that the declaration stated that the corporation itself was a *citizen* of Indiana. Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a State in the sense in which that word is used in the Constitution of the United States, and the averment was rejected because the matter averred was simply impossible. Yet that is one precise position of the appellant here. He insists that a corporation is a citizen of a State within the scope and meaning of the provision of the Constitution: "That the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This court has several times decided that a corporation is not a citizen within the meaning of the Constitution.

In *Lafayette Insurance Co.* v. *French*,‡ this court says:

"The averment, that the company is a citizen of the State of Indiana, can have no sensible meaning attached to it."

This court would not hold that either a voluntary association of persons, or an association into a body politic, created by law, was a citizen of a State within the meaning of the Constitution. And, therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed. In *Covington Drawbridge Company* v. *Shepherd*, referring to the case just mentioned, the court uses the following language:

"Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a State in the sense in which that word is used in the Constitution of the United States, and the averment was rejected because the matter averred was simply impossible."

* 13 Peters, 519. † 20 Howard, 227. ‡ 18 Howard, 404.

So in *Ohio and Mississippi Railroad Company* v. *Wheeler*,* Taney, C. J., for the court, says, that it had been decided in the case of *The Bank* v. *Denning* long before the case of the *Bank of Augusta* v. *Earle* came before the court, that a corporation was not a citizen in the meaning of the Constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State. Many more cases might be cited upon the same point.

If the assumption that a corporation was a citizen in the contemplation of the Constitution of the United States were correct, yet it would not follow, that a citizen of a State residing in one State, would be entitled to the privileges and immunities of citizens of each of the other States. Politically, it is very certain he would not, and it is not seen very clearly how he could in all other things. There is no question, that a citizen of any particular State, who removes into any other State of the Union and resides there long enough to become a citizen, is entitled to all the privileges and immunities of the latter State, without being required to be naturalized. He would become a citizen by the mere operation of the Constitution of the United States. By such removal he might lose some of his privileges, whilst he gained others; after he became a citizen of a State he could not sue a citizen of the same State in the courts of the United States. To illustrate,—a citizen of New York may sue a citizen of Virginia in the United States courts.

It is the duty of all governments to pass all laws which may be necessary to shield and protect its citizens. The companies of which the appellant claims to be the agent, are presumed to have their residence in New York, and all of their effects are there. The deposit required by the law of Virginia is for two purposes: first, to insure the payment of the taxes, and second, as an indemnity to the insured. No foreign insurance company has a right to come into Virginia

* 1 Black, 295.

by her agents, to do the business of insurance, without the consent of Virginia, and, in giving her consent, she has the perfect right to impose such reasonable conditions as she may deem necessary and proper to secure the payment of her revenue and the security of her citizens from impositions and frauds.*

II. The second position taken has no foundation in a true conception of the word commerce. Insuring a house from fire, or plate-glass from breakage—this last, a sort of insurance now common in large cities—is not commerce in the sense of the Constitution, however convenient and even necessary such insurance may be to enable men to protect their houses from the ravages of one of the elements, or their shop windows from accident or mischief.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States." The same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of

* Slaughter *v.* The Commonwealth, 13 Grattan's Reports, 767.

the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. In the early cases when this question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings. Thus, in the case of *The Hope Insurance Company* v. *Boardman*,* where the company was described in the declaration as "a company legally incorporated by the legislature of the State of Rhode Island and Providence Plantations, and established at Providence," the judgment was reversed because there was no averment that the members of the corporation were citizens of Rhode Island, the court holding that an aggregate corporation as such was not a citizen within the meaning of the Constitution.

In later cases this ruling was modified, and it was held that the members of a corporation would be presumed to be citizens of the State in which the corporation was created, and where alone it had any legal existence, without any special averment of such citizenship, the averment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeating the jurisdiction of the court.†

But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. In *Bank of Augusta* v.

* 5 Cranch, 57.

† Louisville Railroad Co. *v.* Letson, 2 Howard, 497; Marshall *v.* Baltimore and Ohio Railroad Co., 16 Id. 314; Covington Drawbridge Co. *v.* Shepherd, 20 Id. 233; and Ohio and Mississippi Railroad Co. *v.* Wheeler, 1 Black. 297.

Earle,* the question arose whether a bank, incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could lawfully exercise that power in the State of Alabama; and it was contended, as in the case at bar, that a corporation, composed of citizens of other States, was entitled to the benefit of that provision, and that the court should look beyond the act of incorporation and see who were its members, for the purpose of affording them its protection, if found to be citizens of other States, reference being made to an early decision upon the right of corporations to litigate in the Federal courts in support of the position. But the court, after expressing approval of the decision referred to,† observed that the decision was confined in express terms to a question of jurisdiction; that the principle had never been carried further, and that it had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its creation; that if the principle were held to embrace contracts, and the members of a corporation were to be regarded as individuals carrying on business in the corporate name, and therefore entitled to the privileges of citizens, they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner; that the result would be to make the corporation a mere partnership in business with the individual liability of each stockholder for all the debts of the corporation; that the clause of the Constitution could never have intended to give citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities attendant upon the exercise of such privileges in those States; that this would be to give the citizens of other States higher and greater privileges than are enjoyed by citizens of the State itself, and would deprive each State of all control over the extent of corporate franchises proper to be granted therein. "It is impossible," continued the court, "upon any sound principle, to give such a construction to the article in ques-

* 13 Peters, 586.

† Bank of the United States *v.* Deveaux, 5 Cranch, 61.

tion. Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State."

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.*

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The

* Lemmon *v.* The People, 20 New York, 607.

special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta* v. *Earle*, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and

business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.

"It is impossible," to repeat the language of this court in *Bank of Augusta* v. *Earle*, "upon any sound principle, to give such a construction to the article in question,"—a construction which would lead to results like these.

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At

the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of idemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

In *Nathan* v. *Louisiana*,* this court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on." And the opinion shows that, although instruments of commerce, they are the subjects of State regulation, and, inferentially, that they may be subjects of direct State taxation.

"In determining," said the court, "on the nature and effect of a contract, we look to the *lex loci* where it was made, or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the States have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different States. These laws, in various forms and in numerous cases, have been sanctioned by this court." And again: "For the purposes of revenue the Federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the Federal government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal government; and domestic bills or promissory notes are as necessary to the commerce of a State as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress, be a tax on the commerce of a State."

If foreign bills of exchange may thus be the subject of

* 8 Howard, 73.

State regulation, much more so may contracts of insurance against loss by fire.

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be AFFIRMED.

UNITED STATES *v.* LANE.

1. The 8th section of the act of July 2d, 1864, which enacts that it shall be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in insurrection, did not confer the power to license trading within the military lines of the enemy.
2. In connection with the regulations of the Treasury Department, and an executive order of the President, issued in accordance with the act, it authorized the insurgents to bring their cotton within our lines, without seizure, and with a promise on our part to buy it from them, with liberty on theirs to go to the nearest treasury agent in an insurrectionary district to sell it, or if they preferred, to leave it under the control of some one who could go to such agent and sell it for them; with leave, to them also, by way of further inducement, to purchase such articles of merchandise as they needed, not contraband of war, to the extent of one-third of the aggregate value of the products sold by them, and to return with them under a safe conduct.
3. By the regulations issued under the act, the purchasing agent could not act at all until the person desiring to sell the Southern products made application, in writing, stating that he owned or controlled them, stating also their kind, quality, and location; and even then the power of the purchasing agent before the delivery of the products was limited to a stipulation (the form was prescribed) to purchase, and to the giving a certificate that such application was made, and to requesting safe conduct for the party and his property.
4. A record of a judgment on the same subject-matter, referred to in a finding, cannot be set up as an estoppel, when neither the record is set forth, nor the finding shows on what ground the court put its decision: whether for want of proof, insufficient allegations, or on the merits of the case.

APPEAL from the Court of Claims, the object of the suit having been to recover damages against the United States for an alleged breach of contract, made by George Lane

with one Risley, who was at the time the treasury agent at Norfolk, Virginia, for the purchase of the products of insurrectionary States.

The case, which depended in part on statutes, regulations of the treasury, and a proclamation of the President, was thus:

ACTS OF 1861 AND 1863.

By act of July 13th, 1861, section 5, "all commercial intercourse" by and between States declared in insurrection and the citizens thereof, and the citizens of the rest of the United States, was declared unlawful, except such as should be licensed by the President, and conducted under the regulations made by the Treasury Department.

An act of March 12th, 1863, authorized agents of the Treasury Department to collect "all abandoned and captured property," &c., and enacted that "all property coming" into any of the United States not declared in insurrection "from within any of the United States declared in insurrection, through or by any person other than a treasury agent, or under a lawful clearance by the proper treasury officer, shall be confiscated."

TREASURY REGULATIONS OF MARCH 31ST, 1863.

The treasury regulations issued March 31st, 1863, by their section 7, ordered thus: "No permit shall be granted to transport to or from, or to sell or purchase in any place or section whatever, *not within the military lines* of the United States army."

Regulation 8, as revised and published September 12th, 1863, declared: "Commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited, and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States."

ACT OF 1864.

By the 4th section of an act of July 2d, 1864, the prohibitions of the act of July 13th, 1861, were extended to "com-

mercial intercourse by and between persons residing or being within the lines of National military occupation, in such districts declared in insurrection, whether *with each other* or with persons being within such insurrectionary districts, but not within our military lines."

Section 8 of this act provided that the Secretary of the Treasury might authorize agents "to purchase *for the United States* any products of States declared in insurrection *at such places* therein as *shall be designated by him*, at *such price* as shall be *agreed on* with the seller, not exceeding the market price thereof at the place of delivery, nor exceeding three-fourths of the market value thereof in the city of New York, at the latest quotations known to the agent purchasing."

Section 9 of this act *repealed* so much of section 5 of the act of July 13th, 1861, as made it *lawful for the President to license* or *permit* such trade by *private citizens* and *traders* except to supply necessaries to loyal persons *within* the Federal lines, and to authorize persons within the Federal lines to bring or send to market in loyal States products of their own labor or of the labor of freedmen or others in their employment.

TREASURY REGULATIONS OF JULY 29TH, 1864.

On the 29th of July, 1864, rules were promulgated by the Secretary of the Treasury, and by one of which "commercial intercourse with localities *beyond* the lines of *actual* military occupation by the United States forces *is absolutely prohibited;* and *no permit* will be granted for the transportation of *any property* to *any place* under *the control of insurgents* against the United States."

TREASURY REGULATIONS OF SEPTEMBER 24TH, 1864.

On the 24th of September, 1864, general regulations for the purchase, on government account, of products of insurrectionary States, were made by the Secretary of the Treasury, approved by the President, by which Norfolk was made a purchasing point, and the special agent was required (by Regulation 7), to the extent of the funds at his command,

to purchase *all products* offered to him (of the character which by his instructions he was authorized to buy); "but *no liability of any character* shall be *authorized* or *assumed* by any agent, *for* or on account of *the government*, previous to the *actual delivery of the products*, other than a stipulation to purchase products *owned* or *controlled by applicants*, at a *price to be agreed upon at the place and date of delivery.*" The form of this stipulation is given, and consists of a certificate by the treasury agent, that he has "*agreed to purchase*" from C. D. property, &c., "which he stipulates shall be delivered to me, *unless prevented* from so doing *by the authority of the United States*," with a "request" for "safe conduct."

By Rule 8, "whenever any person shall make application to the purchasing agent in writing, setting forth that he '*owns* or *controls*' products, stating the kind, quantity, and location thereof, or the date at which they will be delivered at some specified location accessible to transportation," the purchasing agent was directed to give a certificate that such application had been made, and request safe conduct for such party and his necessary transportation to the location specified, and for himself and products from the location specified to the purchasing agent. (The form of this certificate is given.) Rule 9 provided that parties, having sold and *delivered* products, shall, upon their request, be furnished by the purchasing agent with a certificate stating the character and quantity of articles purchased, the price paid, the aggregate amount of payment, *the place whence*, and *the route by which* the property was transported.

PRESIDENT'S PROCLAMATION, SEPTEMBER 24TH, 1864.

On September 24th, 1864, the President issued his proclamation, reciting that Congress had authorized the purchase for the United States of products of States declared in insurrection, and that the Secretary of the Treasury had designated Norfolk and other places named therein as places of purchase, and had made regulations for such purchases, and he therefore proclaimed that all persons, except those in the service of the government, "*having in their possession*" *such*

products (and which said agents were authorized to purchase), "and all persons *owning* or *controlling such products*," are authorized to convey them to either of said places of purchase, and "such products, so destined, shall not be liable to detention, seizure, or forfeiture, while *in transitu* or awaiting transportation." And that "any person having the certificate of a purchasing agent, as prescribed by Treasury Regulation 8, is authorized to pass with means of transportation to the points named in said certificate, and to return therefrom with the products required for the fulfilment of its stipulations." And that "any person having *sold, and delivered* to *a purchasing agent products* of an insurrectionary State," "and having in his possession a certificate of the fact, stating the character and quantity of products, and the aggregate amount paid therefor, as prescribed by Regulation 9, shall be permitted" "to purchase from any authorized dealer," at the place of sale, or any other place in a loyal State, any "articles not contraband of war, nor prohibited by the War Department," "to an amount not exceeding in value one-third of the aggregate value" of products sold by him as certified by the agent; and "such articles may be transported by the *same route* and *to the same place*, *from* and *by which* the *said products* sold and delivered, *reached the purchasing agent*," and *such goods* "shall have safe conduct, and shall not be subject to detention, seizure, or forfeiture, while being transported *to the places and by the route set forth in said certificate.*"

Generals and military officers commanding districts, posts, or detachments, and officers commanding fleets, flotillas, and gunboats, "*will give safe conduct* to persons and products, merchandise, and other articles duly authorized as aforesaid and not contraband of war, or prohibited by order of the War Department, or the orders of such generals commanding, or other duly authorized military or naval officer made in pursuance thereof."

THE FACTS OF THE CASE, as found by the Court of Claims, were essentially these:

The claimant, Lane, entered into contracts with the treas-

ury agent at Norfolk, Virginia, for the delivery to the agent of a large quantity of cotton, which was upon the Chowan River, in the State of North Carolina, and *within the lines held by the insurrectionary forces.* The commander of the military district gave safe conduct to the claimant, his vessel and crew, to bring out the cotton. The claimant *also had a license to take out certain articles*, a schedule of which was attached to the safe conduct given by the military commander.

The purchasing agent of the Treasury Department of Norfolk appointed a sub-agent to proceed on board of the vessel and to be in charge of the outward cargo contained in the schedule, and not deliver the same to the claimant until he should have delivered to such agent on board the vessel three times its value in cotton. The outward voyage was made without hindrance, and having arrived at Chowan River, the claimant delivered the cotton to the sub-agent on board the vessel.

On her return voyage, the vessel and the cargo were seized by order of a naval commander on duty in the inland waters of North Carolina. After being detained several days, the vessel and cargo were released. She again set off on her course towards Norfolk, and before arriving there was again seized by the order of the admiral commanding the squadron in those waters.

The vessel was afterwards sent to Washington, D. C., where she was libelled, at the instance of the United States, in the Supreme Court of the District of Columbia, sitting in admiralty, where, however, a decree, with costs, passed for the claimant. No record of that suit, however, was produced here.

No proceedings were ever taken against the cotton, and it was ultimately, though after some months' detention, restored to the claimant. It was then taken to New York, but the price of the article had greatly fallen during the detention, and the price received on the sale of it was correspondingly less than if the voyage had not been arrested, and if the cotton had been sold on its prompt completion.

The United States were now called on in the suit to make

good the loss caused by the wrongful conduct of its naval officers.

Upon the facts, the Court of Claims ruled, among other things:

That the contracts with the agent of the treasury, for the sale and delivery of the cotton, were valid and lawful contracts.

That the seizure and detention of the claimant's vessels and cargo, by the officers of the navy, were unlawful and unauthorized.

That the judgment of the Court of Admiralty was conclusive; that the voyage was a lawful and proper one, and conducted according to the prescribed regulations of the trade in which the claimant and his vessel were engaged.

That such acts constituted a breach of the contracts between the claimant and the United States, and entitled him to such damages as he sustained thereby.

Mr. Dickey, Assistant Attorney-General (having set forth all the statutes, treasury regulations, &c., bearing on the case, as already given by the reporter, who is indebted for them to Mr. Dickey's brief), *for the appellant; Mr. Hoar, Attorney-General, maintaining the same side:*

1. The voyage was in violation of law, and the contract alleged and the contracts found by the court to have been made were illegal; the seizure, by the naval officers, was proper, and the claimant has, therefore, no just and legal cause of complaint.

The act of July 13th, 1861, the act of March 12th, 1863, the Treasury Regulations of March 31st, 1863, the Revised Treasury Regulations of September 11th, 1863, the act of July 2d, 1864, the Treasury Regulations of July 29th and 30th, 1864, and those of September 24th, 1864, and the President's proclamation of September 24th, 1864, make it plain, that everywhere commercial intercourse with those parts of the insurrectionary States which were within the control of rebels, was absolutely forbidden, from the beginning of the war, unless, indeed, it may be in the act of July 2d,

1864, and the regulations and President's proclamation made thereunder. But these, in truth, make no change in this regard. If it were intended by that act and the practice under it, to license such trade, it is not so specifically provided, and is manifested only, if at all, by the want of express words of limitation in the act. It authorizes the "purchase" for the United States of "any products of States declared in insurrection, at such places therein as shall be designated by" the Secretary of the Treasury. It does not say, expressly, that these provisions relate only to products found within the Federal lines; but is not that the fair construction? Such trade with a public enemy is forbidden without statute, according to the laws of war among all civilized nations; and when that non-intercourse had been so often and so fully proclaimed by all the departments of the government, from the beginning of the war, are we to construe these general words as changing this policy? This construction, limiting the provisions of this act to those parts of the States in insurrection, which were, for the time, within our military lines, is strengthened by the fact that the prohibitions of the act of July 13th, 1861, were extended by the 4th section of this act of July 2d, 1864, *even* "to commercial intercourse by and between persons residing or being within the lines of National military occupation, in districts declared in insurrection" "*with each other.*" This construction is strengthened, too, by the fact, that section 9 of this act repeals so much of the act of July 1861, as made it lawful for the President to license and permit trade by private citizens in such districts, even within the Federal lines, except to supply necessaries to loyal persons, and to authorize persons within the Federal lines to bring to the loyal States products of their own labor, or of freedmen, &c.

This construction is fortified also by the language of Regulation 3 of the Treasury Regulations of July 30th, 1864.

2. The jurisdiction of the Court of Claims depends, of course, upon the acts of Congress which established it; and these, as all know, give it jurisdiction of "all claims founded upon any law of Congress, or upon any regulation of an ex-

ecutive department, or upon any contract, express or implied, with the government of the United States." The only ground which can be pretended here is "contract." But the United States never contracted with the claimant that its naval officers would not seize and detain his vessel and cotton, and claimant has, therefore, no cause of action which the Court of Claims can, within its jurisdiction, enforce.

The grievance or wrong for which this suit is brought was the capture and detention of his steamer and his cargo of cotton by the naval officers, and afterwards by the officers of the Treasury Department. In fact, this capture and detention, which is a *tort*, not anything founded on contract, is the gist of claimant's action.

The Court of Claims, however, have no jurisdiction in cases of tort. Claims arising out of damage to, or destruction of, property in the Southern States taken or destroyed by any part of the army or navy, must be referred to Congress.

Mr. T. J. D. Fuller, contra:

1. Lane was the undisputed owner of the cotton prior to, and at the making of, the contract. He agreed to sell, and the United States to buy, this cotton. The price to be paid, the place it was to be delivered at, was agreed upon by the contracting parties.

The law authorized it: the agents of the United States were fully empowered to contract. Whatever some other statutes and regulations may have meant, the act of July 2d, 1864, and the regulations and proclamation under it, permitted what was done. To understand the act we must read it by the light of surrounding circumstances, circumstances found in the public history of the day. The United States, it is to be remembered, wanted cotton at this time, grievously. France and England were so greatly suffering from the want of it, as to be tempted to acknowledge the independence of the Confederate States. The people of the North, themselves, greatly wanted it. Public necessity rendered a relaxation of former rules indispensable. The 8th section of the act of July 2d, 1864, which made it lawful for the Sec-

retary of the Treasury, with the approval of the President, to authorize agents to purchase for the Middle States any products of the States declared to be in insurrection, conferred the power to license trading within the military lines of the enemy. The Regulations of September 24th, 1864, which were meant to allow the trading authorized by the act of July 2d, previous, do not adopt the prohibition against non-intercourse contained in the prior regulations of July 2d. They thus show that it was meant to be abandoned.

2. But even if the view we thus take were not correct, the United States are estopped from denying its correctness by the judgment of their own courts. The judgment of the Supreme Court of the District of Columbia, sitting as a court of prize, between the United States and Lane, was on this same subject-matter, to wit, the steamer. The steamer could not be free from liability, and the cotton subject to condemnation. The Supreme Court of the District, by restoring the vessel, established the lawfulness of the whole voyage; for if the voyage was unlawful, the steamer would have been condemned. The judgment is, moreover, conclusive upon all the world, and estops the United States from calling in question the legality and regularity of the voyage. It was a judgment of a court of competent and *exclusive* jurisdiction, and binds all the world.

Reply:

It is attempted to conclude the whole question by an estoppel of record. But the record set up as an estoppel is not produced. Never favored, an estoppel which seeks to protect—both in the face of general law and special statutes forbidding it—trading with an enemy who is at once an enemy and a rebel—will not be received.

Mr. Justice DAVIS delivered the opinion of the court.

In the view we take of this case it is unnecessary to discuss the question—conceding the contract to be lawful—whether the action of the naval authorities could be a ground of claim for damages for a breach of this contract against the

United States, because, in our opinion, the contract was unauthorized, and had no power to bind the government.

It appears, by the findings of the Court of Claims, that Chowan River, in North Carolina, the place where the cotton was purchased, was within the lines held by the insurrectionary forces, and that the military safe-conduct protected as well the return as the outward voyage, for Lane was permitted to take out an outward cargo, under the supervision of a person, styled in the record a sub-agent of the purchasing agent at Norfolk, whose duty it was to retain possession of the cargo until he should have received from Lane on board the vessel, three times its value in cotton.

At the time this contract purports to have been made, this country was engaged in war with a formidable enemy, and by a universally recognized principle of public law, commercial intercourse between states at war with each other, is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents should cease. If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen. But the rigidity of this rule can be relaxed by the sovereign, and the laws of war so far suspended as to permit trade with the enemy. Each state settles for itself its own policy, and determines whether its true interests are better promoted by granting or withholding licenses to trade with the enemy. It being the rule, therefore, that business intercourse with the enemy is unlawful unless directly sanctioned, the inquiry arises, whether there was any law of Congress in force at the time that sanctioned this transaction.

At an early period in the history of the war, Congress legislated on this subject. By an act passed on the 13th of July, 1861, all commercial intercourse between citizens of States in insurrection and citizens of the rest of the United States was declared unlawful; but liberty was given to the President, in his discretion, to license trade with the enemy

if he thought it would conduce to the public interests to do so. In so far, however, as it was licensed by him, the manner of conducting it was left to be regulated by the Secretary of the Treasury. In the administration of this law, we do not find any regulation prescribed by the Secretary of the Treasury allowing commercial intercourse within the rebel lines. On the contrary, the trade regulations which were issued by him on the 31st of March, 1863, and the 12th of September of the same year, expressly say that commercial intercourse with those parts of the insurrectionary States within the control of the rebels is absolutely forbidden. Has this policy since then been changed? It certainly has, if this proceeding was authorized; for if Risley in his capacity of treasury agent, could lawfully contract with Lane, a citizen of a State not in rebellion, to purchase from him cotton in the country of the public enemy, which he did not own or control, but must procure after he got there, and had the power to assist him in this enterprise, by allowing him to take out a cargo of goods to facilitate the purchase of the cotton, and to furnish for his protection a sub-agent and a military safe-conduct, then it is clear the door was left open for general trading with the enemy. If one citizen of a State, not in insurrection, could lawfully obtain from a treasury agent the right to transport goods to a place under the control of the insurgents, where he could exchange them for cotton or other products of the country, and could also have safe-conduct to take his property there, and to bring out the property he should buy, with the promise on the part of the agent to protect and purchase it, so could any other citizen —for in this matter equality must be the rule—and in this way it is easy to see a free commercial intercourse with the enemy would be opened, and a radical change effected in the manner of conducting the war. Was this result contemplated by Congress in the act of July 2d, 1864?

It is contended that the 8th section of this act, which says that it shall be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in in-

surrection, conferred the power to license trading within the military lines of the enemy.

If this were so, and it was the intention of Congress to allow this trading, providing it was done on government account, why was it not manifested by a specific provision in the law? Why leave such an important change of policy to be inferred from the general words of the act, and the absence of express words of limitation?

That the Secretary of the Treasury, who, it is natural to suppose, having the administration of the law in his hands was, before it was passed, consulted about it, did not give this interpretation to it, is very clear, for, within a short time after the passage of the act, he adopted, with the approval of the President, a new series of rules regulating commercial intercourse, which were intended to supersede all others, and the third rule absolutely prohibits all intercourse beyond our military lines, and declares further, "that no permit will be granted for the transportation of any property to any place under the control of the insurgents." (See Treasury Regulations, and Rules for Commercial Intercourse, of July 29th, 1864.)

It is argued, as the regulations which were issued on the 24th of September following, for the express purpose of enforcing that provision of the act relating to the purchase for the United States of the products of insurrectionary States, do not, in terms, readopt this prohibition against non-intercourse, that therefore it was abandoned. But this does not follow, for there is nothing in these regulations inconsistent with its continuance, and if not expressly revoked, it remained in force. Aside, however, from the construction adopted by the Secretary of the Treasury, we are able to see, by reference to other provisions of the same act, that Congress did not mean to change, by the 8th section, the non-intercourse policy which had prevailed. By the 4th section of this act the prohibitions of the act of July 13th, 1861, were extended *even* to commercial intercourse by and between persons residing, or being within the lines of National military occupation in districts declared in insurrection, "with

each other;" and the 9th section repeals so much of the act of July, 1861, as made it lawful for the President to license and permit trade by private citizens, in such districts, even within the Federal lines, except to supply the actual wants of the loyal people, and to authorize persons within the Federal lines to bring to the loyal States the products of their own labor, or of freedmen, &c.

The incorporation of these sections in the law is irreconcilable with the idea that Congress intended, notwithstanding these prohibitions, to confer power on the Secretary of the Treasury to allow citizens of loyal States on government account to trade within the actual military lines of the insurgents. If this is not the nature of the power conferred, it is asked what authority did Congress intend to give the secretary, and how was it to be exercised? There is no difficulty in answering these questions and reaching the true meaning of this particular provision, when we consider the entire act, and the treasury regulations adopted to carry into effect the 8th section, in connection with the history of the times. The law was designed to remedy existing evils. The mischiefs attending private trading with the enemy, even in those parts of the insurrectionary districts which were for the time within our military lines, had been seriously felt in the conduct of the war, and the best interests of the country required that it should cease. It was deemed important, however, to still maintain some species of commercial intercourse with the insurgents, for it is well known that the government desired to have, if it did not interfere with military operations, the products of the South, and particularly cotton, brought within our lines. To accomplish this end, and at the same time avoid the complications and embarrassments incidental to private trading, required the inauguration of a new system. This was done by withdrawing from the citizen the privilege of trading with the enemy, and allowing the Secretary of the Treasury, with the approval of the President, to purchase through agents, for the United States, any products of States declared in insurrection. The inquiry is made, how could these agents purchase these products if

private citizens were denied the right of trading in the insurrectionary districts, whether they happened to be within the National or Confederate military lines?, It would not do to let the army be used for this purpose, and the only other way left open was to hold out inducements for the insurgents themselves to bring their products to us.

If they could be induced to do this, we would obtain their products which we needed, and in the manner of obtaining them, would avoid the evils inseparable from private trading. The inducements for the insurgents to pursue this course were very strong, for besides the liability of having their principal product—cotton—confiscated or destroyed, they were, as is well known, in want of many of the necessaries of life. They were substantially told in the Regulations of the Treasury Department, "If you will bring your cotton within our lines, we will not only not seize it, but will buy it from you, and you are at liberty to go to the nearest treasury agent in an insurrectionary district to sell it, or if you prefer, you can leave it under the control of some one who can go to the agent and sell it for you." If this were not enough to accomplish the object, the President of the United States, by way of further inducement, in an executive order of the same date with the Treasury Regulations, said to them: "You can purchase such articles of merchandise as you need, not contraband of war, to one-third of the aggregate value of the products sold by you, and return with them, and I will guarantee you safe conduct." Why this limited permission to buy, after the delivery of the products, unless the privilege was for the benefit of the insurgents? If private persons, living in the Loyal States, could engage in a venture like this of the claimant, they would need, as he did, to make the venture remunerative, to take with them a cargo of goods to exchange for Southern products; but there was no authority for this. The permission of the President is limited to the taking of a return cargo, bought with part of the proceeds of Southern products, previously sold and delivered to a purchasing agent of the Treasury Department. Indeed, so particular is the direction on this subject, that the

military officer commanding at the place of sale, was not authorized to permit a person who had sold Southern products to buy merchandise, unless he exhibited to him a certificate of the purchasing agent, setting forth the fact of the purchase and sale, the character and quantity of products, and the aggregate amount paid therefor.

Enough has been said, without pursuing this investigation further, to show there is nothing in the act itself, the Regulations of the Treasury Department, or the order of the President, to justify Risley in dealing in the manner he did, with Lane. It follows, therefore, that the voyage itself was illegal, as were the contracts and arrangements by which it was undertaken, and that the vessel and cargo were properly seized for being engaged in illegal trading with the enemy.

Although Risley was not authorized in making any contract with a person occupying the status of Lane, still, if he were, he could only do it in the manner and for the purposes pointed out in the Treasury Regulations.

By those regulations the purchasing agent could not act at all until the person desiring to sell Southern products made application, in writing, that he owned or controlled them, stating their kind, quality, and location, and then the power of the purchasing agent before the delivery of the products was limited to a stipulation (the form is prescribed) to purchase, and to the giving a certificate that such application was made, and requesting safe conduct for the party and his property.

There is nothing in the petition, or the findings of the court below, to show that Lane complied with these provisions. On the contrary, it is clear from his own statement that he neither owned nor controlled the cotton when he contracted to sell it, but that, after the contract was made, he procured it within the rebel lines. Neither the law, nor the regulations through which it was administered, were intended to protect a speculation of this sort. The purchasing agent had no authority to negotiate even with any one in relation to the purchase of Southern products, unless at the time of the negotiation he either owned or controlled them.

(See Regulations for the purchase of products of insurrectionary States on government account, of September 24th, 1864, and executive order same date.)

The Court of Claims find that no proceedings were taken against the cotton, and that it was restored to the claimant, but that the vessel was libelled at the instance of the United States, in the Supreme Court of the District of Columbia, where a decree, with costs, passed in favor of the claimant. It is argued, and was so ruled by the court below, that this decree concludes the United States. But the inquiry arises, how far the United States are concluded by it? The record of the admiralty court is not before us, and we only know from the record in this case, that that court refused to render a decree of forfeiture against the vessel, and awarded costs against the United States.

On what ground the court put its decision—whether for want of proof, insufficient allegations, or on the merits of the case—we have no means of determining.

It may well be that the United States could not re-seize the vessel, or take further proceedings against the cotton, and yet be at perfect liberty to litigate the right of the claimant to damages, in a direct proceeding brought against them to test that question.

There is nothing in this record to show that the Supreme Court of this District, in decreeing to the claimant the restoration of his vessel, adjudicated on the question of his right to damages. As that court had the power to award damages —and the record is silent on the subject—it is clear, either that the court refused damages, or that the claimant did not insist on the court considering the question.

The United States are, therefore, not concluded on this point, and the case is relieved of all difficulty.

The judgment of the Court of Claims is reversed, and this cause is remanded to that court, with directions to enter

AN ORDER DISMISSING THE PETITION.

SEYMOUR *v.* FREER.

1. In May, 1835, an agreement was entered into between Price and Seymour, which provided, on the part of Price, that he should devote his time and best judgment to the selection and purchase of land, to an amount not exceeding five thousand dollars, in certain designated States and Territories, or in such of them as he might find most advantageous to the interest of Seymour; that the purchases should be made during the then existing year, and that the contracts of purchase should be made, and the conveyances taken in the name of Seymour; and on the part of Seymour, that he should furnish the five thousand dollars; that the lands purchased should be sold within five years afterwards, and that of the profits made by such purchase and sale, one-half should be paid to Price, and be in full for his services and expenses. Under this agreement, lands having been purchased by Price and the title taken in the name of Seymour; *Held*,
   i. That Seymour took the legal title in trust for the purposes specified; that is, to sell the property within the time limited, and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one-half of the residue; and that, to this extent, Seymour was a trustee, and Price the *cestui que trust*.
   ii. That the trust continued after the expiration of the five years, unless Price subsequently relinquished his claim; the burden of proof as to such relinquishment resting with the heirs of Seymour.
   iii. That the principle of equitable conversion being applied to the case, and the land which was to be converted into money, being regarded and treated in equity as money, the personal representative of Price was the proper person to maintain this suit, and it was not necessary that his heirs-at-law should be parties.
2. The statute of limitations has no application to an express trust where there is no disclaimer.

APPEAL from the Circuit Court for the Northern District of Illinois.

On the 9th of May, 1835, Henry Seymour, residing at Utica, New York, and Jeremiah Price, residing at Chicago, Illinois, entered in New York, into a contract, thus:

"The said Price agrees that he will *forthwith* devote his time and attention, and exercise his best judgment, in exploring and purchasing land, to an amount not exceeding $5000, in the States of Illinois, Indiana, and Ohio, and in the Territories of Michigan and Wisconsin, or in such of them as he may find most

advantageous *to the interest of said Seymour*, in whose name the contracts and conveyances shall be made and taken. The purchases shall be made after full and careful searches and explorations, for the most profitable investments, on or near the sites or expectant sites of towns or places of business, and, in general, in tracts of ground of moderate extent; and the said Seymour covenants, on his part, to furnish $5000 for the above contemplated purchases, and that the lands, purchased as aforesaid, *shall be sold within five years from the present time* and *out of the profit* which may be made by *such* purchase and sale (after charging to the investment, the taxes and other charges, if any, together with 7 per cent. interest on the investment and the charges last mentioned), there shall be paid to the said Price, one-half of the same, *which one-half of the profit shall be in full of his services and expenses of every kind* in making the aforesaid explorations, searches, and in doing all such other things as may be requisite and proper in making the contemplated purchases. It is understood that the purchases shall be made during the *present* year, and that *no* payment for services or expenses will be made by said Seymour, *except* from the profits made *as aforesaid*."

Contemporaneously with the making of the contract, Seymour placed into the hands of Price the $5000 mentioned in it. And between June and October, 1835, Price bought about thirty pieces of land in Illinois, thus using all the money.

The lands were unproductive, and consisted, in their sundry parcels, of two thousand four hundred and forty acres, and some village lots, situate in Joliet. It was all conveyed to Seymour.

In August, 1837, Seymour died; he left two sons, viz, Horatio and John F., and four daughters, two of them being, at his death, and at the expiration of the five years mentioned in the contract, infants. By his will, he appointed Horatio, John F., and another, his executors; and his real estate, under the directions of his will, went to his heirs, except the share of one daughter, which was vested in trustees.

No part of the land was sold during the five years specified in the contract. It was admitted of record that, at the expiration of the time for sale, stated in the contract (May,

1840), the lands were unsalable, and that it was entirely uncertain how much they could have been sold for, or whether they would ever have brought enough to repay the original investment and interest.

During the five years, there were no taxes upon, or expenses as to the lands purchased, except taxes upon the lots in Joliet, amounting, in all, to $19.33. These were paid by Price, with money furnished by Seymour. Subsequently to the five years, Price, till his own death, in 1854, paid the taxes on the lands; Seymour's executors furnishing him the money to pay them, as also to pay any small expenses he was put to.

The accounts of Price (independently of the outlay for the purchase, and in which all the taxes and expenses just spoken of were entered), began March 4th, 1837. They were headed:

"Account of payments on account of H. Seymour."

They began 24th December, 1841, comprised eighty-four items amounting to $2054, and ran to near the date of Price's death in July, 1854, terminating 16th June, 1854. The items were chiefly of taxes on the different pieces of property. But there were several charges for postage on letters, for a small item of travelling expense in paying taxes, for interest on small sums advanced to pay taxes, &c., and one in March, 1845, of $1.53 paid as a charge for advertising a county tax, "because," said the account, "*funds not sent.*" But there was no charge or claim for services by Price or any other person as agent. In fact, in one or more instances he apparently suffered lands to be sold for taxes. At the date of Price's death all Price's charges for taxes paid and for these small outlays had been settled; Seymour's executors having sent him, from time to time, and apparently as informed of them, checks for the sums due. Between December, 1841, and Price's death in July, 1854, the executors had thus sent him about sixteen different checks.

Price, as already said, died in July, 1854, in Illinois. John High became his administrator. High now looked

after the lands; under what exact source of interest was a matter disputed. His accounts of money received and of lands sold were thus headed:

"Account of money received from heirs and devisees of Henry Seymour, deceased (after his decease and after decease of Jeremiah Price), by John High, Jr., as agent for heirs and devisees, to pay taxes and other expenses on lands aforesaid."

"Account of sales made by John High, Jr., as agent for estate, heirs and devisees of Henry Seymour, deceased, from lands purchased by Jeremiah Price, deceased."

In 1855 and 1856, High negotiated sales of portions of the land, which were consummated by contracts executed by the heirs and the purchasers. The sales were profitable. Two hundred acres were sold for $69,200; and High now, as administrator of Price, alleging that the original outlays, costs, and interest had been repaid, claimed one-half the surplus; contending that he was entitled to it under the contract of 1835. The representatives of Seymour not being of this opinion, High (who dying in the course of the suit was succeeded by Freer), now, February, 1857, filed a bill in the court below against all the executors of Seymour, his heirs-at-law, and the trustees of the *cestui que trust's* daughter.

The bill set out the contract, stated that no sales had been made within the five years, and that Price had not insisted on their being so made, because it was thought that the interest of all parties would be promoted by holding on for better times, but that nothing was done to release Seymour or his representatives from their original obligations; that High, after Price's death, had acted as agent of Seymour's representatives, and effected sales; and that the original $5000, interest, &c., being all refunded, and the surplus being clear profits, he, High, as administrator, claimed one-half of it for the estate of Price, and that he had always been and was now ready to agree upon and define the relative rights of the two estates, and divide the profits, but that

in consequence of the number of the parties interested, on Mr. Seymour's part, the distance of their residence from the subject-matter, the death of the original party, and the intervention of descents, marriages, &c., and from the refusal of several of the parties so in interest to admit Price's rights, he was afraid that in case the residue of the lands should be sold out, and the whole converted into money and be allowed to go into the hands of Seymour's representatives, he would, owing to their number and to the fact of their residence being without the jurisdiction of the courts of the State where the whole profits had been made, lose Price's share; on which account as he conceived the interposition of a court of equity was necessary. *Price's heirs were not made parties to the bill.*

The answer, admitting the agreement, purchase, and advance of money, stated that the lands were situated near Price's residence, and being wild required no particular care; that during the five years Price did nothing except what was required of him by his agreement; that at the death of Seymour one of the defendants was a married woman, and two others were infants. It denied that the omission to sell during the five years was for the benefit of the defendants, but averred, on the contrary, that both Seymour, in his lifetime, and the defendants, afterwards, had at all times been anxious to sell if they could do so without loss. It denied that Price did not waive a right to have the property sold within five years, but averred, on the contrary, that he did. It averred, moreover, that Price always treated the defendants as the sole owners, and solely entitled to the proceeds, and never pretended to have any interest; that he refused to pay the taxes or any portion of them; "but claimed that he ought to be allowed a reasonable compensation for his services as agent, and not under the contract;" that the defendants had always been willing to allow him such compensation. It set up further that by the legal effect of the agreement Price's interest was to be half the profits to be got upon a sale to be made in five years, and averred that no profits on sales could be made or were made within

Statement of the case.

that time; and averred that the defendants had in no way continued or extended the agreement with Price.

As to any claim for a breach of the agreement in not selling in five years, the answer pleaded the statute of limitations.

As to the agency and the expenditures of High, it stated that after the death of Price he, High, was requested by Horatio and John F. Seymour to find purchasers for the land if he could; but that he had no other power respecting the lands; that the contracts for the parcels sold were executed by the defendants and not by High; that the negotiations for such sales were made by the defendants through High, and were subject to the ratification of the defendants, and that High was not employed in consequence of any relationship which he had to Price or to his estate, or on account of the agreement between Henry Seymour and Price.

Finally, it denied that any cause existed for the interposition of a court of equity, submitted that the defendants were improperly joined, for the want of a common interest among them, and asserted that no receiver was wanted, the devisees of Seymour being all well known as citizens of New York, and fully competent to dispose of the lands without the aid of a receiver, and not wanting in ability to refund, &c.

General replications were filed. No proofs were taken, nor did it appear from the evidence, that any letters from either side were called for or produced. Certain facts were admitted.

An interlocutory decree making a reference to a master adjudged that Price, by virtue of the agreement of 1835, was "entitled, as an equal copartner" in the property to one equal half of the net profits made, or to be made from the sales; that the lands having been purchased by Price as an "adventure or investment on joint account of himself and said Seymour," the sales already made and the sales yet to be made were to be deemed and taken as made, and to be made "on joint account" of the estates of Seymour and Price.

The final decree recited the former decree and a master's

report made to enable the court to administer the property on "just partnership principles," and, after making a disposition of the proceeds of sales of the lands, it provided that "the balance which shall remain thereof being clear profits of the *partnership* land purchase and sale up to the present time, be equally divided between the parties in this suit: one-half to the complainant, and the other half to be held by the heirs and devisees of Henry Seymour, deceased." And it spoke of "closing and selling the partnership accounts so far as the sales and collections have progressed."

The solicitor of the complainants, by consent of parties, was appointed receiver, with an agreement that he might sell at private sale.

The representatives of Seymour brought the case by appeal here.

Messrs. Kernan and Denio, for the appellants:

This contract, by its terms, plainly excludes implication that the lands are subject to the rules of law applicable to partnership property. The view of the court below is directly in the face of the authorities, including one in this court.*

The main question then is the interpretation of the contract and whether, no sales having been practicable within the five years, the old arrangement either remained or was re-established?

The contract is one *sui generis*. The year in which it was made was an era of great activity in settling lands in the West. "Sites or expected sites of towns or places of business" were sought for with avidity, and they doubled in value or increased in a yet greater ratio in a few months, in the hands of the possessors. Mr. Seymour was disposed to enter into this field with a considerable sum of money, and Price, who it is to be presumed had local knowledge and an aptitude for selecting lands, was willing to aid Seymour with

* Berthold *v.* Goldsmith, 24 Howard, 536, 542; Hesketh *v.* Blanchard, 4 East, 144; Vanderburgh *v.* Hull, 20 Wendell, 70, 71.

his local knowledge and active agency for a collateral consideration precisely defined. The question was, how this consideration should be arranged. It was resolved that Seymour should become the purchaser with his own moneys, and Price the purchasing agent, and that the latter should receive (instead of a *per diem* allowance, or a commission on the amount of the investment, or the interest of a partner in the *ultimate* profit or loss), one-half of the profits to be got on a sale of the lands within five years, and should have no such interest as would in any event subject him to a loss or compel him to advance money. This, at least, is what is specified in precise language. The enterprise was to be rapidly conducted and speedily wound up. Price was to set about the purchases *forthwith*. The purchases were all to be made in the then *present year*, and the lands were all to be sold within five years; and the compensation of Price was expressly made to depend upon, and be measured by the results of a transaction *thus* to be carried on and consummated. And to preclude any pretence of a claim in any other aspect, it is twice inserted that his compensation is to be limited to a moiety of the profits thus arising, and that he is to have no other compensation.

Such a contract was, in that day, a reasonable one, and there is no ground for believing that the parties meant something beyond what they said.

If this is so, the land having become unsalable in 1840, the representatives of Price had not, at the commencement of this suit, any interest in the proceeds of the land subsequently sold or in the unsold lands remaining.

If, however, the representatives of Price have any interest in the profits, the remedy is by an action of law upon the contract. There is no suggestion that if in such an action the plaintiff establishes his rights to a half of the profits, the defendants are not able and willing to pay him.

The rights of Price and his representatives were barred by the lapse of time.

Any personal action for not selling in five years was long since barred by the statute, as the answer sets up.

The remedy in equity, if there was any, is sought after the lapse of so long a period that upon settled principles of equity the demand will not be enforced. It will be considered a stale demand.

In addition to the defence of a bar by the statute, and to the defect of misjoinder of Seymour's executors in a matter where they had no interest, the bill omits to make Price's heirs a party. If Price's estate has any interest in the matter, they are chiefly interested and should be parties.

Price died in July, 1854, more than fourteen years after the alleged default in selling. He never, during his lifetime, once requested that the lands should be sold, or made any claim to an *interest* in them. The heading of the accounts negatives all such ideas. The fact that he attended to the payment of taxes with money remitted by Mr. Seymour's representatives, is quite consistent with the character of an agent, and that he let the lands be sold rather than pay taxes himself, is consistent with no other idea. High's accounts show that he was employed by the heirs and devisees of Seymour *as their agent.* The fact that they both acted distinctly as agents, rather rebuts the idea of any other relation. It is a circumstance of weight that a peremptory sale at any time during these twenty years would have resulted in a loss which Seymour's representatives must have borne alone, as Price and his representatives were in no way bound to contribute; as it also is that during all this time the burden upon the devisees of Seymour was increasing at a rapid rate by the accumulation of interest and taxes and the expenses of agency. Good faith required, on both accounts, that Price should have advised the other party that he claimed a continuing interest, if such was the fact. All idea of a continuance of the contract by mutual consent is thus repelled. But, as the contract looked solely to a sale in five years, and limited the interest of Price to the profits to be made upon *such* a sale, it required a plain understanding on both sides to continue and extend the arrangement to sales to be made afterwards.

By the decree the heirs of Seymour are deprived of all

authority and control over the lands; title is taken from them and vested in a receiver. But there is no allegation that Seymour or his heirs have violated their duty under the contract; nor that they acted improvidently in disposing of the land sold; or that there is any apprehension that they will not dispose of the residue for the best interest of all concerned. They reside where Mr. Seymour did when the contract was made, and are responsible persons. The only ground of complaint is, that the appellants deny that, by the contract, they are bound to pay over to the representatives of Price a share of the proceeds of the land after the same are sold. But this is not an adequate cause for equity to compel a specific performance. Much less does it authorize the court to take the property from the appellants and place it in the hands of a receiver, to be sold by *him*.

Mr. Mather, *contra*, argued at length that the case was one of partnership, citing numerous authorities, and that at all events the evidence showed that both Price and High regarded Price as interested, he having no compensation otherwise than in an ultimate share of profits for his many years of service; that selling had gone off without default on either side; the thing being nursed along till a good price could be got; that the case being one of partnership and trust, chancery had special jurisdiction; that the statute did not run against a trust; that there were no laches; and that the relief given was but adequate and proper.

Mr. Justice SWAYNE delivered the opinion of the court.

The contract which lies at the foundation of this suit, was entered into by Jeremiah Price and Henry Seymour on the 9th of May, 1835. Upon looking into it carefully, we find it contains the following provisions:

Price agreed that he would devote his time and attention and exercise his best judgment, in purchasing lands to an amount not exceeding $5000, in the States of Indiana, Illinois, and Ohio, and in the Territories of Michigan and Wisconsin, or in such of them as he should find most advantage-

ous for the interest of Seymour: the contracts were to be made and the conveyances to be taken in Seymour's name: the purchases were to be made after full and careful search for the most profitable investments "in or near the sites or expected sites of towns or places of business," and in general in tracts of land of moderate extent: Seymour agreed to furnish $5000 wherewith to make the purchases contemplated: that the land so purchased should be sold within five years from the date of the contract: that after charging the investment, the taxes, and 7 per cent. interest on the investment, there should be paid to Price one-half of the profits which should be made: it was agreed that this half of the profits should be in full for Price's services and expenses of every kind in making the explorations and searches, and in doing all such other things as should be requisite and proper in making the purchases: the purchases were to be made during the current year: nothing was to be paid by Seymour for Price's services or expenses, except from the profits as aforesaid. The premises in controversy were bought by Price, and the titles vested in Seymour, pursuant to the contract. The property consisted of $2440\frac{22}{100}$ acres of land in the State of Illinois, and several lots in the village of Joliet, in that State.

It was agreed by the parties to this suit, that at the expiration of the five years within which the premises were to be sold, they were unsalable, "and that it is entirely uncertain how much they could have been sold for, or whether they would even have brought enough to pay the original investment and interest."

Before the commencement of the suit the property had become very valuable; 200 acres had been sold for $69,200.

Seymour died in 1837, and Price in 1854. The five years within which the property was to be sold, expired in 1840.

The duties and obligations with which the contract clothed Price, were those of an agent. He was to make the requisite searches and explorations in the States and Territories named, and to receive and invest the money of Seymour as he might deem best for Seymour's interest. He was to contribute his

time, labor, skill, and judgment, but no money except what might be expended in the service he had undertaken to perform. The titles were all to be taken in the name of the principal, who was to advance the money. These functions were performed by Price. His duties and responsibilities thereupon came to an end, and those of Seymour to him commenced. For his expenditures, whatever they might be, he was to receive no immediate or certain return. The same remark is applicable in respect to his labor and services, and the exercise of his skill and judgment. Everything to be done by the agent he was to do, without any charge to his principal.

Seymour was to receive the titles of the property purchased, as if the purchases had been made by himself at home. All the burdens incident to the acquisition of the property were to be borne by Price, with only the contingency of reimbursement and compensation provided in the contract.

The lands were to be sold within five years. It is not stated by whom, but as the legal title was vested in Seymour, the duty of selling, by the clearest implication, devolved upon him. Price had no power to move in the matter, nor to exert any control, except the right to insist that the property should be sold by Seymour, within the time limited, and that the sales should be fairly conducted.* By an implication equally clear, Seymour was to pay all the taxes upon the property which might accrue.

It is proper here to consider the legal and equitable relations of the parties arising out of the contract.

We think Seymour took the legal title in trust for the purposes specified. A trust is where there are rights, titles, and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity

* Mann *v.* Butler, 2 Barbour's Chancery, 368.

which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked.* Interests in real estate, purely contingent, may be made the subjects of contract and equitable cognizance, as between the proper parties.† The object of the trust here was to sell the property within the time limited, and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one-half of the residue. To this extent, Seymour was a trustee, and Price the *cestui que trust.* They had a joint interest in the property. Seymour held the legal title, but the rights of Price were as valid in equity as those of Seymour were at law.

If Seymour, within the five years, had conveyed the property to one of his children, by way of advancement, or to a stranger, otherwise than upon a *bonâ fide* sale for its fair value, the grantee would have taken the title, subject to the trust upon which Seymour held it, and a court of equity would have followed the property and dealt with it in all respects as if the title had still remained in Seymour. If a valid sale had been made, the trust would have followed and bound the proceeds in like manner as it bound the property.‡

Upon the death of Seymour, the legal estate passed to his devisees.

The principle of equitable conversion has an important bearing upon the case. Equity considers that as done which is agreed to be done. Money which, according to a will or agreement, is to be invested in land, is regarded, in equity, as real estate; and land which is to be converted into money, is regarded as money, and treated accordingly.§ In this view of the subject, the personal representative of Price is the proper person to maintain this suit, and it is not necessary that his heirs-at-law should be parties.

There is another view of the subject, which we think may

* 2 Story's Equity, § 964; Sturt *v.* Mellish, 2 Atkyns, 612.

† Phyfe *v.* Wardell et al., 5 Paige, 268; Armour *v.* Alexander, 10 Id. 571.

‡ Oliver *v.* Piatt, 3 Howard, 401; Taylor *v.* Plumer, 3 Maule & Selwyn, 562; Sweet *v.* Jacocks, 6 Paige, 355; Wylie *v.* Coxe, 15 Howard, 416.

§ Anstice's Administrator *v.* Brown et al., 6 Paige, 448.

properly be taken. The agreement, that the property should be sold, and half of the profits paid to Price, was a charge upon the property, and gave him a lien to the extent of the amount to which he should be found entitled upon the execution of the agreement, according to its terms. The principle involved in this proposition, is a familiar one in equity, and constantly applied in the administration of its jurisprudence.*

It is insisted by the appellees that the contract made the parties copartners in respect to the lands to be bought. We cannot adopt that view of the subject. The adjudications which bear upon it are conflicting and irreconcilable. The case of *Berthold et al.* v. *Goldsmith*† is conclusive in this forum against the proposition. We deem it sufficient to refer to that authority, without reproducing the considerations which control the judgment of the court.

But the result is the same as if we held that the parties were copartners. In that event, Seymour would still have held the property as trustee for the firm, according to the rights of the respective members.‡

The appellants contend, that for any violation of the contract to the injury of Price, he had a remedy at law, and that neither he nor his legal representative could have any other.

An action at law, sounding in damages, may, undoubtedly, be maintained in such cases for the breach of an express agreement by the trustee, but this in nowise affects the right to proceed in equity to enforce the trust and lien created by the contract. They are concurrent remedies. Either, which is preferred, may be selected. The remedy in equity is the better one. The right to resort to it, under the circumstances of this case, admits of no doubt, either upon principle or authority. Such, in our judgment, were the effect and consequences of the contract.

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* Pinch *v.* Anthony and others, 8 Allen, 539; Legard *v.* Hodges, 1 Vesey, Jr. 477; Roundell *v.* Breary, 2 Vernon, 482; Gardner *v.* Townshend, Cooper's Equity Cases, 303; 2 Story's Equity, § 1, 214–16–17; Denston *v.* Morris, 2 Edwards' Chancery, 37.

† 24 Howard, 536.

‡ Anderson *v.* Lemon, 4 Selden, 236.

At the end of the five years, limited for its complete fulfilment, a new element, not anticipated by the parties, and, hence, not provided for, intervened. The property, if then sold, would have afforded no profit. There would have been nothing to divide. It is uncertain whether it would have yielded enough to reimburse the cost and interest. According to the views we have expressed, there was a trust and lien for the benefit of Price. They could be destroyed only by some thing subsequently to occur. Either Price or Seymour's devisees might have insisted upon the sale of the property according to the contract. This would have extinguished the rights of both parties touching the lands, but it would have benefited neither. There would have been no profit for either party. Price would have lost his expenditures of time, money, and skill. The devisees might have lost the interest upon the investment, and, perhaps, a part of the principal.

The devisees might have held the property, and denied that, under the circumstances, the trust subsisted any longer. If Price acquiesced, his rights would have been at an end.

Price might, also, have expressly or tacitly abandoned his claim. This would have worked the same result. Both parties might have concluded to continue their existing relations, and to wait for a more auspicious period for the disposition of the property. Their interests were the same. What would benefit or injure one could not fail to have the same effect upon the others. If the purchases were judiciously made, the course last suggested was obviously the wisest and best for both parties. Was either of the alternatives adopted? and if so, which one?

This is the turning-point of the case.

The burden of the proof as to the two former rests upon the appellants.

Upon a careful examination of the record we have failed to find the slightest proof of any disclaimer by the devisees, or of any renunciation by Price. If such evidence exist we must suppose it is contained in the correspondence between the parties. They are annexed to the bill accounts, showing the

receipts and disbursements of Price down to the time of his death. The receipts, after the death of Seymour, commence on the 24th December, 1841, and terminate on the 16th of June, 1854. All the moneys were received from Messrs. John F. and Horatio Seymour. It appears, by a stipulation in the record, that the sums with which Price debited himself had all been verified by comparing them with the original receipts in the possession of the counsel of the appellants. The Messrs. Seymour lived in the State of New York, and Price at Chicago. The moneys were all remitted by checks. It is apparent, from the face of the accounts, that the receipt of the money, in many instances, if not in all, must have been acknowledged by letter. None of these letters have been produced. Why not? The inference is a fair one, to say the least, that they contain nothing unfavorable to the claim of the appellee. This negative feature of the case is not undeserving of consideration. If Price, neither by expression nor acquiescence, did anything to impair his rights, they must still subsist in full force.

We think there is proof in the record, that he and his personal representative considered the time within which the sales were to be made, prolonged until they could be made profitably, and, that in all other respects, the contract remained as if it had originally contained this modification.

We can hardly conceive how the devisees, who advanced the money to pay the taxes, and with whom Price must have corresponded, could have understood his position differently. It is admitted that from the time of the purchases down to the time of his death, Price had the care and charge of the property, and paid the taxes upon it, the devisees furnishing the money. His accounts are long, and the items numerous. There is no proof that he ever made any charge, or claimed anything for his services. His accounts are silent upon the subject. How can this be accounted for, unless he expected to be compensated by his share of the profits of the lands, to be realized when the proper time for selling should arrive?

Upon his death, High, his administrator, succeeded to the

agency. He was employed by the devisees, and performed the same duties as his predecessor. He negotiated the sales mentioned in the bill, and at once claimed a share of the profits for Price's estate, according to the contract. The claim was resisted by the devisees, and he thereupon instituted this suit.

The theory insisted upon by the appellees is consistent with all the evidence in the case. It is in conflict with nothing which has been developed. It is alleged, in one of the answers, that Price "never pretended to the defendants to have any interest, . . . but claimed that he ought to be allowed a reasonable compensation for his services as agent, and not under the contract." When, where, and how was the claim made? If by letter, why is not the letter produced? The fact is important, but the allegation is wholly unsupported by anything in the record.

The answers set up the bar of the statute of limitations. Where there is no disclaimer the statute has no application to an express trust, such as we have found to exist in this case.

It is said there is a misjoinder of parties in the bill with respect to the executors of Seymour. The doctrine of equitable conversion renders their presence in the case necessary, if not indispensable. If the objection were well taken, the bill as to them would be dismissed. The error would have no other effect.

It is alleged, also, that there is a defect of non-joinder as to the heirs-at-law of Price. The application of the same doctrine is a sufficient answer to this objection.

Conceding that the appellee is entitled to have the contract specifically executed, the appellants insist that the court below erred in decreeing that it should be done by a receiver instead of themselves. There being a trust and a lien a court of equity had unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties. The devisees are numerous. The

death of any one of them might seriously retard and embarrass the execution of a decree shaped as the appellants suggest. The appointment of the solicitor of the appellants as receiver, and the stipulation, which appears in the record, that he might sell at private sale, protects in the best manner the interests of all concerned.

The court below held that the contract made the parties to it copartners, and the decree was framed accordingly. But, as the provisions of the decree conform in all respects to our views, this theoretical error constitutes no ground of reversal. A wrong reason was given for what was properly done.

The litigation appears to have been conducted in a spirit of candor and fairness on both sides, which is eminently creditable to the parties.

We find no error in the record, and the decree of the Circuit Court is AFFIRMED.

Mr. Justice FIELD delivered the following dissenting opinion.

Mr. Justice NELSON, Mr. Justice GRIER, and myself dissent from the judgment of a majority of the court in this case.

The decrees appealed from are founded upon the theory that, by the agreement of May, 1835, Price and Seymour became copartners, and that the property purchased was copartnership property. The interlocutory decree declares that Price, by virtue of that agreement, "was entitled, as an equal copartner in the property, to one equal half of the profits made, or to be made, from the sale of the lands;" that the lands were purchased by Price as an "investment on joint account of himself and said Seymour," and that the sales made, and to be made, were "to be deemed and taken as made, and to be made, on joint account." And in the final decree the court administers the property on what it declares to be "just partnership principles." It provides for the payment out of the fund of all the costs and ex-

penses, and that "the balance which shall remain [of the funds then on hand], being clear profits of the *partnership* land purchase and sale up to the present time, be equally divided." And it speaks of "closing and settling the partnership land accounts, so far as the sales and collections have progressed."

And the case was presented to this court both in the oral and printed arguments of counsel upon the question whether a copartnership was created between Price and Seymour by the agreement of 1835, or any interest vested in Price in the lands purchased.

We shall consider at some length both parts of this question, and in disposing of them, we shall dispose, in our judgment, of the entire merits of the case.

We do not consider the agreement as creating any partnership between the parties, or as vesting in Price any interest, legal or equitable, in the lands purchased. It provides simply for services to be rendered by Price for Seymour, and a contingent compensation to be made to him for such services. It stipulates on the part of Price, that he shall devote his time and best judgment to the selection and purchase of land to an amount not exceeding five thousand dollars, in certain designated States and Territories, or in such of them as he may find most advantageous to the interest of Seymour; that the purchases shall be made during the then existing year, and that the contracts of purchase shall be made and the conveyances taken in the name of Seymour; and on the part of Seymour, that he shall furnish the five thousand dollars, that the lands purchased shall be sold within five years afterwards, and that of the profits made by *such* purchase and sale, one-half shall be paid to Price, and be in full for his services and expenses. And as if to prevent any possible misconstruction, the agreement closes with a declaration that no payment for those services or expenses shall be made except from such profits.

By the express terms of the agreement the ownership of the property was to be in Seymour; the lands were to be selected and purchased for his general interest, and the title

was to be taken in his name. The special interest of Price was only in the profits as a means of compensation for his services; and the interest was not in profits which might be made at any time, upon any future sale, however remote, but upon a sale within five years. He was to receive for his compensation one-half that might be realized above cost, interest, and taxes, from the rise of the property within that period. If language is to be interpreted in its natural and ordinary sense, the contract means that, and means nothing more nor less. The purchases, it says, shall be made during the present year. The sale shall be made within five years from that time, and one-half the profits from *such* purchase and sale, not from purchases or sales made at any other time, shall be paid to Price, not as profits, but as compensation for his services.

The provision for the sale in five years was not merely directory and modal, which might be waived by Price without affecting his rights. The subsequent clauses securing a compensation to him are limited to a sale within the period designated. He was to have half of the profits arising upon *such* sale; the moiety of the profits made upon such sale was to be in *full* for his compensation, and he was not to receive anything for services or expenses, except a participation in the profits made "*as aforesaid.*"

To one who is familiar with the history of the growth of the West, there is nothing singular or even unusual in a contract of this kind. With the immense tide of immigration setting in that direction, lands of comparatively little value one day sometimes in a few months become the sites of villages and cities, and the source of affluence to their possessors. It is not strange, therefore, that in 1835, a year somewhat noted for its speculative tendencies, a gentleman of capital should propose to one of energy and experience in such matters, that he advance the money, and the latter invest it in lands in the States and Territories of the West, "on or near the sites, or expected sites, of towns or places of business," upon a consideration that the latter should receive by way of compensation one-half of the profits which might

be made from the rise of the property in value within a designated period.

Nor is there anything in contracts of this character which imposes the obligations or confers the rights of copartners between the parties. There is no copartnership where the relationship between the parties is that of master and servant, or of employer and employee, though the compensation of the latter may be in proportion to the profits, or be paid entirely out of them. Under some circumstances parties thus receiving a portion of the profits may be held, as respects third persons, subject to the liabilities of partners; but as between themselves, and in the adjustment of their respective rights, no such relation obtains. This has been settled law for more than half a century. Thus, in *Hesketh* v. *Blanchard*,* decided in 1803, the plaintiff had furnished goods purchased by him on credit, to one Robinson, the testator of the defendants, to take to Africa for purposes of trade, upon an agreement that if any profit should arise from the adventure, he should have one-half for his trouble. The plaintiff having paid for the goods, brought an action for the amount. It was objected in defence, that as the parties were to divide the profits, if any, they must be equally liable for any loss, and that, therefore, a partnership was constituted between them. But the objection was not sustained, and Lord Ellenborough said that "Quoad third parties it [the agreement] was a partnership, for the plaintiff was to share half the profits; but as between themselves, it was only an agreement for so much as a compensation for the plaintiff's trouble, and for lending Robinson his credit."

In *Hazard* v. *Hazard*,† this doctrine was applied to a case where one of two parties agreed to devote his time to the management of the concerns of factories belonging to the other party, for one-fourth of the profits of the business for the first year, and one-third of the profits for each year after until the expiration of the agreement, which portion of the profits was to be the sole reward for his services. It was held that there was no partnership between the parties. "A mere

* 4 East, 144. † 1 Story, 371.

participation in the profits," said Mr. Justice Story, "will not render the parties partners *inter sese*, whatever it may do as to third persons, unless they so intend it. If A. agrees to give B. one-third of the profits of a particular transaction or business for his labor and services therein, that may make both liable to third persons as partners, but not as between themselves;" and he refers in support of the doctrine to the case already cited of *Hesketh* v. *Blanchard*.

Similar adjudications have been repeatedly made, we believe, in the highest courts of every State in the Union. Some slight differences exist in them as to the extent in which a participation in the profits of a business, by way of compensation, will render a party liable as a partner to third persons; but there is entire concurrence in the conclusion that such participation alone does not create a partnership between the parties.

In *Denny* v. *Cabot and others*,* the question presented to the Supreme Court of Massachusetts was, whether the defendant Cooper was a partner with Cabot, Appleton & Co. The agreement between them was substantially this: Cabot, Appleton & Co. were to furnish Cooper stock to be manufactured into cloth at his mill on their account, and Cooper was to manufacture the cloth and deliver it to them, and was to receive from them a stipulated sum per yard, and one-third part of the net profits of the business. It was held that the parties were not partners, either between themselves or as to third persons; that the agreement only provided the manner in which the compensation to Cooper for his services in manufacturing the cloth was to be ascertained, and that he had no title to any share of the cloth or any lien thereon.

In *Loomis* v. *Marshall*,† a case, in some respects, similar to that of *Denny* v. *Cabot*, was before the Supreme Court of Connecticut, and the liability of a party who receives a portion of the profits of a business as compensation for his services was very elaborately and ably considered. The agreement in the case was substantially this: A. was to furnish B., who occupied a factory, a supply of wool for two years,

* 6 Metcalf, 83. † 12 Connecticut, 69.

to be manufactured into cloths. B. agreed to manufacture the cloths, and to devote the use of the factory to that purpose, and the net proceeds of the cloths, after deducting incidental expenses and charges of sale, were to be divided so that A. should have fifty-five per cent. and B. forty-five per cent. The cost of the warp used, and the expense of insurance on the wool or cloths, were to be borne by them in the same ratio, and in case of destruction of wool or cloth by fire, the amount received from the insurance was to be divided between them, according to the loss of each. It was held that the agreement did not create a partnership between the parties; that the case was properly referable to that class of cases in which one party receives a share of the profits or avails as a compensation for services rendered, labor performed, and expenses incurred in the business; and the court observed, that if it should hold that the agreement constituted a partnership, it would change the existing law as to factors, brokers, agents, shipmasters, and seamen, who share in the profits by way of compensation, or in lieu of wages, and introduce great perplexity in the adjustment of their legal rights and remedies.

Now, if a party does not become a partner with others in business, general or special, as is above clearly established by the authorities, from the fact that by way of compensation he participates with them in the profits of the business, it follows that he does not, by reason of such participation, acquire any interest, legal or equitable, in the property which constitutes the basis of the business. It is only upon the theory that the services rendered by one party are to be considered as an equivalent to the capital advanced by the other, that a common interest of both in the property can be asserted. This theory, not resting upon any solid foundation, the inference deduced therefrom, of course, fails. The sharing of the profits not changing the relation of the party as agent to the one who furnishes the capital, the ownership of the property acquired by such capital is not affected. The case of *Smith* v. *Watson** is conclusive upon this point. In that case,

* 2 Barnewall & Cresswell, 401.

one Sampson (whose assignees in bankruptcy were the plaintiffs) employed one Gill, a broker, to purchase whalebone, and, by agreement, was to pay him one-third of the profits made on the sale of it for his trouble. The defendants were bankers, with whom Sampson kept his account; and the suit was brought to recover an amount in the defendant's hands, which was the proceeds of a bill drawn by Sampson on account of a parcel of whalebone which he had sold. Gill claiming to be a partner of Sampson, by means of the agreement, indemnified the bankers and received the money. It was held that the plaintiffs, as assignees of Sampson, were entitled to recover. Bayley, J., said:

"A right to share in the profits of a particular adventure may have the effect of rendering a person liable to third persons as a partner in respect of transactions arising out of the particular adventure, in the profits of which he is to participate; but it does not give him any interest in the property itself which was the subject-matter of the adventure. Gill's right to claim property in the whalebone must arise out of the terms of the bargain with Sampson; and looking to them, it appears clearly that it was not joint property. It may be assumed that it was purchased in the name of Sampson only, for Gill was a mere agent, and was to have a proportion of the profits in lieu of brokerage. Considering the question in this view, I am clearly of opinion that Gill had no property in the whalebone, or in the proceeds of the bill."

Holroyd, J., said:

"Assuming it to have been agreed between Sampson and Gill that the latter should make purchases of whalebone, and in lieu of brokerage, should have one-third of the profits arising out of the sales, and that he should even bear a certain proportion of the losses, I am of opinion that although such an agreement might make Gill liable as a partner to third persons, yet that it did not vest in him any interest in the whalebone purchased with the money of Sampson. Such an agreement would not convert that which was obtained by the separate property of Sampson into the joint property of Sampson and Gill. It may be collected from the evidence, that the latter did not furnish any part of the money required to pay for the whalebone, and that the contracts

for sale were made not in his name, but in that of Sampson, for Gill was to act as a broker only, and to receive a share of the profits in lieu of his brokerage. The money paid for the whalebone being, therefore, Sampson's separate property, and the contracts being made in his name as the purchaser, the property in the thing purchased would vest, by virtue of the contracts, in him alone."

There is no difference in principle between this case and the one under consideration. Price was employed to purchase land, and Gill was employed to purchase whalebone. Price was to receive one-half of the profits made upon a sale of the land for his services and expenses, and Gill was to receive one-third of the profits on the sale of the whalebone for his trouble. Gill was held not to be a partner with Sampson who employed him, or to have any joint interest with him in the whalebone; and upon the same principle it should be held, in our judgment, that Price was not a partner with Seymour, and did not possess any joint interest with him, in the land purchased.

If the decision in the case of *Smith* v. *Watson* is sound law, and it has not, that we are aware of, ever been questioned, but, on the contrary, has been uniformly approved by the highest courts of England and of the United States, it is impossible for the complainants to sustain the present suit. The suit proceeds and the decree is rendered, as we have here already stated, upon the theory that Price and Seymour were copartners, and that the property purchased was copartnership property.

We have shown, as we think conclusively, that Price was not a copartner with Seymour under the contract between them, and that he did not possess any interest with him in the lands purchased, but that the lands constituted the separate property of Seymour. Price was, it is true, interested in the profits to be made in the sale of the land, according to the terms of the agreement. It was not, however, the interest of a partner, but the interest which every party to an executory contract has in having the stipulations in his favor

performed by the other party. A personal action against the delinquent party, or his personal representatives, is the remedy for the breach of an agreement of this character. Resort can be had to equity only when special circumstances intervene to render the action at law unavailable. Undoubtedly Price could have maintained an action at law against the representatives of Seymour had a sale of the property been refused within the five years specified in the agreement, and recovered, as damages, a sum equal to one-half the difference between the value of the property and the amount of its cost, interest thereon, and expenses. That he did not institute any such action, or make any claim upon them, is explained by the admission accompanying the record, that the property was at that time unsalable, and that it was uncertain whether, if a sale could have been made, it would have brought enough to repay the original investment and interest. The subsequent conduct of Price shows very clearly that he regarded his right to compensation dependent upon the possibility of effecting a sale at a profit at that time. He lived until July, 1854, more than fourteen years after the expiration of the five years, and he never asserted any claim under the contract. He never requested that the lands be sold, or asserted any interest in them or their proceeds. He uniformly treated the contract as at an end, and the heirs of Seymour as the exclusive owners of the land and its proceeds. He subsequently acted as agent for them in paying taxes upon the property. He lived near the property, and it was natural that he should be employed for that purpose. But if funds, even of trifling amounts, were not forwarded to him, he did not advance the money, but allowed the property to be sold. It is difficult to reconcile this conduct with the theory that he considered himself at the time as having a claim either upon the land or its proceeds. And it is still more difficult to account for his entire silence to all the world, to his own relatives and agents, as well as to the heirs of Seymour, respecting any claim upon the property or its proceeds, if he considered that in fact he possessed any. It remained for the administrator of his

estate, nearly three years after his death, to discover that he possessed, during his life, unknown to himself, large and valuable interests in property which he had purchased for others, and in their name, twenty-two years before. The claim now asserted is contrary to the express terms of the contract, and the construction given to it by Price himself. And even the administrator acted as agent for the heirs in paying taxes upon the property and in negotiating sales for them until he made the discovery of the supposed rights of his intestate.

It is urged as an objection to the case made by the defendants that they did not produce the letters of Price to them. It is assumed without any intimation to that effect on the part of the complainant, that these letters might have contained, and not being produced, must be presumed to have contained something against the interests of the defendants. The objection may be answered by the suggestion that the complainant did not produce the letters of the heirs of Seymour to Price. If they had contained any recognition of the claim now asserted on behalf of Price's estate, there can be no doubt that they would have been brought forth. If it be proper to invoke presumptions in respect to the contents of papers not produced, even when not called for, the presumption against the claim of the complainant must be regarded as very great. It is highly improbable that no allusion would be made by the heirs of Seymour to the interest of Price in the property, or to his claiming an interest, during a correspondence of fourteen years, if, in truth, he possessed or claimed any.

The case of *Stow* v. *Robinson*,* decided by the Supreme Court of Illinois, presents similar features to the one under consideration, and is authority upon the point, that the remedy of Price, if a sale within the five years had been refused, was at law, for breach of the contract, and not in equity. The case was this: Robinson was the owner of a block of land in or near Chicago, and it was agreed between

* 24 Illinois, 532.

him and one Rathway that the block should be subdivided, and that Rathway should dispose of the lots for one-fourth cash, the remainder to be secured by notes payable in one, two, and three years, with interest, Robinson to give bonds for deeds on receiving the notes, and to execute conveyances when the notes were paid. Out of the proceeds obtained Robinson was to receive the purchase-money of the block, with interest, and the balance was to be equally divided between the parties; and for his share upon this division Rathway was to plat, survey, or subdivide the block, and advertise and sell the same at his own expense. Rathway, under the agreement, subdivided the block into lots, and sold a portion of them, when Robinson stopped the sale, and refused to allow any further sale, or to execute any more title-papers. Rathway having died, his heirs and personal representatives filed their bill to compel a performance of the agreement. The court held that by the agreement Rathway did not acquire any vested interest in the land itself, and if he was prevented from executing his part of the agreement, he had his remedy by an action at law for damages, and that his remedy was clearly not in equity.

The difference between this case and the one under consideration is circumstantial; the principle is the same in both. The services rendered in each were the meritorious cause for the compensation to be made by the owner of the land. In the case cited it was the platting, surveying, subdividing, advertising, and selling the land; in the case at bar it was the selection and purchase of the land. The difference in the services is not material. The contract stipulating for the services in the case cited created in Rathway no interest in the land held by Robinson; and for the same reason the contract in the case at bar, in our judgment, created in Price no interest in the land held by Seymour. If Price possessed no such interest, there can be no pretence that the land was subject to any trust for his benefit.

In our judgment the decree below should be reversed and the bill dismissed.

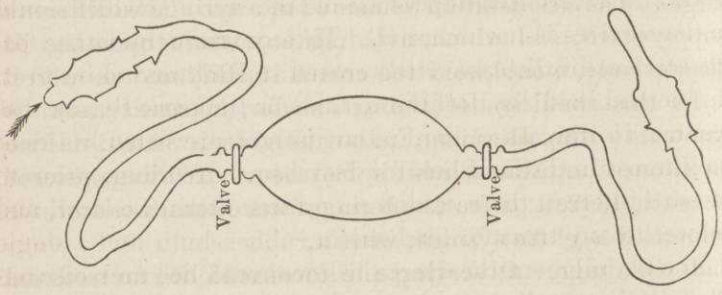
MOREY *v.* LOCKWOOD.

1. Where a limitation of a claim, as found in a patent, has been caused by a mistake of the Commissioner of Patents in supposing that prior inventions would be covered, if the claim was made, as the applicant makes it, more broad, and an inventor has thus been made to take a patent with a claim narrower than his invention, it is the right, and, as it would seem, the duty of the commissioner, upon being satisfied of his mistake, as to the nature of the prior inventions, to grant a reissue with an amended specification and a broader claim.
2. Where the amended specifications and broader claim secures the patentee only the same invention that he had originally described and claimed, the reissue is valid.
3. The syringe known as the Richardson syringe is an infringement of the patent for a syringe, granted March 31st, 1857, to C. & H. Davidson, and reissued April 25th, 1865, with an amended specification.
4. The Davidsons were the original and first inventors of the syringe patented by the patent and reissue above referred to.

APPEAL from the Circuit Court for the District of Massachusetts.

Lockwood, assignee of the inventors, filed a bill in the court just named to restrain Morey and others from infringing letters patent granted to Charles H. and Herman E. Davidson, on the 31st of March, 1857, for a new and useful improved syringe; *and which were surrendered and reissued on the 25th day of April*, 1865, *with an amended specification.* The diagram below presents a sectional view of the instrument; now commonly called

THE DAVIDSON SYRINGE.



The case was this:

Prior to the date, when, by the inventions of Goodyear,

Statement of the case.

India-rubber had become so important an agent in surgical operations, the only syringe in much use was the old metallic syringe, with a plunger, sometimes known as the pump syringe. The objections to the use of it, whether anal or vaginal, were, amongst others, that it required to be worked, if the party was at all feeble, by a second person, that it required the patient to be moved and placed in certain positions before it could be used, thus, sometimes, causing a strain; that where the parts were delicate or diseased, it was liable, even when thus used, by slipping or accidental motion, to injure them; and finally, that unless the instrument was large, when the inconvenience of it was proportionably increased, it required, in many cases, however used, to be removed, refilled, and replaced before a sufficient injection could be obtained. With the discoveries in manufacturing India-rubber, three improved forms of the instrument were made.

1. The globe syringe, composed of a simple globe or bulb of India-rubber with an inflexible pipe inserted in it. By compressing the bulb, the air was expelled and a vacuum caused. The pipe being then placed in any fluid, it flowed by the weight of the external atmosphere into the globe, from which, on the extremity of the pipe being inserted into the part to which it was designed to convey it, the fluid passed on compression of the globe by the hand. One objection, among others, to this instrument was, that it had to be removed, refilled, and replaced, if the injection required was large. The desideratum remained of a syringe which could supply itself, and which, avoiding any strain upon the patient's body, would hold the enema steadily and close to it.

In this condition of the art, so far, apparently, as was known to him, Herman E. Davidson, a physician, resident in Gloucester, Massachusetts, had been attending, prior to August, 1852, a patient, suffering from uterine cancer, and who used a globe syringe, with a rubber bulb and a single inflexible tube. Observing the inconvenience and discomfort to the patient of having to remove this instrument from the body, from time to time, in order to refill the instrument

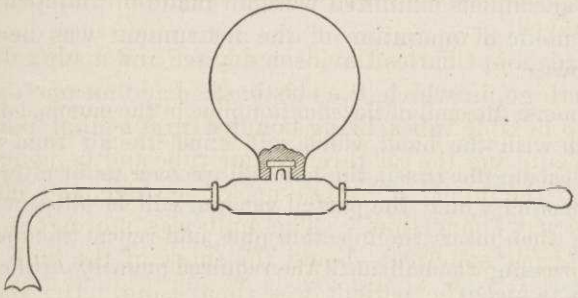
with the enema, Dr. Davidson suggested to a brother of his, Charles H. Davidson, who was a machinist, the making of a syringe which could supply itself with enema without being so removed.

Thereupon, Charles Davidson devised and made a drawing of a syringe, in which the elastic sac had but one opening, the two flexible tubes being coupled to it at that point, the enema entering the sac through one tube and being expelled through the other; a "single-neck" syringe, and having a "three-way connection." The bulb was more round than oval—nearly spherical—being the shape of the bulb in the syringe which the patient was then using. Dr. Davidson suggested the use of the oval form of bulb, and also, as a simpler and better mode of combining the parts, to have the two flexible tubes enter the sac at opposite sides.

In the early part of January, 1853, the Davidsons filed a caveat in the patent office, announcing that they had made certain improvements in syringes, and that they were now perfecting them prior to an application for a patent; their petition, together with the accompanying description, being dated on the 8th of January in that year. In that description, the petitioners state that their improvement consisted in using a spheroidal, cylindrical, or globular elastic sac, or bulb, to which were attached, and communicating with it, flexible tubes or pipes; to the ends of which pipes were connected valve-boxes, with suitable valves therein, so that by the alternate action of compression and expansion, the desirable quantity of injection might be administered without removing the instrument to refill it.

When application was made by the attorney of the inventors to the Commissioner of Patents, with a claim for the combination of an elastic sac, with flexible tubes, terminated with suitable valve cases and valves, the whole operating together in the manner and for the purpose set forth, objection was made by the office, on the ground that they were anticipated by Messrs. Pearsall & Gilbert, who, according to an account published in the Franklin Journal, had already improved syringes by making a rubber sac with two

tubes coupled to it at one point. The diagram, which the Franklin Journal presented, was thus:



And the commissioner refused to grant the patent, except with a claim, thus—the clause in italics, "when the sac, tubes, and valve-boxes are in, or nearly in, the axial line," being particularly insisted on:

"What we claim as new, and desire to secure, &c., is the combination of the prolate spheroidal shaped elastic sac with flexible tubes, terminating in valve-boxes, containing valves, arranged for the purpose of eduction and ejection, *when the sac tubes and valve-boxes are in or nearly in the same axial line*, the whole operating together substantially in the manner and for the purpose set forth."

The specification in this form was supposed to have taken the improvement out of the objection of the prior one by Pearsall & Gilbert.

In May, 1856, the Davidsons acquiesced in the rejection, and submitting an amended and restricted claim, the patent was granted.

The original specification described the improvement, in substance,

"To consist of an oval, or spheroidal elastic bulb, with flexible tubes and metallic valve-boxes, containing valves arranged for the purpose of eduction and ejection, when the elastic tubes and metallic valve-boxes were attached to such an elastic bulb in, or nearly in, its greatest axial line. The bulb and flexible tubes are composed of India-rubber, or of any suitable material of

sufficient elasticity and flexibility, as is necessary, and required by the patentee in the use or operation of the instrument."

The specimens exhibited were all made of India-rubber.

The mode of operation of the instrument was described as follows:

"Immerse the end of the eduction pipe in the enema, compress the bulb with the hand, which will expel the air from within, then releasing the grasp, the bulb will recover its form by means of its elasticity, and the partial vacuum will be filled with the enema; then insert the injection pipe, and repeat the operation of compressing the bulb until the required quantity of the enema is administered."

Having described the invention, what the inventors claimed as new, were the matters already mentioned as the ones thought proper by the commissioner to be so claimed, to wit:

"The combination of the prolate spheroidal-shaped elastic sac, with flexible tubes, terminating in valve-boxes containing valves, arranged for the purpose of eduction and ejection, when the sac, tubes, and valve-boxes are in, or nearly in, the axial line, the whole operating together, substantially in the manner and for the purposes set forth."

Subsequently to this grant of this patent, it was discovered by the patentees, or their assignee, and also by the commissioner himself, that the invention of Messrs. Pearsall & Gilbert furnished no legal objection to the claim of the Davidsons, as first presented to the office; for, although the prior improvement had a rubber sac, the tubes were *metal and inflexible*. Accordingly, on a surrender by the assignee he was allowed to amend the claim by restoring it to its original form, and the office granted a reissue with the claim in that form.

The amended specification was substantially the same as the original, leaving out that part which described the bulb, or sac, tubes, and valve-boxes, attached and so arranged as to be "in, or nearly in, its greatest axial line." As respected the claim, it was as follows:

"What is claimed as the invention of Charles H. and Herman

Statement of the case.

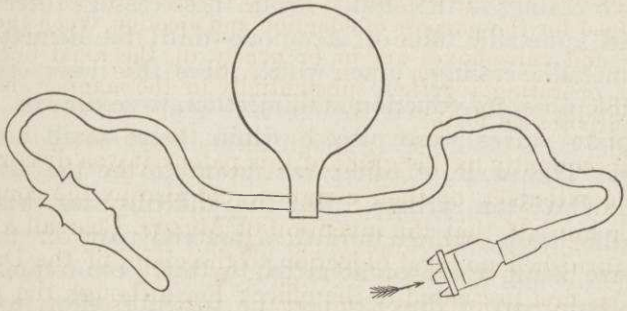
E. Davidson, is a syringe, having an elastic bulb or chamber, flexible tubes, and a suitable valvular arrangement, when organized, so as to operate substantially as described."

This claim, it will be observed, is the same with the one in substance made by the Davidsons, and refused by the commissioner when the patent was applied for.

By the 13th section of the Patent Act of 1836 a surrender and an amended specification may be made when the patent issued is inoperative, or invalid, by reason of a defective or insufficient description or specification; or, "if the error has, or shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention."

The invention which the bill sought to enjoin was one known as

THE RICHARDSON SYRINGE.



The instrument had the same parts and materials as the one made by the Davidsons; but instead of arranging them in an axial line, the bulb or sac was placed above the point of delivery and discharge of the enema, extending its "single neck" (which was of course hollow), so that the tubes might connect with each side of it. The difference between it and the instrument of the patentee was, that in the latter, in the axial line, tubes connected with the ends of the bulb; in the former they connected, not with the ends of the bulb but with the sides of its hollow neck. The enema passed from the eduction pipe through the neck or throat into the bulb,

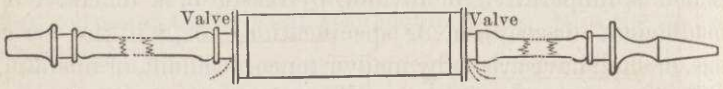
and was forced through the discharge pipe by the same means as those used by the patentees.

The chief ground on which the defendants resisted the invention were:

First. That the claim was broader than the invention.

Secondly. No infringement, want of originality, setting up here as the same in principle certain other syringes confessedly of prior date, as:

1. THE MAW SYRINGE.

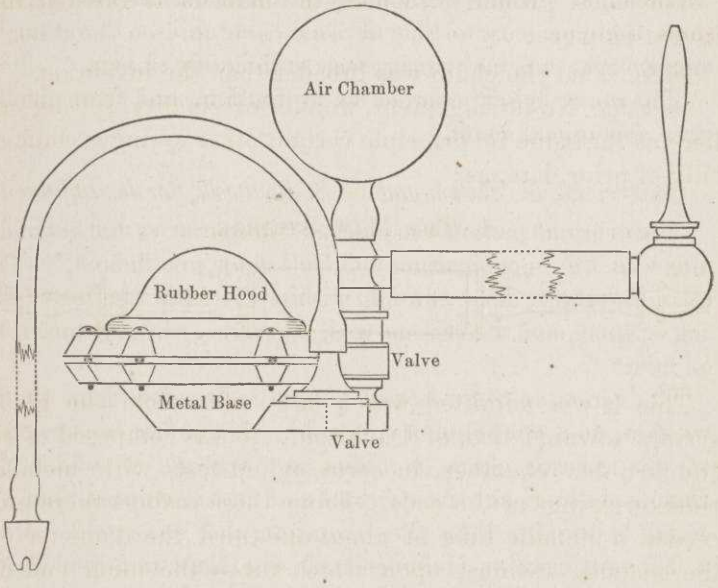


This it was admitted was a large step from the globe syringe towards that of Davidson. It was composed of an India-rubber chamber, in form cylindrical, with metallic rims or casings at the ends. From these casings there proceeded a metallic tube of about one-third the diameter of the metallic casings, upon which tubes the inner end of flexible pipes, for eduction and injection, were drawn. Appropriate valves were placed within these small metallic tubes. The mode of using was meant to be the same as in the Davidson syringe. But the difficulty was that the metallic heads, which formed a material part of the inclosure, being rigid, counteracted, by their connection with the elastic part of the chamber, the patient's effort to compress it. Accordingly the patient, if a female, or otherwise feeble, could not well compress it, and even when the party using it was not feeble, the strength required to compress the chamber was so considerable that no one cared to use it. Practically it proved of no value. Very few were ever sold. The Davidson syringe on the other hand came into nearly universal use at once.

2. THE THIERS SYRINGE.

This was an instrument of French manufacture. It had two flexible tubes, with suitable valves, but it did not have

an elastic bulb or chamber, in form at least, like that shown in the patent. A diagram of it is below.



1. It was not made of elastic material, but of a metal base plate and a rubber hood set upon it; the rubber hood forming one substantial part of the chamber to be collapsed, and the metal base plate forming the other substantial part thereof.

2. The chamber was not expanded by the elasticity of the material, but by means, wholly or partly, of a metal spring placed within the chamber.

3. The necessary prolongation of the flow of the pressure after the collapsing of the chamber had ceased was accomplished, not by the reaction of the chamber alone, as in the Davidson instrument, but by that *and* an air-chamber acting in connection with it.

These Thiers syringes were imported to and sold in this country in small numbers until about the time of the introduction of the Davidson syringes, and soon after that disappeared from the market.

In addition to these were numerous syringes, known as the Galante, the Phelps, the Johnson, the Hernstein, the

Leroy, the Feuchtwanger, and others, some of which had had a certain sale and others none; all were displaced by Davidson's. Much evidence was taken on the one part to show their priority to that of Davidson, and on the other to disprove it; but no priority was sufficiently shown.

The court below decreed an injunction, and from the decree this appeal came.

Messrs. H. F. French and G. S. Boutwell, for the appellants:

The original patent was neither "inoperative nor invalid," nor was the specification "defective or insufficient." The case, therefore, does not fall within the 13th section of the act of 1836, and the reissue was, therefore, without authority of law.*

The claim in the reissued patent is broader than the invention, and, consequently, is void. If the fair construction of the reissue claim includes any syringe of which the Davidsons were not the original and first inventors, then the claim is broader than the invention, and so is void. Now, a fair construction includes both the Maw and the Thiers syringe; both of them old, known, and used. Can any other construction be supported? By striking out the words "or chamber," and giving a very literal meaning to the word "bulb," we may, indeed, make a distinction. We may say the Maw syringe has everything else, but it has not a bulb. Even this, however, cannot fairly be said of the Thiers syringe, for it has an elastic bulb. But those words cannot be stricken out. The surrender for reissue was for the very purpose of inserting them. The original claim describes a bulb in the words "prolate spheroidal-shaped elastic sac." The word *chamber* was not there. It was not in the caveat, and it was used in the reissued claim with a purpose.

It is, in no sense, a synonyme with *bulb*. Every bulb is a chamber, but a chamber is not necessarily a bulb. Chamber is the larger phrase, and may include bulb, but it certainly includes *cylinder* as well. Any inclosed space is a chamber.

* Burr *v.* Duryee, 1 Wallace, 531; Case *v.* Brown, 2 Ib. 320.

In the Davidson *caveat*, they describe their sac as spheroidal, *cylindrical*, or globular. The Maw syringe has everything in the Davidson syringe but the bulb. The Davidson syringe, as described in the reissue, includes every element of the Maw, including the chamber, which the Davidsons do not now pretend to have invented.

The syringe made by the appellants is a combination of old parts, substantially different from the Davidson syringe in structure and effect.

1. Our bulb is not their bulb, but different in this, that ours has but one aperture, while theirs has two apertures.

2. The arrangement, or organization, differs in this, that in ours, the fluid in the bulb is above the point of delivery, and we have gravity to aid in expelling it, while in theirs, one-half the fluid is below the centre of the bulb.

3. Ours has a three-way piece, not found in theirs, and which cannot be used with theirs.

4. Ours is so constructed as to receive other pipes for various purposes.

These differences constitute ours a different instrument, different in its combination of parts, and different in its mode of operation; more different from it than theirs was from the Maw.*

The patent is wholly void, as well for the invention claimed in the original patent, as for the broader claim found in the reissued patent, because syringes containing all that is claimed as the invention of the Davidsons, were long before their alleged invention, known and used in this country.

Messrs. B. R. Curtis and Causten Browne, contra.

1. The limitation of the claim, as found in the patent, in the form in which it is issued, was caused from actual inadvertence and mistake of the Commissioner of Patents. The Davidsons acquiesced from necessity in the commissioner's decision; but the Patent Office had a right to admit and correct its own blunder, and to grant a reissue with the claim as originally made.

* McCormick *v.* Talcott, 20 Howard, 405.

2. The terms bulb, or chamber, are used as synonymous terms. Besides, the argument of the other side assumes that the invention patented, embraces any and all elastic chambers, by the intermittent compression and relaxation of which the instrument is made to operate as an injection syringe; whereas, it covers only instruments having substantially *such* an elastic chamber as is described.

3. The Richardson syringe is our syringe, under a less useful form. It is, in fact, the form in which Dr. Davidson first invented it, "three-way piece and all," a form abandoned as less simple than the one where the pipes were in an axial line. The gravity of an ounce or two of water is small; of other things sometimes injected less. But, in our form, the benefit of gravity can be obtained by turning the sac up perpendicularly.

4. The Maw syringe had two flexible tubes with suitable valves, and it had *an* elastic chamber, but it did not have an elastic bulb, or chamber, substantially like that shown in the patent. We need not examine particularly the construction of the elastic chamber. Whether the difference was theoretically great or small, practically, it was a very important one.

The same thing is true of the Thiers syringe, which has marked differences in the construction of the elastic chamber, particularly the metal spring to expand it, and which proved of little practical use.

Mr. Justice NELSON delivered the opinion of the court:

Several objections are taken to this reissued patent; among others, and which is the most material, that the claim is broader than the invention.

The 13th section of the act of 1836 authorizes a surrender, and an amended specification, when the patent issued is inoperative, or invalid, by reason of a defective or insufficient description or specification; or, "if the error has, or shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention." We do not doubt that the commissioner had full authority to grant the

amendment; and, under the special circumstances of the case, it would seem to have been a duty, as the inventors were led into the error by himself, as may be seen from his letter when the patent was originally granted.

The amendment was very material, as the language of the original claim tied the patentees down to a syringe, consisting of the parts mentioned, to an instrument in which they were arranged in an axial, or straight line; tying them down to the mere form of the construction, regardless of the substance and legal import of the invention. While the original specification and claim remained, it was competent for any one to evade the patent, and enjoy the substance of the improvement by a change in the mere form of the construction; that is, by an arrangement of the several parts in any form, if not in an axial or straight line. And this is what the defendants are endeavoring to accomplish, and would have accomplished, if the amendment of the claim had not been allowed.

They have constructed a syringe with the same parts and materials as used by the patentees; but, instead of arranging them in an axial line, the bulb or sac is placed above the point of delivery and discharge of the enema, extending its hollow neck so that the tubes may connect with each side of it. The only difference even in form between this and the patentees' is, that the latter, in the axial line, tubes connect with the ends of the bulb; in the former they connect, not with the ends of the bulb but with the sides of its hollow neck. The enema passes from the eduction pipe through the neck or throat into the bulb, and is forced through the discharge pipe by the same means as used by the patentees. The mode of operation is precisely the same in both instruments. The change is one of form and not of substance, and upon well-established principles of patent law, constitutes no defence to a bill for an infringement.*

As bearing upon this point it may be stated that the patentees themselves first constructed and used this form of

* Curtis on Patents, 260, 261, and note 2, page 264.

syringe; but, becoming satisfied that the other form was the best, recommended it in their specification accordingly. They are protected, however, against the use of any form, as will be seen by the authorities referred to, that embodies substantially their ideas and mode of operation.

On the question of novelty there are two specimens of syringe produced by the defendants that are chiefly relied on as disproving it: one called the Maw syringe, and the other the Thiers. The first differs from the patentees' in this, that the cylindrical bulb, or chamber, is made so rigid both in the material and from its metallic ends, or heads, that it is not sufficiently elastic to be adapted to practical use; and for this reason it failed and went out of the market.

The Thiers syringe differed from the patentees' in this, that part of the bulb or chamber is metal, and part rubber; and the elastic portion is aided by a spring inside of the chamber. There is, also, an air-chamber attached to the delivery pipe. The whole construction and arrangement is different from the patentees', as they have dispensed with the metal portion of the bulb, the spring, and the air-chamber, and substituted a simple India rubber bulb.

The rest of the proof on this point is conflicting, and we agree with the court below, that the weight of it is decidedly with the complainant.

DECREE AFFIRMED.

DRAKELY *v.* GREGG.

1. If, with a full knowledge of the facts concerning it, a person ratify an agreement which another person has improperly made, concerning the property of the person ratifying, he thereby makes himself a party to it, as much so as if the original agreement had been made with him. No new consideration is required to support the ratification.
2. When evidence *tends* to prove a contract of a certain character, asserted by a party before a jury, a court should either submit the evidence on the point to the consideration of the jury, or if, in the opinion of the court, there are no material extraneous facts bearing on the question, and the contract relied on must be determined by a commercial cor-

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respondence alone, then interpret this correspondence, and inform the jury whether or not it proves the contract to be of the character contended for by the party.

3. Accordingly, this court reversed a judgment, and ordered a *venire de novo* in a case where, in its opinion, the evidence below *tended* to prove a ratification and adoption by one person of a contract made by another, which ratification and adoption, the defendant maintained that the evidence did prove, or, at least, tend to prove. This court, however, in the reversal, carefully avoided the expression of any opinion as to whether the evidence, which it said *tended* to prove such ratification and adoption, did, or did not actually prove it.

IN error to the Circuit Court of the United States for the District of Maryland.

The controversy grew out of the last of three shipments of pork products, in January, 1865, to Drakely & Fenton, of Baltimore, by McCabe & Co., of Chicago. Drakely & Fenton had agreed to receive, on consignment, from McCabe & Co., *hams*, shoulders, prime and new pork; to sell the property at the highest market price, and to advance, on each shipment, at certain specified rates. In pursuance of this understanding, McCabe & Co. made two shipments, one of barrelled meat, and the other of shoulders, in tierces, on which they drew drafts in favor of Gregg & Hughes to the amount of $59,000 which were paid.

Soon after this the *hams* were sent. On the day succeeding their shipment, the Baltimore firm received a telegram, which was followed by a letter from Gregg & Hughes, of Chicago, claiming title to all the property, and requesting that the bills of lading for the hams might not be negotiated until the whole matter was properly adjusted; and, until then, Drakely & Fenton did not know that Gregg & Hughes had any interest in the property consigned to them. It seemed, from Gregg & Hughes's letter, that they had furnished McCabe & Co. with money to cut and pack hogs, and had taken in security, the warehouse receipts on all the pork products, which afterwards came into the possession of Drakely & Fenton. The intervention of Gregg & Hughes resulted in nothing more being paid to McCabe & Co., and in a final direction from McCabe & Co. to Drakely & Fenton, to place

the proceeds of all the pork products consigned to them, to the credit of Gregg & Hughes.

It appeared, from the conduct of the parties, that there was no apprehension, until long after Gregg & Hughes had intervened, that the portion of these products, covered by the two first shipments, would not bring, when sold, enough to reimburse Drakely & Fenton for what they had advanced on them. But it so happened, in the vicissitudes of trade, that the hog market greatly declined, and that the proceeds of the pork and shoulders were inadequate to repay the money which was advanced upon them. The hams having sold for a large sum over charges and advancements, Drakely & Fenton insisted that they were entitled to a lien on the proceeds, for their general balance arising out of the deficiency on the sale of the pork and shoulders, which right was denied by Gregg & Hughes, and hence this litigation.

The question depended, of course, upon the fact, whether the intervention of Gregg & Hughes had changed the relation of principal and factor, which had previously existed between McCabe & Co. and Drakely & Fenton, and separated the consignment of hams from the preceding consignments. This, of course, was a question depending on the terms on which the hams had been received.

The evidence, on this point, consisted of a long correspondence, and of some oral testimony. The transactions originated with a letter from McCabe & Co. to the Baltimore house, as follows:

CHICAGO, January 6th, 1865.

MESSRS. DRAKELY & FENTON, BALTIMORE.

DEAR SIRS: I have about one thousand tierces of pickled hams, and five hundred tierces of pickled shoulders, with some mess, prime mess, and extra prime, which I would like to send to you, provided you think you could sell for good prices. Please let me know what you could get for the above, to arrive, and what amount you would allow me to draw on the shipment.

Yours, truly,

R. MCCABE & Co.

The property here referred to, pork, shoulders, and hams,

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was, all of it, confessedly, at the date of the letter, the property of Gregg & Hughes, by virtue of the warehouse receipts already mentioned. On the 10th January, Drakely & Fenton reply, as follows:

BALTIMORE, January 10th, 1865.

MESSRS. R. MCCABE & CO., CHICAGO.

GENTLEMEN: Yours of 6th instant came to hand this morning. [Here prices are given.] We would be pleased to receive consignments from you, and would advance you as follows, on sight drafts, accompanied with bills of lading; on pickled hams, say $40 per tierce; do. shoulders, $30 per tierce; mess pork, $30 per barrel; P. M. pork, $25 per barrel.

Very respectfully, yours,

DRAKELY & FENTON.

The present litigation had reference, mainly, to 983 of the 1000 tierces of hams, the first-mentioned article in both of the foregoing letters.

Satisfied, apparently, with the terms of Drakely & Fenton, McCabe & Co. write, as follows:

CHICAGO, January 13th, 1865.

MESSRS. DRAKELY & FENTON, BALTIMORE.

DEAR SIRS: Yours of 10th is before me; I will ship to you, by the 16th, fifteen hundred barrels pork, and, probably, will ship one thousand tierces of hams, and six hundred tierces of shoulders, next week. I will draw on the fifteen hundred barrels on the 16th, as directed by you, for about $42,000.

Truly yours,

R. MCCABE & CO.

On the 16th of January, McCabe & Co. forwarded the pork described in letters of that date, of which the following is an extract:

"On the terms enumerated, I have drawn on you to the order of Gregg & Hughes for $41,000. I will ship to order about six hundred tierces of shoulders, and, on Thursday, I will ship the hams. I hope you will put the property in store, on arrival, until I come on, which will be in February."

On the 17th January, McCabe & Co. write again to Drakely & Fenton, informing them of a shipment of "six hundred and three tierces of shoulders," and saying: "I will ship the hams next week, if I can get cars."

The bill of lading for the nine hundred and eighty-three tierces of hams is dated January 23d, 1865, which was Tuesday; but the hams appear to have been forwarded, in fact, on Sunday; and on Monday, 22d, Gregg & Hughes telegraphed Drakely & Fenton, as follows:

CHICAGO, January 22d, 1865.

Don't negotiate bill lading for nine hundred and eighty-three tierces of hams, shipped yesterday by McCabe & Co., consigned to you; hams belong to us. Particulars by mail. Answer.

GREGG & HUGHES.

This was the first intimation that Drakely & Fenton had, of Gregg & Hughes's interest in the property mentioned in the original letter of McCabe & Co. of January 6th, or any part of it. The letter promised by the telegram, and of the same date, followed in course. It was thus:

CHICAGO, January 22d, 1865.

MESSRS. DRAKELY & FENTON, BALTIMORE.

GENTLEMEN: We have been advancing large sums of money, during the past winter, to R. McCabe & Co., of this city, to pack pork with, and have been getting from them their warehouse receipts, with policy of insurance, covering the same security. We have been shipping the property to New York on B. L. in our name, where it was held for our account. *Some few days ago, Col. McCabe, of the firm named, handed us a letter from your house, authorizing them to make sight drafts on you, on the basis of certain figures therein named, the drafts to be accompanied by B. L.* These shipments they made without our knowledge in their own name, *and gave us only a portion of the proceeds of the drafts made on you, payable to our order, viz., one for* $41,000, *and another for* $18,000. TO THIS WE DID NOT MAKE ANY SERIOUS OBJECTION, as they had been cutting a few hogs with money obtained from another source, and we presumed they wanted to close that account. There was still a considerable quantity of lard and hams remaining here, which we supposed was sufficient to secure us for our

advances here, in addition to what we had in New York. Subsequently, they shipped the lard to you, on their own account, for which we got nothing yet. Col. McCabe, however, told us that we should have the benefit of anything that might be in your hands, from the sale of the property shipped you on B. L. in the name of McCabe & Co., the lard included, after your advances and charges were paid. *We were satisfied with that arrangement, and on Friday last proposed that we would ship to you, in a few days, the hams that were still here, there being then about a thousand tierces in which we were interested, and we would not draw anything upon them until they were sold.* Col. McCabe told us, at that time, he would leave on Saturday morning for New York, *and we were to attend to the shipping of the hams ourself.* To our surprise, this morning (Monday), we found that McCabe did not go to New York, as contemplated, but remained here and shipped the hams himself to your house, on yesterday (Sunday), and this morning left for your city himself. Now, the last move, to us, does not look right, and we are not satisfied with it. We, consequently, write to you *all the facts* in connection with our dealings with McCabe & Co., and will deem it an especial favor, *if you will hold off making further advances to them, over and above the* $41,000 *and* $18,000 *sight drafts drawn in our favor. The property shipped you is virtually and legally ours, and we hold McCabe's warehouse receipts for it.* If you will delay the payment of anything further to McCabe & Co. until we can advise with them, and direct the property to be placed with you for our account, we will feel very grateful to you; and if they refuse to comply with our request, we can then take steps to make them surrender the property or reimburse us for our advances. . . .

We do not wish your interests in the matter to be impaired in the least; we want you to sell all the property consigned to you; but we do not want the proceeds paid over to McCabe & Co., until we are secured, nor do we want any sale for the future made, unless the sales are placed to our credit. McCabe & Co. may have the very best intentions in this matter, and we hope they have, but the course pursued is not exactly as we would have done, and we think very strange of McCabe & Co., for having moved *property belonging to us without our consent.* We desire that they shall have the benefit of everything *the pork, lard shoulders, and hams bring over the amount* we have in them. . . . . Yours,

GREGG & HUGHES.

On the 31st of January, 1865, Gregg & Hughes write:

"We have in our former letter notified you that the property consigned to you by R. McCabe & Co., of this city, belongs to us. We again notify you that *all the pork products* shipped to you by McCabe & Co., is ours, and you must not negotiate for advances on the same *with any other parties but us.* We also notify you not to divest yourselves of the control of any of the property, by assigning B. L., or in any other way, as you, we are legally advised, are responsible to us. You will consequently please confer with us in future, in regard to the disposal of said property. . . . . You will distinctly understand, that if you dispose of, in any way, the property *consigned to you by R. McCabe & Co.*, without our consent, that we will hold you responsible for the value of it."

Drakely & Fenton reply, February 3d, 1865, and say:

"We have decided to be governed by your instructions as to retaining the control of the goods, or proceeds of them, and we now assure you we have no wish to embarrass you, and will do all in our power to protect your interests."

On the 6th February, Gregg & Hughes wrote to Drakely & Fenton, and after speaking of some lard, which McCabe & Co. were to have let them have, but did not, say:

"In place of it he agreed that we should not only have the proceeds of sale of the 983 tierces hams shipped to you, *but also all property of the brand of R. McCabe & Co., in your hands. . . . We claim the whole property—the hams, pork, and shoulders. Our receipts cover them.*"

On the 9th February, 1865, Drakely & Fenton, writing to Gregg & Hughes, say:

"In naming figures we would advance to McC. & Co., we based our calculation on at least 300 lbs. tierces ham and shoulder (we have generally found 300 to 320 the net weight of Ohio and Indiana tierces) McC. & Co., we find so far as examined, weigh 280 to 290. *We name this now,* as we shall, when you and Mr. McC. get the matter straightened so that we shall know in whose name to keep our account, make a new estimate, based on the actual weight of the hams and shoulders, *and the depreciated market for all the goods, so that if an advance is required on the*

hams, fix an amount low enough to give good margins on all the shipments."

This letter refers to the letter of the 10th January, fixing the rate of advances, shown by R. McCabe to Gregg & Hughes.

The letter in reply is dated February 11th, *and made no comment* on the subject of the passage last above quoted in long primer.

The next letter is dated February 22d. This was also *silent upon that subject.*

The next, dated February 27th, says:

"*We hand you memorandum of property in your hands which our order covers, subject to two drafts made by McCabe & Co. on you, with transportation and other regular charges,*"

and they add their thanks "for the very liberal and just course" pursued by Drakely & Fenton in the premises. In this same they ask for an advance of $25,000, saying that it was below that promised to McCabe.

The memorandum referred to in the letter as inclosed, had a list of items of the property, *and the hams were among them.*

Drakely & Fenton, on the 2d of March, acknowledging the receipt of the last-quoted letter of the 27th February, whose contents they say they have carefully noted, consented to make a further advance of $25,000, and subsequently did actually advance $10,000.

In advancing that,—in a letter of the 6th of March, after mentioning that they had received from the smoke-house some of "a few tierces each, of Messrs. R. McCabe & Co.'s hams and shoulders," and that more than half came out tainted—they say,

"Under these circumstances and looking solely *to the goods as security for advances,* we cannot now make the advance we proposed to do in ours of the 2d. With the most liberal estimate we can make, we have decided that $10,000 is as much *as we can add to previous advances.*"

In a letter of the 15th of March, acknowledging the re-

ceipt of the letter of the 8th, Gregg & Hughes, recognizing apparently the reasons of Drakely & Fenton, confined themselves to saying:

"We regret that you could not consistently place more than $10,000 for us in New York. . . . We hope you may find it convenient yet to place some more for us, which we will deem as an especial favor."

On the 8th of March—apparently before Gregg & Hughes had received Drakely & Fenton's letter of the 6th—the former write:

"We herein inclose to you Col. McCabe's order on you for the pork products." "In regard to the sales of the stuff, we will place the matter entirely in your own hands, to use your judgment and discretion as to the best time to sell."

The order inclosed in the letter was as follows:

CHICAGO, February 25th, 1869.

MESSRS. DRAKELY & FENTON, BALTIMORE.

GENTLEMEN: You will please place the proceeds of all the pork products consigned to you by us to the credit of Messrs. Gregg & Hughes, of Chicago, Illinois, and oblige

Yours, &c.,

R. MCCABE & Co.

Accepted, March 20th, 1865.

In the already mentioned letter of the 15th March, Gregg & Hughes say:

"In regard to holding on to the property for any great length of time, we can only say that it is not our desire to do so if we can avoid it without sacrificing it." "We certainly do not wish to hold the hams and shoulders until warm weather, and hope you will be able to sell them before that time. If anything is to be held, let it be the pork."

On the 20th March, Drakely & Fenton write:

"As the market is now we cannot estimate *the entire shipments of McCabe & Co.* to a figure any greater than we now have in them; and had the business been consummated, as we originally hoped, we should no doubt ere this have been compelled to ask for a margin."

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On the 29th March, acknowledging the receipt of it, Gregg & Hughes speak of an improvement in the market, and say:

"While we are exceedingly anxious to have the property in your hands disposed of, as we could use the money invested to a good advantage, we would not urge the sale of it hastily, if the prospect of a further advance is any way flattering."

Again, on the 25th April, they write:

"We hope that you will soon be able to dispose of some of the hams and shoulders at good prices, and the pork also; we think, however, it would be better to hold the pork longer than the other stuff. Please give us your views on that point. Our New York balances will require us to place some funds there very soon, *and as we have calculated on the consignments to you to help us through*, we beg leave to ask you whether with the present prospects, you could not within a few days place $5000 with Hennings, Flint & Pearce, and accept our 30 and 60 day bills on you for $10,000 more, favor of Messrs. David Dowse & Co., being a total of $15,000. If you can favor us in this way it will enable us to hold some property that may be greatly to our advantage to not have disposed of at present."

On the 8th April, Drakely & Fenton write to Gregg & Hughes:

"Making the best estimate we can, the advances already made are larger than we would make now on a duplicate shipment."

In reply to this letter, Gregg & Hughes write, April 14th:

"We regret that you felt constrained to advance no more than the $10,000 you sent to New York on *our* 983 hams—the advance you made on the pork and shoulders was more liberal."

On the 22d April, Gregg & Hughes write again:

"Please give us your views generally concerning the condition of the property you hold for us, and the price you can get, also the prospect of selling at an early day."

On the 3d May, Gregg & Hughes write again:

"We would be glad of your views as *to the net value* of the property you have for us, at present market rates. We, of course, know you cannot tell exactly what it would sell for, but

we suppose you can form an opinion somewhere near its value. We would be pleased to have you furnish us with your account sales of each lot sold, *and your account current when all is closed out.* We can then keep the run of how the stuff is selling, and might be governed somewhat in selling off rapidly or gradually."

To this letter Drakely & Fenton reply on the 8th May:

"We have made a rough estimate of your whole provision business, based on present nominal prices, and the net balance is about $10,000."

Now, as was asserted by Drakely & Fenton, and not until now, as they asserted, began a change in the character of the correspondence of Gregg & Hughes, which change, as they assert further, led to the present litigation.

Gregg & Hughes, on the 12th May, write to Drakely & Fenton thus:

"We hope you have been able to dispose of the greater portion, if not all, of *our hams* by this time, at good prices, as also *some of the other portions of McCabe & Co.*, the proceeds of which, over and above your charges and advances on them, is to be placed to our credit."

Here, it will be observed, "our hams" and "portions of McCabe & Co." are referred to as properties in the hands of Drakely & Fenton, belonging to different parties.

In a letter of May 22d, "our hams" are again spoken of, and Drakely & Fenton are told:

"You will please keep the ham account separate. . . . The ham account sales, you understand, will be made direct to us. . . . The pork and shoulders will be made out to McCabe & Co. for our use; we do not want to get the property confused by running it all together. The hams are *exclusively* ours, and the other stuff, we are to have the benefit of what may be in your hands when sold, after deducting your advances and charges on the same."

A letter of Gregg & Hughes of May 31st, speaks of "our hams and McCabe & Co.'s stuff."

Drakely & Fenton, however, did not recognize the distinc-

tion taken by Gregg & Hughes, and say, in a letter of June 5th:

"We do not propose to change the aspect of our relations to you as assignees of McCabe & Co., to receive from us whatever balance may be due them when their consignment of hams, shoulders, and pork, shall have been closed."

On the 27th June, Gregg & Hughes use the term "*our hams*" twice; and in a letter of the 8th July, Drakely & Fenton inform Gregg & Hughes that they have been "pushing off the *McCabe hams* as rapidly as possible." Again, on the 15th July, Gregg & Hughes speak of "our hams;" again, on the 20th; again, on the 29th.

The correspondence closes with a letter from Gregg & Hughes of September 16th, 1865, in which they present their view of the case thus:

"You say that you cannot recognize any distinction in the ownership of the hams, shoulders, and pork, that you received from McCabe & Co. and ourselves, and are not willing to make any further advances on them, until all is disposed of. Now, gentlemen, this is rather a singular view you take of the matter, and a novel construction you place on our account; you certainly were aware, from the beginning, that the 983 tierces of hams belonged exclusively to us, and you also know, that we were to have the benefit of the excess over and above your advances of the sales of the provisions shipped you direct by McC. & Co. They drew on bills of lading as per your proposal in your letter to them, dated January 10th, 1865; the hams, they had no right to value against, and did not do so, which you are well aware of; we were the exclusive owners of the hams, and did not draw against them ourselves, which you are also aware of; we had you remit some money for our account to N. Y., which we expect to have charged up to our ham account, and the balance subject to our draft. Now this is a plain statement of the case, and we hope that we may not have occasion to discuss the subject any further. You dishonored our draft, after holding out the idea that you would place the amount it was for to our New York correspondents. And now we feel as though we want our own account closed, and will hope to get your report of the sales of the pork and

shoulders at an early day, so that we may get some benefit from that."

The parties having now arrived at an issue between themselves, Gregg & Hughes brought this suit against Drakely & Fenton, to recover the proceeds of the hams discharged of the factors' liens, for advances to McCabe & Co.

Mr. Hughes, of the firm of Gregg & Hughes, was examined on the trial, and stated that there was no agreement by them, that the hams should be subject to the drafts of McCabe & Co.; and being asked to look at the letter of the 27th of January, and to explain the circumstances attending the writing of it, said, that the firm did not consider itself as "writing with legal precision, but to mercantile correspondents, whose good faith, it was supposed, would be above taking advantage of a loose phrase, the meaning of which they perfectly understood." There was some other oral testimony.

The evidence being closed, the defendant's counsel asked the court to give these instructions, to wit:

"If the jury shall believe, from the whole of the evidence in the cause, that the plaintiffs were the owners of the property described in the memorandum attached to the letter of the 27th January, 1865, and that the same was referred to in the order, in evidence, of the 25th February, 1865, and although they may have been ignorant, at the time of each consignment of the several portions of said property, of the fact, that it was being made to the defendants, yet, if the jury shall believe that the plaintiffs subsequently recognized and acquiesced in such consignment, and received advances thereon, as well the hams as pork and shoulders, and assumed and exercised the control of owners of all the said property, without discrimination, then there is evidence, from which the jury may infer that the relation of principal and factor was established with regard to the whole of the consignment, offered in evidence, pork, shoulders, and hams, in which event, the defendants would be authorized to retain from the net proceeds of the consignments, the amount of their advances, with interest, and the verdict must be for such sum only as remains, after deducting said advances from the net proceeds aforesaid."

But the court did not give such instructions, either in the form asked, or in substance otherwise; but taking the view, that admitting the construction put by the defendants on the letter of the 27th February, 1865 (in the memorandum appended to which the hams were included), there was no consideration for the responsibility insisted on, put the case to the jury on the single issue of legal title in Gregg & Hughes, and notice of it to Drakely & Fenton.

Verdict and judgment having been given for the plaintiffs, Gregg & Hughes, the other side, brought the case here on error; the ground of exception being, that the court below erred in submitting the case to the jury, upon the simple questions of legal title to the hams in the defendants in error, and notice of that title given to the plaintiffs in error; that, on the contrary, the court should either have itself construed the agreement between the parties, as appearing in the documentary evidence, or more properly under the circumstances of this case, have submitted to the jury, as the appropriate tribunal, to find, from the evidence, what was the true agreement between the parties.

Messrs. Latrobe and Steele, for the plaintiff in error:

The letter of January 22d is the statement by Gregg & Hughes, of "*all the facts.*" It admits, that they held warehouse receipts for *all* the property that had been consigned to Drakely & Fenton; that their title to the hams was no better than their title to the pork and shoulders, but was the same; that they saw the letter by which Drakely & Fenton agreed to make advances; that the advances on the first consignments made, to use their own language, "on the basis of certain figures named" in Drakely & Fenton's letter of the 10th of January, were in drafts to their own order, a part of the proceeds of which they gave to McCabe & Co., to enable them to close an account with other parties.

It admits, moreover, that, although the first consignment of the property of Gregg & Hughes, was made without authority by McCabe & Co., yet that they made "no serious objections to it;" in other words they ratified it, and received

the proceeds of it, availing themselves of the act of McCabe & Co. as their agents in the premises; that (with a knowledge of the letter of Drakely & Fenton, of January 10th, 1865), they proposed to send to them, the same consignees that McCabe & Co. had employed, the property, which, but for the negotiation opened by McCabe & Co.'s letters of January 6th, and which alone introduced Drakely & Fenton into the transaction, would have been sent to New York.

In this letter, Gregg & Hughes propose, in fact, to place themselves in the shoes of McCabe & Co., as regards the property consigned by them to Drakely & Fenton, pork, shoulders, and hams; and although they say, they had *not* proposed to draw, had they themselves made the shipment of the hams, until they were sold, yet, they did obtain advances on them, as has been seen already, from the correspondence, making a reference, at the time, to the letter of Drakely & Fenton of the 10th of January, which was "the basis" of the transaction.

They claim also in this letter, the proceeds, not of the hams only, but of *all* the pork products consigned by McCabe & Co. to Drakely & Fenton.

The same letter admits that it was McCabe's conduct, in forwarding the hams, that created distrust, and produced their telegram and letter of January 22d.

Paraphrased, the letter is as follows: "McCabe & Co. sent you our property without our knowledge; when they informed us of the fact, showed us your letter, and drew drafts for the advance you had agreed to make, payable to our order, we made no objection; and proposed ourselves to send you the balance of the property which they had promised. Finding, however, that they had themselves forwarded it, we distrust them, and while we sanction and adopt the selection of your firm *as the consignees of all the property*, we give you notice of *our title to all the property* and request you to hold off making further advances to McCabe & Co."

These admissions prove the transaction to have been one, where the owners of property, after permitting an agent to establish in his own name relations with a third party, or,

which is the same thing, not objecting to those relations when he learns they have been established, but availing himself of them, becomes dissatisfied, discloses his ownership, and takes upon himself the further conduct of the business. In other words, the case is one in which the principal, intervening in a transaction between his agent and a factor, has recognized their relations and proceeded to carry them out. That in such a case, the factor would have a lien for his general balance is so clear, that the point need not be discussed.

The main question, then, is one of fact. Did Gregg & Hughes recognize the relation of principal and factor, established between McCabe & Co. and Drakely & Fenton by the correspondence and acts of the parties respectively, and assume the obligations thereby created in regard to *all* the property, pork, shoulders, and hams, consigned by the former to the latter?

McCabe & Co.'s letter of the 6th January, proposed to forward *pork, shoulders, and hams*, mentioning the quantities, and inquiring about advances. Drakely & Fenton's letter of 10th January, states what advances will be made. McCabe & Co., January 13th, 1865, advise that shipments will be made accordingly, on the 16th, of the pork; and that the hams and shoulders will go forward the next week. The pork and shoulders go forward accordingly, and drafts amounting to $59,000 are paid. The hams are forwarded also, as promised, *by the same parties*, on the 21st January, with a bill of lading dated the 23d.

Gregg & Hughes intervene on the 22d. Had they not intervened, there would have been no question as to the right of Drakely & Fenton to a lien for their general balance. Their letter of 22d January is a portion of the evidence relied on, to show that this intervention was but the substitution of a principal in place of an agent in dealings with a factor. Was there a reason for such a substitution? Touching *all* the property, pork, shoulders, and hams, McCabe & Co. were but agents dealing with the property of their principal, whose absolute title was the warehouse receipts.

The conduct of the agents exciting distrust, there was a reason why the principal should substitute himself in their place.

From the use of the words *all of the property*, in the letter of 22d January, it would be fair to argue that not only the hams, the consignment of which was the occasion of that letter, but the pork and shoulders were meant. The next sentence, however, removes all doubt on this score. "We desire that they shall have the benefit of everything, *the pork, lard, shoulders, and hams*, bring over the amount we have on them." Here then was a setting up of ownership of *all* the property, assuming the control of *all* of it.

The subsequent correspondence corroborates this view, and shows that Gregg & Hughes stepped into the place of R. McCabe & Co., in *all* respects as regards *all* the property.

Indeed, it is difficult to see how Gregg & Hughes could make their determination to deal with *all the pork products* consigned to Drakely & Fenton by McCabe & Co., as their own particular property, plainer than they have done by their letter of 31st January, 1865. Then comes the letter of Drakely & Fenton to Gregg & Hughes, of February 3d, 1865, in which they recognize the claim of the latter to deal with the property as their own, attorning to them, as it were.

On the 6th February, Gregg & Hughes wrote to Drakely & Fenton: "*We claim the whole of the property—the hams, pork, and shoulders—our receipts cover them.*" The extracts given in the statement of the case (*supra*, p. 244 to p. 252) show that Gregg & Hughes at this time made no distinction between the hams, and the pork, and shoulders; but set up the right to deal with all alike.

But the correspondence does not leave us merely to infer, from the ownership alone, that the hams were responsible for the advances made or for the general balance, when the final account sales of the whole was rendered.

The letter of February 9th, 1865, not only speaks of the hams and shoulders as in the same category, but refers to the letter of the 10th January, fixing the rate of advances, shown by R. McCabe to Gregg & Hughes, and it distinctly

informs Gregg & Hughes that a new rate must be adopted. In other words, the advances originally proposed, owing to the fall of prices, had turned out to be greater than should have been allowed; so that in determining now what was to be advanced hereafter, good margins on all the shipments were to be provided.

Now was the time for Gregg & Hughes to have made their present point, and to have said: "We cannot let the hams go in with the pork and shoulders, so as to give you a margin on all the shipments, for that would give you a lien for your general balance. This will never do. The hams were a separate transaction, and must be kept apart from the pork and shoulders. Deal with McCabe & Co. for the latter; but the hams are an especial consignment, to be accounted for by itself."

The letter in reply is dated February 11th, *and makes no comment* in this connection.

The next letter is dated February 22d—this too *is silent upon the subject.*

The next, dated February 27th, *instead of remonstrating* against Drakely & Fenton's views in regard to the liability of all the property, pork, shoulders, and hams, for the advances already made, expressly confirms it. They say:

"*We hand you memorandum of property in your hands which our order covers, subject to two drafts made by McCabe & Co. on you with transportation and other regular charges.*"

On the memorandum inclosed *the hams are put.*

How, in the face of this letter, it can be contended, that the hams were not liable for the two drafts, along with all the other property consigned, is difficult to see.

The reason for the change in position, shown by Gregg & Hughes's correspondence *after* May 8th, is evident. The letter of Drakely & Fenton of that date, reporting the net of all the consignments as not exceeding $10,000, when the net value of the hams alone was so much greater, on which but $10,000 had been advanced, showed the importance of separating the hams from the pork and shoulders, so that the shortcoming of the latter might not become a claim on

the proceeds of the former. There would be reason for this change if in truth any distinction could be drawn between "our hams," and the "portions of McCabe & Co.," by which is meant the pork and shoulders. But there was no such difference. The origin of the title to all these pork products; the actual ownership, as proved by the warehouse receipts; the equitable ownership as security for advances—all were the same. They were consigned by the same party to the same consignee, Drakely & Fenton. The order of February 25th, directing the proceeds of all the pork products consigned, to be placed to the credit of Gregg & Hughes, made no distinction between "our hams, and other portions of McCabe & Co." The previous and subsequent correspondence up to the 12th May made no such distinction.

The distinction is not borne out by the fact, and cannot therefore be regarded as having any existence whatever.

Regarding then, Gregg & Hughes as the owners, by the same title, of the pork, shoulders, and hams, we find them, after the pork and shoulders had been consigned without their consent, making no serious objection and receiving the proceeds of the advances; we find them also, after the consignment of the hams without their knowledge, insisting that the *whole of the property* was "virtually and legally" theirs, and taking from the consignors an order on Drakely & Fenton for the proceeds of *all the pork products consigned;* we find them declaring, in so many words, that the property which the order covered, including the hams now in dispute, was subject to the consignors' two drafts, the transportation and other regular charges, the liability now denied; we find them throughout controlling the disposition and management of all the property, and making no objections, when Drakely & Fenton referred to the *whole* as a security for the advances, leaving them to suppose, if they had ever doubted on the subject, that this was a thing of course; we find them, in a word, acting in the premises as though the relation of factor and principal as to all the consignments, had been established between the plaintiffs in error and themselves, until the fall in prices and the indifferent condition of much of

the property made it probable that the pork and shoulders would not cover the advances.

Surely upon this case there was evidence, if not proving, at least tending to prove our defence, that after the hams were received by Drakely & Fenton, Gregg & Hughes, with entire knowledge of the agreement between McCabe & Co., and Drakely & Fenton, and its partial performance, ratified and adopted it.

If the evidence but *tended* to prove this case, the court below erred.

As respects the oral testimony of Hughes, it may be said so far as a want of legal precision is suggested in the letter of the 27th February, that it is the legal precision used which frees the case from all doubt. Nothing can well be imagined clearer with regard to what the drafts covered than the expression of that letter.

Messrs. S. T. Wallis and J. H. Thomas, contra:

The hams being confessedly the property of Gregg & Hughes, could not cease to be theirs, or become subject to a lien in favor of any one else, except by some contract of their own, founded upon a legally adequate consideration, of which there is no pretence.

McCabe had entered into no obligation to ship the hams to cover possible deficiencies which might arise from advances made on the other meats. The advance on each was specific, the bill of lading always accompanying the draft to show on what it was drawn. Even as against him, Drakely & Fenton had no claim on the hams till in their possession, and he might have diverted the consignment after it was made. If, however, the arrangement between him and these last had been different, Gregg & Hughes only acquiesced in the shipment of the other meats and the imposition of a lien thereupon by him. They reserved their property in the hams, and right to ship them in their own names, and so notified to Drakely & Fenton.

If McCabe had been under an obligation to ship the hams, and Gregg & Hughes had been bound by it, they would

have been entitled to the corresponding benefits of the contract—to the advance of $40 per tierce on the 983 tierces, to $39,323, which is more than the amount they now claim out of them. If they had meant to subordinate their rights to that agreement, they could have got from him drafts to that amount, which the appellants would have been bound to accept. But they never asked for more than $25,000, and the appellants refused to advance even that.

Gregg & Hughes claimed the hams as their own, claimed none of the benefits, admitted none of the liabilities arising from the contract between McCabe and the other side, except as to the shipment of the pork and shoulders, and the lien imposed on them. They waived no title to the hams, but reserved the right to deal with them as their own property.

Their receiving a portion of the proceeds of the drafts drawn on the pork and shoulders, did not affect their right to the hams. It was received, under an agreement with McCabe, that the hams were to continue their own, be shipped by them in their own names, on their own account, and they so wrote to Drakely & Fenton, before the hams went into their possession.

The taking by Gregg & Hughes of the order for the proceeds of pork and shoulders, and the assignment of the bill of lading for the hams, did not impair the right they already had to the hams. They do not claim title under those papers.

The expression used in the letter of the 27th of February, cannot have the effect of subjecting the hams to a lien, or rendering the proceeds of them liable to a deduction for the drafts which had been drawn on the pork and shoulders, in view of all the facts. Even if Gregg & Hughes had meant, and had expressly promised to pay these drafts themselves, or make their hams liable for them, such a promise would have been void for want of consideration. The other side, as acceptors, were bound to pay them to us, and we, if compelled, as indorsers, to pay them to any one else, might have recovered them from the former. It was a debt due by Mc-

Argument for the defendant in error.

Cabe to Drakely & Fenton, for which our clients were in no way liable, and a promise by them to pay it, or make their property responsible for it, was a promise to answer for the default of another, *nudum pactum*, and void, under the Statute of Frauds.* Admissions are useful to determine doubtful questions, not to take away or qualify clear rights. They must be deliberate, "not fished out of loose expressions in mercantile correspondence."†

Gregg & Hughes might have replevied the hams from the railroad company, before they reached Drakely & Fenton, or from these afterwards, on tendering the freight and charges on them specifically. The amount which Drakely & Fenton would have been compelled to tender before replevying them, is still the test as to the character and amount of liability to which they were then subject.

If the hams had never been shipped, the loss arising from deficiency of the other meats, to cover advances made on them, would have fallen on the other side, not on us. Nothing in the case justifies the transfer of the loss to us. The other side, having exhausted their security, seek now to exhaust that of our clients, who are creditors of McCabe, and losers by him to a much larger amount than they.

Although factors have a lien upon goods actually in their hands, or the proceeds of them for a general balance, it is only for a balance due by the principal, against whom it is sought to be asserted.

All the facts assumed in the court's instructions were admitted, and the court, construing the letters between the parties, according to their proper and legal effect and force, was right, in substantially saying to the jury, that they contained no sufficient agreement, whereby the appellants had acquired the right to charge the property of the appellees for advances made on other property, to McCabe, and not to the appellees.

* Gist *v.* Cockey, 7 Harris & Johnson, 140; Robinson *v.* Marshall, 11 Maryland, 253, 4; Northern Central R. R. Co. *v.* Prentiss, Ib. 123, 27; Sumwalt *v.* Ridgely, 20 Id. 107.

† Cumberland Coal & Iron Co. *v.* Sherman, 20 Ib. 149.

Reply.

The appellant's prayers were properly rejected, because they all fell short of the law of the case. They assumed, that if the jury could establish the relation of principal and factor, between the appellants and appellees, as to all the consignments, a lien upon all would follow as matter of law and matter of course, without reference to the circumstances under which that relation was created, or the intention of the parties who entered into it. This theory and assumption are untenable.

The lien of factors for a general balance is an implication of law, and, therefore, never arises where there is a special arrangement, or the circumstances rebut such implication. Special circumstances indeed always control it.*

The doctrine of lien applies only where the deposit of the goods is in the nature of a pledge, and does not apply where it is made for a special purpose.†

Nor does any lien arise for antecedent debts of the principal, by reason of the subsequent creation of the relation of principal and factor.‡

The property on which the lien is sought to be fixed must not only belong to the party from whom the debt is due to the factor, but it must come to his hands as the agent of that party.§

And where the factor is not acting in the capacity of general factor, but only in regard to a special consignment or adventure, he has no lien for a general balance.‖

These well-recognized principles are conclusive, *à fortiori*, where the effort is, as here, to establish a lien against one principal, for advances made to another, by a sort of process analogous to *merger* at common law.

Reply.—The argument of the other side—and such was

* In re Leith, 1 Privy Council Appeals, 305; Young *v.* Bank of Bengal, 38 E. C. L. R. 633, 4 (1 Deacon, 622); Neponset Bank *v.* Leland, 5 Metcalf, 262; Randel *v.* Brown, 2 Howard, 425.

† Walker *v.* Birch, 6 Term, 262, 3.

‡ Houghton *v.* Matthews, 3 Bosanquet & Puller, 488, 9.

§ Bruce *v.* Wait, 3 Meeson & Welsby, 15.

‖ De Wolf *v.* Howland, 2 Paine, 364, 5.

the view taken in the court below, is, that admitting the construction put by us on the letter of the 27th, there was no consideration for the responsibility insisted on.

Now there are two answers to this.

Looking at the letter of the 27th February, and seeing that, in terms, the hams were made responsible, along with the pork and shoulders, for the $59,000 already advanced—Drakely & Fenton, on the 2d March, acknowledging the receipt of the letter of the 27th February, whose contents they say they have carefully noted, consent to make a further advance, and subsequently do actually advance the further sum of $10,000. This is a sufficient consideration.

But there is a second answer.

The letter of the 27th February is not a single fact in the case, containing a promise, so to speak, for which there was no consideration, but one of a series of facts, going to show that Gregg & Hughes recognized the acts of McCabe & Co. up to that time, and assumed and continued all the obligations of their relations to Drakely & Fenton. Some of these facts are to be found in the admissions of the letter of the 20th January, others in subsequent letters, already commented on; and the letter of the 27th February is but a recognition of a state of things, *not created by it, but existing previously*, the proof of which it facilitates, and that is all. It is an admission of a fact that was susceptible of proof, less absolute, perhaps, but sufficient for all that, without it.

References to the letters of Gregg & Hughes of March 8th, 15th; to Drakely & Fenton's letter of March 20th; and again to Gregg & Hughes's letter of April 25th, corroborate the views taken by us of their relations to all their property in question.

Recollecting that but $10,000 had been advanced on the hams, which, under unfavorable circumstances, produced $37,694.76, it is impossible to read this last letter and believe that, when it was written, Gregg & Hughes believed that the hams were a separate transaction, or that they were not liable for the general balance on final account, embracing all the consignments. The whole tone of the letter cor-

roborates the view taken by us in the relations between them and the other side touching all the consignments.

Mr. Justice DAVIS delivered the opinion of the court.

The correctness of the charge of the court to the jury, and the refusal of the court to charge as requested, present the only questions in this case which we are required to consider.

The plaintiffs in error, who were the defendants below, insist that they are injured by the action of the court in not allowing their defence to go to the jury. Their position is, that the evidence in the case proved their defence, or, at least, tended to prove it; and if it did, it was the province of the jury, and not of the court, to say what effect should be given to it.

It is not denied, that in the dealings between McCabe & Co. and Drakely & Fenton, there existed the relation of principal and factor, and that if Gregg & Hughes had not intervened, Drakely & Fenton would have had a lien on the surplus, after all the consignments were closed up, for their general balance. The question then arises, whether this relation was changed by the intervention of Gregg & Hughes? The defendants in error contend that it was, so far as the shipment of hams was concerned, because they were received as the property of Gregg & Hughes, after notice that it was their property; on the contrary, the plaintiffs in error insist that the relation of principal and factor was unchanged as to all the shipments, for the reason that Gregg & Hughes, after the receipt of the hams by Drakely & Fenton, put themselves in the place of McCabe & Co. in regard to the whole transaction, adopted what had been done in reference to each shipment, and claimed to be the owners of all the property, and did direct and control the disposition of it. The case was tried substantially on this issue.

There is no dispute that the warehouse receipts gave to Gregg & Hughes the legal title to all the property described in them; and if so, it necessarily follows that McCabe & Co. could not lawfully contract with Drakely & Fenton to receive

and sell this property without the consent of Gregg & Hughes. There is no doubt if this consent had been obtained in advance of the making of the contract, that Gregg & Hughes would have been bound by it, and could not free themselves from any of the obligations which rested on McCabe & Co. to discharge.

But as this consent was not obtained before the movement of the property commenced, the important inquiry is, whether the consignment of hams is separable from the preceding consignments, and whether the loss on the pork and shoulders must be borne by Drakely & Fenton, or by Gregg & Hughes. This must depend on the terms on which the hams were received, and these terms need not be embodied in the form of a written agreement, but can be gathered from the correspondence and conduct of the parties. If the case stood alone, on the naked fact that notice of title was given while the hams were *in transitu*, there would be no difficulty. But it is claimed that Gregg & Hughes adopted McCabe & Co.'s contract throughout; substituted themselves in their place as to all the consignments—pork, shoulders, and hams—and continued in their own name, the relation of principal and factor, before existing between McCabe & Co. and Drakely & Fenton. If this were so, the case would be equally free from difficulty; for, if Gregg & Hughes were not bound by a contract which McCabe & Co. had entered into with reference to their property, they could elect, after being informed of the nature of the contract, to reject it or adopt it. If, with a full knowledge of the facts concerning it, they ratify it, they thereby make themselves a party to it, as much so as if the original agreement had been made with them. And if they ratified it, no new or additional consideration was required to support the ratification, because in adopting the contract, they accepted with it the original consideration on which it was founded, as a sufficient consideration for their adoption of it.

With this general statement of the principles of law applicable to the controversy, we are met with the inquiry, whether there is any evidence in the case to support the

theory of the plaintiffs in error, that Gregg & Hughes intended to, and did, adopt the contract of McCabe & Co. with them. It is not enough that Drakely & Fenton should have so understood the agreement, but the proof must also show that Gregg & Hughes had a similar understanding of it, and manifested their intention to be bound by it.

The evidence in the case, to which no exception was taken, consists of a voluminous commercial correspondence, and some parol proof, explanatory of the conduct of the parties. The correspondence covers many pages of the record, and there is a marked difference in its tone and bearing after it had progressed for several months. It would be difficult to discuss the evidence in reference to the theory advanced by the plaintiffs in error, without indicating, in a greater or less degree, our views as to the effect that should be given to it. If the case is to be tried again, it is not proper to do this, for in that event it is the province of the learned court and the jury to determine the effect of the evidence.

The only question with which we have to deal at the present time is, whether the evidence in this record *tended* to prove the position assumed by the plaintiffs in error; for if it did, the learned court should either have submitted the evidence on this point to the consideration of the jury, or if, in the opinion of the court, there were no material extraneous facts bearing on this question, and the contract relied on must be determined by the commercial correspondence alone, then to have interpreted this correspondence and informed the jury whether or not it proved the contract to be of the character contended for by the plaintiffs in error.*

We have examined the record in this case carefully, and are of the opinion that there was evidence at the trial which tended to prove that, after the hams were received by Drakely & Fenton, Gregg & Hughes, with full knowledge of the agreement between McCabe & Co. and Drakely & Fenton, and its partial performance, ratified and adopted it.

* Turner *v.* Yates, 16 Howard, 23

Statement of the case.

Whether the evidence actually proves this ratification and adoption, we express no opinion. It is enough, as we have seen, for the purposes of this writ of error, that it tended to prove it.

As the learned court below submitted the case to the jury, on the single issue of legal title to the hams in Gregg & Hughes, and notice of that title to Drakely & Fenton, it follows that the judgment of the Circuit Court should be reversed, and a

VENIRE DE NOVO AWARDED.

GIBBONS *v.* UNITED STATES.

1. In the Court of Claims the government is liable for refusing to receive and pay for what it has agreed to purchase.
2. When an individual who has been absolved from such a contract, by the refusal of the proper officer to receive the articles when tendered, afterwards consents to deliver them under a threat of the officer that he will withhold money justly due to the plaintiff, he can only recover the contract price, whatever may have been the current market value of the articles.
3. The government is not liable on an implied assumpsit, for the torts of its officer committed while in its service, and apparently for its benefit.
4. To admit such liability, would involve the government in all its operations, in embarrassments, losses, and difficulties, subversive of the public interest.
5. When the injury to individuals in such cases merits redress by the government, the remedy is with Congress. The statute does not confer jurisdiction on the Court of Claims.

APPEAL from the Court of Claims.

The case as found by that court was thus:

Gibbons entered into a contract with the United States for the delivery of two hundred thousand bushels of oats within thirty days from the date of the contract.

He delivered a portion of the oats, and was ready and offered to deliver the residue within the thirty days, but was prevented by the officers of the United States from so doing; they would not receive it, because they had not convenient storehouses for it.

Subsequently to this refusal, the quartermaster having charge of the contract on the part of the United States, sent an "orderly" to Gibbons, requesting his immediate presence with the messenger at the quartermaster's office. This was understood by Gibbons to be an arrest. About the same time, notice was given to him, that he must deliver the residue of the oats specified in the contract under penalty of a purchase in open market; the difference of cost to be charged to him. The quartermaster at this time held a large sum of money in his hands, the price of grain before that time delivered. Gibbons remonstrated, contending that the contract was at an end. Influenced, however, by the above-mentioned assumption of power, and by the threats used, or by some reason, he did deliver the quantity of oats sufficient to make in all the amount specified in the contract.

By this time oats had advanced in price, and the price which Gibbons was compelled to pay in the market to get them, exceeded the amount paid to him by the government, as he alleged, $8\frac{3}{4}$ and 12 cents per bushel.

Gibbons was compelled to pay $333 demurrage on certain vessels which were laden with a portion of the oats, and which were detained by the government officers in receiving the cargoes.

On final settlement with the quartermaster, he was charged for 8000 bushels of oats purchased by the quartermaster in open market, after the expiration of the contract, at an advanced cost of 12 cents per bushel. This money was detained from him.

On this case, the Court of Claims,—upon the petition of Gibbons setting forth a claim for the difference, $8\frac{3}{4}$ and 12 cents per bushel, in the price of oats, delivered after the expiration of his contract, for demurrage, "for damages sustained by failure of the government to receive oats under contract at the time of delivery, $400," and for the money detained, but not alleging anything about duress,—thus announced its conclusions in law:

"The obligation on the part of the government under the contract to receive the oats when they were offered, was as

strong as the obligation to deliver. The plaintiff was not bound under a continuing obligation, and as he had made a reasonable offer, which was improperly refused, that put an end to the contract, and he was released from his obligation by the conduct of the government. The officers who threatened him had no authority to compel him to deliver the oats, and the threats used were superserviceable and improper. If he was so unwise as to submit to the unauthorized menaces of the quartermaster, he must take the consequences. Hence, he cannot recover the difference in price between that named in the contract, and that ruling in market after its expiration.

"Nor can the government withhold from the sum justly due to the plaintiff, any difference which was paid for oats purchased after the expiration of the contract exceeding the price fixed by it.

"Therefore, the plaintiff should recover the sum withheld at the time of settlement; also the demurrage."

Judgment being entered accordingly, Gibbons, claimant in the case, appealed to this court.

Messrs. Reverdy Johnson and A. L. Merriman, for the appellant:

The Court of Claims correctly decide that the obligation on the part of the government under the contract, to receive the oats when they were offered, was as strong as the obligation to deliver; that the plaintiff was not under a continuing obligation, and as he had made a reasonable offer, which was improperly refused, that put an end to the contract, and he was released from his obligation by the conduct of the government. It therefore seems to be clear, that in case of a delivery subsequently to the termination of the original contract, such delivery is under a new contract; and in case no express contract is made as to price, there would be an implied one to pay their market value at the time, unless there was an agreement to sell at the prices specified in the agreement then at an end.

In this case, no such agreement was made. On the contrary, the plaintiff insisted that the contract was at an end,

and the fact that he made the delivery of oats required under a supposed personal arrest, and under the threat of withholding the money due to him upon oats previously delivered, shows conclusively that there was no agreement to deliver the oats at the prices specified in the original contract, and rebuts any presumption of a voluntary delivery under its terms. The court below erred, therefore, in refusing to allow to the plaintiff, the market value of the oats so delivered, and in treating the payment by the government of the amounts specified in the contract before then terminated, as a full payment.

The court should have allowed him the value of the oats when sold and delivered, deducting therefrom, the amount paid by the government.

Mr. Hoar, Attorney-General, and Mr. Talbot, contra:

There was no error on the part of the Court of Claims, the conclusion of law stated in the first and principal paragraph of its opinion being entirely correct.

Besides the reason there given for refusing this allowance, is the additional reason that the facts found leave open to the appellate court, the inference that the whole matter had been voluntarily settled by a payment in full.*

Accordingly, the case should now be disposed of by a mandate to reverse the judgment and to dismiss the petition.

Mr. Justice MILLER delivered the opinion of the court.

The facts found by the Court of Claims show, that under the original contract between the plaintiff and the United States the plaintiff had delivered part of the 200,000 bushels of oats which he had agreed to deliver and had tendered the remainder, and that the quartermaster to whom they were properly tendered had refused to receive them. If the plaintiff suffered any loss by that refusal, he is entitled to recover for it in this action. But the only items of his account which

* United States *v.* Adams, 7 Wallace, 463.

refer to this part of the transaction were allowed to him by the court, except the claim of $400 damages for failure to accept the oats, and there is no evidence that he lost anything by this refusal. On the contrary, it appears that oats had risen in the market above the contract price, so that the presumption is that he was benefited instead of injured by the refusal of the officer to accept the oats when offered.

But after all this had passed and the time for delivering the oats had expired, the quartermaster in charge of the matter demanded of the plaintiff that he should still furnish the quantity of oats necessary, with what had been received, to complete the 200,000 bushels at the price stipulated in the original agreement. The plaintiff objected to this at first, but finally yielded and delivered the remainder of the oats.

Not content, however, with the price fixed by the contract, he now claims that oats had advanced in the market, and were worth, at the time of this latter delivery, $8\frac{3}{4}$ and 12 cents per bushel more than that price, and for the amount of this difference, with some other matters, he asks judgment.

It is very clear that but one contract was ever made in this case, and that the plaintiff was absolved from this by the refusal of the quartermaster to receive the oats when tendered. But, from whatever motive he may afterwards have consented to renew that agreement and proceed to its fulfilment, its terms were the same. If such pressure was brought to bear on him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable. If the plaintiff's consent was voluntary, then the contract to which he assented was binding, and must control the case. The quartermaster treated the contract as still in force, and his demand on the plaintiff was made under that idea. In this he was wrong. But the plaintiff had his option to concur in this view and deliver the balance of the oats, or to refuse to deliver any more.

Though the Court of Claims finds that the plaintiff, when he consented to deliver, had gone to that officer's quarters in company with an orderly, which he considered as an arrest, the court does not find an arrest, nor the use of any force against his person. Nor does the petition of the plaintiff say anything about an arrest, or force, or duress. That he feared the officer might buy the oats in the market and hold back the difference in price from the money due for oats already delivered, does not invalidate the contract which he consented to fulfil to avoid that result. He could still have refused, and the government would have paid him what it owed him.

The supposition that the government will not pay its debts, or will not do justice, is not to be indulged. Still less can it be made the foundation for a claim of indemnity against loss incurred by an individual by acting on such a suggestion.

But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

In the language of Judge Story,* "it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."†

The creation by act of Congress of a court in which the United States may be sued, presents a novel feature in our jurisprudence, though the act limits such suits to claims founded on contracts, express or implied, with certain unimportant exceptions. But in the exercise of this unaccus-

* Story on Agencies, § 319.

† United States *v.* Kirpatrick, 9 Wheaton, 720; Dox *v.* Postmaster-General, 1 Peters, 318; Conwell *v.* Voorhees, 13 Ohio, 523.

tomed jurisdiction, the courts are embarrassed by the necessary absence of precedent and settled principles by which the liability of the government may be determined. In a few adjudged cases where the United States was plaintiff, the defendants have been permitted to assert demands of various kinds by way of set-off, and these cases may afford useful guidance where they are in point. The cases of *United States* v. *Kirpatrick*,* and *Dox* v. *The Postmaster-General*,† are of this class, and establish the principle that even in regard to matters connected with the cause of action relied on by the United States, the government is not responsible for the laches, however gross, of its officers.‡

The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

In the absence of adjudged cases determining how far the government may be responsible on an implied assumpsit for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit, the apparent hardships of many such cases present strong appeals to the courts to indemnify the suffering individual at the expense of the United States.

These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a

* 9 Wheaton, 720. † 1 Peters, 318.

‡ Nichols *v.* United States, 7 Wallace, 122.

remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.

JUDGMENT AFFIRMED.

HUDSON CANAL CO. *v.* PENNSYLVANIA COAL CO.

In the case of a contract drawn technically, in form, and with obvious attention to details, a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the non-implication of it makes the contract, in consequence of events happening subsequently to its being made, quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating.

ERROR to the Circuit Court for the Southern District of New York. The case was this:

The Pennsylvania Coal Company, being engaged in mining coals from land in the northeast corner of Pennsylvania, for which they wished to get means of easy transportation to New York, and the Hudson Canal Company having a canal whose capacity was not fully employed, and which would afford the transportation desired, provided a railroad could be made from the Coal Company's lands to the western end, comparatively near them, of the canal, the two companies entered, under their corporate seals, into long and technically drawn articles of agreement, with recitals in the beginning, and each party's covenants contained in separate parts of the instrument subsequently.

1. The recitals recited that an existing road, which brought coal to the canal, was not sufficient to employ the full capacity of the canal.

2. That if the canal should be enlarged, as it might be, its unemployed capacity would be still greater.

3. That it was for the interest of the canal company, that in either event its surplus capacity should not remain unemployed, but that it should be allowed to be used at a reasonable rate of toll by any other company which might

hold lands for the purpose of mining coal, and should connect such lands by railroad or otherwise, with the said canal *for the purpose of transporting coal thereon.*

The canal company then covenanted and agreed with the coal company to furnish, *at all times thereafter*, to the boats of said coal company, all the facilities of navigation afforded by the canal to boats used by others, or by the canal company itself, charging only a certain toll per ton [a reduced toll], to be regulated each year by the market value of coal; provided, however, that the plaintiffs should not be bound to allow the quantity transported in pursuance of the agreement to exceed, in any one season, 400,000 tons, unless the canal should be enlarged, and in that case, one-half its capacity of transportation.

The coal company, "in consideration of the premises, and of acts done and investments made, *with a view to the transportation of coal* on the canal of the said canal company, as well as of the mutual undertakings herein contained, and of one dollar paid by the managers of the said coal company," promised and agreed with the canal company to use all its influence to cause the speedy construction of a railroad from its coal land to the canal, at or near the mouth of the Wallenpaupack River, and that if the construction of such road should not be commenced within one year, and finished within three, the plaintiffs might declare the agreement null and void.

The coal company built and put in operation the railroad, the canal company enlarged their canal so as to be sufficient for the transportation of all the coals which the coal company could mine, and the coal company put on the canal its boats, which were allowed to pass at the reduced toll agreed on. But the price of coals rising greatly during the war, and after it, and the tolls on the canal (adjusted as, under the articles of agreement, they were, on a sliding scale) becoming very high, the coal company induced the New York and Erie Railroad Company, whose road led to New York, to make a branch road, connecting it with the railway of the coal company at the point where this latter connected

with the canal, and on this railway the coal company now carried a large quantity of its coal.

Hereupon the canal company sued the coal company in covenant for damages, declaring on the articles and facts as above set forth, and averring, moreover, that when the contract was made there were no means, either existing or contemplated, by which the coal company's coal, after being brought to the canal, could be sent to market except on the canal. And the question was whether, by those articles of agreement, the coal company was bound to carry on the canal, all its coal brought to it by the connecting railroad; in other words, and more technical form, whether the declaration was sufficient and any cause of action shown.

It was conceded by the canal company that there was no express covenant by the coal company to transport even a pound of coal by the canal. The suit was founded, therefore, on the assumption that, according to the true construction of the agreement, there was imposed upon the coal company, in consideration of the obligations of the canal company, a correlative obligation on the coal company to send its coal by the canal alone, and that the obligation of the coal company in this respect was so plainly to be perceived in the contract that the court would enforce it as an implied covenant, and as fully as though it were expressed in words.

The court below was of the opinion there was no covenant, express or implied, on the part of the coal company, that it would transport on the canal all the coal brought over their railroad connecting with the canal, and judgment being given accordingly for the coal company, a writ of error was taken hence.

Mr. Nash, for the plaintiff in error:

The rule is settled that though a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations when that is necessary to carry out the intention of the parties and prevent the contract from being ineffectual. Thus, "if a man engages to work

and render services which necessitate great outlay of money, time, and trouble, and he is only to be paid by the measure of the work he has performed, the contract necessarily presupposes and implies on the part of the person who engages him an obligation to supply the work; so when there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible the party bestowing his services could claim any remuneration."*

Now, upon the recitals of the contract, after incorporating all the matters referred to in them, the parties may be considered as making a dialogue in this wise:

Canal Company.—We have more canal capacity than we can use, and are likely to have more than we have now; if you will use it we will take your coal at a reduced rate, the rate to be a sliding scale, according to the market price of coal each year, but this shall not apply to more than half the capacity of the canal.

Coal Company.—But we can't avail ourselves of your offer without building a road to connect our coal lands with your canal.

Canal Company.—To induce you to build the road we'll agree that the rate which we shall fix upon shall be made permanent.

It is apparent, then, that the mutual stipulations were on the one part, to use the canal; on the other to allow it to be so used at a reduced rate. The inducement to build the road was the undertaking of the company never to repudiate the arrangement.

The consideration clause recites "the *mutual* undertakings herein contained." The undertakings of the canal company were plain enough, but unless the coal company was bound to carry on the canal the coal brought to it on the railroad, there was no *mutual* undertakings in the matter. The contract of the canal company would be void as wanting a

* Per Cockburn, C. J., in Churchward *v.* The Queen, Law Reports, 1 Q. B. 173, 198; and see Barton *v.* McLean, 5 Hill, 256.

consideration. The contract, therefore, requires balancing; and when balanced, the considerations arrange themselves thus: reduced rate of tolls, as against the agreement to transport a large amount of coal. Permanent reduction as an inducement to enter into the arrangement and to build the road, without which, as a prerequisite, the contract could not go into effect at all.

In interpreting contracts which seem not fully to express the obligations on both sides, the question is what each party supposed the other party understood by the contract. In other words, the interpretation is to be according to the equity and fair meaning of the whole arrangement, if this does not conflict with the positive provisions of the agreement.*

Now here there were, when this contract was made, no means existing or thought of by which the coal after being brought to the canal could be sent to market except on this canal. In addition the canal was primarily for the transportation of coal. It ran into the coal region and was connected with the coal mines by railroads. There was little miscellaneous freight. The building of the railroad therefore tended to the benefit of the canal, not by bringing a general traffic to it, but simply by making a new connection with the coal fields. The mere building of the railroad, therefore, except as it might *secure* the use of the canal by the coal that came over the road, was no inducement to the canal company to subject themselves to the onerous obligations imposed by the contract.

The contract substantially requires of the canal company to reserve for use of the coal company one-half of the capacity of the canal, and this obligation prevents the canal company from multiplying their own connections with the coal fields or inviting others to invest in such enterprises, because the coal company may at any time, though they substantially cease to use the canal, resume its use and claim all their contract rights.

* Potter *v.* Ont. & Liv. Ins. Co., 5 Hill, 147.

Argument for the coal company.

If the coal company has found a route to market more profitable than our canal, let them notify to us that they shall abandon the contract, and claim no further benefits under it. Then the contract falls. The ground of their refusal to send the coal on our canal is, that at the market price of coal, the toll becomes a high one. But with the increased rate of wages which makes the market price of coal high, the expense of keeping up the canal is in like manner increased. Still the defendants insist on holding the plaintiffs bound. This is unjust. For we are tied up from making any engagements for the use of the canal, which may interfere with the shifting purposes of the coal company, and we are even required, in order to collect any toll at all, to go through every spring with the formality of ascertaining under the contract the rate of tolls on coal which the coal company will send by the canal, if the rate suits them, while if the rate does not suit them they will send it by the New York and Erie road.

Messrs. Evarts and Southmayd, contra:

The plaintiffs' claim rests wholly upon the notion that a covenant to the effect which he would have is raised by *implication of law.*

Strictly speaking, there are no implied covenants in law save those which arise according to fixed legal rules, by the use in instruments of a certain character, of certain words, which when thus used, have a *fixed technical signification*, beyond their natural or ordinary meaning; or which by fixed rules import a particular obligation, or have a specific legal result—as where the word "give" is used in a deed, or "grant," or "demise" in a lease—or those which by fixed legal rules result from particular acts or relations.*

But in construing an agreement, the court will have regard to the real intent and meaning of the parties as ascertained from the entire instrument, and by reference to the circumstances attending the making of it, and wherever the

* Comyn's Digest, Title "Covenant," A. 4.

language of the writing leaves in doubt its meaning upon the particular point, it shall be so construed, *in so far as the language will possibly permit*, as to effectuate the real intent and meaning thus ascertained. In the application of this principle of construction, it is held, that where the language of an instrument expresses imperfectly or obscurely an obligation, which it plainly appears to the court, the party intended thereby to assume, his obscure or imperfect language shall be construed to impose upon him the obligation which he intended it should impose upon him; and in some cases, this principle of supplying defects or imperfections in the language used in an instrument for the purpose of *expressing* or *defining* an obligation intended to be assumed by it, has doubtless been pushed pretty far—sometimes, perhaps, unwarrantably so.

Where a party has been held bound to an undertaking or obligation under a sealed instrument which was thus obscurely or imperfectly expressed upon its face, the case is sometimes spoken of as one of implied covenant; but it is submitted that the expression applied to such a case is an inaccurate one. We take note of its inaccuracy, because its use tends to an idea which misleads as to the extent to which the practice of supplying defects in language may be legitimately carried.

The cases in which parties have been held subject to the obligation of a covenant, not in terms expressed in the instrument (excepting the cases of technical words which import a covenant in law), all rest upon this principle of construing the language to effectuate the intent with which it appears to have been used. If any case be found going beyond the due application of this principle, we submit that it is not good law.*

* Perdage *v.* Cole, 1 Saunders, 319, i; Duke of St. Albans *v.* Ellis, 16 East, 352; Randall *v.* Lynch, 12 Id. 179; Earl of Shrewsbury *v.* Gould, 2 Barnewall & Alderson, 489; Rhodes *v.* Bullard, 7 East, 116; Gerrard *v.* Clifton, 7 Term, 676; Clifton *v.* Walmesley, 5 Id. 564; Seddon *v.* Senate, 13 East, 63, per Lord Ellenborough, 74; Lyell *v.* Newark Lime and Cement Manufacturing Co., New York Court of Appeals Cases, March Term, 1862.

If the question raised by the plaintiffs upon this agreement, is to be determined by reference to this standard, the plaintiffs must inevitably fail.

This instrument contains no language having any reference whatever to any such stipulation on the defendants' part, as is now claimed to exist. There is no language which either party, however careless or illiterate, could have supposed to bear any such meaning, or which could have been used with any *idea* of expressing or defining any such obligation on the defendants' part. And surely a court has no warrant for charging the defendants with such a covenant as is here alleged, not because they have ever made it or ever intended to make it, but upon the ground of its being a covenant which it would have been reasonable for them to make.

Most, if not all, of the cases—it is to be observed—in which courts have so construed the language of an instrument as to amount to a covenant not distinctly expressed upon its face, have arisen upon agreements, brief in their terms, and loosely and inartificially drawn, and in the preparation of which it was manifest that no considerable time or care had been bestowed.

The instrument now under consideration is drawn with most elaborate care. The stipulations on each side, with the considerations moving the parties to enter into them, are technically expressed in very full detail, each party's covenants are contained in a separate portion of the indenture; and the design is plainly apparent that whatever was intended to be agreed to at all, should be expressed at large in unmistakable language, and not left to inference.

Yet, as we have already said, the instrument contains not one word which can be supposed to have been inserted for the purpose or with the idea of expressing any undertaking on the defendants' part, of the nature of that with which they are now sought to be charged.

If, upon an instrument thus planned and drawn, the court should hold the defendants chargeable with such an undertaking as the plaintiffs claim, it would not be *construction* of

Recapitulation of facts in the opinion.

the instrument actually executed, but the mere interpolation, by the will of the court, of a covenant which was not at all in the minds of the parties.

[The learned counsel then analyzed the articles of agreement to show that thus examined they showed that such an agreement as it was sought to imply, was not intended to be made, and that they sustained the view above taken on general principles.]

Mr. Justice CLIFFORD delivered the opinion of the court.

Covenant broken is the foundation of the claim of the plaintiffs, as set forth in the declaration. Reduced to a concise statement, the alleged cause of action is that the defendants covenanted and agreed with the plaintiffs, in the articles of agreement mentioned in the declaration, that all the coal mined by them on their coal lands and transported over their railroad to the place where the railroad connects with the canal of the plaintiffs, should be transported from that place to tide waters upon the plaintiffs' canal, and that they would pay to the plaintiffs the toll prescribed in the agreements for the use of their canal in such transportation; and the alleged breach is that the defendants have not kept those covenants and agreements.

Service of the writ having been made, the defendants appeared and pleaded twelve special pleas in addition to the plea of *non est factum*. Issues were tendered by the defendants in the first, third, fourth, fifth, and sixth pleas, which were duly joined, and the plaintiffs having demurred to the second, seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth pleas, the defendants joined in the several demurrers.

Particular description of the objections taken by the plaintiffs to the several special pleas demurred to is unnecessary, as the defendants concede that they are bad if the declaration sets forth a good cause of action, but they insist that the declaration is also bad and insufficient, and that they, the defendants, are entitled to judgment because the first fault in pleading was committed by the plaintiffs in the

Recapitulation of facts in the opinion.

declaration. Judgment in the Circuit Court was for the defendants, and the plaintiffs sued out a writ of error and removed the cause into this court.

Articles of agreement were concluded on the 31st day of August, 1847, between the plaintiffs and a certain unincorporated association, called the Wyoming Coal Association, and on the 29th of July, 1851, the parties to this suit entered into certain other articles of agreement, in which it is recited, among other things, that the corporation defendants, prior to that date, had, at the request of the coal association, made and constructed the railroad described in the first-mentioned agreement, and that all the business and interests of the coal association had been assigned and transferred, and become fully vested in the said defendants, and the parties therein covenanted and agreed with each other that the former agreement between the coal association and the plaintiffs shall stand, and be deemed and taken to be "the contract of the parties to these presents in the same manner" as if the defendant corporation had originally been the party of the second part to the same, instead of the coal association.

Both of these agreements are incorporated into the declaration, and in determining the rights of the parties in this case, they may both be regarded as they would be if both had been executed by the defendants as well as by the plaintiffs, as all the obligations contracted by the coal association have been assumed by the defendant corporation. All covenants upon the merits of the controversy contained in the first agreement, as well as those contained in the last, must be considered as covenants between the parties to this suit; and viewed in that light the plaintiffs covenanted and agreed with the defendants in the first agreement to furnish, at all times thereafter, to the boats of the defendants navigating the canal of the plaintiffs, all the facilities afforded by the canal company to boats used by other parties or by the plaintiffs themselves, charging and collecting only a certain toll per ton gross weight, to be adjusted each year and regulated in a prescribed manner by the market value of coal, but subject, nevertheless, to the proviso that the plaintiffs

should not be bound to allow the quantity of coal to be transported in pursuance of the articles of agreement to exceed in any one season four hundred thousand tons, unless they should enlarge their canal; nor in that event, to exceed one-half of the whole capacity of the canal for transportation, exclusive of the tonnage employed in the transportation of other articles than coal. Other covenants on the part of the plaintiffs are contained in the original agreement, but none of them are of a character to afford any aid in the solution of the questions involved in the pleadings.

Following the covenants of the plaintiffs are certain unimportant covenants made by the defendants, but in conclusion the defendants also promise and agree, "in consideration of the mutual undertakings herein contained," that they will use all their influence to cause the speedy construction of a railroad from the coal lands which they own to the canal of the plaintiffs, to connect with the same at the point or place therein described; and they also agree that if the construction of such railroad shall not be commenced within one year and be completed within three years, the plaintiffs may declare the agreement null and void.

Based upon these two agreements the declaration alleges that the defendants constructed the railroad therein described and put the same in operation as therein required; that the canal of the plaintiffs at that date did not permit the transit of boats of a tonnage exceeding fifty tons; that relying upon the covenants and undertakings of the defendants they immediately entered upon the work of enlarging their canal, and that they continued to prosecute the work with diligence and at great expense until the same was completed; that the canal as so enlarged permits the transit of boats of the tonnage of one hundred and twenty-five tons, making the capacity of the canal for transportation, in each season of navigation, as enlarged, eighteen hundred thousand tons; that the defendants, claiming the benefits and privileges of the covenants and agreements, did, after the completion of their railroad, construct and procure a large number of boats to be used upon the said canal in the transportation of coal

brought over their railroad, and did thereafter for the period therein mentioned transport all the coal which they brought over their railroad upon the canal of the plaintiffs to its eastern terminus at tide-water, as contemplated by the agreements; that they, the plaintiffs, have at all times been ready and willing to furnish to the boats owned and used by the defendants for the purpose of such transportation, all the facilities of navigation the canal ever afforded to their own boats, or to the boats owned or used by any other person or company.

Such facilities were sufficient, as the plaintiffs allege, for the transportation of all the coal mined by the defendants and transported by them over their said railroad during the period laid in the declaration, but the plaintiffs allege that the defendants, not regarding their covenants and undertakings to transport all their coal, to the extent aforesaid, over the canal of the plaintiffs, and to pay to them the prescribed rate of toll for such transportation, did not nor would they perform that covenant and agreement, but induced another railroad company to construct a branch road and connect the same with their railroad at the place where the latter road connects with the canal of the plaintiffs, and that they thereafter, during the period alleged in the declaration, diverted a large quantity of their coal transported over their railroad from the plaintiffs' canal, and transported the same from the place of such connection to tide-waters over the railroad of such other company, to the damage of the plaintiffs, as they say, in the sum of nine hundred thousand dollars.

Defects of form in the declaration or in the several pleas filed by the defendants are waived, as it is well settled that defects of substance only are open to a party who has pleaded to the merits or to one who has replied to an antecedent pleading.*

Particular examination of the several special pleas to which demurrers were filed need not be made, as it is conceded that they were framed upon the theory that the decla-

* Aurora *v.* West, 7 Wallace, 93; Clearwater *v.* Meredith, 1 Wallace, 38.

ration is insufficient. Judgment, therefore, must be for the plaintiffs if it be held that the declaration alleges a good cause of action, but if not, then the judgment of the Circuit Court must be affirmed, because if that conclusion be adopted the first fault in pleading was committed by the plaintiffs.*

Obviously the decision of the question must depend upon the construction to be given to the first agreement therein set forth, as it is quite clear that the declaration is well drawn if that agreement, when properly construed, will support the allegations that the defendants covenanted and agreed that all the coal mined on their coal land, and transported over their railroad to the place where the railroad connects with the canal of the plaintiffs, should be sent forward from that place to tide-waters upon their canal, and that the defendants also covenanted and agreed that they would pay to the plaintiffs the rate of toll therein prescribed for the use of the canal in such transportation.

Provision is made by the agreement, it is admitted, that the rates of toll to be charged by the plaintiffs shall be permanently reduced, and the plaintiffs contend that the defendants, in consideration of that stipulation, assumed a correlative obligation to send all their coal brought over their railroad to market upon the plaintiffs' canal. Express covenant to that effect, it is conceded, is not to be found in the articles of agreement, but the plaintiffs contend that the obligation in that respect is so plainly contemplated by the agreement that the law will enforce it as an implied covenant as fully as if it were expressed in appropriate words.†

Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as where the act to be done by one of the contract-

* Aurora *v.* West, 7 Wallace, 94.

† United States *v.* Babbit, 1 Black, 61.

ing parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfil his contract.

Three other examples are put in the case cited which it may be well to notice as illustrating the general principle, and as showing its true boundary when properly limited and applied. They were first adduced at the bar, but were subsequently adopted and confirmed by the court in substance and effect as follows:

1. If one person covenants or engages by contract to buy an estate of another at a given price, the law will imply a corresponding obligation on the part of such other person to sell, although the contract is silent as to any such obligation, as the person contracting to purchase cannot fulfil his contract unless the other party will consent to sell.†

2. So if one person engages to work and render services which require great outlay of money, time, and trouble, and he is only to be paid according to the work he performs, the contract necessarily implies an obligation on the part of the employer to supply the work.

3. Persons often contract to manufacture some particular article, and in such cases the law implies a corresponding obligation on the part of the other party to take it when it is completed according to the contract, because if it were not so the party rendering the services and incurring the expense in fulfilling his contract could not claim any remuneration.‡

* Churchward *v.* The Queen, Law Reports, 1 Q. B. 195.

† McIntyre *v.* Belcher, 14 Common Bench, New Series, 664; Pordage *v.* Cole, 1 Williams's Saunders, 319, l.; Whidden *v.* Belmore, 50 Maine, 360; Barton *v.* McLean, 5 Hill, 258.

‡ St. Albans *v.* Ellis, 16 East, 352; Randall *v.* Lynch, 12 East, 179; Shrewsbury *v.* Gould, 2 Barnewall & Alderson, 489; Gerrard *v.* Clifton, 7 Term, 676; Aspdin *v.* Austin, 5 Q. B. 671; Great Northern Railway Co. *v.* Harrison, 12 C. B. 576.

4. Instruments inartificially drafted, or where the language employed is obscure, imperfect, or ambiguous, are always open to construction, and the primary rule in all such cases, whether the contract is or is not under seal, is the intention of the parties; but the power of a court of common law extends no further than to collect such intention from the language employed as applied to the subject-matter, in view of the surrounding circumstances.*

5. Courts of law cannot incorporate into a sealed instrument what the parties left out of it, even though the omission was occasioned by the clearest mistake; nor can they reject what the parties inserted, unless it be repugnant to some other part of the instrument, and none of the authorities cited by the parties in this case, when properly applied, are inconsistent with the views here expressed.†

Examined in the light of the rules here suggested, the court is of the opinion that the articles of agreement set forth in the declaration contain no such covenants as those alleged by the plaintiffs as the foundation of their claim; that the terms of the agreement do not support the allegation that the defendants ever made any such covenants, nor that they ever agreed to pay toll except for coal actually transported under the agreement. Language to express any such contract is entirely wanting in the instrument, nor is there any covenant on the part of the plaintiffs from which any such implication can legally arise.

Reference is made by the plaintiffs to the provision of the agreement extending certain facilities to the boats of the defendants and covenanting for a permanent reduction in the rates of toll upon the plaintiffs' canal, as calling for a different construction of the articles of agreement, but it is quite obvious that those concessions were made as inducements to the defendants to locate and construct the contemplated railroad from their coal lands to the plaintiffs' canal,

* Tipton *v.* Feitner, 20 New York, 425.

† Bealey *v.* Stuart, 7 Hurlstone & Norman, 753; Whittle *v.* Frankland, 2 Best & Smith, 49; Pilkington *v.* Scott, 15 Meeson & Welsby, 657; Rigby *v.* Great Western Railway Co., 14 Id. 811; Seddon *v.* Senate, 13 East, 74.

so as to form a continuous line of transportation from the coal mines, over the canal, to tide-waters. Great advantages were expected to result from the completion of that railroad, and it is quite evident that the plaintiffs were willing to accept the prospect of increased freight for transportation upon their canal as affording full compensation for the concession which they made in the articles of agreement.

Principal covenant of the defendants was that they would use all their influence to cause the speedy construction of the railroad, and the plaintiffs proffered the concessions described in the agreement to encourage the enterprise and secure its early completion.*

Support to these views might be drawn from the recitals in the first agreement and from the proceedings of the plaintiff corporation, but it does not seem to be necessary to pursue the subject, as the only covenant of any importance made by the defendants was the one before mentioned, that they would use all their influence to cause the speedy construction of the railroad; and the second agreement contains the recital that the covenant in that behalf had been fully performed as agreed, before the second articles of agreement were executed between the parties.

Unsupported as the declaration is by anything else contained in the record, it is clear that it must be adjudged insufficient, and as the first fault in pleading was committed by the plaintiffs, it follows that the judgment of the Circuit Court was correct.

JUDGMENT AFFIRMED WITH COSTS.

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* Commonwealth *v.* Delaware & Hudson Canal Co., 43 Pennsylvania State, 302.

Syllabus.

PATTERSON *v.* DE LA RONDE.

1. The 3333d article of the Civil Code of Louisiana, which in English is as follows:

> "*The registry* preserves the evidence of mortgages and privileges during ten years, reckoning from the day of *their* date; *their* effect ceases even against the contracting parties if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made,"

relates to the effect of the inscription, when not renewed, not to the effect of the mortgage, and declares that the inscription preserves such evidence for ten years, and that *its* effect ceases if not renewed before the expiration of that period. This construction of the article reached by reading the English and French version together—the English and French being printed in the same volume, by authority of the legislature of that State, in parallel columns, and the French being thus:

> "Les inscriptions conservent l'hypotheque et le privilége pendant dix années à compter du jour de *leur* date; *leur* effet cesse même contre les parties contractantes si ces inscriptions n'ont été, renouvelées avant l'expiration de ce delai, de la même manière quelles ont été prises."

2. The general doctrine, where registry of conveyances and mortgages is required, that knowledge of an existing conveyance or mortgage is, in legal effect, the equivalent to notice by the registry, is the law of Louisiana as expounded by the decisions of her highest court.
3. Prescription of a mortgage and vendor's privilege does not begin to run, until the debt secured has matured.
4. By the law of Louisiana, where property, susceptible of being mortgaged, is to be sold under execution, the sheriff is required to obtain, from the proper office, a certificate of the mortgages, &c., against it, and to read it aloud before he cries the property; and also to give notice that the property will be sold subject to them. The purchaser in such case is obliged to pay to the officer only so much of his bid as may exceed the amount of the mortgages, &c., and is allowed to retain the amount required to satisfy them.

The law, in these particulars, having been followed in a sale made in this case, and, in his deed to the purchaser, the marshal having recited his proceedings at the sale; his announcement to the bidders of the subsisting mortgages on the property, of which the first was a mortgage of one Mrs. McGee to a certain Hoa; and the retention of the sum bid by the purchaser to satisfy the amount due thereon; *Held*, that by the terms upon which the purchaser took the property at the marshal's sale, and the stipulations contained in the marshal's deed accepted by him and placed on record, he assumed to pay the amount due on Hoa's mortgage, and could not, therefore, avoid compliance with his contract, in this respect, on the ground that Hoa's mortgage had, in fact, at the

Statement of the case.

time, lost its priority by not being reinscribed before the expiration of ten years from its first inscription.

ERROR to the Circuit Court of the United States for Louisiana.

The case was thus: In April, 1853, Pierre Hoa sold to one Mrs. McGee a plantation and several slaves attached thereto, in Louisiana, for the sum of ninety-five thousand dollars, and for a portion of the purchase-money took her seven promissory notes, two of which were payable, respectively, in five and six years from date. In the act of sale before the notary, which was subscribed by the parties, the officer, and the attending witnesses, the purchaser stipulated for a special mortgage on the property, as security for the payment of her notes; and it was declared that the vendor's mortgage and privilege should extend, not merely to the land and slaves, but to the appurtenances of the land and the improvements. The act of sale was duly recorded in the register's office of the parish.

Before the maturity of the last note given by Mrs. McGee on this purchase, and in July, 1858, she executed a mortgage upon the same property to one Patterson, to secure several notes made by her at the time, amounting to thirty-five thousand dollars. This mortgage was also duly recorded in the office of the register of the parish. In it reference is made to the previous mortgage given by Mrs. McGee in favor of her vendor, Hoa.

In October, 1865, Patterson brought a suit in the Circuit Court for the District of Louisiana upon these notes, and, in February, 1866, recovered judgment for their full amount and interest. Upon this judgment execution was issued, and the mortgaged property was sold by the marshal to the plaintiff, he being the highest bidder, for the sum of $26,200.

By the law of Louisiana, where property, which is susceptible of being mortgaged, is to be sold under execution, the sheriff is required to obtain, from the office of the register of mortgages in the parish, a certificate setting forth the mortgages and privileges inscribed against the property on

the books of the office, and to read the certificate to the bystanders at the place of sale before he cries the property. (Code of Procedure, Art. 678.) The sheriff is also required to give notice at the sale that the property will be sold subject to all privileges and hypothecations, of every kind, with which it is burdened. The purchaser in such case is only obliged to pay to the officer so much of his bid as may exceed the amount of the privileges and special mortgages upon the property, and is allowed to retain in his own hands the amount required to satisfy them.

The law, in these particulars, was followed in the sale made on the execution in this case. The marshal states in his return that the sum bid by Patterson was retained in his hands—*first*, to pay the mortgage in favor of Hoa; and, *second*, to be applied on account of marshal's and clerk's fees, and the purchaser's own claim. And, in his deed to Patterson, the marshal recites his proceedings at the sale; his announcement to the bidders of the subsisting mortgages on the property, of which the first was the mortgage of Mrs. McGee to Hoa; and the retention of the sum bid by the purchaser to satisfy the amount due thereon.

Soon after the sale, and before the return was made by the marshal, or the deed to the purchaser was executed, Hoa filed what is termed in Louisiana a petition of intervention and third opposition, a proceeding by which a third person is allowed to become a party to a suit between other persons, for the purpose, among other things, of enabling him to present any claim which he asserts on the proceeds or property seized and sold under the order or judgment of the court. The object of the intervention of Hoa was to obtain payment, out of the proceeds of the sale, of the amount due him of the purchase-money of the mortgaged premises. To the petition, Patterson, in the first instance, filed an answer, stating that, at the sale, he bought the property for the sum of $26,200; that out of this sum he undertook, according to law and the proclamation of the marshal, to pay whatever sum might be due to Hoa, alleged to be a creditor of McGee, with a mortgage and a vendor's privilege on the plantation

superior to his own; but that the amount was uncertain and was not stated by the marshal, and did not appear by the register's certificate read by him at the sale. The answer then proceeds to detail certain transactions which he insisted resulted in a novation of the debt of McGee to Hoa, and to a forfeiture of Hoa's right, by virtue of his mortgage and privilege, to prior payment out of the proceeds of the sale.

No point was made in this court upon the sufficiency of the new matter thus set up, and no further reference to it need be made. Subsequently, and on the day set for the trial of the intervention, Patterson filed a peremptory exception to the demand contained in the petition, to the effect that the mortgage and priority of privilege of Hoa had been prescribed, and that his privilege had been lost by reason of the non-reinscription of the mortgage to him within the delay provided by law.

On the trial the peremptory exception was overruled, and the intervention and third opposition were sustained, and judgment was given for the representatives of Hoa (he having died during the pending proceedings) for $25,000 and interest, "with preference and privilege in the proceeds of the plantation sold" superior to that of all persons, and particularly to that of Patterson, the plaintiff. A second trial granted by the court resulted in a similar judgment.

The 3333d section of the Civil Code of Louisiana, published by authority of the legislature of the State, in English and French, and in parallel columns, is as follows:

IN ENGLISH.	IN FRENCH.
The registry preserves the evidences of mortgages and privileges during ten years, reckoning from the day of *their* date; *their* effect ceases even against the contracting parties if the inscriptions have not been renewed before the expiration of this time in the manner in which they were first made.	Les inscriptions conservent l'hypothèque et le privilége pendant dix années à compter du jour de leur date; leur effet cesse même contre les parties contractantes, si ces inscriptions n'ont été renouvelées avant l'expiration de ce delai de la même manière qu'elles ont été prises.

Mr. T. Durant, for the appellant:

Under the laws of most of the United States, a mortgage

is perfectly good, as between the parties to it, whether it be recorded or not. Those States brought this principle of their jurisprudence from the country of their origin, England, in which country registries were not obligatory, nor ever made, except in special places. And while most of the States of our Union require registries, it is only in order that the rights of subsequent incumbrancers or purchasers *bonâ fide*, and without notice of the prior privilege, may not be cut out by secret liens. As between the parties, the mortgage, though never recorded, but on the contrary kept secret, remains as in the land from which their people came and derive the body of their laws; that is to say, it remains valid.

But in Louisiana, the whole system of law springs from a source quite different from that whence most of the States derive theirs. The genius of the system is different, as different as are France and England, as the French codes and the common law. Great errors are made in the discussion of a question like this, by arguing from one system to the other. Yet independently of the preconceived ideas natural to lawyers or judges bred wholly in the system of the Northern and Western States, and necessarily ignorant of the French system, there is no reason why it may not be enacted that a mortgage not registered every ten years shall not bind property against any one, as why it may not be enacted that unless so registered it shall not bind the property as against subsequent creditors or purchasers. Creditors and purchasers can examine registries after ten years have expired as well as before, and, in most of our States, do.

Now the enactment of the code, if we take the English side of it, settles this dispute at once. And it does but lead us to the same conclusion as does our argument, *à priori.* Why shall we not take that English side? The State of Louisiana, from which the French *language* has been departing ever since our purchase of it, and is now departing more and more, acknowledges, in the interpretation of its code, the supremacy of the language in which the Constitution of our country is indited and proclaimed; the English alone.

But if we take the French side of the column, what then? The question even then is, at most, but doubtful. The expression "*leur effet*" may refer to the *two* singulars, "*l'hypothèque*" and "*le privilége*," it being a rule as old as grammar itself, that two singulars allow and sometimes require a plural verb or adjective. This is just what the English side declares is the true syntax. The English side—the authoritative side—is plain. The French side is capable of two meanings, one of them being that which is undeniably the meaning of the English side.

The *recital* in Patterson's deed is unimportant. Purchasers of property sold under *fi. fa.* in Louisiana, are required indeed to take it subject to real mortgages if they be recorded. But if upon investigation it is found that no real mortgages exist, the purchaser is not bound to take it subject to mortgages that, by the sheriff's blunder, are only imagined. Nor is there injustice in this. The amount of the non-existent mortgage retained is not necessarily so much gained by the purchaser if he does not pay the amount to the imaginary mortgage. For if the mortgage erroneously assumed to be a binding one, prove not to be so, then the purchaser owes the amount to the judgment debtor and must pay *him*.*

Mr. Evarts, *contra*, having observed that the French side of the code, literally translated, reads thus:

"*The inscriptions preserve the mortgage and the privilege* during ten years, reckoning from the day of their date; their effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made"—

went into a critical examination of the whole system of inscriptions of privileges and mortgages, and their extinction by prescription, as regulated by the Louisiana code, arguing that, upon a right view of them, it was manifest that those same general principles, so familiar to us in their applica-

* Pickersgill *v.* Brown, 7 Louisiana Annual, 305.

tion to the recording acts of the other States and England, equally obtained in the law of Louisiana.

That inscription was of no application, in respect of the efficiency of the instruments between the parties to the contracts or their privies, in law or fact, or those brought by their own contract, into knowledge, or obligation of knowledge, of the privilege or mortgage in question.

That in those relations, it added nothing to the force or durability of the contract, and that its omission neither enervated nor curtailed the contract itself.

That it was solely to affect "*third parties*," within the definition of the code, with knowledge of what was lawfully inscribed, by giving them the opportunity of knowledge by inspection, and visiting the neglect of inspection upon *them*, and not upon the party who had made the *required* inscription.

That reinscription, or its omission, was of no more consequence between parties and privies to these contracts, *in regard to the efficacy of the contracts*, than original inscription; the whole measure of its application being to "*third parties*," within the definition of the code, and only in limitation of the period of time for which they were affected by the opportunity of inspection, and the consequences of its neglect.*

That Patterson was, by the force of his own contracts with Hoa's vendee, held to the knowledge and the maintenance of Hoa's vendor's privilege, and to knowledge of and submission to his mortgage.

That, *as mortgagee*, he took, in terms and in equity, a security only on what estate his mortgagor had, and, on the face of the mortgage to him, had limited her estate to, to wit: the estate over and above the vendor's privilege for the unpaid purchase-money.

That, *as purchaser*, at the marshal's sale, he was affected as a *bidder* by the announcement of this vendor's privilege and mortgage; obtained his deed from the marshal only upon assenting to assume the satisfaction of the *debt* to the vendor

* Shepherd *v.* Orleans Cotton Press, 2 Louisiana Annual, 113.

remaining unpaid; and assumed, in the deed, the payment of the amount so due to Hoa.

That the whole defence was rested, not upon any equity or right on his part; nor on any defect of right or equity on the part of the defendant in error; nor upon any policy or principle of the inscription law of Louisiana; but solely upon some literal obstruction of all this right, equity, policy, and principle, found, it is argued, in article 3333 of the code. But that, even this support failed him upon a correct interpretation of the article, and the authorities founded on it.*

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The only error alleged in the action of the Circuit Court lies in its ruling upon the peremptory exception. It is contended here, as in that court, that the mortgage and vendor's privilege of Hoa were prescribed, and that the prescription resulted from the failure to reinscribe the mortgage within ten years from the date of the first inscription.

It is supposed that support for this position is found in article 3333 of the Civil Code of Louisiana; and such would be the case if, in the construction of the article, we were confined to its language, as given in English, in the printed volume published by authority of the legislature of the State. It would seem from its reading, as thus given, that the omission to reinscribe a mortgage within the time designated, was intended to have the effect of defeating and annulling its operation. But, upon examining the language of the article as given in French, in the same volume (the English and French being printed in parallel columns), this construction becomes impossible. Read in the light thus afforded its meaning is obvious. It was intended to declare the effect of the inscription in preserving the evidence of mortgages

* Planters' Bank *v.* Allard, 8 Martin, N. S. 136; Rachal *v.* Normand, 6 Robinson, 88; Noble *v.* Cooper, 7 Id. 44; Robinett *v.* Compton, 2 Louisiana Annual, 846; Swan *v.* Moore, 14 Id. 833; Sanders *v.* Dosson, 3 Id. 587; Haines *v.* Verret, 11 Id. 122; Thompson *v.* Parrent, 12 Id. 183; Sauvinet *v.* Landreaux, 1 Id. 221.

and privileges, and the effect of the omission to renew the inscription in destroying such evidence. It declares that the inscription preserves such evidence for ten years, and that its effect ceases if not renewed before the expiration of that period. It is the effect of the inscription when not renewed, which ceases, not the effect of the mortgage. The object of requiring reinscription is to dispense with the necessity of searching for evidence of mortgages more than ten years back.*

Besides, the object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore, that purchasers, or others desirous of ascertaining the condition of the property, must look, and if not otherwise informed, they can rely upon the knowledge there obtained. But if they have notice of the existence of unregistered conveyances and mortgages, they cannot, in truth, complain that they are, in any respect, prejudiced by the want of registry. In equity, and in this country generally at law, they are not permitted to defeat, under such circumstances, the rights of prior grantees or incumbrancers, but are required to take the title or security in subordination to their rights. The general doctrine is that knowledge of an existing conveyance or mortgage is, in legal effect, the equivalent to notice by the registry. And such is the law of Louisiana as expounded by the decisions of her highest court. Thus, in *Robinett* v. *Compton*,† that court said: "The doctrine is now well settled, that the actual knowledge by a purchaser of an existing mortgage or title is equivalent to a notice resulting from the registry. The formality of recording is for the benefit of the public, and for the purpose of giving notice to individuals. But if a party have knowledge of that of which it is the purpose of the law to notify him, by causing an act, instrument, or lien to be recorded, the effect is the same, and he is as much bound by his personal knowledge as

* Shepherd *v.* Orleans Cotton Press Co., 2 Louisiana Annual, 113.

† Ib. 854.

if his information was derived from an inspection of the record."

The cases of *Planters' Bank of Georgia* v. *Allard*,* *Bell* v. *Haw*,† *Rachal* v. *Normand*,‡ and *Swan* v. *Moore*,§ are to the same effect.

In the case at bar, Patterson had knowledge of the mortgage and vendor's privilege of Hoa. They are stated in the mortgage to himself, which he placed on record. If, therefore, the act of sale, stipulating for the special mortgage and acknowledging the vendor's privilege, had not, in fact, been recorded, he would have been bound by his knowledge of their existence. He could not have urged the want of inscription to defeat Hoa's priority, and, for like reasons, he cannot urge the want of reinscription.

Prescription of the mortgage and vendor's privilege did not follow from the omission to reinscribe the act of sale. From its nature, prescription could not have begun to run until the debt secured had matured.

But there is a further answer to the objection founded on the want of reinscription. By the terms upon which Patterson purchased the property at the marshal's sale, and the stipulations contained in the marshal's deed accepted by him and placed on record, he assumed to pay the amount due on Hoa's mortgage. He cannot now avoid compliance with his contract, in this respect, on the ground that Hoa's mortgage had, in fact, at the time, lost its priority by not being reinscribed before the expiration of ten years from its first inscription.‖

JUDGMENT AFFIRMED.

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* 8 Martin New Series, 136.

† Ib. 243.

‡ 6 Robinson, 88.

§ 14 Louisiana Annual, 833.

‖ See Parker *v.* Walden, 6 Martin, N. S., 713; and Noble *v.* Cooper, 7 Robinson, 44.

Statement of the case.

THE CARROLL.

1. Nautical rules require, that where a steamship and sailing vessel are approaching from opposite directions, or on intersecting lines, the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact.
2. Porting the helm a point, when the light of a sailing vessel is first observed, and then waiting until a collision is imminent, before doing anything further, does not satisfy the requirements of the law.
3. Fault on the part of the sailing vessel at the moment preceding collision does not absolve a steamer which has suffered herself and a sailing vessel to get in such dangerous proximity, as to cause inevitable alarm and confusion, and collision as a consequence. The steamer, as having committed a far greater fault in allowing such proximity to be brought about, is chargeable with all the damages resulting from the collision.

THIS was a case of collision between the schooner Loon and the steamer Carroll, which occurred on the waters of Chesapeake Bay. The collision happened about two o'clock at night; the night was bright, and the weight of the testimony was, that each vessel was provided with the necessary lookouts and lights. The schooner was in her proper course down the bay to James River, in Virginia, while the steamer was on her way from New York to the port of Baltimore, which the schooner had left the previous afternoon; and it was certain that the lookout of the steamer saw the schooner at least fifteen minutes before the accident happened. There was no dispute about the state of the wind nor of the respective speed of the boats; and that there was fault by one vessel or the other, was conceded by both parties. The officers of the steamer charged the fault to the schooner, because at the moment before the collision she changed her course, while those in command of the schooner asserted that this change of course was taken to avoid a greater danger, and only made when a collision was inevitable, and that if the officers of the steamer had been attentive to their duty the misfortune could have been averted. The only question was, therefore, which vessel was in fault? The

witnesses on the part of the schooner were her captain, one Edmonson, and two common seamen, Travis and Henry. The chief ones for the steamer, were Ashcom, her mate, and one Jordan, her lookout. The testimony of all these witnesses was given at length, and went chiefly to questions of the exact times when particular manœuvres were ordered or resorted to, and of the distances of the respective vessels at those times. Going thus to questions of fact merely, no sufficient advantage would be gained by setting it out; more particularly since the important parts of it on both sides are so largely recapitulated in the opinion of the court, as to make sufficiently intelligible the principles of law meant to be established by the judgment.

The evidence in the case was limited in extent, and not as contradictory as the evidence generally is where vessels collide. As usual, the effort of each boat was to relieve itself, and cast the blame on the other; but there was no good reason to think that any witness had intentionally sworn falsely.

The court below decided in favor of the schooner, and the owners of the steamer appealed.

The case was ably argued in this court, on the evidence and law, by *Mr. J. H. Latrobe, for the appellant, and by Messrs. Schley and Waters, contra:*

Mr. Justice DAVIS delivered the opinion of the court.

The only difficulty in cases of the kind brought by this appeal before the court, arises out of the almost necessarily conflicting character of the evidence; but if the court is able to reconcile it, or if this cannot be done, can see, notwithstanding this conflict, how the matter really occurred, then a conclusion is easily reached; for the rules of navigation which are applicable, have not only been settled by repeated adjudication, but are now embodied in the statute law of the United States.*

If the two vessels in this case were approaching each other in opposite directions, so as to involve risk of collision,

* 13 Stat. at Large, 60–61.

the duty of each was plainly marked out by law. The steamer was required to keep out of the way, slack her speed, or, if necessary, stop and reverse, while the schooner was required to maintain her course, and was not justified in changing it, unless obliged to do so to avoid a danger that immediately threatened her. As the steamer did not keep out of the way, and as the collision did occur, the steamer is *primâ facie* liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner.

It is manifest from those facts which are not disputed that, with proper precautions, these vessels should not have collided, and that there was blame somewhere.

Edmonson, captain of the schooner, says, that when opposite "Point-no-Point" he saw the steamer coming up the bay, about a quarter of a mile distant. The schooner was steering south by east, her proper course, and the steamer's bearing from the schooner was about a point westward from the schooner's course. The schooner held her course until about the time of the collision, when, as it seemed inevitable, directions were given to starboard the helm in order to ease the blow; in consequence of which change, the blow of the steamer was received forward of the fore-rigging instead of in the middle of the vessel, which would have been the case if the schooner had continued on her course.

Travis and Henry, seamen on board the schooner, corroborate this testimony.

It is true they manifestly err when speaking of time and distance, but they were inexperienced seamen, and not very intelligent men, and there is no good reason for discrediting their testimony, which, in other respects, is reliable, because they do not testify with accuracy about distance on the water, and err in computations of time. It may well be doubted, whether Edmonson was not mistaken in the distance he said he was from the steamer when he first saw her; but in view of the testimony furnished from the steamer, the point is not material.

Ashcom, the mate of the steamer, in command at the

time, and Jordan, the lookout, are the only witnesses on the part of the steamer who testify as to the state of the case prior to the collision, and they do not agree in their account of the transaction. Ashcom says, as soon as he made the schooner's light to be a port light, he gave the order to port the wheel, and it was done; while Jordan says he saw the schooner about fifteen minutes before the steamer struck her, and reported the fact to the mate, and that the course of the steamer was not changed until four or five minutes before the collision. At the speed the vessels were then running they could not have been more than a mile apart, and Ashcom admits, when he first saw the schooner, she was four or five miles off.

It is highly probable that Jordan is right as to the point of time when the change was made, but be this as it may, the steamer cannot escape condemnation, unless she is able to show that there was no risk of collision, or that she adopted suitable measures to avoid it, and that the disaster was the result of misconduct on the part of the schooner. The fact that the vessels did collide, explodes the theory that there was no risk of collision, and besides, why did the mate port his helm if in his judgment there was no risk of it? He says this was done as soon as he saw the schooner. If so, he believed at the time the relations of the vessels to each other were such that they might collide, and the possibility of it is all that is required to charge the steamer, unless she can establish that she was without fault. There is no evidence to show that the schooner changed her course until the peril was imminent, but the natural inquiry arises, which boat was blamable for producing this peril? The schooner was not, because she was obliged to keep her course. She could not choose, because the law had chosen for her. It is otherwise with the steamer. She could go to the right or left, and change as often as there was, in the apprehension of her officers, a necessity for change.

The steamer is, therefore, to blame for suffering this peril to occur; for if it be conceded that the schooner was wrong in starboarding her helm, this cannot affect her right to

recover, as she was in other respects without fault, because the steamer, having the right of way, put her in this predicament, and must answer for the consequences.*

It is obvious that the officers of the Carroll were either unaware of the nature and extent of the nautical rules which govern vessels approaching each other in opposite directions, or were unmindful of them. These rules were established in the interest of commerce—for the protection of life and property, and must be observed. They require, where a steamship and sailing vessel are approaching from opposite directions, or on intersecting lines, that the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact. This the Carroll, on this occasion, failed to do. Porting the helm a point, when the light of the schooner was first observed, and then waiting until the collision was imminent before doing anything further, does not satisfy the requirements of the law. The safeguards against danger, in order to be effectual, must be seasonably employed, and in this case they were not used until the danger was threatening. If there was fault on the part of the schooner, the steamer committed a far greater fault in suffering the vessels to get in such dangerous proximity at the moment preceding the collision, and as she has furnished no excuse for this misconduct, is chargeable with all the damages resulting from this collision.

DECREE AFFIRMED, WITH INTEREST.

MILLER, J., having been absent on the argument, took no part in the judgment.

* New York and Liverpool U. S. M. S. Co. *v.* Rumball, 21 Howard, 383.

Statement of the case.

THE LUCY.

1. An appeal which had been allowed from a District Court having Circuit Court powers dismissed; it having been allowed just after an act had passed, which created a Circuit Court for the same district, and which repealed so much of any act as gave to the District Court Circuit Court powers.
2. Appellate jurisdiction in the Federal courts depends on the Constitution and the acts of Congress. When these do not confer it, courts of the United States cannot exercise it by virtue of agreements of counsel or otherwise.
3. The fact that no transcript of the record was filed at the next term to that when a decree appealed from was made is, in general, fatal to the appeal.

MOTION to dismiss an appeal from the District Court for the Southern District of Florida, condemning the schooner Lucy, the case being this:

An act of Congress of 1803* prescribes the circumstances under which appeals are allowed from the District to the Circuit Courts, and from these last to this court. This act being in force and governing the appeals mentioned, an act of February, 1847,† established the District Court for the Southern District of Florida, with the jurisdiction and powers of a District and Circuit Court of the United States; and appeals were allowed from its decrees in the same manner, and under the same regulations as appeals from a Circuit Court.

On the 15th of July, 1862,‡ Congress passed an act establishing a Circuit Court for a circuit which included the Southern District of Florida, and repealing the former act conferring upon the District Court Circuit Court jurisdiction.

In this state of the law, on the 4th of August, 1862, that is to say, nineteen days after this last statute was enacted, the District Court passed a decree condemning the schooner Lucy, and on the 15th, allowed an appeal to this court.

The record was, in the October following, filed in the

* 2 Stat. at Large, 244. † 9 Id. 131. ‡ 12 Id. 576.

Circuit Court for the district "by reason of the act of Congress, approved July 15th, 1862, establishing a Circuit Court in said district."

Afterward, to wit, May 1st, 1867, the cause was transferred to the Supreme Court of the United States by consent of all parties in interest, and the case so came up here from the Circuit Court. The record was filed December 24th, 1867.

The Attorney-General and Mr. Ashton, special counsel of the United States, citing *The Alicia*,* argued in support of the motion to dismiss:

1. That the appeal allowed in *August* must have been so granted in ignorance that the act establishing a District Court with Circuit Court powers had been repealed in *July;* that the transfer into the Circuit Court in the absence of statutory authority, and the transfer *by consent* to this court was a nullity.†

2. That independently of this, the cause must be dismissed because the record was not filed before the end of the term succeeding the allowance of the appeal, nor before the end of the term succeeding the passage of the act of June 30th, 1864.‡

Mr. Durant, contra, distinguishing the case from *The Alicia*, contended, that the act of filing the transcript of the record in the Circuit Court of Florida was a mere error of the clerk, which could prejudice no one, and gave that court no jurisdiction; that the agreement between the parties, that the appeal taken and allowed in this case be taken to the Supreme Court of the United States, operated as a waiver of the irregularity existing, in the fact that the appeal had not been filed in the Supreme Court of the United States during the December Term, 1862, and as a consent that it should be filed at the next term after the agreement, which was done; that an irregularity in the return of a writ of error or appeal might be cured by consent, whether implied from

* 7 Wallace, 571.

† Washington County *v.* Durant, 7 Wallace, 694.

‡ Edmonson *v.* Bloomshire, 7 Wallace, 306.

appearance or otherwise shown,* and that good faith required that the agreement made by the United States below should be kept here, since no law forbade its observance in the present instance.

The CHIEF JUSTICE delivered the opinion of the court.

At the time when the District Court for the Southern District of Florida was established, the act of 1803† governed appeals from the District to the Circuit Courts, and from the Circuit Courts to this court. No appeal in admiralty could be taken directly from the District Court to this court, except when, as in the case of the Southern District of Florida, the District Court exercised the jurisdiction of the Circuit Court as well as that of the District Court.

If this state of the law had undergone no change at the date of the decree of condemnation in this case, the allowance of an appeal to this court would have been quite regular.

But the effect of the act of July, 1862,‡ was to vest in the Circuit Court for that circuit the whole appellate jurisdiction exercised by other Circuit Courts in respect to decrees in admiralty. It left the original jurisdiction in admiralty of the District Court, untouched.

It was in virtue of this original jurisdiction that the District Court had cognizance of the case of the Lucy. The appellate jurisdiction of the case was vested by the act in the Circuit Court.

It follows that, when the decree was pronounced in August, no appeal could be taken to this court, but only to the Circuit Court, and that the allowance of an appeal to this court was a nullity.

This objection to the jurisdiction is decisive; but, if it were otherwise, the fact that no transcript of the record was filed at the next term, would be fatal to the appeal.§

No consent of counsel can give jurisdiction. Appellate

* Wood *v.* Lide, 4 Cranch, 180.

† 2 Stat. at Large, 244. ‡ 12 Id. 576.

§ Castro *v.* United States, 3 Wallace, 47; Insurance Company *v.* Mordecai, 21 Howard, 195.

jurisdiction depends on the Constitution and the acts of Congress. When these do not confer it, courts of the United States cannot exercise it.

We cannot take cognizance of a case not brought before us in conformity with the law.

The case at bar, therefore, must be DISMISSED.

MANDELBAUM *v.* THE PEOPLE.

It is error, entitling the aggrieved party to a reversal, for a court, on motion of a plaintiff, to strike out of an answer that which constitutes a good defence, and on which the defendant may chiefly rely.

ERROR to the Supreme Court of the Territory of Nevada.

The suit was brought by the Territory against Mandelbaum and Klauber, in a District Court, to recover from them the amount of certain taxes, which the county assessor had assessed upon property alleged to be theirs, to wit: upon goods in a store in Carson City, of the assessed value of $70,000; upon twenty tons of hay, at $800; upon goods in store at Kinkead & Harrington's, at $6500; upon timber for a barn, at $600; and upon one hundred tons of hay in Mr. Ormsby's storehouse, at $4000, the property of the defendants—the whole amounting to $81,900. The different kinds of tax, and the amount of the assessment were specified.

In an amended complaint, it was declared that the tax was assessed between the first Monday of August, 1862, and the last Saturday in October of the same year; that the property had not been assessed in the regular list of assessments; and that it was entered in the tax list of the county under the head of subsequent assessments.

The answer of the defendants set forth, that the property described in the complaint was fraudulently and wrongfully assessed, and was not subject to taxation for the year 1862, because, as they say, the hay so described was a part of a growing crop for the year, produced from their ranche in

Statement of the case.

Douglas County; and was not cut or removed from this county until after the first Monday in August of that year; and long after they had been duly assessed for all their taxable property in this county, including said ranche, which was taxed at a valuation of between nine and ten thousand dollars, and taxes upon which had been fully paid.

The answer further set forth, that of the said extra amount of goods, some seven or eight thousand dollars in value constituted their stock of goods at Genoa, in Douglas County, and was included in the assessment and payment of taxes in that county, and had been brought and added to their stock in their store in Ormsby County; that the remainder of said extra amount of goods mentioned in the complaint was not the property of the defendants, nor was the same within the county of Ormsby until long after they were assessed and taxed, and the taxes paid, in said county; that said extra goods were purchased from the proceeds of their business houses in the counties of Ormsby and Douglas, the sale of their goods and other property, and proceeds of their business generally; all of which had been assessed in said counties, and the taxes paid for the year 1862, long before the making of the pretended assessment in the complaint; that the timbers and lumber for a barn were not the property of the defendants, until after the assessment and taxes paid for the year 1862; and were obtained in the course of their business after this assessment.

This answer was verified under oath.

The next step in the cause, as appeared from the record, was that, on the motion of the plaintiff, the court struck out so much of the answer as had no relation to the payment of the taxes on the seven or eight thousand dollars of property described in the complaint, and which was alleged in the answer to have been taxed in Douglas County. This, in effect, struck out the defence set up to all the property assessed and taxed as charged in the complaint, except the item above specified. The issue left was then tried by the court, which held that the defendants had proved payment of a tax on $5800 worth of property; and gave judgment in favor of

the tax to the amount of $1522 and costs of suit. To all which the defendant's counsel excepted.

The court found the following facts: "That the allegations in the complaint are true; also, that as to the property assessed, as set forth in the complaint, the defendants were assessed in Douglass County for the sum of $5800 on property in the year 1862, and paid taxes on the same, for which they are entitled to a credit."

The case was then carried to the Supreme Court of the Territory, where the judgment was affirmed.

By the statutes of the Territory of 29th November, 1861, the regular or annual assessment of taxes is made between the first Monday of March and the first Monday of August in each year; and the tax list is to be completed on or before the last-named day. Then the assessor annexes his warrant to it, and delivers the same with a map of the tax to the clerk of the board of commissioners.

It is also provided in the same act that the assessor, at any time subsequent to the first Monday of August and prior to the last Saturday in October, may assess any property which shall not be on the regular list; and he shall enter such assessment in a separate portion of the tax list, under the head of "subsequent assessments."

Messrs. W. S. Cox and N. Wilson, for the plaintiff in error:

The striking out of the principal part of defendant's answer was erroneous.

1. Because the proceeding was *ex parte*, without notice to the other side, and unwarranted by any principle of law.

2. And principally because the answer set forth a valid defence. The act of 1861 authorizes the assessor, after the first Monday of August, to assess property which shall not be on the regular list. This refers to property in existence and taxable, but omitted from the regular list from accident or other similar cause. It does not apply to property newly acquired, and newly brought into the county after the regular assessment has been made. Still less does it apply to property which is the product or proceeds of that already

assessed and taxed; otherwise parties would be subject to double tax. Yet the answer in the case averred as to the property charged, that it was all the yield, product, or proceeds of property and business heretofore regularly assessed and paid for, and was also acquired, made, manufactured, or realized after the regular legal assessment of all the defendant's property was made, and the taxes paid on it. The act of striking out the answer was equivalent to a judgment on demurrer to the answer in favor of the plaintiffs, and was erroneous, if the defence was valid.

No opposing counsel.

Mr. Justice NELSON delivered the opinion of the court.

It will be seen by reference to the statutes of the Territory of the 29th November, 1861, that the assessor is only authorized to make subsequent assessments upon the property of a citizen or inhabitant, which was subject to taxation at a regular or annual assessment, and had escaped the tax from mistake, or otherwise, and which is a very common provision in every system of taxation. And, if this was the question presented to the court below, upon the pleadings or proofs, there could be no doubt as to the correctness of the decision. But the question presented by the answer was not one of this description, but of double taxation; for, if the facts were true as set forth, the property had been taxed either at the regular assessment, or had been purchased or procured by the defendants after this assessment; and, therefore, not the subject of a subsequent tax within the meaning of the statute. On this ground the answer presented a perfect defence to the action.

The court below, however, on motion of the plaintiff, struck out this defence as to all the property except one item of seven or eight thousand dollars in value, which stood in the answer in the same category with all the rest of the property. This singular mode of meeting a legal defence set up in the pleadings has not been explained by any counsel representing the plaintiff; and in the absence of such ex-

Statement of the case.

planation, we can only apply to it the usual and customary principles governing pleadings in like cases, and hold that it was an error which entitled the party aggrieved to a reversal of the judgment.

If any authority was needed for so obvious a proposition, we refer to the case of *Hozey* v. *Buchanan.**

The court there say that it would be as novel as it would seem to be unjust to strike out of the answer, on motion of the plaintiff, that which constitutes a good defence, and on which the defendant may chiefly rely.

JUDGMENT REVERSED AND REMITTED TO COURT BELOW.

GIBSON *v.* CHOUTEAU.

1. It is necessary to the jurisdiction of this court, under the 25th section of the Judiciary Act, that the *record* show, either by express words or necessary legal intendment, that one of the questions mentioned in that act was before the State court, and was *decided* by it.
2. Neither the argument of counsel nor the opinion of the court below can be looked to for this purpose.
3. Where there are other questions in the record, on which the judgment of the State court might have rested, independently of the Federal question, this court cannot reverse the judgment.

ON motion to dismiss a writ of error to the Supreme Court of Missouri. The case purported to be brought here, under the 25th section of the Judiciary Act, which gives this court jurisdiction to review judgments in the highest court of a State, where there has been drawn in question the validity of an authority exercised under the United States, and the decree is against such validity, or where there is drawn in question the construction of any statute of, or commission exercised under the United States, and the decree is against the title, right, or privilege, or exemption specially set up;

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* 16 Peters, 215.

OR, where there is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the laws of the United States, and the decision is in favor of such their validity.

The record showed that the plaintiff below, who was also plaintiff here, filed his petition in the Land Court of St. Louis, to recover of the defendants a tract of sixty-four acres of land. The petitions stated that Mrs. Mary McRee was, prior to August 20th, 1862, invested with the title *by the United States*, and that on the day mentioned, she conveyed the same to him.

The defendant's answer denied the plaintiff's right to the possession, denied that he had the title, denied Mrs. McRee's title, set up the statute of limitations, and alleged, that the title acquired by the plaintiff was so acquired as agent of the defendants, and in fraud of their rights. To this, the plaintiff filed two or three replications, going into a minute history of the transaction in which the fraud was supposed to have originated, and denying it wholly.

On these pleadings, the case was tried by the court without a jury, and the issue was found for plaintiff, his damages assessed at six hundred dollars, and judgment rendered for that sum, and for the possession of the land. A bill of exceptions, which, in the record, made eighty printed pages, was signed, filled with surveys, deeds, decrees, and testimony of witnesses, some of which was evidently directed to the questions of fraud made in the pleadings. It also contained some ten or twelve prayers for instructions by the plaintiff, which were refused by the court, as rulings of law, which relate to the validity of plaintiff's title; also, an instruction given by the court to the effect, that the patent of the United States to Mrs. McRee invested her with the title which her deed transferred to the plaintiff, and that the patent having issued within the ten years next preceding the commencement of the suit, the statute of limitations could not be relied on as a bar.

On this record, the case was carried to the Supreme Court of the State, where it was "affirmed in all things" on De-

cember 3d, 1866. Three days after this, a motion for rehearing was filed. This was, in fact, an argument of counsel. It cited decisions and urged reasons to show, that the statute should be regarded as a bar; decisions and reasons which it alleged that the court had not sufficiently weighed. The motion for rehearing was granted on the 10th day of the same month, and the judgment of affirmance set aside, and the cause ordered to be docketed for a rehearing. This rehearing was had in March, 1867, and in April, the following judgment was entered:

"Now, again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis Land Court be reversed, annulled, and for naught held and esteemed; that the respondent take nothing by his suit in this behalf, but that the appellants go thereof without day, and recover of the said respondents their costs and charges herein expended, and have execution therefor. Opinion filed."

It is proper to state that, by the code of practice in the State courts of Missouri, an equitable defence may be set up in a common law action, there being no separate chancery jurisdiction in those courts.

The matter which, on this case, the plaintiff conceived to have been decided against him in the Supreme Court of Missouri, and which, as he assumed, gave this court jurisdiction, was, that the statute of limitations of Missouri ran against the title of the plaintiff, while the same was in the United States, and before it had been transferred by the patent of 1862 to Mrs. McRee. And the question which was before this court, on review for its consideration, was, whether it appeared from this record, either by express words or by necessary legal intendment, that the court did decide that proposition. If it did, then this court had jurisdiction under the already quoted 25th section of the Judiciary Act.

Messrs. McPherson and Gibson, for the plaintiff in error, contended that it did, sufficiently and to a reasonable intent, so

appear; a matter made even more plain, as they argued, by reference to the opinion of the court and by the motion for rehearing.

Messrs. Glover and Hill, contra.

Mr. Justice MILLER delivered the opinion of the court.

The record presented to the Supreme Court questions the validity of Mrs. McRee's title, the transfer of her title to plaintiff, the trust asserted by which plaintiff's title enured to the benefit of defendants, and the statute of limitations. On all these the court below must have found for plaintiff, for such a finding was essential to his recovery. The first judgment of the Supreme Court affirming the judgment of the Land Court must also have found all these issues for the plaintiff.

We are asked now to hold that the second judgment of the Supreme Court, which reversed that of the Land Court, was founded on the question of limitation. If we look to the language used in the judgment of the court in setting aside its judgment of affirmance and granting a rehearing, or in the final judgment of reversal, we can see nothing to justify that inference.

This court has decided, in the case of *Rector* v. *Ashley*,* following *Williams* v. *Norris*,† that the opinion of the court cannot be resorted to for the purpose of showing that a question of Federal cognizance was decided by the State court. In the present case it is said that the application for a rehearing was based exclusively on the question of the statute of limitation. That which is here called a motion for a rehearing is merely an argument of counsel setting forth numerous decisions of the courts, and many reasons of counsel why the statute should be held to be a bar; and it insists that this question had not received sufficient attention at the hands of the court. It is not easy to see how this argument can be regarded as a part of the record of the case. It can

* 6 Wallace, 142.

† 12 Wheaton, 117.

have no better claim to be so regarded than the opinion of the court, which accompanies the record.

If, however, it could be treated as part of the record, it affords no conclusive evidence that the rehearing was granted on that ground.

But if we could infer that the rehearing was granted because the court was of opinion that it had not well considered that question, it is to be remembered that the reargument took place four months afterwards, that there is nothing to show what might then have been presented by counsel on either side, or what might have been considered by the court, for the case was fully opened, by setting aside the former judgment, to every consideration which could rightfully influence the decision. It is hardly a reasonable inference, under these circumstances, that the court did decide the case on the question of the statute of limitation, and certainly it does not appear that the case was necessarily decided on that question, or that the proposition was essential to the judgment.

It is our opinion, therefore, that under the repeated decisions of this court, this record presents no case of which we have jurisdiction. The writ of error is therefore

DISMISSED.

CLARK *v.* REYBURN.

1. A decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot, in the absence of some special law authorizing it, be sustained.
2. No such special law exists in Kansas.
3. Where, after a mortgage of it, real property has been conveyed in trust for the benefit of children, both those in being, and those to be born; all children *in esse* at the time of filing the bill of foreclosure, should be made parties. Otherwise, the decree of foreclosure does not take away their right to redeem. A decree in such a case against the trustee alone, does not bind the *cestui que trusts*.

APPEAL from a decree of the Circuit Court for the District of Kansas, in a case in which one Reyburn had filed an

amended bill in equity against Jeremiah Clark, and Florinda his wife, and also against one Few, to foreclose a mortgage given by Clark and wife to him, Reyburn, on certain land then owned by them, and afterwards conveyed by them to the said Few, in trust for Mrs. Clark, during her life, and for the children of herself and of her then husband after her death.

Messrs. Clough and Wheat, for the appellants, submitted an elaborate brief of Mr. L. B. Wheat, urging with several others, the objections taken by the court to the decree. *Mr. Black, contra; a brief of Mr. E. Stillings being filed on the same side.*

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

This is an appeal in equity. Reyburn is the complainant. Florinda Clark and Few only were made defendants by the original bill. She answered. Few filed a plea and demurred. On the 5th of May, 1862, leave was given to the complainant to amend his bill, and leave was given to Mrs. Clark to withdraw her answer. It had been filed as her answer in a former case, and was refiled in this case. The court ordered it to be restored to the files from which it had been taken. The complainant thereupon filed an amended bill whereby Jeremiah Clark was brought into the case as a defendant.

The amended bill states the following case:

That on the 30th of April, 1859, Jeremiah Clark executed to the complainant his promissory note for $5250, payable twelve months from date, with interest after maturity at the rate of twenty-five per cent. per annum. On the same day, Clark and wife executed to the complainant a mortgage upon the real estate therein described, conditioned to secure the payment of the note. The mortgage was acknowledged by the grantors, and duly recorded. Clark failed to pay the note at maturity. The complainant, on the 5th of October, 1861, filed his bill of foreclosure against the same parties who

are defendants in this suit. Before the hearing, the bill was dismissed as to Mrs. Clark and Few. It was adjudged and decreed that there was due from Jeremiah Clark $8565.77; that he should be forever barred and foreclosed of any interest in the mortgaged premises, and that they should be sold by the marshal, and the proceeds applied to the payment of the amount found due. On the 27th of December, 1861, the marshal sold the premises to the complainant for $7000, and on the 23d of that month executed to him a deed for the property. That there was still due to the complainant upon the decree the sum of $1884.25, for the payment of which, the interest of Florinda Clark in the mortgaged premises is chargeable. That the defendant, Few, under a deed from Clark and wife to him in trust, claims to have the interest of a trustee in the property, which interest accrued subsequently to that of the complainant, and is inferior and subject to his mortgage. The prayer of the bill is for a decree of foreclosure as to the interest of Florinda Clark and Few in the mortgaged premises, and for general relief.

Few filed an answer which sets forth, that about the 12th of January, 1860, Clark and wife executed to him, in trust, a deed for the same premises described in the mortgage; that the persons for whose benefit the deed was made were Florinda Clark, the wife of Jeremiah Clark, and their children, then born or thereafter to be born, and the lawful heirs of such children, with certain limitations as to the further disposition of the property as set forth in the deed, a copy of which it is stated is annexed to the answer of Mrs. Clark to the amended bill in this case. As to all the other matters set forth in the bill, he avers that he has no knowledge, and he disclaims all interest in the matter in controversy, except as such trustee. He prays that the court will adjudge fairly between the parties in interest, and that he may be dismissed with costs.

Clark and wife failed to answer. The trust deed referred to in the answer of Few, as made a part of the answer of Mrs. Clark, is not in the record. No replication was filed by the complainant, and no testimony was taken upon either

side. The bill was taken *pro confesso* as to Clark and wife, and the case stood upon the bill and answer as to Few.

The court decreed that all the defendants should be forever barred and foreclosed of their right of redemption in the mortgaged premises. The decree does not find either the fact or the amount of the alleged indebtedness. It is silent upon the subject. The record shows no proceeding in relation to it. No time was given either to Mrs. Clark or her trustee within which to pay and redeem. The foreclosure was unconditional, and was made absolute at once. The appeal is prosecuted to reverse the decree.

In our view of the case it will be sufficient to consider one of the numerous objections insisted upon by the counsel for the appellants.

The sale and conveyance by the marshal transferred the entire interest of Jeremiah Clark in the mortgaged premises to Reyburn, but it did not in any wise affect the equity of redemption which had been vested in Few by the trust deed of Clark and wife to him.* The equity of redemption would have been barred and extinguished by the decree which ordered the premises to be sold if the proper parties had been before the court when it was made. The bill in that case having been dismissed as to Mrs. Clark and Few, the proceedings left their rights in full force. They were before the court in the case now under consideration, and the trust estate was then for the first time liable to be affected by its action. If there was a balance of the debt secured by the mortgage still unpaid, they were properly proceeded against, and the complainant was entitled to relief. The question to be considered relates to the character of the decree.

Can a decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, be sustained?

The equity of redemption is a distinct estate from that

* Childs *v.* Childs and others, 10 Ohio State, 339.

which is vested in the mortgagee before or after condition broken. It is descendible, devisable, and alienable like other interests in real property.* As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim "once a mortgage always a mortgage," but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy, and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law.† After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute.

In this country the proceeding in most of the States, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law "impairing the obligation of the contract" within the meaning of the provision of the Constitution upon the subject.‡

At the date of the execution of this mortgage the act of

* 1 Powell on Mortgages, 252; 2 Greenleaf's Cruise, 128.

† 2 Greenleaf's Cruise, 77–78; Spence's Equity Jurisdiction, 601–603.

‡ Bronson v. Kinzie, 1 Howard, 311; Williamson v. Doe, 7 Blackford, 13.

the territorial legislature of Kansas of 1855, "concerning mortgages," was in force. It directed that in suits upon mortgages the mortgagee should recover a judgment for the amount of his debt, "to be levied of the mortgaged property," and that the premises should be sold under a special *fieri facias*. But it also provided that nothing contained in the act should be so construed as to "prevent a mortgagee, or his assignee or the representative of either, from proceeding in a court of chancery to foreclose a mortgage according to the course of proceeding in chancery in such cases."* This gave to the complainant in the case before us the option to proceed in either way. He elected to file a bill in equity. No rule of practice bearing upon the subject, established by the court below, has been brought to our attention.

The 90th rule of equity practice adopted by the Supreme Court, directs that where no rule prescribed by this court, or by the Circuit Court, is applicable, the practice of the Circuit Court shall be regulated by the practice of the High Court of Chancery in England, so far as it can be applied consistently with the local circumstances and convenience of the district where the court is held.

The equity spoken of in the Process Act of 1792, is the equity of the English chancery system.†

Spence says: "At length, in the reign of Charles I, it was established that in all cases of mortgages, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, *unless payment were made by a short day, to be named.*"‡

The settled English practice is for the decree to order the amount due to be ascertained, and the costs to be taxed;

* Statutes of Kansas of 1855, p. 509.

† Robinson *v.* Campbell, 3 Wheaton, 212; Boyle *v.* Zacharie, 6 Peters, 648.

‡ Equity Jurisdiction, 603.

and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant; but in default of payment within the time limited, "that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises."* We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent, with his accustomed fulness of research. He came to the conclusion that the time was in the discretion of the chancellor, and to be regulated by the circumstances of the particular case; but he nowhere intimates that such an allowance could be entirely withheld.† The practice in Illinois is in conformity to these views.‡ In the light of these authorities we are constrained to hold the decree in the case before us fatally defective.

There is another point upon which we deem it proper to remark before closing this opinion. It was urged by the counsel for the appellants, as a further ground of reversal, that the children of Clark and wife, who are alleged to be beneficiaries under the trust deed, were not before the court. It does not appear by anything in the case that there were such children *in esse*. If the facts were as alleged, it is clear that they should have been made parties. Otherwise their right to redeem could not be taken away by the decree. A decree against the trustee alone does not, in such a case as this, bind the *cestui que trusts*.§

The decree is REVERSED, and the cause will be remanded to the court below for further proceedings

IN CONFORMITY TO THIS OPINION.

* 2 Daniel's Chancery Practice, 1016; 1 Seton on Decrees, 346.
† Perine *v.* Dunn, 4 Johnson's Chancery, 140.
‡ Johnson *v.* Donnell, 15 Illinois, 97.
§ Collins *v.* Lofftus & Co., 10 Leigh, 5; Calvert on Parties, 121.

Statement of the case.

THE LADY FRANKLIN.

1. A bill of lading given by a person who was agent of several vessels all alike engaged in transporting goods brought to certain waters by a railway line, but having separate owners, and not connected by any joint undertaking to be responsible for one another's breaches of contract—the bill, through mistake of the agent, acknowledging that certain goods had been shipped on the vessel *A.*, when, in fact, they had been previously shipped on vessel *B.*, and a bill of lading given accordingly—will not make the vessel A. responsible, the goods having been lost by the vessel B., and the suit being one by shippers of the merchandise against the owner of the vessel A., and the case being thus unembarrassed by any question of a *bonâ fide* purchase on the strength of the bill of lading.
2. While a bill of lading, in so far as it is a contract, cannot be explained by parol, yet being a receipt as well as a contract, it may in that regard be so explained, especially when used as the foundation of a suit between the original parties to it.

APPEAL from the Circuit Court for the Northern District of Illinois, in which court King & Co. had libelled the propeller Lady Franklin, for non-delivery of certain flour.

The libel alleged, that the libellants, in the month of November, 1863, by their agent, Edward Sanderson, delivered at Milwaukee, to the steamer Lady Franklin, 340 barrels of flour, to be transported to Port Sarnia, on the St. Clair River, for which shipment they received a bill of lading, but that 290 barrels of the flour were never delivered. As a consequence, they claim a maritime lien on the vessel for the value of the flour.

The answer denied that the flour in controversy was ever delivered to the master, or shipped on board of the steamer.

The case was this:

There was, in 1863, a line of steamers engaged in the lake service from Milwaukee to Port Sarnia, and running in connection with the Grand Trunk Railway. The Lady Franklin was one of them. But each boat had separate owners, and there was no joint undertaking that any one of the boats should be responsible for the breach of a contract or misconduct of another. This line of steamers had a particular

warehouse in Milwaukee, at which they stopped, and which was used to receive and store freight for them; one Courtenay was the agent of this warehouse, and he also acted as agent for the boats in engaging and shipping freight. The cargo of flour in dispute, *which was owned by the libellants, and of which they were the real shippers*, was received by Courtenay for them, through Sanderson, their agent, with an agreement to ship it for them on one of this line of steamers; and, in point of fact, 50 barrels were shipped on the Antelope, one of the line, and received by the libellants. The remaining 290 barrels, for which the lien is claimed on the Franklin, were also shipped on the 7th of November by the Water Witch, another boat in the same line, and consigned to the libellants, but were not received by them, the boat having foundered at sea. Notwithstanding these shipments, a clerk in the warehouse, under Courtenay, in the absence of Courtenay, in ignorance that the flour had been previously shipped on the Antelope and Water Witch, but supposing it still in the warehouse for shipment, by mistake gave to Sanderson, the agent of the libellants, a bill of lading.

Attaching the bill to a draft upon the libellants, for the value of the flour, Sanderson soon afterwards drew on them for this value, and they paid the draft. The flour never arriving, they libelled the *Lady Franklin*, in the District Court of the district, attaching this bill of lading to their libel.

The District Court dismissed the libel, and the Circuit Court having affirmed the decree, the case was now here for review.

Mr. Robert Rae, for the appellants:

1. The signing of the bills of lading by the authorized agent of the vessel, after delivery of the property into his possession and control, binds the vessel, and has the same force and effect as if signed by the master.*

2. The owner of the vessel is estopped as against a con-

* Rawls et al. *v.* Deshler, 3 Keys, 577; Dows *v.* Greene, 24 New York, 638; Coosa River Steamboat Company *v.* Barclay, 30 Alabama, 120; Putnam *v.* Tillotson, 13 Metcalf, 517.

signee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit, by the signature of his agent, so far as these statements relate to matters which are, *or ought to be*, within his knowledge.*

In this case, the consignee advanced on the faith of the bill of lading.

3. Parol testimony cannot be received in courts of admiralty, any more than in courts of law, to contradict the terms of a bill of lading.† Nor can courts of admiralty exercise chancery powers to reform maritime contracts.‡

4. When a written contract is attacked on the grounds of containing some material mistake, the evidence of mistake must be very strong. Lord Hardwicke says,§ that in such a case, he would require "the strongest proof possible," which words Lord Eldon observes, "leave a weighty caution to future judges."

And in *Shelburne* v. *Inchiquin*,‖ Lord Thurlow demanded "strong irrefragable evidence."

Mr. Goodwin, contra:

1. A maritime contract of affreightment, which shall bind the vessel to the merchandise, for the due performance of the contract, commences only with the delivery of the goods on board, or on a lighter or barge, belonging to and controlled by the boat, or into the custody of some officer of the boat, to be carried on board. No such delivery of the flour is shown in this case. It never was received on board the Lady Franklin, or into the custody of any officer or agent of the boat, to be carried on board. Courtenay was the warehouse-

* Sears *v.* Wingate, 3 Allen, 103; Ward *v.* Whitney, 3 Sanford, 399; Sutton *v.* Kettel, 1 Sprague, 309.

† 3 Greenleaf on Evidence, § 402.

‡ Andrews *v.* Essex Insurance Company, 3 Mason, 7; The Ives, Newbury, 205.

§ Langley *v.* Brown, 2 Atkyn, 203.

‖ 1 Brown's Chancery Cases, 340.

man, and received the flour in store as such. He held it as such warehouseman, not as agent for any, or either, or all of the different boats running in that line, but like any forwarding merchant, *pro hac vice*, the agent of the shipper to forward the merchandise by some of the boats of that line. In fact, he had forwarded this flour by the Antelope and Water Witch.

2. It is now well settled, both in English and American law, that so far as the fact of the receipt of the goods, or the quantity received, is concerned, the bill of lading is in the nature of a receipt, not conclusive between the shipowner and shipper, but open to explanation and evidence of the real facts.* A false bill of lading, whether by mistake or fraud, is beyond the power of the master or other agent of the shipowner, and cannot be made to bind the vessel, especially under the circumstances of this case.

3. There is, really, no question of an innocent purchase for value in this case.

Mr. Justice DAVIS delivered the opinion of the court.

The attempt made in the prosecution of this libel, to charge this vessel for the non-delivery of a cargo, which she never received, and, therefore, could not deliver, because of a false bill of lading, cannot be successful, and we are somewhat surprised that the point is pressed here.

Courtenay was a warehouseman in Milwaukee, and, although he acted as agent for the different steamers of the Grand Trunk line, he did not receive the flour to be sent by one particular steamer in preference to another. His engagement had this meaning, and nothing more: to forward the flour with all practicable expedition, by the first suitable steamer of the line which arrived in port that would carry it. Having actually shipped it in good condition in advance of the arrival of the Franklin in port, by seaworthy steamers, against which nothing is alleged, he discharged his obligations to the libellants. It would be strange, indeed, if the

* Abbott on Shipping, 7th Am. Ed. 324, *m*; 1 Parsons' Maritime Law, 137, n. 2, and Cases.

owners of the Franklin were made to suffer, because the common agent of all the boats had, through inadvertence, given a receipt for merchandise not on the boat, or in the warehouse even, but which was then on board other boats, on its way to its destination. The case is not embarassed by any question of a *bonâ fide* purchase on the strength of the bill of lading, for the libellants themselves were the real shippers. Such is the claim of the libel, and it is supported by the evidence, for Sanderson swears the flour belonged to the libellants, on its delivery at the warehouse. In so far as a bill of lading is a contract, it cannot be explained by parol; but if a contract, it is also a receipt, and in that regard, it may be explained, especially when it is used as the foundation of a suit between the original parties to it—the shippers of the merchandise, and the owner of the vessel.

The principle is elementary, and needs the citation of no authority to sustain it.

In this case the bill of lading acknowledges the receipt of so much flour, and is *primâ facie* evidence of the fact. It is, however, not conclusive on the point, but may be contradicted by oral testimony.

The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation. The case of the *Schooner Freeman* v. *Buckingham*, decided by this court,* is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake; but the principle is the same, and the court held in that case that there could be no lien, notwithstanding the bill of lading.

The court say, "There was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security."

JUDGMENT AFFIRMED.

* 18 Howard, 192.

UNITED STATES *v.* GILMORE.

1. Constructions of statutes, in relation to the accounts of individuals with the United States, made by the accounting officers of the Treasury, especially when so long continued as to become a rule of departmental practice, are entitled to great consideration, and will in general be adopted by this court.
2. But when, after such a construction of a particular class of statutes has been long continued, its application to a recent statute of the same class is prohibited by Congress, and following the spirit of that prohibition, the accounting officers refuse to apply the disapproved construction to a still later statute of the same class, this court will not enforce its application.
3. The act of June 20th, 1864, increasing the pay of private soldiers in the army, cannot be construed as having the effect of increasing the allowance to officers for servants' pay.

THIS was an appeal from the Court of Claims, in which court a suit was instituted by Gilmore, an ex-colonel of the army, for a sum alleged to be due him as allowance for servants' pay, beyond the sum actually allowed him for that purpose by the Comptroller of the Treasury, in settlement of his accounts; Gilmore claiming the same sum ($16) per month for such pay, as was allowed by act of Congress of June 20th, 1864, to private soldiers, and the Comptroller of the Treasury considering that under acts of Congress, regulating the matter, he was not entitled to so large a sum. Judgment was given in favor of Gilmore by the Court of Claims, and the United States appealed.

The sum in controversy, in the particular case, was insignificant, but the principle involved extended to numerous claims and large amounts.

Mr. Chipman, for the appellant; Mr. Dickey, Assistant Attorney-General, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It was for many years the practice in the army to detail enlisted men as personal servants of officers, and the practice had the sanction of law.

In 1812, with a view undoubtedly to the discouragement of this practice, it was provided by the act of July 6th,* that "officers who shall not take waiters from the line of the army shall receive the pay, clothing, and subsistence allowed to a private soldier, for as many waiters as they may actually keep, not exceeding the number allowed by existing regulations."

In 1816, the practice was absolutely prohibited except to company officers, and it was again provided, by the act of April 24th,† almost in the terms of the act of 1812, that "all officers be allowed for each private servant actually kept in service, not exceeding the number authorized by existing regulations, the pay, rations, and clothing of a private soldier, or money in lieu thereof, on a certificate setting forth the name and description of the servant in the pay account."

At the time of the passage of the last act, the pay of a private was five dollars a month, with rations and clothing of certain money value in addition. The effect of the act was precisely the same as if the money value of the whole had been ascertained, and the amount had been inserted as the allowance or emolument to be paid to the officer in addition to his own regular pay.

There is nothing in the act which expresses any intention on the part of Congress that, whenever the pay of the private should be thereafter increased, the emolument of the officer should be proportionably augmented, without further legislation. But this construction was given to the act by the accounting officers, and the emolument of officers were thus indirectly increased from time to time until 1861. Whenever the pay, clothing, and rations of private soldiers were advanced in amount or value, the emoluments of officers were increased proportionably, not by legislation to that effect, but by departmental construction.

In 1854, by the act of August 4th,‡ the pay of privates was increased to eleven dollars a month, and the allowance of officers for servants was also increased in like manner.

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* 2 Stat. at Large, 785. † 3 Id. 299. ‡ 10 Id. 575.

At length, when, in 1861, by the act of August 3d,* the pay of privates was augmented to thirteen dollars a month, and the army ration was increased, and the emoluments of the officers were also augmented by the construction referred to, the subject attracted the attention of Congress, and by the act of July 17th, 1862,† it was provided that "the first section of the act, approved August 6th, 1861, entitled 'An act to increase the pay of privates in the regular army and in the volunteers in the service of the United States,' shall not be so construed, after the passage of this act, as to increase the emoluments of the commissioned officers of the army."

This act virtually gave the legislative sanction to the construction which had heretofore prevailed at the departments, in respect to the past acts; but virtually, also, prohibited its future application. It expressly forbid its application to the increase of pay provided for by the act of August, 1861; the departmental officers conformed their action to its directions, and thenceforth limited the emoluments of officers in respect to servants' pay to the allowances made under the act of 1854.

In 1864, another act was passed on the 20th of June,‡ by which the pay of privates was still further increased to sixteen dollars a month, without any mention of officers' emoluments; and it is under this act that the claim under consideration is made. It is not denied that the action of the accounting officers, under the act of 1862, is correct, but it is insisted that the act of 1864 must be construed as were the acts of 1861 and the former acts increasing pay, until the prohibitory act of 1862.

But it by no means follows, from the silence of the act of 1864, in respect to the emoluments of officers, that the old construction must be applied to it. The contrary inference, we think, is better warranted.

We have already said that the correctness of the original interpretation of the earlier acts increasing pay was at least

* 12 Stat. at Large, 289, 326. † Id. 594. ‡ 13 Id. 144.

doubtful. Constructive allowances are not entitled to favor. And it is certain, though the allowances in question, so far as made prior to the act of July, 1862, were confirmed by that act, that its prohibition of that construction in future, as applied to the act of 1861, must be taken, at least, as a legislative disapproval of the construction itself. It cannot, then, be assumed, that when the act of 1864 was passed, Congress intended that this disapproved construction should be applied to it.

We conclude, on the contrary, that the indirect effect, claimed for the act of 1864, of increasing the emoluments of officers, was not contemplated by the legislature, and cannot properly be given to it.

The construction contended for was not given to that act by the accounting officers, and we cannot say that, in rejecting it, these officers committed any error.

We agree with the counsel for the appellee that no effect can be given in this case to the act of March 3d, 1865,* which declares that "the measure of allowance for pay for an officer's servant is the pay of a private soldier, as fixed by law at the time." In prior acts, this allowance had extended to the pay, clothing, and subsistence of a private. The intention of this act seems to be that the allowance shall be limited to the pay.† But whatever the intention, the act can have no retrospective operation.

JUDGMENT REVERSED, and the cause remanded for further proceedings

IN CONFORMITY WITH THIS OPINION.

WOOD-PAPER COMPANY *v.* HEFT.

1. An appeal upon a bill for the infringement of a patent dismissed, it appearing that after the appeal the appellants had purchased a certain patent to the defendants, under which the defendants sought to protect themselves; and that the defendants as compensation had taken stock

* 13 Stat. at Large, 487.

† Winthrop's Digest of Opinions of Judge Advocate-General, 264.

in the company which had unsuccessfully sought to enjoin them, and was now appellant in the case.

2. The fact that *damages* for the infringement alleged in the bill had not been compromised, held not to affect the propriety of the dismissal.

ON motion to dismiss an appeal from the Circuit Court for the Eastern District of Pennsylvania. The case was thus:

In August, 1865, the American Wood-paper Company filed a bill in the court below to enjoin Heft, Dixon, and other defendants, against infringing certain patents owned by the company for improvements in paper-making; these patents, including one to Watt & Burgess, granted on the 2d July, 1854, the other to M. A. Miller, on the 26th May, 1857.

The answer of the defendants set up, among other defences: 1st. The want of novelty; and, 2d, that they manufactured paper under inventions and patents of Dixon, one of the defendants. Proofs were taken on both sides, and, after the hearing of counsel on the 22d November, 1867, the bill was dismissed; and the case was subsequently brought here by appeal.

Pending this appeal, one Meach asked leave to intervene by counsel, upon an allegation that, since the decree below, the case had been settled, and that it was now carried on without the appellees having any further interest in the defence, and for the purpose of obtaining the decree of this court in favor of the complainants to influence suits pending in the circuits in their favor and against strangers to this suit, and in which the same questions are involved; and that the intervenor was a defendant in one of these suits. The application of Meach being allowed, a commission issued to take proofs in the matter, and these being before the court, the motion to dismiss came on to be heard. It appeared, as this court assumed, from the proofs under the commission, that at the time when the original bill was filed, to wit, in August, 1865, the Dixon patents, which were set up as one of the defences to the suit, were owned, two-thirds by one Harding and one-third by Dixon, the inventor; the two-thirds having been conveyed in December, 1864, the co-defendants of Dixon having no interest therein, ex-

cept working under them in the manufacture of paper. It further appeared that in the autumn of 1868, about one year after the decree dismissing the bill, Harding and Dixon sold and transferred all their interest in the Dixon patents to the complainants, and received for the same eighteen hundred shares of the stock of their company at par value, which was $100 per share, nominally $180,000, and this for one-half the interest in the patents; for the other half the complainants confirmed the licenses that had been granted under the Dixon patents.

This was the account of the sale given by Dixon, who was examined as a witness under the commission. One Hay, the general agent of the complainants, testified that the purchase was made with Harding, and that stock to the amount of two thousand shares was given, and that two certificates with blank vouchers of attorney were made out, and delivered to Harding, one for eighteen hundred, and the other for two hundred shares. Dixon stated that Harding transacted the business with the complainants for him, and with his concurrence.

The evidence, it should be added, tended to show that Dixon had agreed to keep Heft and the other defendants harmless.

Mr. B. F. Butler, *in support of the motion*, argued that on the case presented the appellant had become the sole party in interest; that the controversy was thus a fictitious one; and on the authority of both English and American precedents* ought to be dismissed.

Mr. Jenkes, *contra*, contended that the evidence rightly viewed did not present such a case as opposite counsel assumed from it; that a fictitious case was not to be supposed, but, on the contrary, required clear proof; and that, even if now late in the controversy, the appellant had, without the

* Hoskins *v.* Lord Berkeley, 4 Term, 402; In the matter of R. J. Elsam, 3 Barnewall & Creswell, 597; Fletcher *v.* Peck, 6 Cranch, 147, 8; Lord *v.* Veazie, 8 Howard, 251; Cleveland *v.* Chamberlain, 1 Black, 425.

knowledge of counsel, become the *dominus litis* on both sides, still that the question of damages for infringement on the bill remained to be adjusted, and that this required a settlement of the merits as they originally stood.

Mr. Justice NELSON delivered the opinion of the court.

The case, as it now stands, is this: The complainants having purchased in the patents under which the suit was defended, own both sides of the subject-matter of this litigation; and, further, the owners of the Dixon patents having taken, in consideration for the sale, stock in the complainants' company, their interest has been transferred to the side of the complainants.

It is said, notwithstanding all these negotiations, exchanges, and transfers, the *damages* for the alleged infringement in the bill have not been compromised. But, before that question can be reached, as the bill was dismissed below, this court must hear and determine the question on the merits, whether or not the defences set up in the answer are sustained upon the proofs. If the court should determine they were not, then the question of damages would arise; if otherwise, not. Now, upon this question of merits, the complainants own both sides of the litigation, and control them; and, in the language of the Chief Justice, in the case of *Lord* v. *Veazie*,* "the plaintiff and defendant have the same interest, and that interest adverse, and in conflict with the interest of third persons, whose rights would be seriously affected, if the question of law was decided in the manner that both parties to this suit desire it to be." And, for this reason, the case should not be heard by this court.

If anything further was necessary to show that the litigation is no longer a real one, even if the suit should proceed, and the question of damages be reached, there would be the same interest on both sides, Dixon, one of the defendants, since the sale of his patents, having a large interest on the side of the complainants, and, as defendant, would be

* 8 Howard, 255.

subject to his payment of part, or the whole amount, of the damages recovered. Indeed, the weight of the proofs is, that he has bound himself to keep his co-defendants harmless.

The motion to dismiss the case, for the reasons above given, must be GRANTED.

ALVISO *v.* UNITED STATES.

1. Where a Mexican grant of land in California designates the land granted by a particular name, and specifies the quantity, but does not give any boundaries, the grantee is entitled to the quantity specified within the limits of his settlement and possession, if that amount can be obtained without encroachment upon the prior rights of adjoining proprietors.
2. When the evidence upon a boundary line, between two Mexican grants, is conflicting and irreconcilable, this court will not interfere with the decision of the court below.
3. Parties not claiming under the United States, who are allowed to intervene in proceedings of the District Court to correct surveys of Mexican land grants in California, under the act of June 14th, 1860, must claim under cessions of the former Mexican government. The order of the District Court, allowing a party thus claiming to intervene, is a determination that he possesses such interest derived from that government as to entitle him to contest the survey; and objection to his intervention, on the ground that he possesses no such interest, cannot be taken for the first time in this court.
4. The United States cannot object to the correctness of a boundary line in an approved survey, if they have not appealed from the decree approving the survey.

THIS was an appeal from a decree of the District Court of California, approving a survey of a confirmed Mexican land claim. There were two grants issued by the Mexican government to the claimant.

The original grant, issued in September, 1835, described the land ceded as known by the name of Milpitas, and as being one league in length, from north to south, and one-half a league in width, from east to west, and being in extent equal to half a square league, as shown by the accompanying map. The second grant, issued in October following,

added a half league to the original quantity on the west, so as to make the entire tract ceded a square league. The second of these title-papers, merely adding to the quantity originally granted, the two are spoken of in the opinion, as constituting one concession or grant.

Neither of the title-papers gave any boundaries of the land, or referred to any documents by which the boundaries could be ascertained, except the map mentioned. This map was a rude and imperfect sketch, indicating only the general locality of the land, without fixing, with any precision, its exterior limits.

The decree of the District Court upon the claim of the grantee did not give the boundaries of the claim. It adjudged the claim to be valid, to the extent and quantity of one square league, provided that quantity be contained "within the boundaries called for in the grants," and the map to which they referred; and if there were less than that quantity, then the confirmation was to be restricted accordingly. But no boundaries were, in fact, stated in the grants. The decree also declared the tract confirmed to be the land "of which the possession was proved to have been long enjoyed" by the claimant. The proof here mentioned, only showed that the claimant had been, for many years, in possession of some of the land granted to him, without mentioning any boundaries of the land, or indicating that any were established.

Three surveys of the claim were made by different surveyors, and submitted to the District Court for examination and approval; and in relation to each of them, testimony was taken and counsel were heard, either upon the intervention of the United States, or of the claimant, or of adjoining proprietors.

The first two surveys were set aside, and the questions presented arose upon the third survey. One Higuera owned a tract on the north, and it appeared, from the evidence, that the boundary line between him and Alviso, at one time in dispute, was settled and fixed, under the Mexican government. On the west, one White owned a tract, as confirmee

of a grant known as *Rincon de los Esteros*, and a creek, known as Penetencia Creek, was the boundary between him and Alviso. The questions on this case related to the southern boundary of the tract of the claimant, and upon this the evidence was conflicting and irreconcilable. One Berrysea claimed the land on the south; and he intervened in the proceedings upon the survey in the District Court, by leave of the court. In his petition for permission to intervene, he alleged that he was the owner of the rancho on the south of the claim of the claimant, as surveyed under title derived from the Mexican government; that the creek Milpitas was the boundary between his rancho and the rancho confirmed to the claimant, and that the survey of the claimant's claim included about fifteen or eighteen hundred acres of land belonging to him. There was no other evidence in the record that Berrysea had any grant.

The appeal was by the claimant.

Mr. Bradley, for the appellant; Mr. Wills, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

In the case of *Higueras* v. *United States*,* this court speaks of concessions or grants of public lands, made by Mexican governors, as being of three kinds: 1st. Grants by specific boundaries, where the donee was entitled to the entire tract; 2d. Grants by quantity, as of one or more leagues of land situated in a larger tract, described by out-boundaries, where the donee was entitled only to the quantity specified; and 3d. Grants of a certain place or rancho by some particular name, either with or without specific boundaries, where the donee was entitled to the tract, according to the boundaries, if given, and if not given, according to the limits of the tract, as shown by the proofs of settlement and possession.

The grant in the case before us, partakes of the two latter classes. It is a grant by quantity, and the claimant is en-

* 5 Wallace, 827.

titled to the amount specified, if that amount can be obtained without encroachment upon the prior rights of adjoining proprietors. It is also a grant of a certain place by name, and as the boundaries are not given, its extent and limits must be shown by the settlement and possession of the grantee.

The correctness of the ruling of the court in setting aside the first survey is not questioned; and the appellant himself united with adjoining proprietors in excepting to the second survey. The testimony taken established, with sufficient distinctness, the northern and western boundaries, as fixed by the third and approved survey. It showed that the northern boundary, between Alviso and Higueras—at one time, a matter of dispute between them—was settled and fixed under the Mexican government, and that the Penetencia Creek was the dividing line on the west, between Alviso and White, the confirmee of the grant of Rincon de los Esteros.

But as to the southern boundary—the boundary between Alviso and Berrysea—the testimony was conflicting and unsatisfactory. Indeed, it is impossible to reconcile the different statements of the witnesses as to the extent of the occupation of either party, south of Milpitas Creek. Some of them testified that the possession of Alviso extended far south of it, whilst others asserted that the creek itself was recognized, both by him and Berrysea, as the boundary between them. The contradictions are so flat that the counsel of the appellant is forced to state that the mind is left in uncertainty whether there was any exclusive occupation of the land by either of the parties. Under these circumstances, there being great doubt as to which side the weight of evidence inclines, we should not be justified, under any rules governing our action upon such cases, in interfering with the decision of the District Court.

The counsel of the appellant objects that there is no evidence in the record that Berrysea had any grant, or if he had any, that it was ever confirmed, and insists that no weight should therefore be given to his possession against the claim of the appellant. This objection cannot be made

for the first time in this court. The right of Berrysea to contest the survey originally made, and the nature of his interest, were determined by the District Court on his application to intervene. The act of June 14th, 1860, provides for the return into court of surveys for examination and adjudication upon the application of parties who, in the judgment of the District Court or judge, have such interest in the survey and location as to render it proper for them to intervene for its protection. It enacts that where objections are advanced by the United States, the application shall be made by the district attorney, and be "founded on sufficient affidavits," and that when the application is made by "other parties claiming to be interested in, or that their rights are affected" by the survey and location, there shall be a preliminary examination into the fact and nature of such alleged interest. "The court or judge in vacation," says the statute, "shall proceed summarily, on affidavits or otherwise, to inquire into the fact of such interest, and shall, in its discretion, determine whether the applicant has such an interest therein as, under the circumstances of the case, to make it proper that he should be heard in opposition to the survey, and shall grant or refuse the order to return the survey and location as shall be just." When the interest of the applicant is shown and the order is made, those who claim under the United States, whether by "pre-emption settlement or other right or title," must intervene in the name of the United States, and be represented by the district attorney and counsel employed by them acting with him. All other parties not claiming under the United States and allowed to intervene, must necessarily claim under cessions more or less perfect of the former Mexican government. In the case at bar, when the original survey was made, Berrysea applied for and obtained an order for its return into court. In his petition he set forth that he was the owner of the rancho south of the claim surveyed, under title derived from the Mexican government, that the creek Milpitas was the boundary between his rancho and the rancho confirmed, and that the survey included about fifteen or eighteen hundred acres

of land belonging to him. The order of the court made thereon necessarily involved under the statute a determination that he possessed such interest, derived from the former government, as to render it proper that he should be heard in opposition to the survey. His right to contest the survey, founded upon the interest alleged, was then settled. The claimant might, perhaps, have subsequently insisted that the intervenor had no such interest as to give him a right to object to the survey, and have asked on that ground for a revocation of the order. But not having taken any such course, he cannot now object to the position of the intervenor as a contestant. As contestant, the intervenor could, of course, show his own occupation of the land in dispute to meet and overthrow the pretensions of the claimant founded upon his asserted possession of the premises.

As to the eastern boundary of the approved survey, we are not entirely satisfied that it is correct. There is much force in the position that this boundary should run along the base of the hills, and not embrace any portion of their sides. But the United States, who might have interposed an objection of this character, have not appealed from the decree approving the survey in its present form. They cannot, therefore, raise any objection to its correctness now.*

Upon the whole case, we are satisfied that the survey approved, is as favorable to the appellant as any which the evidence would justify. The decree sustaining that survey must therefore be

AFFIRMED.

EXPRESS COMPANY *v.* KOUNTZE BROTHERS.

1. The act of February 22d, 1848, which enacts that the provisions of the act of February 22d, 1847, transferring to the District Courts of the United States, cases of Federal character and jurisdiction begun in the territorial courts of certain Territories of the United States, and then admitted to the Union (none of which, on their admission as States,

* Fossat Case, 2 Wallace, 649.

however, as it happened, were attached to any judicial circuits of the United States), shall apply to all cases which may be pending in the Supreme or other Superior Courts of *any* Territory of the United States which may be admitted as a State at the time of its admission, is to be construed so as to transfer the cases into District Courts of the United States, if, on admission, the State did not form part of a judicial circuit, but if attached to such a circuit, then into the Circuit Court.

2. An averment in the declaration, that the plaintiffs were a firm of natural persons, associated for the purpose of carrying on the banking business in Omaha, Nebraska Territory (a place which, at the time of the suit brought, was remote from the great centres of trade and commerce), and had been for a period of eighteen months engaged in that business, at that place, is equivalent to saying that they had their domicile there, and is a sufficient averment of citizenship.
3. An averment that the defendant is a foreign corporation, formed under and created by the laws of the State of New York, is a sufficient averment that the defendant is a citizen of New York.
4. A common carrier of merchandise is responsible for actual negligence, even admitting his receipt to be legally sufficient to restrict his common law liability. And he is chargeable with actual negligence, unless he exercise the care and prudence of a prudent man in his own affairs.
5. A simple omission of a court to charge the jury as fully on some one of the points of a case about which it is charging generally, as a party alleges on error that the court ought to have charged, cannot be assigned for error, when it does not appear that the party himself made any request of the court to charge in the form now asserted to have been the proper one.

ERROR to the Circuit Court for the District of Nebraska. The case, which involved two distinct subjects, one of jurisdiction and the other of merits, was thus:

I. *As to the matter of jurisdiction.* This again involved two different points.

An act of 1847* provided, that in all cases of Federal character and jurisdiction commenced in the Superior Courts of the Territory of Florida, and the Court of Appeals of that Territory, after the 3d of March, 1845, "in which judgments or decrees were rendered, or which are claimed to have been since pending there, in the records and proceedings thereof, and the judgment and decrees therein, are hereby transferred to the District Court of the United States for the District of Florida." The provisions of the act were made

* February 22d, 1847, § 8; 9 Stat. at Large, 130.

at the time applicable to cases pending in the then new State of Michigan, and by an act of 1848,* were afterwards extended to courts of the then new State of Iowa. Neither Florida, Michigan, nor Iowa were, at the time of becoming States, attached to any judicial circuit of the United States.

This last act, the act of 1848, declares that the provisions of the act of 1847 shall apply to all cases which may be pending in the Supreme, or other Superior Court of *any* Territory of the United States which may be admitted as a State, at the time of its admission. With these acts in force, Kountze Brothers brought suit in a District Court of the Territory of Nebraska against the United States Express Company. The declaration described the plaintiffs as "an association of persons not incorporated, formed for the purpose of carrying on the banking business at Omaha, Nebraska, and who were, at the time the cause of action arose, and still were engaged in said business at Omaha," and described the defendants as "a foreign corporation formed under and created by the laws of the State of New York."

The answer and a replication being filed prior to the 3d of July, 1867, the proceedings while thus in *fieri*, were on that day—Nebraska having now become a State of the Union—brought and filed by the plaintiffs in the *Circuit Court* of the United States for the District of Nebraska.

Nebraska, as a Territory, was, at the time of her admission to the Union, *attached to the eighth judicial circuit of the United States.*

II. *As to the merits.* The suit was brought to recover from the Express Company, as common carriers, the value of certain gold dust which they had undertaken to forward from Omaha to Philadelphia.

The dust had been delivered to the company, for the transportation just mentioned, on the 29th of September, 1864, and was one of regular series of consignments, running through a term of more than eighteen months. The receipt given for it was the ordinary receipt of the company.

* February 22d, 1848, § 2; 9 Ib. 211–12.

Statement of the case.

It set forth, that it had been expressly agreed, that the company should not be liable "for any loss or damage by fire, the acts of God, or *the enemies of the government*, mobs, riots, insurrections, or pirates, or from *any of the dangers incident to a time of war*."

There were two routes used by the company to convey their property. One was across the State of Iowa, and the other to St. Joseph, Missouri, and thence across that State by the Hannibal Railroad. The latter route was the most expeditious, but the former was the safest, as the rebellion was in progress at this time, and Missouri, although adhering to the Union, was infested with predatory rebels, as well as with more regular bodies of the Confederate troops.

The gold dust was conveyed by the St. Joseph route, and the company was robbed of it, by a band of armed men, while it was in transit across the State.

On the trial, the plaintiffs testified that they gave notice to the agent of the company not to send their gold dust by the St. Joseph route; though there was testimony, also, that tended to prove that this notice was not until after the robbery of this particular gold.

No exception was taken, on the trial, to the admission or rejection of evidence, and the only subject for review here was the charge given by the court to the jury. The court instructed the jury only on a single point, that of negligence. The jury were told substantially that, although the contract was legally sufficient to restrict the liability of the defendant as a common carrier, yet, if the defendant was guilty of actual negligence, it was responsible. And that it was chargeable with negligence, unless it exercised the care and prudence of a prudent man in his own affairs. The Express Company requested the court to charge the jury that it was not liable, unless grossly negligent.

The jury having found for the plaintiffs, and the judgment having gone accordingly, the present writ of error was taken.

The case being thus, here the grounds asserted for reversal were:

I. As to jurisdiction.

1. Because there was no statutory authority for removal into the Circuit Court.

2. Because there was no such averments of citizenship as to bring the case within the provision of the Constitution and Judiciary Act of 1789. [This second point, however, not being taken in the court below.]

II. Because the court had not charged that the company was not liable, unless grossly negligent.

Mr. Ashton, for the Express Company, plaintiff in error:

I. *As to the jurisdiction.* There was no authority for the transfer of this case into the *Circuit Court* of the United States for the District of Nebraska. The case, if it fell within the provision at all, went to the *District Court*, and not to the *Circuit Court.* The act of 1847 is explicit that the cases in the enumerated courts of the Territory of Florida should be transferred to the *District Court* of the United States; and, if the act of February, 1848, authorized the transfer of this case into any Federal court, it required its transfer to the *District Court* of Nebraska. There would seem to be no answer to this suggestion whatever.

Again: It is settled that where a plaintiff asserts a right to prosecute a suit in the Circuit Court of the United States, on the ground of the citizenship of the parties, the pleadings must distinctly aver and show that they are citizens of different States, and that one of them is a citizen of the State where the suit is brought; and, if he omit to do this, and a judgment is rendered in his favor, by the Circuit Court, this court, on a writ of error or appeal, will reverse the judgment for want of jurisdiction in the court below.*

This doctrine is equally applicable to cases instituted in State courts, which may be the subjects of removal into the Circuit Court, on the ground of the citizenship of the parties.†

* Bingham *v.* Cabot, 3 Dallas, 382; Capron *v.* Van Noorden, 2 Cranch, 126; Montalet *v.* Murray, 4 Id. 46; Morgan *v.* Callender, 4 Id. 370; Wallen *v.* Williams, 7 Id. 602; Dred Scott *v.* Sandford, 19 Howard, 401.

† Conkling, Treatise, 4 ed. 155; Ward *v.* Arredondo, 1 Paine, 410.

Argument for the carrier.

The declaration describes the plaintiffs as "an association of persons carrying on the banking business in Omaha, Nebraska." "This court does not hold," says Curtis, J., "that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution."* Moreover, where the jurisdiction of the Circuit Court depends on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each one must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained.†

The averments of the petition referred to are not equivalent to an averment that the plaintiffs are citizens of Nebraska.‡ They may have been aliens, or citizens of New York, or some other State, doing business at Omaha. No legal inference that they were citizens of Nebraska can be drawn from any of the facts averred.

The description of the Express Company as a "foreign corporation, formed under and created by the laws of the State of New York," is not a sufficient or proper description of the defendants to bring them within the jurisdiction of the Circuit Court.§

The petition fails to aver that the corporation defendant has its principal place of business in New York, and is therefore defective, under the opinion of Chief Justice Taney in the last case in *Covington Drawbridge Co.* v. *Shepherd.*‖

II. *The merits.* The property was delivered, accepted, and carried under and subject to the provisions of a *special contract*, and not under or in pursuance of a general undertaking on the part of the defendants to transport the property as common carriers. There can be no doubt, at this

* Lafayette Insurance Company *v.* French, 18 Howard, 405; and see Paul *v.* Virginia, 8 Wallace, 168.

† Strawbridge *v.* Curtiss, 3 Cranch, 267.

‡ Brown *v.* Keene, 8 Peters, 112; Piquignot *v.* Pennsylvania Railroad Company, 16 Howard, 104.

§ Marshall *v.* Baltimore & Ohio Railroad Co., 16 Howard, 314; Lafayette Insurance Co. *v.* French, 18 Id. 404.

‖ 20 Id. 227.

time, notwithstanding that able writers once thought otherwise, that such a receipt, accepted under such circumstances, constitutes an *agreement* between the company and the owners of the property, and has the same effect in law as if signed by both parties.*

The defendants having been thus shown to have been *special carriers* of the property in question, the court should have instructed the jury that the plaintiffs could not recover in this action.

It is a question of law for the court, and not of fact for the jury, whether facts proved or admitted constitute a special contract or not.†

Whenever a special contract exists, changing the character of a carrier from a common to a private carrier, the latter cannot be declared against as a common carrier, but the action must be on a special contract, or for a breach of duty arising out of such contract; and if the declaration in such case set forth the general liability of the defendants as a common carrier, the variance is fatal.‡

The declaration here was upon a supposed general undertaking as common carriers.

The court should have instructed the jury, that by the terms of this contract, there could be no recovery against the defendants, unless they were guilty of gross negligence or misfeasance in regard to this property, and the loss was occasioned thereby.

The terms of the contract leave no doubt as to the meaning of the parties. And we contend that effect should be given to their stipulation, at least to the extent of relieving the carriers from liability for every degree of negligence, except that which has been termed gross or guilty negligence, or which amounts to positive *misfeasance*.

* York Company *v.* Central Railroad, 3 Wallace, 111.

† Kimball *v.* Rutland & Burlington Railroad Company, 26 Vermont, 248.

‡ Kimball *v.* Rutland & Burlington Railroad Company, 26 Vermont, 248; Shaw *v.* York & N. M. Railway Company, 13 Adolphus & Ellis (N. S.), 347; Crouch *v.* London & N. W. Railroad Company, 7 Exchequer, 705.

Opinion of the court.

This court has never decided, we suppose, that a stipulation against losses from negligence, short of misfeasance or misconduct, cannot be made by a carrier of merchandise. In the case of *York Company* v. *Central Railroad** the question did not arise, but there Field, J., would seem to speak of *misconduct* of the carrier as a thing alone against which no contract could be maintained.

The spirit of the later adjudications, in those States where the subject has been most carefully considered, is not opposed to any agreement or arrangement between parties to such a transaction, which shall relieve the carrier of *property* from responsibility for negligence which does not amount to positive misconduct or fraud, misfeasance, malfeasance, or gross negligence, in respect to the subject committed to his care.†

The doctrine of Pollock, C. B., in *Beal* v. *South Devon Railway Company*,‡ that "a contract to which a person has signed his name is, *quoad* him, a reasonable contract; that he has agreed to it, and therefore has no right to complain of it," is a doctrine which commends itself to good sense.

Mr. Justice DAVIS delivered the opinion of the court.

Before proceeding to consider the merits of this controversy, it is necessary to dispose of the point of jurisdiction which is raised.

It is urged that the Circuit Court had no jurisdiction over the cause, because there was no authority to transfer it. This depends on the construction of the acts of Congress relating to the subject.

On the admission of a new State into the Union, it be-

* 3 Wallace, 113.

† Dorr *v.* New Jersey Steam Navigation Company, 1 Kernan, 485; Wells *v.* Steam Navigation Company, 4 Selden, 381; Wells *v.* New York Central Railroad, 24 New York, 181; Smith *v.* Central Railroad Company, Ib. 222; Bissell *v.* The same, 25 Id. 442; Moore *v.* Evans, 14 Barbour, 528; Brown *v.* Eastern Railroad Company, 11 Cushing, 97; Buckland *v.* Adams' Express Company, 97 Massachusetts, 124; Kallman *v.* United States Express Company, 3 Kansas, 210; Prentice *v.* Decker, 49 Barbour, 21.

‡ 5 Hurlstone & Norman, 883.

comes necessary to provide not only for the judgments and decrees of the Territorial courts, but also for their unfinished business. In recognition of this necessity Congress, after Florida became a State, passed an act providing, among other things, that all cases of Federal character and jurisdiction pending in the courts of the Territory be transferred to the District Court of the United States for the District of Florida. The provisions of this act were made applicable, at the time of its passage, to cases pending in the courts of the late Territory of Michigan, and were afterwards extended to the courts of the late Territory of Iowa. Congress, in making this provision for the changed condition of Iowa, thought proper in the same act to adopt a permanent system on this subject, and extended the provisions of the original and supplementary acts to cases from all Territories which should afterwards be formed into States.

It is contended, if this cause were transferable at all, it went, under these acts of Congress, to the District Court, and not to the Circuit Court. This would have been true if Nebraska had not at the time of the transfer occupied a different judicial status from that occupied by Florida, Michigan, or Iowa, when these laws were passed. These States were not then a part of any one of the judicial circuits, while Nebraska, when this cause was removed, was attached to the eighth circuit. Their District Courts had general Circuit Court powers, while the District Court in Nebraska had only the ordinary jurisdiction properly belonging to the District Courts of the country. If Nebraska had not at the time of the transfer formed a part of a judicial circuit, her District Court would, by virtue of the laws above recited, have been clothed with the general powers of a Circuit Court, and could have taken cognizance of this cause, and it would, in the purview of these laws, have been rightfully transferable to it. To construe these laws so as to limit the right of transfer to the District Court alone, without regard to the powers of that court, would defeat the very object Congress had in view. That object is made plain enough by the legislation relating to this subject. It was, on the admission

of a new State, to transfer pending civil cases of a Federal character from the Territorial courts into the District Court, if the State did not form part of a judicial circuit; because in such a case the District Court was invested with Circuit Court powers. But if the State were attached to a circuit, then, as the District Court did not possess this jurisdiction, the cause was transferable to the Circuit Court. To adopt any other construction would render the provisions for the transfer of causes, in case a new State on its admission were attached to a circuit, nugatory.

It is said, if cases of a Federal character were properly transferable to the Circuit Court, this was not one of them; because it does not appear that the suit was between citizens of different States. It is true there is no direct averment to this effect, but it is the necessary consequence of the facts stated in the pleadings, that the parties to the suit were citizens of different States. The averment that the plaintiffs were a firm of natural persons, associated together for the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in said business at said place, is equivalent to saying they had their domicile there. In this country people usually live and have their citizenship in the place where they do business. Especially is this true of persons engaged in a business requiring capital, and involving risk, at a point which is remote from the great centres of trade and commerce.

The citizenship of the defendant is clearly enough averred. It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation formed under and created by the laws of the State of New York. The obvious meaning of this allegation is that the defendant is a citizen of the State of New York. The course of proceeding in the court below shows that the parties to the suit recognized it as being of Federal jurisdiction, and it could only be so (as there was no Federal question involved), on the ground that the plaintiffs and defendant were citizens of different States. If the parties had thought otherwise, after the cause reached the Circuit Court, the point would have

been taken, and an effort made at least to test the jurisdictional question. The record shows that nothing of the sort was attempted.

There remains to be considered the merits of this case, so far as they are presented in the bill of exceptions.

The only subject for review here is the charge given by the court to the jury. The court instructed the jury only on a single point—that of negligence. The jury were told substantially that, although the contract was legally sufficient to restrict the liability of the defendant as a common carrier, yet, if the defendant was guilty of actual negligence, it was responsible. And that it was chargeable with negligence, unless it exercised the care and prudence of a prudent man in his own affairs. The defendant requested the court to charge the jury that it was not liable unless grossly negligent.

To understand what are the rights of the parties to this suit, so far as the court was asked concerning them, it is necessary to see what were the facts proved in the case. It appears that the particular lot of gold dust, which is the subject of this controversy, was confided to the express company for transportation to Philadelphia, on the 29th of September, 1864, and that it was one of a series of shipments of the same kind, running through a period of eighteen months or more. The receipt given for the packages was not different from the ordinary receipts of the company, and was doubtless intended to limit the liability of the company as common carriers. There were two routes employed by the express company to convey their property—one across the State of Iowa, and the other to St. Joseph, Missouri, and thence across that State by the Hannibal Railroad. The latter was the most expeditious route, but the former the safest, as Missouri, although at the time adhering to the Union, was in a disturbed and unsettled condition. The property in dispute was conveyed by the St. Joseph route, and was robbed while in transit across the State by a band of armed men. Under the circumstances in which the country was then placed, no prudent man, in the management of his own

affairs, would have sent his property by the Missouri route, if another route were open to him. It seems that the plaintiffs acted on this idea, for one of them testifies that he notified the agent of the company not to send their gold dust by the St. Joseph route. If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in defiance of the wishes of the owner of the property, reject the safe, and adopt the hazardous route. Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation, whenever practicable.* In this case it was practicable to obey the instruction given by the plaintiffs, and the defendant furnishes no excuse for not obeying it.

It is said that the weight of the evidence is against the statement of the plaintiffs, that they directed their goods sent by the Iowa route. Conceding this to be true, it cannot be corrected here. It was a proper matter to be considered by the court below, on a motion for a new trial, but the granting or refusing such motions are not subject to be reviewed in this court.

If the evidence in the case tended to prove the defendant guilty of actual negligence, then the court below were justified in basing upon it an instruction to the jury. That it did tend to prove it is clear, and the charge of the court on the subject correctly stated the law to the jury.

As the court was not asked to instruct the jury on any other point, there is not, as the argument for the plaintiff in error seems to suppose, anything else for this court to review. It is the usual practice for the presiding judge at a nisi prius trial, in his charge to the jury, to take up the facts and circumstances in proof, explain their bearing on the controverted points, and declare what are the legal rights of the parties arising out of them. If the charge does not go far enough, it is the privilege of counsel to call the attention of

* Redfield on Carriers, § 34.

the court to any question that has been omitted, and to request an instruction upon it, which, if not given, can be brought to the notice of this court, if an exception is taken. But the mere omission to charge the jury on some one of the points in a case, when it does not appear that the party feeling himself aggrieved made any request of the court on the subject, cannot be assigned for error.

JUDGMENT AFFIRMED.

YOUNG *v.* MARTIN.

1. The entries of a clerk of a Territorial District Court, stating in a general way the proceedings had in that court, and that they were excepted to by counsel, do not present the action of the court and the exceptions taken in such form that they can be considered by this court.
2. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of the orders or judgment of the court.
3. To be of any avail, exceptions must be drawn up so as to present distinctly the ruling of the court upon the points raised, and must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by an appellate court.
4. When parties, after a demurrer interposed by them to an answer is overruled, instead of relying upon its sufficiency, file a replication, they thereby abandon the demurrer, and it ceases henceforth to be a part of the record.

ERROR to the Supreme Court of the Territory of Utah.

The case was begun in a District Court of the Territory just named, and was carried thence to the Supreme Court of the same, under the provisions of an act of the legislature of the Territory, providing for appeals to the Supreme Court, approved January 18th, 1861.* The 1st section of that act provides:

"That hereafter whenever any final order, judgment, or decree is made or rendered in the District Court of the Territory, the party aggrieved may have the same reviewed in the Supreme

* Revised Statutes of Utah Territory, 1866, p. 66.

Court on appeal, by obtaining from the clerk of the court, making or rendering such order, judgment, or decree, a complete transcript of the record of the case, which shall be filed with the clerk of the Supreme Court."

The 7th section provides that:

"The hearing of the Supreme Court shall be upon the record and argument of counsel; and the District Court is hereby required to sign all bills of exceptions taken to its rulings, decisions, or charge to the jury, which shall be incorporated into and constitute part of the record of the cause."

The 8th section provides that:

"When the judgment, final order, or decree shall be reversed, either in whole or in part, the Supreme Court may render such judgment as the court below should have rendered, or remand the cause to the court below to proceed according to the decision of the Supreme Court."

Final judgment was rendered in the District Court against the plaintiffs, on the 14th of March, 1867, and a complete transcript of the proceedings in the case was filed by the plaintiffs, with the clerk of the Supreme Court of the Territory, on the 2d of August, 1867, attached to which transcript was an assignment of errors by the plaintiffs, with a prayer asking that the judgment of the District Court might be reversed, and judgment rendered in favor of the plaintiffs on the record. No bill of exceptions was taken at the trial in said District Court, but in the record the following appeared, to wit:

"August 23d.

"Plaintiffs' counsel filed demurrer to defendant's answer, which was argued by Messrs. Baskin and Hempstead, for plaintiffs, and Messrs. Marshall and Carter, for defendant. Pleadings submitted to the court and held under advisement."

"August 24th.

"Court overruled demurrer filed by plaintiffs to defendant's answer, and ruled that defendant has a lien on the goods of E. R. Young & Sons, now in possession of defendant, for freight, both by the McWhurt train and the Irwine train.

"Plaintiffs ordered to reply as though demurrer had not been filed. C. H. Hempstead, Esq., counsel for plaintiff, excepted to the ruling of the court."

"December 7th.

"C. H. Hempstead, Esq., made a verbal motion praying for judgment and damages on the pleadings. Motion argued by Messrs. Baskin and Hempstead for plaintiffs, and Messrs. Marshall and Carter for defendant.

"Pleadings submitted to the court and held under advisement."

"December 8th.

"Motion for judgment overruled. Rulings excepted to by plaintiffs' counsel."

The Supreme Court of the Territory dismissed the appeal, and the plaintiff took this writ of error.

Mr. De Wolfe, for plaintiff in error; Mr. Van Cott, contra.

Mr. Justice FIELD delivered the opinion of the court.

There is no evidence contained in the transcript that any exceptions were taken to the action of the District Court of the Territory, except such as appears from the minutes of the clerk. These minutes are mere memoranda, stating, in the briefest and most general manner, the proceedings had in court. They do not purport to give the particulars of the proceedings, but only to describe their character. They were made to preserve an account of the general order of business of the court, and to assist the clerk in the subsequent preparation of the formal record. In this case they state that, on a day mentioned, the plaintiffs' counsel filed a demurrer, which was argued and taken under advisement; that, on the subsequent day, the demurrer was overruled, and the plaintiffs excepted. And, also, that afterwards, on a certain day, the plaintiffs' counsel made a verbal motion for judgment and damages on the pleadings; that the motion was argued and, on the following day, overruled, and that the ruling was excepted to.

These entries do not present the action of the court and the exceptions in such form that we can take any notice of

them. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court. To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by an appellate court.*

It is true, as stated by counsel, that the object of a bill of exceptions is to make matter of record what would not otherwise appear as such, and that no bill is necessary where the error alleged is apparent upon the record. So here, had the demurrer been in the transcript, and it had appeared that the plaintiffs had relied upon its sufficiency, and final judgment thereon had passed against them, the error of the court, if any existed, would have been open to examination, for it would have been disclosed by the proceedings. No bill of exceptions, then, could have presented more clearly the ruling of the court.† But the demurrer is not in the transcript, and it is only a matter of conjecture whether it was a special or general one; to the form or substance of the answer. Nor is any order overruling the demurrer shown; a statement of the clerk in his entries that such was the fact is all that appears. But, independent of this consideration, the ruling of the court on this point would not be noticed, for it appears that the plaintiffs, instead of relying upon the sufficiency of the alleged demurrer, filed a replication to the answer. They thus abandoned their demurrer, and it ceased to be a part of the record.‡

The exception to the ruling in denying the motion for judgment on the pleadings is not only subject to the general objection already stated, but to the further objection, that

* Williams *v.* Norris, 12 Wheaton, 119; Leveringe *v.* Dayton, 4 Washington's Circuit Court, 698.

† Suydam *v.* Williamson, 20 Howard, 427.

‡ Aurora City *v.* West, 7 Wallace, 92; Clearwater *v.* Meredith, 1 Id. 42; Brown *v.* Saratoga Railroad Co., 18 New York, 495.

the grounds upon which the motion was made or denied are not given. The motion was not made at the trial, and, as counsel suggests, it may have been denied on a point of practice, without respect to the merits.

JUDGMENT AFFIRMED.

GILBERT & SECOR *v.* UNITED STATES.

1. An act of Congress directing the Secretary of the Navy to enter into a contract with certain parties, provided it could be done on terms previously offered by the parties, does not, of itself, create a contract.
2. If such parties afterwards sign a written agreement with the secretary, on terms less favorable to them than the act of Congress authorized the secretary to make, they must abide by their action in accepting the less favorable terms.

APPEAL from the Court of Claims; the case being this:

By an act of March 3d, 1847, making appropriations for the naval service, certain sums were set apart for floating dry-docks at Philadelphia, at Pensacola, and at Kittery, which the Secretary of the Navy was directed to have built.

Proposals were received for these docks from several persons, and among them from Gilbert & Secor, who offered to build the dock at Kittery for $732,905. The proposals were made on a basis that the docks should have what is known "as tar and felt sheathing." If the sheathing known as "copper sheathing" was required, the offer was to do the work for an additional sum of $72,742.

Upon an examination of the proposals, and on full consideration of the plans proposed, it was found that the appropriation made by Congress in the act just mentioned, was insufficient to pay for the work on the plan approved by the secretary. Thereupon, under the advice of the Attorney-General, the secretary *declined to make any contracts.*

At the next session, Congress having considered the matter, passed another act,* in which the secretary was di-

* Act of 3d August, 1848.

rected, *in the execution of the act already mentioned*, to enter into a contract with Dakin & Moody for the construction of a *sectional* floating dry-dock, basin, and railways at Philadelphia, and with Gilbert & Secor, for the construction of a *balance* floating dry-dock, basin, and railways at Pensacola, and with one or the other of the parties for the construction of a floating dry-dock, basin, and railways upon either of those plans that the secretary might prefer for the navy yard at Kittery; provided that such contracts could be made at prices that should not exceed by ten per cent. the prices which had been submitted by either of said parties. It was also provided that the secretary should, in contracting with said parties, enlarge the dimensions of said works at each yard to a capacity sufficient for docking war steamers of the largest class.

Under the powers conferred by this statute, the Secretary of the Navy contracted with Dakin & Moody, for the dock at Philadelphia, and with Gilbert & Secor, for the work at Pensacola.

In determining which of the proposed plans (both of which it seems were patented) he would select for *Kittery*, he seems to have considered whether he could get the dock at that place copper-sheathed without any additional cost. It is recited in the contract, signed by him and the plaintiffs, for the work at that place, that "the Secretary of the Navy, in the execution of the aforesaid law, after mature deliberation thereon, and *in consideration that the said parties of the second part will copper-fasten said dock at Kittery*, according to the specifications for the Pensacola dock hereto annexed, has determined to select, and does hereby select, the balance dock, basin, and railways of Gilbert & Secor, parties of the second part, as best adapted for the navy yard at Kittery." A contract, with the recital just mentioned, and a provision that the dock should be copper-sheathed, was accordingly concluded. The work was to be done according to minute specifications, for the sum originally proposed, on the assumption that *felt and tar sheathing* would be used. When executing this contract, Gilbert & Secor had protested against

that provision. The contract also provided for the enlargement necessary for war steamers, and for the increase of the *price of the work by ten per cent.*

The whole work being completed, the price named in the *contract*, $732,905 was paid to Gilbert & Secor. They, however, contended that this sum was the sum named on an assumption that tar and felt sheathing, and not copper, would be used, and they accordingly asked for the $72,742 additional. The government declining to pay it, Gilbert & Secor then brought suit in the Court of Claims. That court dismissed their petition, and they took the present appeal.

Messrs. Carlisle and McPherson for them, appellants here, contended that the proposals were made under the first act of Congress, that it was in *execution of that act*, and of the proposals under *it*, that all which was subsequently done was done; and that what was thus subsequently done amounted to an acceptance of their proposals. No new proposals, it is certain, had been made. Under what else then than the old ones, could anything be done by the government?

The second act was passed only because the first one did not make an appropriation sufficient to meet the proposals, and was, in fact, an acceptance of them; the secretary only being required to complete the matter in form.

Mr. Norton, contra.

Mr. Justice MILLER delivered the opinion of the court.

The present claim for $72,742.82 is the difference in value between felt and tar sheathing, and copper sheathing, the latter of which, by their contract, Gilbert & Secor, the claimants, were required to put on the dock, and did put on it.

The claimants do not make any question that by the terms of the agreement signed by them, and by the Secretary of the Navy, they were bound to copper sheath the dock, and that this was included in the work which they agreed to do for the aggregate sum already mentioned. Nor do they contend that there was any mistake in reference to that par-

ticular, for they protested against that provision of the contract while they signed it.

But the proposition on which their claim is based seems, when fairly stated, to be this: That the act of Congress under which the secretary acted when he made the contract with them, was itself an acceptance of certain proposals made by plaintiffs, and, therefore, taken in connection with those proposals, constituted a contract binding on the government, and that under that contract the dock was built. That those proposals were framed on the basis of allowing the sum now claimed for copper sheathing if copper was used.

But it seems to us that the statement of the case sufficiently negatives the idea that the act of Congress completed a contract.

When did the claimants become bound to build such a work as that specified in their final contract? That work was much larger than the one for which they made proposals. When did they consent to the enlargement? Their proposals of the year previous had been rejected by the secretary. When did they renew them? The proposition which Congress authorized the secretary to accept was ten per cent. larger than any proposal they had made. Did Congress mean to say, we accept your proposal, and give you ten per cent. more than you have asked? Or did it mean to authorize the secretary to make the best terms he could, not exceeding that limit? Clearly it must have intended the latter.

It also appears from the agreement signed, and therefore accepted by the claimants, that the secretary was induced to exercise the option which the act gave him in regard to the two kinds of work, in favor of that of claimants, in consideration that they would copper-fasten the dock without additional charge. Having thus induced the secretary to decide in their favor, they are not at liberty to repudiate this part of their contract.

If these transactions are to be construed by the rules which govern agreements between private individuals, there does not appear to be any reason to infer a contract prior to the

written agreement between the parties; nor any reason why that agreement should not govern the rights of the parties.

JUDGMENT AFFIRMED.

KEMPNER *v.* CHURCHILL.

A sale of personal property, made much below its cost, by a man indebted to near or quite the extent of all he had, set aside as a fraud on creditors; it having been made within a month after the property was bought, and before it was yet paid for; made, moreover, on Saturday, while the account of stock was taken on Sunday (the parties being Jews), and the property carried off early on Monday.

APPEAL from the Circuit Court for the District of Northern Illinois, in which court, Churchill and others, merchants of New York, and judgment creditors of one Levison, filed a bill against a certain Kempner (Levison being impleaded), to set aside a purchase of a whole stock of dry goods which the bill alleged that Kempner, confederating and colluding with Levison how to cheat the complainant, and to hinder, delay, and defraud the creditors of Levison, had proposed to purchase, and had purchased of Levison, for a greatly inadequate consideration, to wit: for fifty-five cents on the dollar.

It appeared, from the testimony, that Levison, who kept a clothing store in Chicago, and had, at the time, a stock of clothes there, worth $6000, went on, about the middle of March, 1866, to New York, where, according to the testimony, he enjoyed the reputation of "a responsible, paying, first-class customer," and there laid in an additional quantity, which he purchased on credit, and which cost him $11,622 more. The new goods were forwarded to Chicago; and the whole stock thus cost $17,622. The circumstances attending the sale were thus testified to by Levison:

"The sale was made on the 8th of April, 1866. I came back from New York about the 22d of March, 1866. I was in Chicago some few days; Mr. Kempner came in the store one day, shook hands, and said he had an idea of going to Omaha to open business, and, if he could buy a cheap stock of goods, he would take

them up there; that was on Saturday, a week before the sale. I told him I had a pretty good stock of goods here that I would sell him, as I had a chance to go into something that would pay me better than this business just now. He said he would see, and come in to-morrow with his brother-in-law, and look over the goods, as he was a better judge of goods and prices than *he* was. On the following day, he came in with David Adams, and they did look over the stock, and he said he would go home and think about it, and come in to-morrow and see me. The next day, he came in and offered me fifty-five cents on the dollar. I got pretty mad at that, and told him seventy cents would not buy them, and went off and left him. A day or two afterwards, he came in again, and we had a talk, and he said the goods were not worth more than that to him, and he had taken advice with some friends, who told him that goods were not worth as much then as they were at the time I bought them, and my credit was not very good in New York, so I had to pay ten or fifteen per cent. more than any one else. He said he wanted to make something on them; he would have to sell them on credit, and wait for his money. I told him it was no such thing, that I did not pay more than any one else; that he might go around town and inquire, and make himself familiar with the prices, and he could find out. I told him it did not make any difference, that that money would not buy them, and I expected to hear from another gentleman in the country, who wanted to go into business in Chicago, and I would, probably, sell out to him; that ended the conversation that day. The next day, I think it was, I met Mr. Kempner and asked him why he circulated the reports around that he had offered me fifty-five cents, and that I was going to sell out. He said he did not circulate any reports, but he would take me in and show me a good honest man, who would tell me where those reports came from. I went in with him to David Witowsky's fur store, on Lake Street; Witowsky said he had heard reports, but could not tell where they came from. We three stood and talked about the value of the goods. I went out after a while and went home to the store. In the afternoon, Mr. Kempner was passing by, and I called him in. We had some talk there about business. He said to me, 'There is some pretty rough talk in town about you; you had better not delay this matter; you had better let me have the goods, and put the money in your pocket, and let the credit-

ors go to the devil,' or words to that effect. I told him I would not sell them for that price anyway. He said, 'That is my offer, and, if you can do any better, do it.' I told him I did not see what I had to fear from the creditors; that I did not owe any one anything *that was due*, except Freidlander, Steitch & Co. He said, 'You had better look out for them, I know them better than you do.' On Saturday, we came together again, in the store, the 7th of April, 1866. I told him I wanted to close the trade with him. I asked him to meet me half way in the offer. I had offered them to him before for sixty-five cents; either at this time or before he had offered me fifty-five cents. He said, 'No; he would not give any more than fifty-five cents.' Previous to that, I told him I would sell him the fixtures in the store. He said he would not have them if he bought the stock; that he would move the goods out of the store before he paid for them, or that he would pay for them as soon as he had them out of the store: I think the last were his words; that he did not want to have any trouble with them, for fear the creditors might replevy them. We closed the trade on Saturday, and he said he would come in on Sunday and take stock. On Sunday morning, he came in with David Witowsky, Jr., and David Adams; I was there with Mr. Berk. Before we took stock, Mr. Kempner and I had some conversation; he asked me how much I owed Freidlander, Steitch & Co. and several other parties. I told him I owed Freidlander, Steitch & Co. a little over $3000, and named over some other creditors, but I don't remember their names, or the amounts I gave. He said, 'Little Coleman' would have to suffer too. I told him I did not know that; I only owed him a little over $200, and I might pay that bill. We then went to work and took stock. When we got through taking stock, and we were starting for home, he said, 'You had better give me the key of the store, so as to show that the goods are in my possession.' I then gave him the key of the store, and told him I must have the money for the goods by twelve o'clock the next day. He said, you shall have it as soon as I get the goods moved. On Monday morning, I came down to the store about nine o'clock, or between nine and ten, and the goods were already removed."

The fifty-five per cent. agreed on between the parties, gave Levison $9725. The bill of the goods sold was, however,

made out on the basis of the New York cost, $17,622, and receipted accordingly. The goods were removed to a basement-story, or cellar, at some distance from the store (for the purpose, as Kempner asserted, of saving storage); and the $9725 paid in cash to Levison.

Levison in his answer given, as in his testimony, admitted the fraud. Kempner in his, denied all fraud on his part, and represented himself as having come from California with $12,000 in gold, his only fortune; that being in Chicago he met Levison, who had also been in California, and whom he had known there; that Levison *urged* him to buy him out; that after several interviews, Levison sent for him and accepted his offer of fifty-five cents for the dollar of cost, saying, "Well, you shall have them. I am sick of this business; I want to be in some business in which I shall be occupied all day long doing something." Kempner's answer further asserted that he knew of no judgments or liens on the property, and that the purchase was not made to forestall or delay Levison's creditors; and it denied the conversation stated by Levison in which he, Kempner, was represented as having urged Levison to make a sale and to disregard his creditors. It asserted that the goods were worth nothing like the cost price, and that the consideration paid was not fraudulently below value, and it charged that the complainant's bill was filed in collusion and conspiracy with Levison, to defraud Kempner, while he, Levison, was permitted to go free, with the money paid him.

There was a great amount of testimony (the record having had 260 pages) to show fraud. Much of it was not direct, and some of it was more or less contradictory. Numerous persons were examined to show that the cost price of the goods was too high; but they failed to show that it was so to the extent of forty-five per cent. or near it.

At the time of the sale Levison owed about $15,000. With the cash that Kempner paid him he could show in money and furniture about $13,000, owned by himself. His wife had property.

As to the conspiracy alleged by Kempner between the

complainants and Levison, it appeared that the sale having been made on the 9th, Levison was arrested on the 10th upon the affidavit of a brother-in-law to one of the complainants; that on the 11th, complainant came to Chicago; that he staid until the 14th; that while here he discharged the warrant of arrest of Levison, and employed Levison's previously retained counsel, to collect his debt out of the goods sold to Kempner; that on the 16th (Sunday intervening), Levison confessed judgment to the complainants; that on the 17th he confessed judgments to seven other of the creditors, now complainants, and on the same 17th April this bill was filed as a creditor's bill, on executions returned unsatisfied as against Levison; that none of these demands were due at the time under three months, except one, which rested in open account; that those judgments were confessed in the office of Levison's attorneys; and, that the bill waived an answer on oath.

The parties defendant were Jews.

The court below, on view of all the evidence, decreed the sale fraudulent, and Kempner appealed.

Mr. S. A. Goodwin, for the appellant:

We charge that the bill has been filed by collusion between the complainants and Levison, and we think that the dates at which, and the circumstances wherein the judgments were obtained show that.

But passing to the complainants' case, it is certain that they must establish affirmatively, that the sale was fraudulently intended by Levison, and, as a fact, that Kempner conspired with Levison to cheat and defraud the creditors by having such sale made with the design of keeping the merchandise beyond the reach of process of law; and that the sale was in fact made for such purpose, that is to say, to hinder and delay creditors.* These are the allegations of their bill.

* Cadogan *v.* Kennett, 2 Cowper, 434; United States *v.* Hooe, 3 Cranch, 88; Clements v. Moore, 6 Wallace, 299.

Argument for the appellant.

The *bona fides* of the purchase by Kempner is affirmatively established. Levison's whole indebtedness on the 9th of April, 1866, was within $15,000. He had full $13,000 money and chattels. The complainants do not allege nor show, nor did Levison, as a witness, pretend that he had not notes, claims, and choses in action, or other moneys to meet the balance of $1100 in full. His wife had money. It is incumbent on the complainants to show affirmatively that Levison was bankrupt, before they can charge that the sale was fraudulent. The complainants do not show anywhere in the case, that Levison has not now, nor that he has not always had money enough to pay these creditors all he owes. The answer which the complainant's solicitors drew for him does not *deny* that he has such money.

Kempner could not know of a fraudulent purpose which Levison did not entertain, so far as shown, for he (Levison) substantially negatives that. In the absence of that main necessary fact, the complainants have attempted to prove some remarks, which, if substantiated, they seem to suppose would show Kempner cognizant of some wrong intention. But they are all unsatisfactory for the conclusion, and every one of them denied by Kempner and disproved. Besides, if considered proved, they would not indicate knowledge or intent on Kempner's part, that the money paid would not be applied to satisfy creditors. If the sale was honest and fair, and for a fair price, it could make no difference that the creditors might not be paid in full. Purchases are often made of the stocks of insolvents, and rightly and honestly, although such consequences necessarily ensue.

As to the value of the goods there is a difference of opinion, but the preponderance is with the defendant. Inadequacy of consideration is thus exploded, either as a badge of fraud *per se*, or as a motive for a fraudulent collusion with Levison. Kempner's purpose of going into trade was a legitimate one. The right to sell was perfect in Levison, either at wholesale or retail. The right to buy and make a good, or even a hard bargain, cannot be denied to a purchaser, there being no fraudulent conspiracy between vendor and vendee.

The debts of Levison were not due. No suit had been commenced, or even threatened. Kempner could therefore have had no design to place these goods beyond the reach of an execution in behalf of these creditors. Levison's creditors had no lien on them fixed or inchoate. Nor had they begun, or threatened to begin any proceedings to mature a lien. The full price paid put Levison in funds to pay his creditors.

The Supreme Court of Illinois say, in *Waddams* v. *Humphrey*,*

"No matter how much a man may be indebted, he may sell his property for a fair price, *or even for a price below the market value*, if done honestly and with no view to delay, hinder, or defraud creditors of their just dues. A debtor may sell his property for a fair price, even if he sells it with the avowed intention of defeating an honest claim, if no lien exists to forbid it."

It was reasonable prudence for Kempner to remove the goods at once into his own possession after the inventory was made. Prompt possession has never before been urged as a badge of fraud. On the contrary, possession left with the vendor has always been considered ground of suspicion.† It is idle to say that the possession was in haste to avoid seizure by creditors. There was not only no such thing threatened, but not one of Levison's creditors was in a position, legally, to touch these goods by attachment, replevin, execution, or other process.

These parties were all Jews, and with them Sunday is always a secular and convenient day for any extra work.

Will it be said that the receipt on the invoice of goods sold, was taken for the whole sum fraudulently? The charge is without foundation. All the parties connected with the sale well knew the amount Kempner was to give. It was openly and notoriously known, and talked about by near a dozen witnesses. How then could Kempner expect to keep it a secret by the form of the receipt?

* 22 Illinois, 663; and see Hessing *v.* McCloskey, 37 Id. 342.

† Twyne's Case, 1 Smith's Leading Cases, 1.

Deeply as the law abhors fraud and crime, it equally abhors the imputation of either, except upon clear and controlling evidence. And the onus is therefore upon the creditor who assails a sale to *show* the fraud which he relies on.

Levison's testimony is worth very little, situated as he is, interested to pay his debts with property which he once sold, while he keeps the $10,000 consideration-money in his pocket, and proclaims his own turpitude.

Mr. Gillet, contra.

Mr. Justice GRIER delivered the opinion of the court.

It has been frequently held that fraud ought not to be presumed, but must be proved. But the evidence of it is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony.

It would be a troublesome, as well as an unprofitable task, to examine all the very astute arguments, founded on the large mass of testimony contained in the record, to show that the court below have come to a wrong conclusion. It suffices to say that it sufficiently appears that the evidence before the court fully justified their conclusion.

It is true that mere inadequacy of consideration, unless extremely gross, does not *per se* prove fraud. But the direct testimony here confirms the fact that Kempner urged the acceptance of his offer to purchase with arguments such as this: "There is some pretty rough talk in town about you. You had better not delay this matter. You had better let me have the goods and put the money in your pocket, and let the creditors go to the devil."

The circumstantial evidence amply confirms this direct evidence of fraud.

1st. The false receipts given for full value on Saturday.

2d. The account of stock made out on Sunday.

3d. The removal of the goods into a cellar on Monday.

The defendant's endeavor to prove by *experts*, that the price

given was sufficient, tends only to confirm the correctness of the decree of the Circuit Court, which is

AFFIRMED WITH COSTS.

MATTINGLY *v.* NYE.

1. The statute of 13 Eliz., ch. 5, which is in force in the District of Columbia, does not affect, in favor of subsequent creditors, a voluntary settlement made by a man, not indebted at the time, for his wife and children, unless fraud was intended when the settlement was made. *Sexton* v. *Wheaton* (8 Wheaton, 229; S. C. 1 American Leading Cases, 1), approved and affirmed.
2. A judgment for money due, at a certain time, against the party making the settlement, is conclusive in respect to the parties to it. It cannot be impeached collaterally, and it cannot be questioned upon a creditor's bill.

APPEAL from the District of Columbia; the case being thus:

Nye, a man not very provident, bought a city lot of no great value in Washington, with some money that he had, and on the 25th June, 1857, had it conveyed in trust for his wife and children, to one Harkness as trustee. The purchase and conveyance in trust was made, as it seems by Harkness's own account of it, by Nye at the suggestion of Harkness, "who, living in the neighborhood of Nye, and having frequent opportunities of seeing the destitution and need of the family, and the infirm and broken health of the wife, interested himself in securing a home for herself and children, proposed a conveyance by which the property should be secured against the contingencies of any future recklessness or want of care in the said Nye." On the 21st July, 1860—that is to say *a little more than three years after this transaction*—Nye obtained money of one Mattingly, a person with whom he had had frequent money dealings, and sometimes as it seemed at exorbitant rates (including some dealings before the purchase), making, for the money now got, an assignment of a certain claim, but whether in satis-

faction or as security the assignment did not clearly show. The money not being repaid, Mattingly sued and obtained judgment against him on the 10th June, 1863; and execution having issued without result, he now filed a creditor's bill againt him, his wife and children, making the trustee also a party, to set the trust aside, and have satisfaction from the property conveyed. The bill alleged that *at the date of the purchase and settlement* Nye owed him money; but this was denied by the answer, and, as this court considered on an examination of the evidence, not true!

It was also asserted in Nye's answer that the judgment given was given by default, and that nothing was due by him to Mattingly even then.

The question was, therefore, the validity, as against a party becoming a creditor three years afterwards, of a settlement in favor of his family, made by a man not indebted at the time, and made apparently without fraudulent intent in fact; the case being complicated only by the point set up in the answer of Nye, to wit, that the judgment on which the creditor's bill was filed was for an unfounded claim, and got through his own default.

The court below thought the settlement good; and dismissing the bill, Mattingly appealed.

Messrs. Cox and Phillips, for the appellant.

Mr. Bradley, contra, relied on *Sexton* v. *Wheaton;* and note thereto in 1 American Leading Cases, 1. He contended also, that there being a proceeding in equity which rested wholly on an assumption of a valid judgment, as a base, it was competent for the defendant to show that in fact the judgment had no validity; even if by so doing he impeached it collaterally.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an appeal in chancery from the decree of the Supreme Court of the District of Columbia. The case as disclosed in the record is as follows: On the 10th of June,

1863, the complainant recovered a judgment at law against the defendant, J. W. Nye, for $2450, with interest from the 21st of July, 1860, until paid, and costs; a *fi. fa.* was issued and returned *nulla bona.* The defendant has no property liable to execution. On the 25th of June, 1857, Nye bought and paid for the property described in the bill. It was conveyed by deed of that date to the defendant, Harkness, in trust for Mary Nye, the wife of J. W. Nye, and her children. The legal title is still in Harkness upon that trust. The bill is a creditor's bill, filed to reach this property. It alleges, in addition to the facts already stated—which are not controverted—that a large part of the indebtedness for which the recovery at law was had, subsisted at the time the property was bought and conveyed, and that hence it is liable in equity to be applied, in satisfaction of the judgment.

Nye and Harkness only answered. Harkness denies that there was any indebtedness by Nye to the complainant at the time of the purchase and conveyance of the trust property. Nye alleges usury in the transactions between him and the complainant to a very large extent; that they had settled everything before the trust property was conveyed to Harkness, and that he then owed the complainant nothing; that the judgment was rendered by default; that he intended to defend, and could have done so successfully, but that he was prevented by extreme illness.

Testimony was taken upon both sides. The court below dismissed the bill.

The case involves several legal propositions which it is proper here to state.

1. The statute of 13 Eliz., ch. 5, is in force in the county of Washington, but it does not affect a conveyance like this as to subsequent creditors, unless fraud was intended when it was made. (*Sexton* v. *Wheaton*, 8 Wheaton, 239; S. C. 1 American Leading Cases, 1.) The whole learning of the law upon this subject is so fully developed in the note to this case in the work last mentioned, that it would be a waste of time to do more than refer to it.

2. Such settlements, though voluntary, are founded upon a meritorious consideration, and will be upheld and enforced in equity against the husband.*

3. The judgment is conclusive in respect to the parties to it. It cannot be impeached collaterally, and it cannot be questioned upon a creditor's bill.

If in this case there is any ground of equitable relief, it should have been presented by a cross-bill, or other proper proceeding had directly, to affect the judgment.†

Here the question is not as to the conclusiveness of the judgment, but as to the indebtedness of Nye to the complainant when the property was conveyed to Harkness. The trust deed bears date on the 23d of June, 1857. The judgment was recovered on the 10th of June, 1863, nearly six years later. The judgment was founded upon an assignment by Nye to the complainant of $2450 of a claim in favor of Bargy and Stewart against the United States. Nye was the assignee of those parties, and his assignment to the complainant is dated July 21st, 1860. This was about three years before the date of the judgment.

But it is alleged by the complainant that the consideration of this assignment included two debts due to him from Nye, evidenced by instruments bearing date on the 2d of November, 1853, and amounting together to $1650. One is an order by Nye on General McCalla to pay the complainant the sum of $1450 out of the claim of Bargy and Stewart before-mentioned. The other is a like order for the payment of $200 out of the same claim, or out of another claim which is mentioned, payment to be made out of the first money which should be received on either, after reserving $500 to meet a previous order which Nye had given. The complainant insists that these two orders represented debts which subsisted more than two years before the execution of the trust deed, and which still subsist. Nye insists that

* Ellison *v.* Ellison, 1 Leading Cases in Equity, 199.

† Bank of Wooster *v.* Stevens, 1 Ohio State, 233; Marine Insurance Co. *v.* Hodgson, 7 Cranch, 336; Peck *v.* Woodbridge, 3 Day, 30; Davol *v.* Davol, 13 Massachusetts, 265; Story's Equity Pleadings, § 782.

they were given and received in discharge of all his liabilities to the complainant down to their date, and that the complainant took them at his own risk. Here lies the stress of the controversy between the parties.

Nye and the complainant were both examined as witnesses. A considerable mass of other testimony is found in the record. It is to some extent conflicting, but we have had no difficulty in coming to a satisfactory conclusion as to the facts. We think they are as follows:

The complainant made advances of money to Nye from time to time and charged him high rates of usury. Nye evinced a strange fatuity in submitting to whatever terms the complainant thought proper to impose. The order for $1450 was given to the complainant for a much larger sum than he claimed to be due; Nye testifies that it was for double the amount. It was not doubted then that the claim to which the order refers would be speedily sanctioned by Congress, and paid by the government. A committee of the House of Representatives had unanimously reported a bill to pay it. This has occurred more than once since. There has been at no time any adverse action; but the claim has not yet been finally acted upon and is still pending before Congress. According to the testimony of Nye, at the same time that he gave this order to the complainant he gave a like order to William G. White for double the amount of a debt due to him. The condition upon which both orders were given was the same. It was that the creditors should take them in discharge of their debts, and that Nye was to be under no further personal liability touching either the debts or the orders. He avers that they were received by the complainant and White respectively with this agreement.

White was examined as a witness. Speaking of these orders, he says: "That order in my favor was taken by me in full satisfaction of my claim on Mr. Nye; *I understood from Mr. Mattingly that he received the order from Mr. Nye in satisfaction of his claim.*" The complainant in his testimony admits that he advanced but $100 for the order for $200, but

says, the balance was "*in consideration of advantages, benefits, and favors I had done him.*" This order was taken like the other, with the understanding that there was to be no personal liability on the part of the drawer. The creditor was to look alone to the fund upon which it was drawn for payment.

These conclusions receive strong support from the fact that on the 5th of January, 1857, the complainant addressed a letter to S. W. McKnew, in which he stated that he had settled with Nye, and, in effect, that Nye owed him nothing. He complains that this letter was obtained from him by unfair means. The testimony of McKnew shows that in this he is mistaken.

In regard to the assignment of $2450 of the Bargy and Stewart claim, upon which the judgment was recovered, Nye testifies that the only consideration for it, in addition to the pre-existing orders of $1450 and $200, was a further advance by the complainant of $200—$100 in money and the same amount in groceries.

The complainant says: "We had in 1860 such a settlement as we always had. He obtained further advances—one of $400, one of $200, and some smaller amounts at different times which I do not recollect." Even this would leave a large margin of difference between the amount assigned and the amount of the consideration. There are several features in the complainant's testimony which impress us unfavorably, but it is not necessary to dwell upon them. Nor is it material to consider the facts relating to the last assignment. We are entirely satisfied that the orders of November 2d, 1853, were taken by the complainant upon the terms stated by Nye and White. There was, therefore, no indebtedness by Nye to the complainant when the trust deed was executed to Harkness, nor subsequently, until the assignment of July 21st, 1860, was given, if there were before the rendition of the judgment. This is decisive of the case before us. Harkness and Mrs. Nye were neither parties nor privies to the judgment. Their rights, legal and equitable, were vested and fixed by the deed. Neither Nye nor the

Argument for the defendant in error.

complainant could do anything subsequently to impair them. The settlement of 1860 between those parties, and the judgment recovered upon the instrument then given, could have no retroactive effect, so far as the rights of trustee and *cestui que trust* were concerned.

The court below, we think, properly dismissed the bill, and the decree is AFFIRMED.

AVENDANO *v.* GAY.

1. A party in this court cannot allege as error in the court below, the admission of evidence offered by himself and objected to by the other side.
2. A statement of facts, made and filed by the judge several days after the issue and service of the writ of error in the case, is a nullity. *Generes* v. *Bonnemer* (7 Wallace, 564), affirmed.

ERROR to the Circuit Court of Louisiana.

Avendano brought suit in the court below against Gay; and, in the course of the trial, offered certain evidence, which was objected to by the defendant, but which was admitted, notwithstanding, by the court. The defendant excepted, and a bill of exceptions was sealed. A verdict was given against the plaintiffs, who brought the case here on error. The writ of error was allowed on the 9th of July, 1867. The citation was issued on the 10th, and served on the 11th. On the 16th of July, a "statement of facts," by the judge who heard the case, was filed, and the cause in this state was here.

Mr. Durant, for the plaintiff in error, referring to the action of the court below in admitting the evidence, contended, that upon the case, as found by the court below, the judgment ought to be reversed.

Mr. Janin, contra, observing that the admission of the evidence was on the plaintiff's own offer, relied on *Generes* v. *Bonnemer*,* as disposing of the case; quoting the following passage:

* 7 Wallace, 564.

Syllabus.

"To permit the judge to make a statement of facts, on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties, who have judgments of record, entirely in the power of the judge, without hearing and without remedy. The statement of facts, filed without consent of the parties, must be treated as a nullity; and, as there is nothing of which error of the court below can be predicated, the judgment must be affirmed."

Mr. Justice MILLER delivered the opinion of the court.

In order to show error in the proceedings in the Circuit Court, the counsel of the plaintiff in error, who was plaintiff below, has referred to a bill of exceptions taken by the defendant to the ruling of the court admitting evidence, offered by plaintiff against defendant's objection. If there was error in the ruling, it was at plaintiff's request, and to the prejudice of defendant, and can form no ground of reversing the judgment, which, notwithstanding this testimony, was for the defendant.

Counsel also attempts to impugn the judgment, as not being supported by the facts of the case, and relies on what purports to be a statement of the facts found by the court. But the statement is filed in the court several days after the issue and service of the writ of error in this case, and is, therefore, a nullity, as we decided in the case of *Generes* v. *Bonnemer*.

JUDGMENT AFFIRMED.

THE BALTIMORE.

1. *Restitutio in integrum* is the leading maxim as to the measure of damages in cases of libel in admiralty, for injury to vessels, for collision: in other words, where repairs are practicable, the general rule is, that the damages shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred. And this rule does not allow deduction, as in insurance cases, for the new materials furnished in the place of the old.

Statement of the case.

2. Although, if a vessel be sunk by collision in so deep water, or otherwise so sunk, that she cannot be raised and repaired, except at an expense equal to or greater than the sum which she would be worth when repaired, the rule cannot apply, still the mere fact that a vessel is sunk is not, of itself, sufficient to show that the loss is total, nor to justify the master and owner in abandoning her and her cargo.
3. Courts of admiralty cannot properly allow counsel fees to the counsel of a gaining side in admiralty, as an incident to the judgment, beyond the costs and fees allowed by statute. Under the statute now regulating the fees of attorneys, solicitors, and proctors (the statute, namely, of 26th February, 1853, 10 Stat. at Large, 161), a docket fee of twenty dollars may be taxed, on a final hearing in admiralty, if the libellant recover fifty dollars, but, if he recovers less than fifty dollars, only ten.

THE schooner Woolston, with a cargo of coal, and the steamer Baltimore, collided in the Potomac, on the 16th of December, 1863, and the schooner and her cargo sank. The owners of the schooner accordingly libelled the steamer in the Admiralty Court of the District. The libel averred that the collision had been caused wholly by the steamer's fault, and that the schooner had sunk in such deep water as to make both her and her cargo a total loss, since the cost of raising either, or both, would be greater than its or their value.

These allegations, both as to the fault and the total loss, the answer explicitly denied. The testimony as to the question of fault, need not be stated, since it appeared that a part of it was given below, was not in the record sent to this court, and the court therefore did not pass at all upon the merits. On the other matter, the matter of total loss, it rather showed that the water in which the schooner went down, was not so deep but that her masts were visible eighteen feet above the water, and that her position, as she lay, was clearly discernible.

No proof was given of the fact of a total loss, further than that the vessel sunk.

The court, regarding the steamer as in fault, entered a decree for the libellants, and, upon the report of a commissioner, decreed, as damages, notwithstanding exceptions by the respondents, the full value of the schooner and cargo, at the time of the collision, and awarded to the libellant's

counsel $500 as a fee. This decree having been affirmed by the Supreme Court in general term, the case was now here on appeal.

Mr. Ashton, for the appellant:

I. The most palpable error in law of the court below, and one considerable, as respects amounts, relates to the assessment of damages.

The true measure of the damages in this case, was the expense of raising and repairing the vessel, so as to make her equal to the value before the collision, and the expense of raising the cargo, and the amount of any deterioration which it might have undergone in consequence of the sinking.

Mr. Justice Grier, in a collision case in the third circuit,* forcibly observes:

"This is not the first instance in which I have had to notice that where one vessel has been so unfortunate as to come into collision with another, the parties injured suppose that the insurance doctrine of *abandonment* will apply to their case, and they may, therefore, increase the damages by their own neglect. We are all wise after the event, and if a judge can point out how the accident might have been avoided, the unfortunate party is condemned to pay the damage. But this amount cannot be increased by the negligence or folly of the injured party. *The only measure of damages is the amount it would cost to repair the damage, with some allowance for demurrage.*"

In that case, the District Court had allowed the difference between the value of the vessel, before the collision, and the amount realized by the owners by a sale of the hull, after the collision. The decree was reversed by the Circuit Court, and the amount which it would have cost to repair the vessel was alone allowed.

This principle was directly adjudged to be the correct one by this court, in the case of *The Catharine*,† where the court said, that in a case of a vessel sunk by a collision, the inquiry

* The Harriet Rogers, A. D. 1867, 3 Wallace, Jr.

† 17 Howard, 174; and see Williamson *v.* Barrett, 13 Id. 101.

to be made is, as to the practicability of raising the vessel and cargo, and repairing the former, and that the expense attendant thereon is the principal ingredient of the damage proper to be allowed. The court, in that case, condemn the principle which governed the court below in the present case, in respect to the damages; that is, that the owners of the schooner had a right to abandon her as a *total loss*, and look to the steamer for compensation. With this authority, there is no use of discussing further the law.

The libel here alleged a *total loss*. The answer denied it. There was no evidence before the court on the point. It was not proved; and yet the court, without evidence, gave the full damages claimed. But this is not all. All the evidence in the case shows that the vessel probably, and the cargo certainly, which was coal, might have been raised.

Numerous witnesses for the libellants spoke of having seen the masts, recognizing their color, and also of having seen sails of the schooner above water, as late as June, 1864, the collision having occurred in December, 1863.

No effort was made by the libellants to raise either vessel or cargo; and no proof given to show that this was impossible, or that the cost would have been greater than their value. Of course, the coal could have been taken out without much expense.

For these reasons alone, the decree should be reversed, and the case remanded for an inquiry as to the actual damage sustained, according to the legal principles heretofore applied by this court.

[The counsel then went into an argument on the merits, unnecessary to be reported, as the judgment here was given on an assumption made for this hearing alone, that on this point the decree was correct.]

II. The counsel fee was, perhaps, not warranted by any statute, or entirely correct practice. But the error, as to the measure of damages, is the error which we insist on.

Messrs. Williams and Fendall, contra, contended,

I. That while, of course, this court now had, under any

circumstances, the right to review on appeal, cases in admiralty, and to reverse decrees of the Circuit Court upon them, yet that the decree of the judge who heard the cause in the first instance having been in favor of libellants, and that decree having been affirmed by a full court at the General Term, and testimony supporting their decision, the decree would not be reversed on mere doubts raised here.*

II. That the vessel was sunk in so deep water that nothing but the top of her masts could, even by the testimony of the libellant's witnesses, be seen; and that, under those circumstances, she was so far worthless, as that she might be properly abandoned to the wrongdoers who struck and sunk her; that such parties had no right to call on the injured party to undertake a task desperate, or nearly so.†

III. That the allowance for fees to counsel in admiralty was correct, as was decided both in *The Apollon*,‡ and in *Canter* v. *The Ocean Insurance Company*.§

Mr. Justice CLIFFORD delivered the opinion of the court.

Cases of admiralty and maritime jurisdiction, since the passage of the act of the 3d of March, 1803, cannot be brought here for re-examination in any other mode than by appeal; and the provision is, "that upon such appeal, a transcript of the libel, answer, depositions, and all other proceedings, of what kind soever in the cause, shall be transmitted to" this court. Prior to that time, the judgments and decrees of the Circuit Courts in civil actions and suits in equity, whether brought there by original process, or transferred there from the courts of the several States, or from the District Courts, could only be removed into this court for revision by writ of error; and the further provision was, that there should be no reversal in this court for any error in fact, which still continues to be the rule of law in respect to all cases brought here from the Circuit Courts by writs of error.

* Newell *v.* Norton, 3 Wallace, 267; The Hypodame, 6 Id. 223.

† The Columbus, 3 W. Robinson, 158; The Eugenie, 1 Lushington, 139.

‡ 9 Wheaton, 362. § 3 Peters, 307.

Power to reverse for error, in fact, any judgment or decree of a Circuit Court brought here for revision, being absolutely prohibited, it became necessary to prescribe some mode by which the facts in equity suits and in cases of admiralty and maritime jurisdiction should be ascertained and embodied in the record, and it was accordingly provided in the 19th section of the Judiciary Act, that it should be the duty of the Circuit Courts in such cases to cause the facts on which they founded their sentence or decree fully to appear upon the record in some one of the modes therein described, and while that provision remained in force this court had no more right to re-examine the facts found in such a case than the court possesses in a common law suit where the facts are found by the verdict of a jury.*

Appeals, however, are now allowed to this court by the amendatory act, in all such cases where the matter in dispute, exclusive of costs, exceeds the sum or value of $2000, and so much of the 19th section of the Judiciary Act as provided for the finding of the facts in the Circuit Court, and so much of the 20th section of the same act as provided that such cases should be removed into this court by writs of error, are repealed.

Viewed in the light of the repealing clause in that act, and the requirement that the transcript shall embrace the depositions as well as the pleadings and proceedings in the case, it is evident that Congress intended that this court shall hear and determine the whole merits of the controversy. Provision is also made by that act, that new evidence may be received by this court, in admiralty and prize causes, which shows to a demonstration that the facts, as well as the law of the case, are open to revision on the appeal.

Where the appeal involves a question of fact, the burden is on the appellant to show that the decree in the subordinate court is erroneous, but it is a mistake to suppose that this court will not re-examine the whole testimony in the case, as the express requirement of the act of Congress is, that

* 1 Stat. at Large, 84; 2 Id. 244.

the Supreme Court shall "hear and determine such appeals," and it is as much the duty of the court to reverse the decree from which the appeal is taken for error of fact, if clearly established, as for error of law.

Appeal was taken in this case from the decree of the Supreme Court of the District affirming the decree of the District Court, sitting as a court of admiralty in a cause of collision, civil and maritime.

By the transcript, it appears that the owners of the schooner J. W. Woolston filed a libel *in rem* against the steamer Baltimore, her engine, machinery, boats, apparel, tackle, and furniture, claiming damages as for a total loss of the schooner and her cargo, consisting of two hundred tons of coal, and also for the loss of the freight on the cargo, and for the loss of the equipment of the schooner.

Bound on a voyage from Philadelphia to the port of Washington, the schooner, when the collision occurred, was coming up the river Potomac towards her port of destination. Though cloudy, the night was not very dark, and the schooner had a light at her bow, under the jib-boom, and she had two good lookouts properly stationed in the forward part of the vessel. She was steering west-northwest, with all her sails set, and was proceeding safely on her voyage up the river under a good breeze, when the lookouts descried the steamer heading in a southeasterly direction and coming down the river, and the charge in the libel is, that the steamer, when she was not more than three hundred yards from the schooner, suddenly changed her course, came down on the schooner, and struck her near midships, and caused her to sink in the deepest part of the channel. Due vigilance, it is alleged, was practised by the schooner to prevent the collision, and that it was occasioned solely by the gross negligence and culpable mismanagement of the steamer.

Pursuant to the warrant issued for the purpose, the steamer was arrested and the claimants appeared and gave a bond for her value in the sum of $8350. In their answer they admit that the state of the wind and the weather at the time

of the collision is correctly described in the libel, but they allege that the proper course of the schooner in coming up the river was northwest by west half west; that instead of pursuing that course she was heading, when first seen by the steamer, diagonally across the river; that the bell of the steamer was immediately rung and her engine stopped, but that it was too late to avoid the collision; that the collision was wholly occasioned by the fault and carelessness of those in charge of the schooner in attempting to cross the bows of the steamer instead of keeping their course, as they were bound to do by the well-known rules of navigation.

I. Testimony was taken on both sides, but the court is not inclined to decide the merits of the controversy, as the clear inference from the certificate of the clerk is, that the whole testimony taken in the District Court is not contained in the copy of the record transmitted to this court. Although the record in that behalf is apparently defective and incomplete, still the court deems it proper to determine some of the questions presented for decision, as otherwise it may hereafter become necessary to send the case back a second time.

Directions were given to the commissioner to whom the cause was referred, in the decretal order, to take proof of the value of the schooner, her cargo, furniture, and fixtures, at the time she collided with the steamer, and also to inquire into the damage which thereby accrued to the libellants, and the cost of the suit, including an allowance for fees to the counsel of the libellants, and to report the same to the court.

Agreeably to those directions the commissioner heard the parties and reported that the libellants were entitled to recover $5000 for the actual value of the schooner at the time she was sunk, $1521.96 for the value of the cargo, $200 for the value of the furniture and fixtures, $450 for the loss of freight, and $100 for profits on the cargo, together with costs of suit, including $500 as an allowance for fees to the counsel of the libellants.

Exceptions were duly taken by the claimants to the report

of the commissioner, setting forth thereto three objections: (1.) That the finding as to the value of the vessel is erroneous. (2.) That the allowance of counsel fees is unauthorized. (3.) That the allowance for profits on the cargo is incorrect. Both parties were heard, and the court sustained the third exception, but overruled the first and second, and confirmed the report, striking out the $100 for profits on the cargo.

II. Suppose the libellants are entitled to recover, still the claimants insist that the rule of damages adopted by the District Court is erroneous.

Owners of ships and vessels are not now liable for any loss, damage, or injury by collision occasioned without their privity or knowledge, beyond the amount of their interest in such ship or vessel and her freight then pending.* Subject to that provision in the act of Congress, the damages which the owner of the injured vessel is entitled to recover are estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention.†

Restitutio in integrum is the leading maxim in such cases, and where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred; and in respect to the materials for the repairs the rule is that there shall not, as in insurance cases, be any deduction for the new materials furnished in the place of the old, because the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indem-

* 9 Stat. at Large, 635; The Niagara, 21 Howard, 26.

† 1 Parsons on Shipping, 538; Maude & Pollock on Shipping, 411; The Ann Caroline, 2 Wallace, 538; Tindall *v.* Bell, 11 Meeson & Welsby, 232.

nification is not limited by any contract, but is coextensive with the amount of the damage.*

Such repairs, in consequence of a collision, may enhance the value of the vessel and render her worth more than she was prior to the accident, and in that state of the case the rule in insurance cases is that one-third of the value of the new material is deducted, because the new material is more valuable than the old, but the rule is not so where the repairs are required in consequence of a culpable collision.†

Restitution or compensation is the rule in all cases where repairs are practicable, but if the vessel of the libellants is totally lost, the rule of damage is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction.‡

Allowance for freight is made in such a case, reckoning the gross freight less the charges which would necessarily have been incurred in earning the same, and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of voyage.§

Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her would exceed or equal her value after the repairs were made.

Experience shows that in many cases where the injured vessel is sunk, especially when the disaster happens in rivers or harbors, the vessel may be raised at moderate expense, and that the cargo, if not perishable, may be saved and re-

* Williamson *v.* Barrett, 13 Howard, 110; The Gazelle, 2 W. Robinson, 281; Sedgwick on Damages (4th ed.), 541; MacLachlan on Shipping, 285.

† The Clyde, Swabey, 24; The Pactolus, Ib. 174; The Catharine, 17 Howard, 170.

‡ The Clyde, Swabey, 23; 1 Parsons on Shipping, 542; The Granite State, 3 Wallace, 310; The Ann Caroline, 2 Id. 538; The Rebecca, Bl. & H. 347; The New Jersey, Olcott, 444.

§ The Canada, Lushington, 586.

stored to the shipper, or carried forward to the port of destination, and the rule in such cases is to award such damages only as will compensate the owners for the loss incurred, which is held to include the expense of raising the vessel and putting her in repair, with a proper allowance for the loss of freight and for the damage to the cargo, and for the detention of the vessel during the time necessary to make the repairs and fit the vessel to resume her voyage.*

Justice as well as sound policy forbids that the owner of a vessel sunk by collision should be allowed to recover the full value of the vessel and cargo except in cases where the entire property is lost by the disaster, which is not true in a case where, by reasonable exertions, the vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies. Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were in fault, but that no negligence on their part has increased or aggravated the injury. Damages are awarded in such cases for the injury done to the vessel and cargo by a wrongful act, but if the party suffering the injury to his property will not employ any reasonable measures to stop the progress of the damage, but wilfully and obstinately, or through gross negligence, suffers the damage to augment, it is his own folly, and the law will not afford him any redress for such part of the damage as proceeded directly from his own culpable default.

Persons injured in their property by collision are entitled to full indemnity for their loss, but the respondents are not liable for such damages as might have been reasonably avoided by the exercise of ordinary skill and diligence, after the collision, on the part of those in charge of the injured ship.†

Responsive to these views, the suggestion is, that the libel

* Williamson *v.* Barrett, 13 Howard, 110; Sturgis *v.* Clough, 1 Wallace, 272.

† The Flying-Fish, B. & Lush. 443; S. C., 3 Moore Privy Council (N. S.) 86; The Lotus, Holt, R. R. 183; The Lena, Ib. 213.

alleges that the schooner and cargo were sunk in such deep water as to make both a total loss, but the insuperable difficulty in the way of that suggestion is, that the allegation of the libel is expressly denied in the answer, and the libellants failed to introduce any proof to support their allegation. Subsequent to the disaster, several witnesses saw the schooner, and they concur that her masts were some eighteen feet out of water, and that she lay with her stem to the west-northwest, in the exact course in which she was steering when she was sunk by the steamer. Theory of the libellants is, that the vessel and cargo were of no value, but the court cannot adopt that theory in the absence of any proof to warrant the conclusion.*

Decided cases may be found where it is held that the owner of the injured vessel is not bound to raise the vessel in a case where she was sunk by a collision, but it is clear, that the court cannot award damages for a total loss, where it appears probable that the vessel and cargo may be raised without much expense, and restored to their owners.†

III. Due exception was also taken to that part of the report of the commissioner in which he allowed to the libellants, the sum of five hundred dollars for counsel fees, but the District Court overruled the exception and confirmed the report.

Taxable costs are recognized by the Judiciary Act, in several of its sections, as a part of a judgment or decree in a Federal court, but it contains no fee bill, nor does it furnish any express authority for any such taxation. Costs have usually been allowed to the prevailing party, as incident to the judgment, since the statute 6 Edw. I, c. 1, § 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was organized.‡

* Miller *v.* Mariner's Church, 7 Maine, 51; Loker *v.* Damon, 17 Pickering, 284; Thompson *v.* Shattuck, 2 Metcalf, 615; Sedgwick on Damages (4th ed.) 105.

† The Columbus, 3 W. Robinson, 158; The Eugenie, 1 Lushington, 139; Lowndes on Collision, 148.

‡ Hathaway *v.* Roach, 2 Woodbury & Minott, 63; 2 Tidd's Practice, 945;

Opinion of the court.

Circuit Courts, under the Judiciary Act, have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, in the cases described in the 11th section of that act.*

Cases of Federal cognizance, commenced in a State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, may be removed, under the conditions specified in the 12th section of the act, into the Circuit Courts.†

Such courts also may make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States.‡

Where the plaintiff or petitioner recovers less than five hundred dollars, or the libellant, upon his own appeal, recovers less than three hundred dollars, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs. Appeals from the decrees of the District Court to the Circuit Court were allowed by that act, where the matter in dispute exceeded, exclusive of costs, the sum or value of three hundred dollars, and the final judgments rendered in the District Courts might be re-examined in the Circuit Court on writ of error, where the matter in dispute exceeded, exclusive of costs, the sum or value of fifty dollars; and a similar provision is made for the re-examination by this court of the final judgments and decrees of the Circuit Courts, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars.

Just damages for delay and single or double costs may be adjudged to the respondent in error, at the discretion of the court, in all cases where the judgment or decree is affirmed.§

Provision is also made that the district attorney shall receive, as compensation for his services, such fees as shall be

The Christina, 8 Jurist, 321; Conklin's Treatise, 426; Laws of the United States Courts, 255.

* 1 Stat. at Large, 78. † Ib. 80. ‡ Ib. 83. § Ib. 85.

taxed therefor in the respective courts, before which the suits or prosecutions shall be, and the act makes no other provision for his compensation.*

Weighed in the light of these several provisions in the Judiciary Act, the conclusion appears to be clear that Congress intended to allow costs to the prevailing party, as incident to the judgment, as most of the regulations referred to would be meaningless upon any other theory. Concede that to be so, still the inquiry arises, by what rules was the taxation to be regulated, and what were the rates of fees to be allowed; to which inquiries there can be but one answer, unless it be assumed that Congress intended to leave the whole matter to the discretion of the court trying the case, which cannot be admitted. Reject that construction, and the only reasonable one which can be adopted is, that the Federal courts were referred to the regulations upon the subject in the courts of the State, and no doubt is entertained that such was the intention of Congress, as conclusively appears by the terms of the Process Act, which was passed five days after the approval of the Judiciary Act. By that act the modes of process and the rates of fees allowed in the Supreme Courts of the States, were expressly adopted as regulations in that behalf, in common law suits, in the District and Circuit Courts established by the prior act. Rates of fees, in causes of equity and of admiralty and maritime jurisdiction, were also prescribed by that act, and they were therein declared to be the same as are and were last allowed by the States, respectively, in the court exercising supreme jurisdiction in such causes. State forms of writs and executions were also adopted by the same act, and the rates of fees and the forms and modes of process ever after remained the same, except so far as they have been changed by subsequent legislation, or by the rules ordained by the Supreme Court. Temporary though the act was, still it was of sufficient duration to put the new system in complete operation.†

Subsequent to the passage of that act, the costs taxed in

* 1 Stat. at Large, 93.

† Ib. 123; Ib. 191.

the Circuit and District Courts were the same as were allowed at that time in the courts of the State, including such matters as the travel and attendance of the parties, fees for copies of the case, and abstracts for the hearing, compensation for the services of referees, auditors, masters, and assessors, and many other matters not embraced in the fee bills, since passed by Congress.*

Most of the provisions of that act were incorporated into the second section of the act of the 8th of May, 1792, but the particular regulation, adopting the State fee bill as the rate of fees in the Circuit and District Courts, was not reproduced in that section, as that fee bill had already been adopted by the Federal courts.†

Since that time, costs in the Circuit and District Courts, held in the old States, have been taxed under that regulation as adopted by that act, except so far as the rates of fees have been changed by subsequent legislation.‡

Congress, by the act of the 1st of March, 1793, regulated more specifically the taxation of costs in admiralty proceedings in the District Courts.§

Fees of the attorney and counsellor were prescribed by the 1st section of the act. They were a stated fee of three dollars for drawing and exhibiting the libel, claim, or answer in each cause; three dollars for drawing interrogatories, and three dollars for all other services in any one cause. Nine dollars only could be taxed for the services of an attorney or counsellor, but the 4th section of the act provided, that there be allowed and taxed, in the Federal courts, in favor of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attorney and counsellor's fees, except in the District Courts, in causes of admiralty and maritime jurisdiction, as are allowed in the Supreme or

* Crosby *v.* Folger, 1 Sumner, 514; Brown *v.* Stearns, 13 Massachusetts, 536.

† Ibid. 276; Hathaway *v.* Roach, 2 Woodbury & Minott, 68; Hovey *v.* Stevens, 3 Id. 17.

‡ Whipple *v.* Cotton, 3 Story, 84.

§ 1 Stat. at Large, 332.

Superior Courts of the respective States. Passed to continue in force only for one year, and, from thence, until the end of the next session of Congress thereafter, it was suffered to expire, but it was renewed by the act of the 31st of March, 1796, and was continued in force two years longer, and to the end of the next session of Congress.*

Detailed provision was made by the subsequent act of the 28th of February, 1799, for compensation to marshals, clerks, district attorneys, jurors, witnesses, and criers, but the special provision allowing counsel fees was dropped.†

Even while it remained in force, it did not authorize such an allowance in a case like the present, as cases of admiralty and maritime jurisdiction in the District Courts were expressly excepted from the operation of the provision. Ordinary costs in admiralty suits were doubtless taxed under that act, as if it was in force long after it had expired, but it never furnished any authority to charge counsel fees in the District Courts; but if it did, and if it had not expired, it would be repealed by the present law.

Fees and costs, allowed to the officers therein named, are now regulated by the act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed.

Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated.‡ They may tax a docket fee of twenty dollars on a final hearing in admiralty, if the libellant recovers fifty dollars, but if he recovers less than fifty dollars, the docket fee of the proctor shall be but ten dollars.§

* 1 Stat. at Large, 453. † Ib. 624. ‡ 10 Stat. at Large, 161.

§ The Sloop Canton, 21 Law Reporter, 473; The Liverpool Packet, 2 Sprague 37; The Conestoga, 2 Wallace, Jr., 116.

Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the act of Congress, under consideration, was passed. They do not, therefore, furnish the rule of decision in the case before the court.

DECREE REVERSED.

BRADLEY *v.* RHINES' ADMINISTRATORS.

1. In a suit brought by the assignee of a chose in action in the Federal court on the contract so assigned, it is necessary that plaintiff shall show affirmatively that such action could have been sustained if brought by the original obligee.
2. The burden of proof in such case is on the plaintiff, when the instrument and its assignment are offered under the plea of the general issue.

ERROR to the Circuit Court for the Western District of Pennsylvania; the case being this:

Section eleven of the Judiciary Act of 1789, which defines the jurisdiction of the Circuit Courts as regards citizenship, after declaring that no person shall be sued in any other district than that of which he is an inhabitant, or in which he shall be found at the service of the writ, adds:

"Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

With this provision in force Bradley sued the administrators of one Rhines in the court below, describing himself in the declaration as a citizen of Kentucky, and alleging the defendants, whom he described as administrators, to be citizens of Pennsylvania. He declared, in a special count on a contract of lease, and in two common counts for money had and received by defendants' intestate to plaintiff's use, and for money laid out and expended at his request. The

lease, which was set out in the declaration, was made by Breeden & Co., described as of Elk County, Pennsylvania, as lessors, and Andrew Hines and Hiram Carmen, lessees, and it was alleged that Breeden & Co. had assigned the lease to the plaintiff.

A trial was had before a jury on the plea of the general issue, in which the plaintiff offered in evidence the lease, its execution and assignment being admitted by defendants. The court refused to admit the lease in evidence, and the plaintiff took a bill of exceptions to the ruling. As the lease was the foundation, so to speak, of the plaintiff's action, the plaintiff, after its rejection by the court, offered no further evidence, and verdict and judgment went for the defendant. The ruling of the court just mentioned was the error assigned.

Mr. Lucas, for the plaintiff in error:

1. Neither in point of fact nor law was this lease a *chose* in action. A lease and the term created by it, so far as the tenants are concerned, constitute a *chattel real*, and so far as the landlord is concerned, they are but a part of his original estate in the premises leased. Had a sum of money been due from the tenants to Breeden & Co. as rent, and had Breeden & Co. continued to be the owners of the lands leased, and simply assigned to the plaintiff the lease as the evidence of the debt due by the tenants for such rent in arrears, it would, under those circumstances, have been a case of an assignment of a *chose* in action merely.

But here Breeden & Co. were, at the time of the making of the lease, the owners of the land in fee. During the continuance of the lease, and before the expiration of the term, Breeden & Co. sold and conveyed the whole of the leased premises to Bradley, the present plaintiff, in fee. This conveyance carried with it the lease, with all its benefits, without any formal assignment of the lease.*

Wherever the right passes by operation of law, the case

* Johnston *v.* Smith, 3 Pennsylvania, 496; Bank of Pennsylvania *v.* Wise, 3 Watts, 394.

does not fall within the exception contained in the 11th section of the Judiciary Act.*

2. It does not appear that Breeden & Co. were citizens of Pennsylvania *when the suit was brought.* The presumption is the other way; and the jurisdiction, thus presumably existing, can be defeated only by positive proof that the presumption is a false one in fact.

3. The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement, as is decided by this court in *De Sobry* v. *Nicholson.*† It came, therefore, too late.

Mr. Wills, *contra* (citing on his first point various statutes of Pennsylvania), contended that the ruling was correct, because

1. That Hiram Carmen, the partner and survivor of the defendant's intestate, could alone be sued by the law of the State named.

2. That the plaintiff suing as assignee of Breeden & Co., who are citizens of Pennsylvania, the Circuit Court for that district could have no jurisdiction of the action under the 11th section of the Judiciary Act of 1789.

Mr. Justice MILLER delivered the opinion of the court.

The first proposition made by the counsel for the defendant in error, and by which the ruling of the court is maintained, depends for its soundness on the construction to be given to certain statutes of Pennsylvania, and will not be examined by us if the ruling of the court is well founded as to the second proposition.

There can be no doubt that the lease sued on here is a chose in action, and the assignors are described in the instrument as residing in the same State with defendants.

Two propositions are relied on as taking this case out of the prohibition of the statute:

* Sere *v.* Pitot, 6 Cranch, 336; Mayer *v.* Foulkrod, 4 Washington's Circuit Court, 349.

† 3 Wallace, 420, and the cases therein cited.

1. That the plaintiff having purchased the lands which were the subject of the lease, became entitled thereby to the benefit of the lease, and the assignment was not necessary to enable him to maintain the action.

If he had shown, or offered to show that he had become the owner of the land, the court would probably have permitted him to do so. But as he only offered the lease and the assignment, the court could not admit them on the ground of a purchase of which there was no evidence.

2. Then it is argued that although Breeden & Co. might have been, as the lease shows, citizens of Pennsylvania when the lease was made, this may not have been so when suit was brought; and that, as the plaintiff was a citizen of Kentucky, and the defendants, of Pennsylvania, this makes a *primâ facie* case of jurisdiction in the court, which can only be defeated by evidence that the assignors were citizens of the same State with defendants when the suit was brought.

This court has decided the proposition otherwise. In *Turner* v. *Bank of North America*,* the plaintiff recovered judgment in the Circuit Court as assignee of Biddle & Co. The only error assigned was, that it did not appear in the record that Biddle & Co. were citizens of a State other than North Carolina, in which district the defendant resided, and where he was sued; and for this cause, the judgment was reversed. The soundness of this decision is recognized in the cases of *Mollan* v. *Torrance*,† and *Bank of United States* v. *Moss*,‡ and we take the doctrine to be settled, that when a party claims in the Federal courts through an assignment of a chose in action, he must show affirmatively that the action might have been sustained by the assignor if no assignment had been made.

The case of *De Sobry* v. *Nicholson*, relied on by plaintiff's counsel, is not in point. There plaintiff had become possessed of all his partner's interest in the contract sued on without assignment, and none was relied on. The partner not being

* 4 Dallas, 8. † 9 Wheaton, 537. ‡ 6 Howard, 31.

Statement of the case.

a necessary party, his citizenship in the same State with defendant did not defeat the jurisdiction.

JUDGMENT AFFIRMED.

INSURANCE COMPANY *v.* MOSLEY.

1. The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a *present* existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person.
2. So is a declaration made by a deceased person, contemporaneously or nearly so, with a main event by whose consequence it is alleged that he died, as to the cause of that event. Though generally the declarations must be contemporaneous with the event, yet where there are connecting circumstances, they may, even when made some time afterwards, form a part of the whole *res gestæ*.
3. Where the principal fact is the fact of bodily injury, the *res gestæ* are the statements of the cause made by the injured party almost contemporaneously with the occurrence of the injury, and those relating to the consequences made while the latter subsisted and were in progress.

APPEAL from the Circuit Court for the Northern District of Illinois, the case being this:

The Travellers' Insurance Company of Chicago insured the life of one Mosley for $5000, in favor of his wife.

"Within ninety days, after sufficient proof that the assured at any time within twelve months after the date of this policy shall have sustained personal injury, caused by any accident within the meaning of this policy *and the conditions hereunto annexed*, and such *injuries* shall occasion death within three months from the happening thereof."

The policy among other provisos contained this one:

"*Provided always*, That no claim shall be made under this policy by the said assured, in respect of any injury, unless the same shall be caused by *some outward and visible means, of which proof satisfactory to the company* can be furnished, and this in-

surance shall not extend to any injury caused by or arising from natural disease."

Mosley having died within the term for which his life was insured, his wife, who alleged that he had died from personal injury, caused by accident, demanded the $5000 of the company, which they declined to pay. She thereupon brought assumpsit on the policy. The declaration alleged, that on the 21st of July, 1866, the said Mosley "accidentally fell down a pair of stairs and was severely injured thereby, and that he, within three months after the happening of the said accident, to wit, &c., died from the effects of the said accidental fall, and that the death was occasioned by the said injury and accident, and that the defendant had *sufficient* proof of said accident and death ninety days before the commencement of this suit." On a plea of the general issue and a trial before a jury, the main point in question was the cause of the death of Mr. Mosley; the plaintiff contending that it was the consequence of a fall that he met with in going into his back yard on the night between the 18th and 19th of July, 1866, and the defendant, that it was not.

It appeared that Mr. Mosley was in his usual health until that night; that he and Mrs. Mosley had gone to bed; that between 12 and 1 o'clock he got up and went down stairs; that he came up and complained to his wife and son of having had a fall; and that the symptoms were described by him at the time; that he continued ill until Monday, the 22d, when he died. There was testimony, medical and other, given of his mental and bodily condition from the time of the alleged accident up to the time of his death; there was also medical testimony given of his condition after death, and of an examination of the cranium and brain, externally and internally. The plaintiff insisted that the evidence she introduced tended to show that Mr. Mosley died in consequence of the fall before referred to, and the defendant insisted that the evidence introduced by the company tended to show that death was not caused by any fall, but was in consequence of disease, (congestion of the brain.)

Statement of the case.

Mrs. Mosley testified in her own behalf, that on Wednesday night, the 18th of July, 1866, she and her husband had gone to bed. Between twelve and one o'clock he got up and went down stairs for the purpose of going out back; she didn't know how long he was gone. When he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling down the stairs which led out back. She noticed that his voice trembled, and she inquired into the matter at once. He complained of his head, and appeared faint and vomited; he threw up almost as soon as he got into the room; she got up, and he laid down on the sofa. He had nothing on but his pataloons and vest; she didn't sleep any more that night, and was up with him all night. He complained and appeared to be in great pain. She asked him if she should send for Dr. Webster, who lived near, but he said no; he thought he should be better, and she did not then call the Doctor. On Thursday morning he said he felt bad, and there was a recurrence of fainting.

To all that portion of the testimony of Mrs. Mosley which set forth the declarations of her husband about his falling down the back stairs and almost killing himself and hurting the back part of his head, the defendant's counsel objected, and their objection being overruled, the defendant excepted.

A son of the assured, testified in behalf of the plaintiff, "that he slept in the lower part of the building occupied by his father; that about 12 o'clock of the night before mentioned he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly." The defendants objected to both the question and answer. An exception to their admission followed.

The same witness testified further, "that on the day after the fall, his father said he felt very badly, and that if he attempted to walk across the room his head became dizzy; on the following day he said he was a little worse, if anything." The admission of this testimony also was excepted to by the defendants.

There was no witness who testified that he saw the deceased fall down stairs; though several did, that there were such back stairs as it was testified that he spoke of falling down.

Verdict and judgment having been given for the plaintiff, and the case being here, the questions as presented by the bill of exceptions were:

1. Whether the court erred in admitting the declarations of the assured as to his bodily injuries and pains?

2. Whether it erred in admitting such declarations to prove that he had fallen down the stairs?

Mr. Sansum, for the plaintiff in error:

Without spending time upon the first of the questions presented by a technical division of the bill of exceptions—and a decision on which, adverse to our view of law, does not affect our main objections—we contend that the widow must show—

1st. That her husband died from injuries caused by accident, and,

2d. That the proof thereof was satisfactory to the insurance company.

The insurance is not against death generally, but against death from *accidental* injuries.

1. It is expressly provided that proof *satisfactory* to the company shall be made. *It* is the judge as to what proof shall be satisfactory. This may be a hard agreement, but it is the contract between the parties, and the court will enforce the contract that the parties have made. The company, by refusing to pay, and by contesting the demand, says, that the proof of the injuries and accident are not satisfactory. There is no allegation in the declaration that proof of the injuries and accident has been *satisfactory to it.*

2. As it is a part of the case, that no witness was called to prove that the deceased fell down the stairs, it cannot be presumed that evidence was given to prove an accident. And supposing that the court shall go so far as to hold that the declarations of the deceased are admissible to establish the

fact that he did fall, still there is nothing in them to show that it was an *accidental* fall.

The declarations of the deceased made to his wife and son *four days* before he died, ought not to have been admitted to establish the fact that deceased did fall down the stairs in question, because they are clearly hearsay, and they come not within any of the exceptions to the general rule that derivative or secondhand statements are not receivable as evidence *in causa.** The reasons against admitting them are that the party against whom the evidence is offered has had no opportunity to cross-examine the original source; and, that assuming the original statement to be correctly reported, it was not originally made under the sanction of an oath; and, though it were made under the sanction of an oath *in judicio*, it is not admissible unless the party against whom it is offered had the right and opportunity to cross-examine, but neglected it.

The fact which defendant in error seeks to establish by mere declarations, is not one of reputation, nor of pedigree, or boundary. None of these established exceptions apply.

Nor as dying declarations were they admissible. This is plain.

Nor are they *res gestæ*. *Res gestæ* are the surrounding facts of a transaction, and may be submitted to a jury provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute. And again, declarations accompanying an act, explanatory of that act, are *res gestæ*. They are the surrounding facts, explanatory of an act, or showing a motive for acting. But the principal fact must be first established, and until it is established, surrounding facts are not admissible—and, certainly, exhibiting surrounding facts is not establishing a principal fact. For example: A merchant leaves his place of residence or denies himself to his creditors. That he left his place of residence, or denied himself to his creditors, upon an issue of bankruptcy,

* Mima *v.* Hepburn, 7 Cranch, 290; King *v.* Inhabitants of Eriswell, 3 Term, 707; Ellicots *v.* Pearl, 10 Peters, 412.

are material facts; and one of these being proven, his declarations made to others explaining why he left it, or denied himself, are admissible as *res gestæ;* but it would not be competent to show what he said, unless it were first made to appear that he has denied, or left his place of residence.

Mr. Peck, contra, relied on *Aveson* v. *Kinnaird** as decisive of the case.

Reply.—The counsel for the widow cite *Aveson* v. *Kinnaird,*† and it is relied upon. But that case makes against the plaintiff. The issue there was, whether the insured was in good health at the time the policy then in question was effected on her life by her husband. A few days after the physician examined her, and made inquiries of her about her health. She was seen in bed at 11 o'clock in the forenoon; and a witness was called to testify to the fact that she saw the deceased in bed at the time mentioned, and that the deceased then said she was not in good health, and that she was afraid she would die before the policy could be delivered. The fact that deceased was in bed was established by the witness. This was a material fact to be established upon the issue made in the case, viz., whether the deceased was in good health at the time; and doubtless the declarations of the deceased were admissible, explaining why she was in bed. Upon an issue as to whether the deceased was well or ill at the time in question, her declarations were admissible; for one's feelings while suffering from any malady are the true indicators of that malady, and how the deceased in the case cited felt could only be ascertained by what she said. The case was one of necessity as well as *res gestæ.* The very nature of that case made it necessary to show what the deceased said as to how she felt; and being found sick in bed, her declarations why she was there is a surrounding fact, explanatory of the material fact—being found in bed.

The declarations of the deceased, in the case at bar, as they show how he felt in the presence of the witnesses, are *res*

* 6 East, 188. † Ib.

Recapitulation of the case in the opinion.

gestæ so far as they are explanatory of the other facts that were occurring then. But as evidence of his fall down the stairs, they are not competent.

The fact that deceased *declared* to his wife that he had fallen down the back stairs and hit his head, is not the point here in controversy. The point in controversy is, did the deceased fall down the stairs in question, and was the fall accidental? The *declaration* of the deceased, made to his wife, as she says, several days before he died, is all that we have upon the facts in question. If not competent to prove the fall, how is it enough to prove the accidental character of it?

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois. The action was upon a policy of insurance. It insured Arthur H. Mosley against loss of life, or personal injury by any accident within the meaning of the instrument, and was issued to Mrs. Arthur H. Mosley, the wife of the assured, for her benefit. The declaration was in assumpsit. The defendant pleaded the general issue, and the cause was tried by a jury. The plaintiff recovered. During the trial, a bill of exceptions was taken by the plaintiff in error, by which it appears that the contest between the parties was upon the question of fact, whether Arthur H. Mosley, the assured, died from the effects of an accidental fall down stairs in the night, or from natural causes.

The defendant in error was called as a witness in her own behalf, and testified, "that the assured left his bed Wednesday night, the 18th of July, 1866, between 12 and 1 o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs; . . . she noticed that his voice trembled; he complained of his head, and appeared to be faint and in great pain."

To the admission of all that part of the testimony which relates to the declarations of the assured, about his falling down stairs, and the injuries he received by the fall, the

counsel of the defendants objected. The court overruled the objection, and the defendants excepted.

William H. Mosley, son of the assured, testified, in behalf of the plaintiff, "that he slept in the lower part of the building, occupied by his father; that about 12 o'clock of the night before-mentioned, he saw his father lying with his head on the counter, and asked him what was the matter; he replied, that he had fallen down the back stairs and hurt himself very badly." The defendants objected to both the question and answer. An exception to their admission followed.

The same witness testified further, "that on the day after the fall, his father said he felt very badly, and that if he attempted to walk across the room, his head became dizzy; on the following day, he said he was a little worse, if anything." The admission of this testimony also was excepted to by the defendants.

This statement presents the questions which we are called upon to consider. They are, whether the court erred in admitting the declarations of the assured, as to his bodily injuries and pains, and whether it was error to admit such declarations, to prove that he had fallen down the stairs.

It is to be remarked, that the declarations of the former class all related to *present* existing facts at the time they were made.

Those of the latter class were made immediately, or very soon after the fall; the declarations to his son, before he returned to his bed-room; those to his wife, upon his reaching there.

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent explanatory or corroborative evidence, it is often

indispensable to the due administration of justice. Such declarations are regarded as *verbal acts*, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.

In actions for the breach of a promise to marry, such evidence is always received to show the affection of the plaintiff for the defendant while the engagement subsisted, and the state of her feelings after it was broken off; and in actions for criminal conversation, to show the terms upon which the plaintiff and his wife lived together before the cause of action arose. Upon the same ground, the declarations of the party himself are received to prove his condition, ills, pains, and symptoms, whether arising from sickness, or an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. But to whomsoever made, they are competent evidence. Upon these points, the leading writers upon the law of evidence, both in this country and in England, are in accord.*

There is a limitation of this doctrine that must be carefully observed in its application.

Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations, as furnish evidence of "a *present* existing pain or malady."† Examined by the standard of these rules, the testimony to which this exception relates was properly admitted.

The other exception requires a fuller examination.

Was it competent to prove the fall by the declarations of the assured made under the circumstances disclosed in the bill of exceptions?

In *Thompson and Wife* v. *Trevanion*,‡ the action was for the

* 1 Greenleaf on Evidence, § 102; 1 Phillips on Evidence (last ed.) p. 183; 1 Taylor on Evidence, 478, § 518.

† Bacon *v.* The Inhabitants, &c., 7 Cushing, 586.

‡ Skinner, 402.

battery and wounding of the wife. Lord Chief Justice Holt "allowed, what the wife said immediately upon the hurt received, and before that she had time to contrive or devise anything for her own advantage, to be given in evidence." The reporter adds: "*Quod nota.* This was at *nisi prius*, in Middlesex, for wounding the wife of the plaintiff." This case was referred to by Lord Ellenborough with approbation in the case before him of *Aveson* v. *Kinnaird.** In that case, Lawrence, Justice, in answer to the objection, that such evidence was hearsay, said: "It is in every day's experience in actions of assault, that what a man has said of himself, to his surgeon, is evidence to show what he has suffered by the assault."†

The King v. *Foster*‡ was an indictment for manslaughter, for killing the deceased by driving a cab over him. A wagoner was called as a witness for the prosecution. He stated that he saw the cab drive by at a very rapid rate, but did not see the accident, and that immediately after, on hearing the deceased groan, he went to him and asked him what was the matter. The counsel for the prisoner objected, that what was said by the deceased, in the absence of the prisoner, could not be received in evidence.

Gurney, Baron, said, that what the deceased said at the instant, as to the cause of the accident, was clearly admissible.

Park, Justice, said, that it was the best possible testimony that, under the circumstances, could be adduced to show what knocked the deceased down. Mr. Justice Patterson concurred. The prisoner was convicted.

In the *Commonwealth* v. *Pike*,§ the indictment, as in the preceding case, was for manslaughter. The defendant was charged with killing his wife. It appeared that the deceased ran up stairs from her own room, in the night, crying murder, and bleeding. Another woman, into whose room she was admitted, went, at her request, for a physician. A third

* 6 East, 197.

† Ib. 191.

‡ 6 Carrington & Payne, 325.

§ 3 Cushing, 181.

person, who heard her cries, went for a watchman, and, on his return, proceeded to the room where she was. He found her on the floor, bleeding profusely. She said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The Supreme Court of Massachusetts held, that the evidence was properly admitted. It was said that the declaration was "of the nature of *res gestæ*," and that the time when it was made was so recent, after the injury was inflicted, as to justify receiving it upon that ground.

It is not easy to distinguish this case and that of *The King* v. *Foster*, in principle, from the case before us, as regards the point under consideration.

In *Aveson* v. *Kinnaird*, it was said by Lord Ellenborough, that the declarations were admitted in the case in Skinner, because they were a part of the *res gestæ*.

To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate. But this rule is, by no means, of universal application. In *Rawson* v. *Haigh*,* a debtor had left England and gone to Paris, where he remained. The question was, whether his departure from England was an act of bankruptcy, and that depended upon the intent by which he was actuated. To show this intent, a letter written in France, a month after his departure, was received in evidence. Upon full argument, it was held that it was properly received. Baron Park said: "It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying, that a declaration, made a month after the fact, would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the *whole res gestæ*."

Where a peddler's wagon was struck and the peddler injured by a locomotive, the Supreme Court of Pennsylvania said: "We cannot say that the declaration of the engineer

* 2 Bingham, 99.

was no part of the *res gestæ*. It was made at the time—in view of the goods strewn along the road by the breaking up of the boxes—and seems to have grown directly out of and *immediately after the happening of the fact.*" The declaration was held to be "*a part of the transaction itself.*"*

In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the *verbal fact* would not unfrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. The doctrine of *res gestæ* was considered, by this court, in *Beaver* v. *Taylor*.† What was said in that case need not be repeated. Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestæ* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below.

In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this

* Hanover Railroad Co. *v.* Coyle, 55 Pennsylvania State, 402.

† 1 Wallace, 637.

concurrence in the law is often deeply to be regretted.* The weight of this reflection, in reference to the case under consideration, is increased by the fact, that what was said could not be received as "dying declarations," although the person who made them was dead, and hence, could not be called as a witness.

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD, dissenting.

Questions as to the rules of evidence "are of vast importance to all orders and conditions of men" interested therein, as parties in common law suits, as life, liberty, and property depend very largely upon their strict observance, that proper testimony, pertinent to the issue, may not be excluded, and that incompetent and improper testimony may not be received.†

"One of these rules," says Chief Justice Marshall, "is that hearsay evidence is, in its own nature, inadmissible. Not only because it supposes that better testimony might be adduced to prove the alleged fact, but on account of its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its color." Experience shows that wrong verdicts are the usual result of wrong rulings in admitting improper testimony, or in rejecting that which was competent and material. Appellate courts, viewing the matter in that light, are therefore prompt to correct such errors and to reverse judgments founded on verdicts produced or influenced by such erroneous rulings.

All courts agree, that the introduction of evidence to the jury is governed by certain fixed principles of law, and text writers usually treat the subject under four general heads: 1. That the evidence must correspond with the allegations and be confined to the issue. 2. That the substance of the declaration must be proved to warrant a verdict in

* Appleton on Evidence, ch. 11, 12.

† Child *v.* Hepburn, 7 Cranch, 295; Rex *v.* Eriswell, 3 Term, 721.

favor of the plaintiff. 3. That the burden of proving a proposition or issue lies on the party holding the affirmative. 4. That the best evidence, of which the case in its nature is susceptible, must always be produced.*

Founded, as the action is, upon a policy of insurance, it becomes necessary, in order to understand the precise bearing of the rulings embraced in the exceptions, to examine the terms of the contract, and to refer to the exact issue tendered in the declaration. By the terms of the policy, insurance, for the period of one year, in the sum of five thousand dollars, was granted by the defendants to the late husband of the plaintiff, against "personal injury caused by any accidents within the meaning of this policy," . . . and such injuries as shall occasion death within three months from the happening thereof, and also against any such personal injury, though not fatal, if the assured was thereby absolutely and totally disabled from the prosecution of his usual employment. After setting out the policy in full, the declaration alleges that the assured, on the 1st of July in the same year, "accidentally fell down a pair of stairs in the city of Chicago, in said county, and was severely injured thereby," and that the assured, within three months after the happening of the said accident, died, and that the death of the assured "was occasioned by said injury and accident."

Defendants appeared and pleaded that they never promised in manner and form, as alleged in the declaration, which presented the direct issue, whether the assured met with the accident and injury described in the declaration, and whether his death was occasioned by "the personal injuries caused" by that accident, as therein alleged. Payment of the sum insured, in case of such personal injury or death occasioned by any accident within the terms of the policy, was to be made to the plaintiff, and she was examined as a witness to support her claim against the defendant corporation.

Several witnesses "testified as to back stairs being there, leading to the back yard," but "no witness testified that he

* 1 Greenleaf on Evidence, § 50.

saw the deceased fall down the steps," and there was no testimony upon the subject, except that given by the plaintiff and the son of the deceased, as recited in the bill of exceptions. She testified, that between twelve and one o'clock, (July 18, 1866), he (her husband) got up and went down stairs for the purpose described; that she did not know how long he was gone, but "when he came back, he said he had fallen down the stairs and almost killed himself; that he had hit and hurt the back part of his head in falling down the stairs which led out back."

Objection was duly taken to the testimony of the witness as to the declarations of the husband, but the court overruled the objection, and the defendants then and there excepted.

His son was also examined and testified, that he saw his father, about twelve o'clock that night, lying with his head on the counter, and that "he asked him what was the matter, and he answered, that he had fallen down the back stairs and hurt himself very bad." Seasonable objection was also made to the introduction of this testimony, but the court admitted it, and the defendant excepted, as appears by the transcript.

Viewed in the light of the facts, as here stated, which are carefully and accurately drawn from the record, I am clearly of the opinion, that the declarations of the deceased, as given in the testimony of those witnesses, were inadmissible, and that the judgment of the Circuit Court should be reversed.

Mere declarations, made by a third person, not under oath, it is conceded are hearsay, but the argument is, that the declaration given in evidence in this case may be regarded as part of the *res gestæ*, and therefore, that the testimony of both witnesses was properly admitted as original evidence. Declarations of a party to a transaction, though he was not under oath, if they were made at the time any act was done which is material as evidence in the issue before the court, and if they were made to explain the act, or to unfold its nature and quality, and were of a character to have that

effect, are treated, in the law of evidence, as verbal acts, and as such, are not hearsay, but may be introduced with the principal act which they accompany, and to which they relate, as original evidence, because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its true nature and quality.*

But such declarations cannot properly be received as evidence, unless the principal act which they accompany and to which they relate, is, itself, material to the issue to be submitted to the jury, nor unless the declarations were made at the time the principal act was done, nor unless they were of a character to explain that act, or to unfold its true nature and quality, as they are only admissible as incident to the principal act, and because they are a part of it, and are necessary to explain and define its true character.†

When the inquiry is into the nature and character of a certain transaction, not only what was done, says Mr. Roscoe, but also what was said by those present, during *the continuance of the transaction*, is admissible for the purpose of illustrating its peculiar character and circumstances.‡

Undoubtedly, whenever evidence of an act done by a party is admissible, the declarations he made, at the time the act was done, are also admissible, if they were of a character to elucidate and unfold the act, because they derive a degree of credit from the act itself, and do not rest entirely upon a statement not made under oath.§

Unless, however, they were made at the time the act was done, or during the continuance of the transaction constituting the principal fact, they are not admissible, as in that state of the case, they cannot derive any credit from the principal fact, which alone renders them admissible in evidence.

Verbal and written declarations are admissible, says Mr.

* Enos *v.* Tuttle, 3 Connecticut, 250.

† Corinth *v.* Lincoln, 34 Maine, 312; Noyes *v.* Ward, 19 Connecticut, 269; Moore *v.* Meacham, 10 New York, 210; Osborn v. Robbins, 37 Barbour, 482.

‡ Roscoe on Evidence, 23.

§ Sessions *v.* Little, 9 New Hampshire, 271.

Phillips, "when they accompany some act, the nature, object, or motives of which, are the subject of inquiry." In such cases, he says, words are receivable as original evidence, on the ground, that what is said, at the time, affords legitimate, if not the best, means of ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords.*

Evidently, the rule as understood by the author of that work, would not admit the declarations, unless they were made at the time the act was done, or during the continuance of the transaction; but the annotator is even more explicit, as he expressly adopts the rule laid down in the leading case, that to be a part of the *res gestæ*, the declarations must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and character of the facts which they are intended to explain, and so to harmonize with them as obviously to constitute one transaction.†

Much of the difficulty in the application of the rule, arises from the nature of the principal act, especially, in cases where it is continuous, or extends for a considerable time, as in questions of domicile, or of bankruptcy; but there is no difficulty in applying the rule in cases where the principal act is single and well defined as to time, nor is there any well-considered case, which gives any countenance to the admission of such declarations, unless they were made at the time the principal act was done, or, as in the case of a riot, during the continuance of the transactions.‡

Equity rules are the same as the rules at common law, as appears by the decision of Chancellor Walworth, *In the matter of Taylor*,§ in which he held, that the declarations of parties, and other attending circumstances, in order to render them

* Phillips on Evidence, ed. 1868, 185.

† Enos *v.* Tuttle, 3 Connecticut, 250.

‡ Russell *v.* Frisbie, 19 Connecticut, 209; Carter *v.* Beals, 44 New Hampshire, 412; Price *v.* Powell, 3 Comstock, 322; Ridley *v.* Gyde, 9 Bingham, 351.

§ 9 Paige, 617.

admissible as a part of the *res gestæ*, must be contemporaneous with the main fact under consideration, and to which they were intended to give character.*

Suppose the rule to be that such declarations are inadmissible, unless made at the time the principal act was done, still it is contended that the rulings of the court, in admitting the declarations in this case, may be sustained as falling within the rule laid down in the case of *Commonwealth* v. *McPike*,† and the opinion of the majority of the court, as just read, rests chiefly upon that ground. The indictment, in that case, was for manslaughter, and the evidence introduced showed that the deceased, on the morning she received the mortal blow, ran from her room, where her husband, the defendant, was, to a room occupied by the witness, in the same house, crying murder; and when admitted to the room, she said she was killed. Another witness heard the cry of murder, and went for a watchman, and when he returned, he went to the room where the wounded woman was, and, among other things, she said to him that her husband had stabbed her, and told the witness what she wanted done, if she died.

Objection was taken to the statement, as to the declaration of the wife, that the defendant had stabbed her, but the court admitted the testimony, and the case was removed to the Supreme Court for revision. Other exceptions were taken to the rulings of the court, but they were all overruled, the court holding that the statement of the wife, as to the cause and manner of the injury, might be "sustained, upon the ground that the testimony was of the nature of the *res gestæ*." No authorities are cited in support of the proposition, and the opinion, upon that point, is very brief, and seems to rest mainly upon the closing sentence upon that subject, which is as follows: "In the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge."

Prior to that date, all the decisions of that court had been

* Frink *v.* Coe, 4 Greene, 556.

† 3 Cushing, 184.

in strict conformity to the rule, that declarations not under oath, in order to be admissible as original evidence, must have been made at the time the principal act was done or committed, as before explained, unless they were admitted as declarations in *articulo mortis;* and every decision made by that court, upon that subject, since that case was determined, is equally explicit in prescribing the same rule. Reference will be made to a few of the subsequent cases to establish that proposition.

Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings are considered competent and original evidence in his favor.* Such evidence, however, say the court, is not to be extended beyond the necessity on which the rule is founded; and they add, that anything in the nature of narration or statement is to be carefully excluded, and the testimony (unless the statement was made by a patient to a medical man) is to be confined strictly to such complaints and expressions as usually and naturally accompany, and furnish evidence of, a *present* existing pain or malady. Before the year expired, the same question, under a different state of facts, was again presented to that court, and in view of the importance of the questions, and of their frequent occurrence, the court came to the conclusion to consider the subject somewhat more at large than they had theretofore done, and to set forth and illustrate "the principles and tests by which this class of questions must be determined."† They accordingly decided:

1. That the admission of such evidence is not left to the discretion of the presiding judge, as had sometimes been supposed; that its admission is governed by principles of law, which must be applied to particular cases as other principles are applied, in the exercise of a judicial judgment, and that errors of judgment in the case, as in other cases, may be examined and corrected.‡

2. That a declaration, if it has its force by itself, as an ab-

* Bacon v. Charlton, 7 Cushing, 586.

† Lund *v.* Tyngsborough, 9 Cushing, 41.

‡ Tatham *v.* Wright, 6 Neville & Manning, 151.

stract statement, detached from any particular fact in question, is not admissible in evidence, because it depends for its effect on the credit of the person making it, and therefore is hearsay.

3. That mere narrative is never admissible, because such statements are detached from any material act which is pertinent to the issue.

4. That whenever the act of the party may be given in evidence, his declarations, made at the time, are also admissible, if they were calculated to elucidate and explain the character and quality of the act, and were so connected with it as to derive credit from the act itself, and to constitute one transaction.

5. That there must be a main or principal fact or transaction, and that such declarations *only* are admissible as grow out of the principal transaction, serve to illustrate its character, are contemporary with it, and derive some degree of credit from it.

6. That the main act or transaction is not, in every case, necessarily confined to a particular point of time, but whether it is so or not depends solely upon the nature and character of the act or transaction.

Search is made in vain for any decided case, where the principles and tests which regulate and control the admission of such evidence is so satisfactorily stated, and with so much fulness and clearness as in that case.*

Narration of the cause and manner of the injury has been carefully excluded since that decision in the courts of that State, even where the statements were made by a patient to his physician, as will be seen by the case of *Chapin* v. *Marlborough*,† which was decided six years later.

By the statement of the case, it appears that the plaintiff called a physician, and wished him to examine his leg, saying that it gave him great pain, and the physician testified, that he said that he had been struck by a horse, on that leg, four or five months before.

* Meek *v.* Perry, 36 Mississippi, 261.

† 9 Gray, 245.

Seasonable objection was made to the evidence, but the judge, at the trial, admitted it, and the case was transferred to the Supreme Court, where a new trial was granted. In disposing of the case, the court say, the exception must be sustained, which was to the admission of the plaintiff's statement to his physician, that his leg had been struck by a horse; and the court add, that it was a statement of a fact, "*and was used as evidence of that fact.*" It was, therefore, wrongly admitted, which shows to a demonstration, that the evidence in this case was also wrongly admitted, because it was admitted and used as evidence to prove that the injury and death of the assured were occasioned by the alleged accident.

Death was occasioned by a stab, in the case of *Commonwealth* v. *Hackett*,* and it is suggested, that the ruling in that case qualifies the doctrine, as laid down in the preceding case, but there is no foundation for the suggestion, as the court say, that the declaration given in evidence was uttered immediately after the homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him, after so brief an interval of time, that the declaration or exclamation of the deceased (I am stabbed) may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted.

Many bodily sensations and ailments are of such a character that they can only be known to the person who experiences them, and, in view of that fact, the Supreme Court of that State decided, in the case of *Barber* v. *Merriam*,† that the statements of a patient to his physician, as to the character and seat of his ailments, when made for the purpose of receiving medical advice, were admissible in an action for a personal injury, but they expressly affirmed the doctrine of the previous decisions, to which reference has been made.

* 2 Allen, 139.

† 11 Allen, 322.

Declarations of a narrative character were again offered in the subsequent case of *Commonwealth* v. *Densmore et al.*,* and they were again rejected as hearsay evidence; and the leading case of *Lund* v. *Tyngsborough* was again approved and reaffirmed.

Examined in the light of the decisions made by the Supreme Court of Massachusetts, since the case of *Commonwealth* v. *McPike*, I am of the opinion, that the rulings of the Circuit Court, in this case, find no support from any reported case in the volumes of the Massachusetts Reports.

Next suggestion is, that those rulings may be sustained upon the authority of the case of *Rex* v. *Foster*,† and of the case of *Thompson* v. *Trevanion*,‡ but those cases are so imperfectly reported that they can hardly be said to be reliable. Grant, however, that the reports of the cases, though meagre, are reliable, still, I am of the opinion that the rules of evidence there adopted, are contrary to the modern decisions in both countries. They are both specially noticed by Mr. Roscoe, in his valuable Treatise on the Law of Evidence, and he says, they "are difficult to reconcile with established principles." Both admit the declarations to extend to the particulars of what was said, and though they (the declarations) were both made in close proximity to the event to which they relate, it is very questionable indeed, says the same writer, whether that ground alone is sufficient to render them admissible.§

Both of these cases are also cited by Taylor, in his more recent work upon the Law of Evidence, and yet, the rules which he promulgates, as tests to regulate the admission of such evidence, show that the rule adopted in those cases is not good law. His leading tests are as follows:

1. That declarations, though admissible as evidence of the declarant's knowledge or belief of the facts to which they relate, and of his intentions respecting them, are *no proof* of the *facts* themselves, and, therefore, if it be necessary to show

* 12 Allen, 537.

† 6 Carrington & Payne, 325.

‡ Skinner, 402.

§ Roscoe's Criminal Evidence, 26.

the existence of such facts, proof *aliunde* must be laid before the jury.*

2. That, although acts, by whomsoever done, are *res gestæ*, if relevant to the matter in issue, yet, if they be irrelevant, declarations, qualifying or explaining them, will, together with the acts themselves, be rejected.†

3. That where an act done is evidence *per se*, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act, but where the act is, in its own nature, irrelevant to the issue, and where the declaration *per se* cannot be received, no case has yet established the rule, that the union of the two will render them admissible.‡

4. That an act cannot be varied, qualified, or explained by a declaration which amounts to no more *than a mere narrative* of a past transaction, nor by an isolated conversation, nor by an isolated act done, at a later period.§

Condemned by all these tests, it is impossible to admit, that the two cases relied on, as supporting the rulings of the Circuit Court, can be good law, and if not, then those rulings stand unsupported in principle, or by any well-considered English or American decision.‖

Obviously, the main fact in the case before the court was the alleged accident, and the bill of exceptions finds that there was no other evidence to prove that material allegation than the testimony of the plaintiff, and the son of the deceased, who knew nothing of what had occurred, except what they were told by the injured party.¶

Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible for that purpose, but they are not admissible to prove *a past occurrence*, nor to prove that they were occasioned by such an accident

* 1 Taylor on Evidence, § 523. † Ib. § 524.

‡ Ib. § 524; Redfield on Carriers and Bailments, § 454.

§ Taylor on Evidence, § 526; Nutting *v.* Page, 4 Gray, 584.

‖ Wright *v.* Tatham, 5 Clark & Finnelly, 770; S. C. 7 Adolphus & Ellis, 389.

¶ Baker *v.* Griffin, 10 Bosworth, 142.

as that alleged in the declaration as the foundation of the plaintiff's claim.

Mr. Justice NELSON also dissents from the opinion and judgment of the court, in this case, and concurs in this opinion.

BLANCHARD *v.* PUTNAM.

1. Where, in a suit at law for infringement of a patent, witnesses testify to previous invention, knowledge, or use of the thing patented, the judgment will be reversed unless an antecedent compliance with the requirements of the 15th section of the Patent Act, requiring in the notice of special matter the names and places of residence of those whom the defendant intends to prove possessed prior knowledge, and where the same had been used, appear in the record. And this, although no reversal for this cause have been asked by counsel, but the case have been argued wholly on other grounds.
2. *Semble*, That the only proper comparison on a question of infringement, is of the defendant's machine with that of the plaintiffs, as described in the pleadings; and that it is no answer to the cause of action to plead or prove that the defendant is the licensee of the owner of another patent, and that his machine is constructed in accordance with that patent.

ERROR to the Circuit Court for the Southern District of Ohio, the case being thus:

The 15th section of the Patent Act enacts, that whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, "he shall state in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used," and if he does not comply with that requirement no such evidence can be received under the general issue.

With this statute in force, Alonzo Blanchard and others, being owners by assignment of a patent for an improvement in bending wood, granted to Thomas Blanchard, December

18th, 1849, reissued to him November 15th, 1859, and extended for seven years from December 18th, 1863, brought suit at law against Putnam and others for infringement. The defendants pleaded the general issue, but so far as the transcript of the general record showed, gave no notice of any special defence.

On the trial, the plaintiffs gave in evidence the original patent, the reissue, the certificate of renewal and extension, the assignment, and facts tending to prove the alleged infringement, and rested.

The defendants, who were licensees under a patent granted March 11th, 1856, and reissued May 22d, 1862, to one Morris, for an improvement in wood-bending machines, offered in evidence the reissue.

The plaintiff objected to the admission of that evidence, but the court overruling the objection, admitted it, and the plaintiff excepted.

The defendants called as a witness one W. Mitchell, and offered to prove by him, that in A.D. 1858, he saw in use at a factory of one Andrews, in Grand Detour, in the State of Illinois, a machine for bending plough handles, similar to a model then shown to the witness, and asserted by the defendants to be the same in its mode of operation as the plaintiff's patented machine; the defendants' counsel promising thereafter to connect the said evidence with other testimony, showing such a machine to have been in public use anterior to Blanchard's said invention. To "which evidence," said the bill of exceptions, "the plaintiff objected as not competent or proper." But the court overruled said objection and admitted the evidence. Other testimony was introduced by the defendants tending to prove that the machine described by the witness, or others like it, were in public use at that place before the date of the invention claimed and owned by the plaintiffs.

The court charged the jury at length. It told them that the defences to the action were:

1st. That the Blanchard machine was void for want of novelty.

2d. That the machine constructed under Morris's patent did not infringe.

On the first defence, while stating that it was not the intention of the court to go into an analysis of the testimony on the question of anticipation, the learned judge, nevertheless, enumerated the machines set up as prior inventions, leaving it for the jury to pass on the question of novelty, or the want of it.

The case was now here on exceptions.

Mr. G. M. Lee, by brief, for the plaintiff in error, observed that the machine of the defendants, in appearance, was somewhat unlike that patented by Blanchard, and that the defendants assert that it worked on a different principle from Blanchard's; while the plaintiffs assert it to be the same in principle and mode of operation as Blanchard's, and that it is covered by Blanchard's patent and claim; *that the real question was, therefore, what construction should be given to Blanchard's patent;* and that there was little else in the case.

The learned counsel then went into an examination of "what the Blanchard patent and invention was; of its parts and office;" of the "parts and office of Morris's patent and the defendant's machine;" and having shown, as he assumed, the errors of the charge upon a true view of the case, merely glanced at other errors, of these specifying five; the fourth being thus:

"We claim that William Mitchell's evidence was improperly admitted on the promise of defendant's counsel to afterwards so connect it with other evidence as would make it admissible. *There is nothing to show it was ever so connected, and upon its face it was inadmissible.*"

After specifying the five errors, the counsel added, towards the conclusion, that it was not necessary to argue the effect of the defendant's evidence showing the existence of prior machines, though really none of them showed any want of novelty in Blanchard; that this question became immaterial, because the jury were not called to pass upon it; that the

court blotted out the question of novelty or state of the art by its charge, and in substance ordered the jury to find for defendants, because Blanchard's patent did not cover the stationary form used by defendants as the court held.

Mr. Fisher, *contra*, stated that the machine of the plaintiffs was what was known in the art as a "rotating form machine," and the machine of the defendants what was known in the art as the "stationary form of machine," and that the struggle of the parties in the case was upon the question of infringement, and the *issue was finally resolved to the single point*, whether in view of the state of the art, the plaintiffs' patent could be fairly construed to cover machines for bending wood in which stationary forms were employed.

So far as the reporter perceived, the plaintiff in error nowhere alleged nor alluded to, nor asked a reversal for error in receiving evidence of want of novelty, because proper notice in writing had not been given to the plaintiff as required by the 15th section of the Patent Act, quoted at the beginning of the statement of the case.

Mr. Justice CLIFFORD delivered the opinion of the court.

Damages for the infringement of letters patent may be recovered by the patentee, or by his assignee of the whole interest, or by his grantee of the exclusive right within and throughout any specified district, by a suit in equity or by an action on the case, at the election of the holder of the legal title.*

Letters patent were granted to Thomas Blanchard, December 18th, 1849, for a new and useful improvement in bending wood, for and during the term of fourteen years from that date, but the specification being imperfect, on the fifteenth of November, 1859, he surrendered the patent, and the same was reissued to him, with an amended specification, for the residue of the original term.

Granted for the term of fourteen years only, the patent

* 5 Stat. at Large, 123, 124.

expired on the seventeenth of December, 1863, but the patentee having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, the Commissioner of Patents renewed and extended the patent for the term of seven years from and after the expiration of the first term, giving it the same effect as if it had originally been granted for twenty-one years. Subsequent to the extension of the term the patentee deceased, and the patent was reissued to his executrix, from whom the plaintiffs derive title by virtue of an assignment in due form, as is conclusively admitted by the defendants.

Undoubted owners of the title to the patent the plaintiffs, on the twenty-third of November, 1865, instituted this suit, and the charge is that the defendants, on the second of November of the previous year, and on divers other days and times between that day and the commencement of the suit, infringed the exclusive right to the invention vested in the plaintiffs, by constructing and using ten machines for bending wood in imitation of the plaintiffs' invention, and in violation of the exclusive right secured to them in their letters patent. Process was issued, and being duly served the defendants appeared and pleaded the general issue, and upon that issue, unaccompanied by any notice to the plaintiffs of any special defence, the parties went to trial, and the verdict and judgment were for the defendants.

Exceptions were duly taken by the plaintiffs to certain rulings of the court in admitting evidence offered by the defendants, and to the instructions of the court, as given to the jury, and the only questions presented for decision are such as are involved in the exceptions to those rulings and instructions.

On the trial of the cause the plaintiffs, to sustain the issue on their part, introduced in evidence the reissued patent on which the suit was founded, together with the original patent and the certificate of renewal and extension; and having proved the assignment and introduced evidence tending

to prove that the defendants had infringed the reissued patent, as alleged in the declaration, rested their case.

They might well rest in that state of the case, as the letters patent afforded *primâ facie* evidence that the patentee under whom they claimed was the original and first inventor of what is therein described as his improvement, and having introduced evidence tending to show infringement and damage, they were entitled to a verdict unless some evidence was introduced by the defendants to rebut the evidence given to prove infringement, or to establish some valid defence to the cause of action set forth in the declaration.

Influenced doubtless by that view of the case, the defendants offered in evidence the reissued patent granted to one John C. Morris, dated May 27, 1862, as the foundation for the introduction of evidence to show that the machine or machines which they were using were constructed by them under a license from the patentee in that patent, and in accordance with the specification and claims of that patent as reissued. Seasonable objection was made by the plaintiffs to the introduction of that patent, as evidence in the case, but the court overruled the objection and admitted it in evidence, and the plaintiffs excepted.

Such evidence was inadmissible for the purpose for which it was offered, and should have been excluded, as the novelty of the invention was not open, and because it presented on the question of infringement an immaterial issue not involved in the pleadings, and because the evidence was well calculated to mislead the jury by withdrawing their attention from the real subject-matter in controversy.*

Apart from the question of damages two issues only were presented by the pleadings, and they were all which are involved in any similar case:

1. Whether the patentee in the patent on which the suit is founded is the original and first inventor of the alleged improvement, which the plaintiffs in this case established as

* Corning et al. *v.* Burden, 15 Howard, 271.

a *primâ facie* presumption when they introduced in evidence the letters patent described in the declaration.*

2. Whether the machine of the defendants infringes the plaintiffs' machine as described in the specification and claims of their letters patent.

Attempts are often made in the trial of patent cases to introduce such collateral issues on the question of infringement, but they are irregular and cannot be sanctioned, as the only proper comparison, on that issue, is of the defendants machine with that of the plaintiff, as prescribed in the pleadings. What the jury have to determine is, does the machine of the defendant infringe the machine of the plaintiff; and if it does not, then the defendant is entitled to a verdict; but if it does infringe the plaintiff's machine, then the plaintiff is entitled to his remedy, and it is no answer to the cause of action to plead or prove that the defendant is the licensee of the owner of another patent, and that his machine is constructed in accordance with that patent.

Controversies between litigants in court cannot be completed in that way, nor should the plaintiff be subjected to such outside issues, as he is clearly entitled to a verdict when he has proved that he is the original and first inventor of his improvement, and that the defendant has infringed his patent.†

Suppose the rule in that respect is otherwise, still the judgment of the Circuit Court must be reversed, as the next exception to be considered is clearly well taken, and the error of the court is of such a character that it cannot be remedied in any other way than by granting a new trial.

Testimony was offered by the defendants to prove the existence and use, in 1858, at Grand Detour, in the State of Illinois, of a machine for bending plough handles, similar to a model shown to the witness under examination, and which, as is claimed by the defendants, was the same in its mode of operation as the patented machine of the plaintiffs.

* Curtis on Patents, § 118; Pitts *v.* Hall, 2 Blatchford, 229; Cahoon *v.* Ring, 1 Clifford, 625.

† Curtis on Patents, §§ 350, 353; Carver *v.* Manuf. Co., 2 Story, 432.

Objection was seasonably made by the plaintiffs to the admissibility of the testimony, but the defendants stating that they expected to connect the same with the other testimony showing that the machine was in public use anterior to the invention described in the plaintiffs' patent, the court overruled the objection and admitted the testimony, and the bill of exceptions shows that other testimony was introduced by the defendants tending to prove that the machine described by the witness, or others like it, were in public use at that place before the date of the invention claimed and owned by the plaintiffs.

Evidence to prove such a defence is not admissible in any case without an antecedent compliance with the conditions specified in the fifteenth section of the Patent Act. Whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, "he shall state, in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used," and if he does not comply with that requirement no such evidence can be received under the general issue.*

Unless the rule of law was so the plaintiff might often be surprised at the trial, as he would rely upon the presumption which the patent affords, that he or his assignor or grantor was the original and first inventor of the improvement in question, and would not think it necessary to summon witnesses to rebut the evidence introduced by the defendant attacking the novelty of his patent.†

Other exceptions to the rulings of the court were taken by the plaintiffs to the same effect, but it is unnecessary to refer to them, as the charge of the court shows to a demonstration, that the court throughout the trial overlooked the fact that such evidence is not admissible in patent cases, unless it appears that the defendant, thirty days before the trial, gave notice in writing to the plaintiff, or his attorney,

* 5 Stat. at Large, 123; Teese *v.* Huntingdon, 23 Howard, 10.

† Agawam Co. *v.* Jordan, 7 Wallace, 596.

of his intention to give such special matter in evidence, as required in the fifteenth section of the Patent Act, and that the notice given constituted a compliance with the several conditions therein specified.

Compliance with that provision being a condition precedent to the right of the defendant to introduce such evidence, under the general issue, it necessarily follows that the *onus probandi* is on him to show that the required notice was given to the plaintiff thirty days before the trial, and if he fails to do so he cannot introduce any evidence to controvert the novelty of the patent.*

Undoubtedly the plea of not guilty puts in issue the novelty of the invention as well as the charge of infringement, but the answer to that suggestion, as applied to this case, is that the letters patent, when introduced by the plaintiffs, afforded a *primâ facie* presumption that the assignor of the plaintiffs was the original and first inventor of the improvement, and as the defendants had not given to the plaintiffs the required notice that they intended to offer evidence at the trial to overcome that presumption, they had no right to introduce any such evidence, and it necessarily follows that the court had no right to submit any such question to the jury.

Two defences, said the court, are interposed by the defendants: (1.) That the patent is void for the want of novelty. (2.) That the machine constructed and used by the defendants does not infringe the patented machine of the plaintiffs; and the charge proceeds throughout upon the ground that both of those defences were open and were to be determined by the jury.

Extended remarks were made by the judge to the jury, upon the evidence produced by the defendants to impeach the novelty of the invention, and very full explanations were given to them in respect to the principles of law by which they were to be governed in determining that question. Most of the rules of law as stated by the judge are correct,

* Philadelphia and Trenton Railroad Co. *v.* Stimpson, 14 Peters, 459; Silsby *v.* Foote, 14 Howard, 222; Phillips *v.* Page, 24 Id. 168.

but the difficulty is that no such questions were involved in the pleadings.

JUDGMENT REVERSED. NEW VENIRE ORDERED.

Mr. Justice SWAYNE, with whom concurred GRIER and MILLER, JJ., dissenting.

I am unable to concur in the conclusion reached by the majority of my brethren, and will state briefly the grounds of my dissent.

The judgment is reversed, because no notice of the special matters which were proved to the jury is found in the record. If a sufficient notice had been given to the plaintiffs, according to the statute, the testimony was unquestionably proper to be received. It is shown by the bill of exceptions, that the admission of the evidence was objected to, but upon what ground, except as to one item mentioned hereafter, does not appear. The objection may have had reference to several considerations other than the want of notice. The case was tried in all respects as if no such defect existed. If due notice had not been given, and that fact had been brought to the attention of the learned district judge who tried the case, it cannot be doubted that he would at once have excluded the evidence, or have admitted it only after the defect had been properly supplied. It nowhere appears in the case that such an objection was made in the court below. A series of instructions were asked by the plaintiffs' counsel, and refused by the court; neither of them has any reference to this point. The court was not asked to rule out the evidence, nor to direct the jury to disregard it. The point was not made in this court by the counsel for the plaintiffs in error. Other errors were strenuously insisted upon, but nothing was said upon this subject. Other objections to the admission of the testimony excepted to in the court below were fully discussed here, but there was entire silence as to the want of notice. The discovery that there is no notice in the record, was made after the cause had been argued and submitted to this court, and the objection does not now

come from the plaintiffs in error. It is not of a jurisdictional character.

Upon a careful examination of the record, it seems to me doubtful whether any of the testimony in question required a notice to authorize its introduction,* except that of Mitchell, which was objected to upon a distinct and different ground. But, conceding this to be otherwise, under the circumstances, I think these propositions apply:

1. We are bound to presume that a proper notice was before the court below. This suggestion derives additional weight from the fact that the statute requires the notice to be given to the plaintiff, and does not prescribe that it shall be filed in the clerk's office, or made part of the record. In some of the circuits the practice has been heretofore simply to produce and prove it at the trial.

2. If there were no such notice, it was waived by the plaintiffs in error, and they are concluded by their conduct.†

3. The objection not having been made in the court below, according to the settled rule and practice of this court, it can not be made here.‡

4. The plaintiffs in error not having made the objection, this court ought not to make and enforce it for them. They have not suffered, and do not complain. The interests of justice do not require such vicarious and voluntary action on the part of this court. The counsel for the defendant in error has had no notice and no opportunity to be heard. I think, therefore, that the judgment ought not to be reversed.

HOME OF THE FRIENDLESS v. ROUSE.

1. A statute which, for the declared purpose "of encouraging the establishment of a charitable institution," and enabling the parties engaged in thus establishing it "more fully and effectually to accomplish their laudable purpose," gave to the institution a charter, and declared by it

* Corning v. Burden, 15 Howard, 252.

† Laber v. Cooper, 7 Wallace, 569. ‡ Ib.

that "the property of said corporation shall be exempt from taxation," and that an already existing statutory provision, that every charter of incorporation should be subject to alteration, suspension, or repeal, at the discretion of the legislature, should not apply to *it*, becomes, after the corporation has been organized, a contract; and its property is not subject to taxation, so long as the corporation owns it and applies it to the purposes for which the charter was granted.

2. A State which, after granting such a charter, passes a law, taxing property of the corporation, passes a law violating the obligation of a contract, and, consequently, such its law, is void, under the Constitution.

ERROR to the Supreme Court of Missouri.

On the 3d of February, 1853, the legislature of Missouri passed "an act to incorporate the Home of the Friendless, in the city of St. Louis." The preamble and one section of the act were thus:

"WHEREAS, it is proposed to establish in the city of St. Louis a charitable institution, to be called 'The Home of the Friendless,' having for its object, to afford relief to destitute and suffering females, and the affairs of which shall be in the keeping of ladies, who contribute pecuniary aid to the institution; therefore, *for the purpose of encouraging said undertaking, and enabling the parties engaged therein more fully and effectually to accomplish their laudable purpose,*

"*Be it enacted, &c., as follows:*

"SECTION 1. All such persons, of the female sex, as heretofore have or hereafter may become contributors of pecuniary aid, as hereinafter specified, to said institution, shall be, and they are hereby, constituted a body politic and corporate, by the name of 'The Home of the Friendless,' and by that name shall have perpetual succession, and be capable in law as well to take, receive, and hold, as to dispose of, as they see proper, all and all manner of lands, tenements, rents, annuities, franchises, and other hereditaments and personal property which may be conducive to the objects of said institution; and all property of said corporation *shall be exempt from taxation;* and the sixth, seventh, and eighth sections of the first article of the act concerning corporations, approved March 19th, 1845, *shall not apply to this corporation.*"

The sections thus referred to provided, that the charter

of every incorporation that should thereafter be granted by the legislature should be subject to alteration, suspension, and repeal, at the discretion of the legislature.

The corporation was organized and set in action, and by gifts, grants, and devises, had acquired a considerable amount of real estate in St. Louis. A constitution, adopted by the State, in the year 1865, authorized the legislature to impose certain taxes, and soon after, the legislature did impose a tax upon the real property of the Home. The corporation declining to pay, the collector of taxes for the county was about to levy on and sell its real estate, when the corporation filed a bill in one of the State courts, praying for an injunction against collecting the taxes, on the ground that they were illegally assessed, all property of the Home being, by its act of incorporation, expressly exempted from taxation at all times. The defendant interposed a demurrer, which was overruled, and the judgment on the demurrer made final. The cause was removed to the Supreme Court of the State, and resulted in the reversal of the judgment of the lower court, and the dismissal of the bill or petition.

The case was now here for review; the Supreme Court of Missouri certifying, as a part of the record, that in the determination of the suit there was necessarily drawn in question the construction of that clause of the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of a contract, and that the decision was against the right claimed by the complainant, and was necessary to the adjudication of the cause; thus bringing the case clearly within the 25th section of the Judiciary Act, which gives to this court in such cases a power to examine and affirm or reverse the decision of the State court.

The question was, whether the act of 1853 was a contract never to tax. If so, the subsequent act was in violation of that clause of the Constitution which says, that "no State shall pass any law impairing the obligation of contracts."

Mr. B. R. Curtis, for the appellant:

1. The charter contains not only an explicit promise on

the part of the State, that whatever property should be owned by this charity should not be taxed, but, what is very unusual, if not unprecedented, it contains an assurance that the legislative power should not thereafter be used to interfere with this franchise.

The discretionary authority which the legislature reserved, in regard to corporations in general, it is declared, shall not exist as to *this* corporation.

The charter in express terms, holds out to the benevolent persons to whom it is addressed, that, if they will take upon themselves the burden of organizing this corporation, of making themselves, and soliciting from others, donations and grants, and of administering its affairs for the relief of suffering female poor of the city of St. Louis, the funds thus obtained, devoted, and held, shall not be diminished by taxation.

2. That the legislature had power to make this contract, and that when made and accepted it became one of the franchises of this corporation, of which it could not be deprived, is too well settled to require a citation of numerous authorities.*

Messrs. Dick and Blair, contra:

1. The legislature, in 1853, for the mere consideration that the Home should be established, with no obligations or duties imposed upon it, had no power to promise that the State of Missouri should never have the legal authority to impose a tax upon any property which it might acquire, and, at the same time, confer upon it power to acquire an unlimited amount of property. The State may accept a bonus in place of a tax, or may fix upon a given rate of taxation, and thus, for a consideration, bargain away the power to levy taxes in the usual way. But this charter makes no such contract.†

* See the cases collected in Cooley's Constitutional Limitations, 279–81.

† Rector of Christ Church *v.* County of Philadelphia, 24 Howard, 300; East Hartford *v.* Hartford Bridge Co. 10 Id. 511, 535; Commonwealth *v.*

2. The legislature has not in the act of 1853, declared its intention to bind the State never to impose any such tax. The language used does not expressly say that the State *forever* is to be bound, and the law will not imply such meaning.*

3. The rule of construction applicable to laws relied upon as contracts, granting to corporations special advantages, to the detriment of the public, is that they shall be construed strictly against the corporation.

4. There is no consideration stated in the law for the release from taxation. The establishment of the institution by the corporation, was the consideration which made the grant of the charter binding upon the State, and the contract to that extent is beyond the control of the State as a contracting party. But the exemption from taxation was a mere gratuity, intended to last during the pleasure of the State.†

The legislature of 1853 omitted to provide for any advantage in the future to the State, which should be commensurate with the greater and growing advantage to the institution, which would accrue from the increase of taxes appropriated to its use with the increase of its property. The law shields the Home from rendering any account of the amount of public funds thus devoted to its use, and authorizes an unlimited increase.

This omission of the legislature, as the agent of the State, to provide for any commensurate advantage to the State, or for any check upon the corporation, is fatal to the instrument as a contract. For, first, it will not be held that the legislature could have intended any such arrangement to have been perpetual and obligatory as a contract on the people; and, second, if such was its intention, it had no

Bird, 12 Mass. 443, cited in 24 Howard, 300, 303; Providence Bank *v.* Billings, 4 Peters, 561.

* Charles River Bridge *v.* Warren Bridge, 11 Peters, 536, 583; Butler *v.* Penn., 10 Howard, 402.

† Phalen *v.* Virginia, 8 Howard, 163; Bank of Columbia *v.* Okely, 4 Wheaton, 235; Aspinwall *v.* Commissioners, 22 Howard, 364.

such legal power as an agent. The cases already cited, with others, show this.*

5. Retrospective laws divesting rights not secured by contract may be passed by a State†

Reply.—To suppose that any consideration beyond the public objects for which this corporation was created was necessary as a basis of a contract is a mistake. The consideration is found in the nature of those objects, the acceptance of the charter, and the consequent implied undertaking to use its franchises in the way and for the purposes in which they were granted.

This has been the settled law of this court since the *Dartmouth College case*,‡ and is fully set forth anew of late, in the *Binghamton Bridge case*,§ as the continuing and unalterable judgment of the court.

Mr. Justice DAVIS delivered the opinion of the court.

The case is relieved, by the certificate of the Supreme Court of Missouri, of all difficulty on the question of the jurisdiction of this court, and the important question raised by the record is, whether the State of Missouri contracted with the plaintiff in error not to tax its property. If it did so contract, it is undisputed that the assumed legislation, under the authority of which the property in controversy was taxed, impaired the obligation of this contract.

The object for which the Home of the Friendless was incorporated was to enable those persons of the female sex, who were desirous of establishing a charitable institution in St. Louis for the relief of destitute and suffering females, to carry out their laudable undertaking.

It can readily be seen that a charity of this kind would

* State Bank of Ohio *v.* Knoop, 16 Howard, 378; Commonwealth *v.* Bird, 12 Massachusetts, 443; Brewster *v.* Hough, 10 New Hampshire, 139; People *v.* Roper, 35 New York, 629; Mott *v.* Pennsylvania Railroad Co., 6 Casey, 9; Commonwealth *v.* Easton, 10 Barr, 442; Gardner *v.* State, 1 Zabriskie, 557.

† Satterlee *v.* Matthewson, 2 Peters, 413; Watson *v.* Mercer, 8 Id. 110; Railroad *v.* Nesbit, 10 Howard, 401.

‡ 4 Wheaton, 625. § 3 Wallace, 73.

be of great benefit to the people of St. Louis, and that the legislature of the State would naturally be desirous of using all proper means to promote it. The purposes to be attained by such a charity are usually beyond the ability of individual effort, and require an association of persons who will themselves contribute pecuniary aid, and are willing to become solicitors for the contributions of others. Usually the initiation of such an enterprise is in the hands of a few persons who need to be clothed with more than ordinary powers in order to obtain the successful co-operation of others. In no way could this co-operation be better secured than by conferring on the corporators the authority to say to the benevolent people of St. Louis, that their donations in money or lands, for the relief of the suffering female poor of the city, would be held by the institution undiminished by taxation.

It was doubtless under the influence of these considerations, and because every government wishes to encourage benevolent enterprises, that the legislature granted the charter for the Home of the Friendless, and said to the charitable persons engaged in this business, that if they would organize the society and conduct its affairs, would give themselves and solicit others to give for the common purpose, "that the property of the corporation shall be exempt from taxation." This charter is a contract between the State of Missouri and the corporators that the property given for the charitable uses specified in it, shall, so long as it is applied to these uses, be exempted from taxation. It follows, that any attempt to tax it impairs the obligation of the contract. It is proper to observe, that the immunity from taxation does not attach to the property after the corporation has parted with it, but is operative on it while owned by the corporation, and devoted to the uses for which it was originally given.

It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College* v. *Woodward*.

It is contended that the rules of construction applicable to legislative contracts are more stringent than those which are applied to contracts between natural persons, and that, applying these rules to this contract, it cannot be sustained as a perpetual exemption from taxation.

It is true that legislative contracts are to be construed most favorably to the State if on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation; but, as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons. Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. "All property of said corporation shall be exempt from taxation," are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word "forever" after the word "taxation" could not make the meaning any clearer. It was undoubtedly the purpose of the legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature, without taking direct action on the subject, could at its will, resume the power of taxation. This view is fortified by the provisions of the general law of the State regarding corporations, in force at the time this charter was granted, and which the legislature declared should not apply to this corporation. The seventh section of the act concerning corporations, ap-

proved March 19, 1845, provided that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." As the charter in controversy was granted in 1853, it would have been subject to this general law if the legislature had not, in express terms, withdrawn from it this discretionary authority. Why the necessity of doing this if the exemption from taxation was only understood to continue at the pleasure of the legislature?

The validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that a State may by contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State if the charter containing it is accepted.*

It is proper to say that the present constitution of Missouri prohibits the legislature from entering into a contract which exempts the property of an individual or corporation from taxation, but when the charter in question was passed there was no constitutional restraint on the action of the legislature in this regard.

Without pursuing the subject further, we are of the opinion that the State of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the corporation from taxation, and that the attempt made on behalf of the State through its authorized agent, notwithstanding this agreement, to

* New Jersey *v.* Wilson, 7 Cranch, 164; Gordon *v.* Appeal Tax Court, 3 Howard, 133; Piqua Bank *v.* Knoop, 16 Id. 369; Ohio Life and Trust Co. *v.* Debolt, 16 Id. 416; Dodge *v.* Woolsey, 18 Id. 331; Mechanics' and Traders' Bank *v.* Thomas, Ib. 384; Mechanics' and Traders' Bank *v.* Debolt, Ib. 380; McGee *v.* Mathis, 4 Wallace, 143.

compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed.

JUDGMENT REVERSED, and the cause remanded to the court below, with directions to proceed

IN CONFORMITY WITH THIS OPINION.

The CHIEF JUSTICE, with MILLER and FIELD, JJ., dissented; see the opinion of MILLER, J., *infra*, p. 441, in the next case.

NOTE.

At the same time with the case just reported was argued and adjudged another in error to the same court. It was the case of

THE WASHINGTON UNIVERSITY *v.* ROUSE,

In which the principles of the case just decided were held applicable to an institution of learning.

IN this second case the charter was to the Washington University, an institution of learning. It was granted on the 22d of February, 1853, and by the same legislature which incorporated the Home of the Friendless on the 3d of that same February. It contained exactly the same provision about freedom of the corporation from taxation and from liability to have its charter interfered with at the discretion of the legislature, and the case came here under proceedings similar to those in the last case, and from the same court, and was argued by the same counsel, to wit:

Mr. B. R. Curtis, for the appellant; Messrs. Dick and Blair, contra.

Mr. Justice DAVIS delivered the opinion of the court.

There are no material points of difference between the case just decided and this case, and the views presented in that case are applicable to this. The object of the charter

in the one was to promote a charity, in the other to encourage learning. Both were public objects of advantage to the country, and which every government is desirous of promoting. Whether the endowment of a charity is of more concern to the State than the endowment of a university for learning, is within the power of the legislature to determine. If the legislature has acted in a manner to show that it considered both objects equally worthy of favor, it is not the province of this court to pass on the wisdom of the measure.

On the contrary, it is the duty of the court to carry out the intention of the legislature, if ascertainable, by applying to both charters the ordinary rules of construction applicable to legislative grants. In applying these rules to this charter, we find the existence of the same contract of permanent exemption from taxation, as in the charter of the Home of the Friendless. The State contracted in the one case as in the other, not to tax the property of the corporation, using the same words in both charters, to convey its meaning, and binding itself in the same terms, not to repeal or modify either charter in that regard. Both charters were passed by the same legislature, within a few days of each other, and neither charter is unusual in its provisions, except in this particular. The inference would, therefore, seem to be clear, that it was the legislative intention that both should, in this respect, be on an equality. The public purposes to be attained in each case constituted the consideration on which the contracts were based. The charter of the University, with its amendment (not material to notice, because not affecting this question), having been accepted, and the corporation, since its acceptance, having been actively employed in the specific purpose for which it was created, the exemption from taxation became one of the franchises of the corporation of which it would not be deprived by any species of State legislation.

It is urged that the corporation, as there is no limit to its right of acquisition, may acquire property beyond its legitimate wants, and in this way abuse the favor of the legisla-

ture, and, in the end, become dangerous, on account of its wealth and influence. It would seem that this apprehension is more imaginary than real, for the security against this course of action, is to be found in the nature of the object for which the corporation was created. It was created specially to promote the endowment of a seminary of learning, and it is not to be presumed that it will ever act in such a manner as to jeopardize its corporate rights; nor can there be any well-grounded fear that it will absorb, in its effort to establish a literary institution of a high order of merit, in the city of St. Louis, any more property than is necessary to accomplish that object. Should a state of case in the future arise, showing that the corporation has pursued a different line of conduct, it will be time enough then to determine the rights of the parties to this contract, under this altered condition of things. The present record presents no such question, and we have no right to anticipate that it will ever occur. It is enough for the purposes of this suit to say, that so long as the corporation uses its property to support the educational establishments for which it was organized, it does not forfeit its right not to be taxed under the contract which the State made with it.

We cannot see that the case of the University is distinguishable from that of the Home of the Friendless.

JUDGMENT REVERSED, and the cause remanded to the court below, with directions to proceed

IN CONFORMITY WITH THIS OPINION.

Mr. Justice MILLER, dissenting.

The CHIEF JUSTICE, Mr. Justice FIELD, and myself, do not concur in these judgments.

It is the settled doctrine of this court, that it will, in every case affecting personal rights, where, by the course of judicial proceedings, the matter is properly presented, decide whether a State law impairs the obligation of contracts; and if it does, will declare such law ineffectual for that purpose. And it is also settled, beyond controversy, that the State

legislatures may, by the enactment of statutes, make contracts which they cannot impair by any subsequent statutes.

It may be conceded that such contracts are so far protected by the provisions of the Federal Constitution that even a change in the fundamental law of the State, by the adoption of a new constitution, cannot impair them, though express provisions to that effect are incorporated in the new constitution. We are also free to admit that one of the most beneficial provisions of the Federal Constitution, intended to secure private rights, is the one which protects contracts from the invasion of State legislation. And that the manner in which this court has sustained the contracts of individuals has done much to restrain the State legislatures, when urged by the pressure of popular discontent under the sufferings of great financial disturbances, from unwise, as well as unjust legislation.

In this class of cases, when the validity of the contract is clear, and the infringement of it by the legislature of a State is also clear, the duty of this court is equally plain.

But we must be permitted to say, that in deciding the first of these propositions, namely, the validity of the contract, this court has, in our judgment, been, at times, quick to discover a contract that it might be protected, and slow to perceive that what are claimed to be contracts were not so, by reason of the want of authority in those who profess to bind others. This has been especially apparent in regard to contracts made by legislatures of States, and by those municipal bodies to whom, in a limited measure, some part of the legislative function has been confided.

In all such cases, where the validity of the contract is denied, the question of the power of the legislative body to make it necessarily arises, for such bodies are but the agents and representatives of the greater political body—the people, who are benefited or injured by such contracts, and who must pay, when anything is to be paid, in such cases.

That every contract fairly made ought to be performed is a proposition which lies at the basis of judicial education, and is one of the strong desires of every well-organized

judicial mind. That, under the influence of this feeling, this court may have failed in some instances to examine, with a judgment fully open to the question, into the power of such agents, is to be regretted, but the error must be attributed to one of those failings which lean to virtue's side.

In our judgment, the decisions of this court, relied upon here as conclusive of these cases, belong to the class of errors we have described.

We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful.

It cannot be maintained, that this power to bargain away, for an unlimited time, the right of taxation, if it exist at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men, making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all the burdens of supporting the government.

Argument for the plaintiff in error.

The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity.

With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned.

BRONSON *v.* KIMPTON.

The cases of *Bronson* v. *Rodes* and *Butler* v. *Horwitz* (7 Wallace, 229 and 258) affirmed.

APPEAL from the Court of Appeals of New York.

Kimpton filed a bill against Bronson in one of the State courts of New York to compel satisfaction of a mortgage executed by him to Bronson on the ground that it had been paid. The mortgage was given to secure a bond for the payment of a certain sum in gold and silver coin, lawful money of the United States. The payment relied on was a tender of United States notes equal in nominal amount to the sum due on the bond and mortgage. The Supreme Court of New York held the tender sufficient, and adjudged satisfaction; and this judgment was affirmed by the Court of Appeals, and was now here for review.

Mr. J. A. Townsend (by whom the case of *Bronson* v.

Statement of the case.

*Rodes** had been elaborately and ably argued at the last term) now stated *for the plaintiff in error* that, as was obvious, there was no essential difference between this case and that, or *Butler* v. *Horwitz*,† which had been adjudged at the same time, and he relied upon these two decisions as conclusive of the case.

The CHIEF JUSTICE delivered the judgment of this court to the effect that the questions being no other than those already fully considered and determined in the cases referred to by the counsel, this case was necessarily

REVERSED, AND WOULD BE REMANDED FOR FURTHER PROCEEDINGS.

BENNET *v.* FOWLER.

1. Whether a given invention or improvement shall be embraced in one, two, or more patents, is a matter about which some discretion must be left with the head of the Patent Office; it being often a nice and perplexing question, and one not capable of being prescribed for by a general rule.
2. Accordingly, in a case where two reissued patents, both related to the lifting and depositing a load of hay in a mow of a barn, or in a rick or shed, but, in one of them the lifter was somewhat differently constructed, so as to adapt it specially to the *stacking* of hay (which, as this court assumed, had doubtless led the office to divide the improvements, and issue separate patents, in a case where the improvements had been embraced in one in the original patent), the reissue in the twofold form was held proper.
3. Where the defendant proposes to maintain at the final hearing of a case in chancery, that his machine does not infringe the complainant's patent, proof of non-infringement should appear in the testimony.

APPEAL from the Circuit Court for the Northern District of Illinois.

Fowler filed a bill in that court to enjoin Bennet and others from infringing two reissued patents, No. 1870 and

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* 7 Wallace, 229.

† Ib. 258.

1869,* for improvements in hay elevators, issued February 14th, 1865. The improvements had been embraced in one, in the original patent. An analysis of the complainant, Fowler's, claims presented them thus:

No. 1870.

First Claim: In the construction of elevators for hay, the combination of the permanent pyramidal supporting frame, and the revolving cross-bar, and its braces, with a central supporting piece *for allowing the cross-bar, and its braces, to turn upon the supporting frame, substantially in the manner, and for the purposes described.*

Second Claim: In the construction of elevators for hay, I claim, in combination with the cross-bar revolving upon an under supporting frame, the so arranging of the sheaves, and hoisting tackle, that the weight to be raised shall be upon one end of the cross-bar, whilst the power to raise that weight is applied to the opposite end of the cross-bar, *for the purpose of enabling me to use a small and compact structure that may be easily transported or moved, occupying but little space, and sufficiently rigid within itself, without the use of additional guys, braces, or other fastenings, as herein described.*

Third Claim: In the construction of elevators for hay, I also claim two pyramidal frames, one placed upon the other, the under frame being upright, and the upper inverted, and the head blocks, or *apices* of both, *so united* as *that the upper frame may freely turn upon, whilst it is supported by the lower frame, substantially as described.*

No. 1869.

First Claim: So constructing a machine for elevating hay or other like products, that the *same power employed in elevating said products, will also revolve the top of the machine while the load is being elevated, or when high enough to pass over the top of the stack, and so that it may be raised from either, or any side of the machine, and deposited on the stack at any other side, and wherever desired, substantially as described.*

* By some clerical error at the Patent Office, the higher number, 1870, came before the lower, 1869.

Second Claim: An elevator, or crane (when constructed as herein described) in combination with a device *for grasping hay, or other like products, and depositing it upon a stack substantially as described.*

The defendants put in an answer setting up various defences to the bill, but no proofs were taken in support of it, so that it need not be referred to more particularly. The complainant filed a replication to the answer.

When the cause was brought on for hearing no counsel appeared for the defendants. After proof of infringement, a decree was rendered for the complainant, affirming the validity of the patents and the infringement, and referring the cause to a master to take proofs of the gains and profits of the defendants for the use of the machines.

A good deal of testimony was taken before the master, on the subject of the gains and profits, counsel on both sides appearing before him. The master reported in favor of the complainant $1860. The counsel took one exception to the report, namely, that part of the allowance for profits against the defendants were for infringements of third persons. The court modified the report in this respect, and reduced the amount to $1500. A decree having been entered accordingly, the case was brought by the defendants here.

Mr. Coburn, for the appellant, contended:

1. That the court erred in affirming the validity of the *two* reissued patents.

2. That the machines of the defendants did not infringe the complainant's patents.

Mr. Goodwin, contra.

Mr. Justice NELSON delivered the opinion of the court.

An objection has been taken by counsel for the defendants that the court erred in affirming the validity of the two patents, Nos. 1869, 1870.

It may be, that if the improvements set forth in both specifications had been incorporated into one patent, the patentee

taking care to protect himself as to all his improvements by proper and several claims, it would have been sufficient. It is difficult, perhaps impossible, to lay down any general rule by which to determine when a given invention or improvements shall be embraced in one, two, or more patents. Some discretion must necessarily be left on this subject to the head of the Patent Office. It is often a nice and perplexing question. It is true, in the present case both patents relate to the lifting and depositing a load of hay in a mow of a barn, or in a rick or shed. But, in No. 1870, the lifter is somewhat differently constructed, so as to adapt it specially to the stacking of hay, which, doubtless, led the office to divide the improvements, and issue separate patents. The improvements were embraced in one, in the original patent.

The counsel also objects that the machines of the defendants do not infringe the complainant's patents, but, if he had intended to contest this point, he should have introduced proof to this effect. Proof of the infringements given, that the machines made and used by the defendants were substantially like the complainant's, was sufficient, if not rebutted. Models were also produced on the argument before the court, which confirm this proof.

DECREE AFFIRMED.

THE CAMANCHE.

1. A corporation is not disqualified, by the simple fact of its being a corporation, from maintaining a suit for salvage. Hence, where a service, in its nature otherwise one of salvage, was performed by a stock company, chartered to hire or own vessels manned and equipped to be employed in saving vessels and their cargoes wrecked, and to receive compensation in like manner as private persons, and where the persons actually performing the service had no share in the profits of the company, but were hired and paid under permanent and liberal arrangements and rates of pay—the net profits being divided among stockholders—such service was held to be a salvage service, and the corporation to be entitled to pay as salvors accordingly.
2. A suit for salvage cannot be abated on the objection of claimants that others as well as the libellants are entitled to share in the compensation.

The remedy of such others is to become parties to the suit, or to make a claim against the proceeds, if any, in the registry of the court.

3. The defence, that the services for which salvage is claimed were rendered under an agreement for a fixed sum payable in any event, is waived unless set up in the answer, with an averment of payment or tender.
4. Nothing short of a contract to pay a fixed sum at all events, whether successful or unsuccessful, will bar a meritorious claim for salvage.
5. A salvage service is none the less so, because it is rendered under a contract which regulates the mode of ascertaining the compensation to be paid, but makes the payment of any compensation contingent upon substantial success.
6. Decrees in salvage will not be disturbed as to their amount, unless for a clear mistake, or gross over-allowance of the court below.

APPEAL from the Circuit Court for California.

The case was this:

In November, 1863, in the midst of a violent southeast gale, the ship Aquila, then but a few days in port, sunk at her moorings in deep water, alongside her wharf, in San Francisco. She had just hauled in there to discharge her cargo, consisting of the materials and armament—shot, shells, guns, ordnance, stores, &c.—of the monitor Camanche, which was to be constructed under contract with the government by Donahue & Ryan, who owned both the Aquila and the whole cargo sunk.

The materials, armament, &c., were valued at $400,000. Of this, $340,000 were insured by various companies, each having a certain part of the risk. This left $60,000 at the risk of Donahue & Ryan, the owners.

The Aquila had been anxiously expected at San Francisco with her cargo. Her foundering in an exposed and difficult part of the bay, made the loss of the monitor highly probable. The public mind, excited by the civil war then raging, and by fears of attacks by hostile cruisers on a harbor and city inadequately defended, was shocked by the shipwreck of the only sure means of protection provided by the government for both; and this feeling extended itself throughout the country.

Measures were promptly taken to save, if possible, the vessel and cargo. Donahue & Ryan, who owned her and

the cargo, and had contracted to build the monitor, then in San Francisco, of which they were residents, made within a day or two after the Aquila sunk, an abandonment of ship and cargo to the agent of the underwriters at San Francisco.

The agent did not accept, but took vigorous measures to save the property. The government superintendent for the building of the monitor was early on the ground and was active.

The best mechanics of the city were contriving measures. A dry-dock was thought of, and plans were drafted. The first attempt actually made was by pumping out the ship. This was after full consultation. It proved unsuccessful. The next attempt was to lift the ship by chains under her bottom. Different modes of getting these under were tried by divers: by blowing a hole underneath, &c.; all in vain. This attempt, like the other, was abandoned.

These efforts were continued several weeks, at a cost to the underwriters of $38,000 in gold, but were finally given up. Ryan, one of the contractors, bore a leading part in these operations; had charge of the pumping process, and received $1000 for his services.

In this juncture, the efforts at San Francisco having proved abortive, a company called the Coast Wrecking Company, agreed at New York, with the underwriters, to undertake the recovery of the materials of the monitor.

The peculiar character of this company, and their agreement in the case—matters, both of them, much discussed in the argument—must here be stated.

The company was an *incorporated stock company*, incorporated by the legislature of the State of New York, and invested by their charter with authority to hire or own vessels manned and equipped, to be employed in towing, aiding, protecting, and saving vessels and their cargoes wrecked or in distress, whenever such wrecks or distress occur, and to receive compensation or salvage for such services in like manner as *private persons*, and entitled to like liens and remedies.

Statement of the case.

The location of the company was in the city of New York, and its chief business was with the cruising grounds of the large Eastern ports. Its business of wrecking or salvage was conducted exclusively by vessels, equipments, and materials supplied and paid for out of the corporate funds; and the officers and men executing the work done, did not participate in the losses or gains springing out of the services rendered on the occasion of their employment; but, of whatever rank and position, were paid by the corporation, and out of its funds, as in cases of pure contracts of hiring.

The company was in the habit of paying to its agents and servants who were engaged in services of difficulty or danger, a rate of wages or salary proportionately high, and in case of injury to any of them while so engaged, its practice was to take care of them till they recovered, and in case of their death, to take care of their families, and to place them or their families, as the case might be, in a position to earn a livelihood. It also paid the medical bills of men hurt in its employment.

The rate of wages paid was high in proportion, and above pay for mere work and labor. Merritt's (the captain) salary was $4500 a year, with primage (for the service in this case, about $1500 to $2000), besides all expenses paid. His assistant had $1200 a year, and $500 primage. He and the others who went out with the expedition had all their expenses paid from the time they left New York until they returned. The principal divers averaged $13 a day, for the same time out and back; their day's work being four hours; besides expenses paid. The divers regularly employed by the company were on half pay while not engaged in service.

The agreement which the company made, was between itself and different insurance companies who had taken risks on the *cargo*, to raise *it* for $110,000, to be paid by the companies, each in proportion to its interest in the $400,000 valuation, insured; the Wrecking Company agreeing to complete the work in ten months, with a proviso, however, that if not completed in that time, the company should for-

feit ten per cent.; and, also, that if there was no substantial recovery, the Wrecking Company should receive nothing. The proviso as to time was made because a cargo of the nature that this was, would, as to part of it, be injured by remaining long in water.

The agreement being made, the Wrecking Company promptly despatched to San Francisco a party of men, divers and wreckers, specially selected from New York, Boston, and Providence, and fully provided with suitable apparatus and machinery; the whole under the command of Captain Merritt, the company's general superintendent, a man of twenty years' experience, and of admitted skill in his calling.

The expedition left New York, December 24th, 1863, and arrived in San Francisco, January 17th, 1864. Captain Merritt on the 23d of January received possession of the wreck, and on the 25th of January, after examination and study as to the best plan, began operations.

The winter had just begun, and there was reason to expect cold and stormy weather. The ship, as she lay, was exposed to the southeast gales of the season, one of which had sunk her, with the rake of the bay for thirty miles, and to its currents. She lay ten feet from the wharf, with a list to starboard (off-shore) of forty-five degrees; pitched by the head at thirty to thirty-two degrees. Her forward part, for one-third of her length, projected beyond the end of the wharf, with the bow exposed to the force of the tides and currents. Her bow was sunk in forty-eight to fifty feet of water; her stern in about nineteen feet. At low water about one-sixteenth of her deck was out of water; at high water she was submerged, except a space on one side, close astern. In effect she was at the bottom of the bay, and at such angles of inclination fore and aft, and from side to side, as to make it, independent of the depth of water and the darkness, somewhat difficult to stand on her decks, and even more difficult to work at getting out her cargo. Besides, she rested on a rocky bottom, shelving off shore; making her liable, if her fasts should part at any time, to slip off into deeper water.

Statement of the case.

Besides the difficulties of the ship's position, the cargo was perplexing in its character and in its stowage.

The materials of the monitor comprised a great number of iron pieces, from twenty-six tons to one hundred pounds in weight. The frame was of angle-iron, long, crooked pieces, very difficult to handle. Floor timbers, also of iron, were of irregular shape, and some very heavy and long. There were two main engines for propelling the monitor, and eight smaller engines. The guns weighed twenty-two tons each, and there was a number of shot and shell. The guns, as well as the other heavy pieces, as *ex. gr.*, the pilot-house, twenty-six tons, were liable, in the progress of loosening and getting out the cargo, to break away and do great damage. There were also a multitude of construction tools, machinery for a machine shop, and small pieces, bolts, rivets, &c., by thousands. The weight of the whole was fourteen hundred tons.

By reason of the very unusual nature, construction, value, and weight of the cargo, and to keep it from shifting, extraordinary means and care had been used in the stowage of it. It was "stowed down solid," "firmly fixed in the hold," shored by staunchions or joists, one end resting under the deck-beams, and the other resting on the cargo or the flooring over the cargo, in such angles and positions as required, and some of them tied with braces; the whole thoroughly wedged in. The stowage was such, as in the opinion of Mr. Ryan, one of the claimants, to make it impossible to remove the cargo with divers.

After full examination, the plan adopted by Merritt and his company, was to get out the cargo by divers, as far as necessary, and then to raise the ship, lay her on the flats, and hoist out the remaining cargo. It was considered impracticable to raise the ship with the cargo in her.

The first part of the work, getting out the cargo by divers, was commenced January 28th, 1864, and by unremitting labor from early in the morning until late at night, except two and a half days stormy and Sundays, it was completed about April 20th, 1864; somewhat less than three months.

The risk of life and limb during this part of the labor, was testified to be "great and constant." "The divers were obliged to work in entire darkness, and the inclination of the deck both ways, and the mud which rendered it slippery, made it impossible for them to walk, and compelled them to crawl by a line on the weather or upper side of the ship. Yet they had to follow up every piece to the hatchway. To find and hook on the pieces to be hoisted out, they had to grope their way in the dark, and feel with their hands all over each piece. This part of the operations was peculiarly dangerous. With the utmost care in breaking away the timbers which formed the stowage of the cargo, it was almost impossible to prevent the heavy pieces on the upper side of the ship from fetching away. One of the large guns, weighing twenty-two tons, fetched away in this manner. One of the long, crooked iron ribs, coming away, cut off a finger of an experienced diver, who had just hooked it on. He dived no more. Many of the pieces had sharp edges, so that if one of them had struck a diver in a vital part it must have killed him."

In getting out the cargo the ship was necessarily a good deal injured. Holes had to be cut in her. But her value bore no comparison at all to that of the cargo.*

After the cargo was got out, the raising of the ship was undertaken. The attempt was first made to get chains under her. This failed, as she rested forward so heavily on the rock that the divers, after working two days with picks, &c., could not get the chains under her. Another plan was tried, and succeeded, that of lifting her with chains fastened to the deck-beams and other parts of the ship, and hove through pontoons, with levers worked by powerful hydraulic machines, until the bow was raised from the bottom, so that chains could be introduced under her whole length. The

* The testimony did not, so far as the reporter saw, show what would have been the value of the vessel independently of what she suffered in the process of getting the cargo away. She was worth $30,000 when she left her port of departure, New York; and, after being raised, sold for $4900. But she had apparently been injured by another vessel after she sank.

chains were worked in the same way through the pontoons. About the 20th of May, after a month's incessant work, day and night, Sundays included, the ship was raised and floated upon the flats.

Steps were then taken for pumping her out. By means of a large hole made in the mud under her, the divers stopped the leaks; the ship was pumped out by steam, the mud removed, and the remaining cargo hoisted out. Captain Merritt, with some of his men, returned to New York about the middle of June, 1864, and the last of the materials were landed July 3d. The duration of the salvage service, from the time of leaving New York until its completion, was about six months and a half, or until the return to New York, over seven months. The outlay made by the company in its work of recovering the cargo, was nearly $70,000; all of which, but $5300, was consumed in the enterprise.

The Aquila, or vessel on which the cargo had been shipped, was raised by the Wrecking Company, though the main matter to which attention was directed was the cargo, which from the character of a part of it (fine machinery and polished metal), it was indispensable to get from under the water at once, and this necessity for expedition interfering somewhat, perhaps, with the recovery of the vessel itself in the best condition, and along with the cargo.

All the insurance companies (except one which had a risk for $15,000 and had failed) paid the money which by the terms of their contract they were bound to pay; but there remained over and above *their* interest in the cargo, the $60,000 uninsured. For rescuing this, the Wrecking Company claimed salvage of the owners, Donahue & Co. These refused to pay. Thereupon the company filed a libel in the District Court for Northern California, to have salvage for this $60,000 saved, and for the $15,000 insured on the cargo by the broken company, and a monition issued in due form, to every one having anything to say, to come in. Donahue & Ryan answered, admitting in effect the recovery of the cargo, but denying the vast and unheard of peril, difficulty, and labor alleged; and setting up that the Wrecking Company

had paid very little regard to what damage they did to the Aquila, and had seriously and lastingly injured her; without setting up, however, either as a fact or fear, that the individual men, who performed the actual labor, would make a claim for salvage. No tender of money for anybody was made.

The District Court, regarding the service as a salvage service, awarded on the two items $24,062, and the Circuit Court affirmed the decree, with interest at seven per cent. from the beginning of the suit. And from this decree the appeal came.

Mr. Ward, for the owners, appellants:

1. *The libellant in this case cannot be a salvor.* A salvor is one who renders *personal* service. In *The Lively*,* an agent, at a seaport where a vessel had run ashore, being applied to by the master, and having hired and employed persons to unload the vessel and get her afloat, sued as a salvor. It was held that his claim could not be sustained. Dr. Lushington, giving judgment, said:

"The whole records of this court show that a claim of this description cannot be allowed. . . . . If I were to sanction a claim of this description, the inevitable consequence would be this, that in every case where an accident occurred in the neighborhood of the various seaports of this country, and any agent was applied to, to hire a steamboat or hire sailors to go on board to render assistance, he would be entitled to come to this court and sue as if he were himself a salvor, he personally doing nothing to effect the salvage. I believe, over and over again, when such attempts have been made—and there have been two or three in my experience—every judge of this court has set his face decidedly against them."

In *The Charlotte*† it was distinctly held that no claim for salvage remuneration, properly so called, can be maintained

* Notes of Cases in Ecclesiastical and Maritime Courts, H. T. 1848 to H. T. 1849, p. 206.

† Ib. 279.

by parties not personally engaged in the service. Dr. Lushington, in giving judgment, said:

"I now come to the other point, namely, who are the salvors? Two of the persons by whom the claim is made are William and John Thomas. Why? On the ground that they had command over the boats and the command over the crews, and sent them out, but did not go themselves. Is that a salvage service? I apprehend clearly not, and that principle has been laid down. It is alluded to by Lord Stowell in *The Vine*, but though he merely alludes to it in that case, it is a principle which has been settled over and over again, from the earliest period of my practice in this court. The principle is this, that a party is not entitled to be considered as a salvor who stays on shore and sends his own boats and his own crews. . . . Lord Stowell laid down that in order to entitle a person to claim as salvor, he must have been personally engaged in the service; but he also laid it down that persons contributing to a salvage service by furnishing boats or other articles, should be entitled to remuneration, not as salvors, but for the use of the articles they supplied. That is the general principle, and from that principle I am not prepared, in the slightest degree, to recede."

Decisions by district judges are, of course, of no authority here. Yet, on admiralty questions, they often deserve the highest respect. We therefore mention that in *The Stratton Audley*, where this very Coast Wrecking Company was the corporation spoken of, Judge Blatchford says, "Nor can the corporation itself be a salvor. It cannot hire persons on wages and claim salvage for services rendered by those persons;" and this principle was also declared by Betts, J., in *The Morning Star;* Nelson, J., affirming him.

2. *If this libellant can be a salvor, it is not the sole salvor; and payment to it would be no protection to the claimants against its employees.*

In *The Britain** an agreement was entered into between the masters of the salving vessel and the vessel salved:

"That it shall be left to the decision of arbitrators, to be

* 1 W. Robinson, 40.

named by each party, to fix the amount of remuneration that is due Sulling, the master of the Fortitude, as well for his vessel as for himself and his crew, for the services rendered and loss of time, and likewise what shall be due them in indemnification of the expenses incurred by having put into the harbor of New Deep; and both parties renounce the right of any higher appeal."

The arbitrators awarded £420, which was paid by the owners of the salved ship. Yet upon a libel by the crew of the salving vessel, setting forth that they had not been paid for their services, Dr. Lushington awarded £383, 11*s.* 6*d.* (upon the basis of the arbitrator's award), to be paid by the owners of the Britain; and he said that "they must recover from the owner of the Fortitude the sum which has already been paid by them into his hands."

So in *The Sarah Jane*,* where salvage of £800 was paid to the master of the salving vessel, under an agreement between the owners and masters of such vessel and the owner of the vessel salved, action was successfully sustained by some of the crew of the salving vessel, dissatified with the distribution of the £800 so paid; Dr. Lushington concluding his judgment in these words:

"I regret much the hardship that will be experienced by the owners of the Sarah Jane, in thus being called upon a second time to pay a salvage remuneration. At the same time, I hope it will be a warning in future cases, that owners cannot safely enter into a compromise of this description, which includes the interests of all persons that have rendered service to their vessel, without procuring a release from all parties interested, or incurring a risk of the consequences. In the present instance the owners of the Sarah Jane have chosen to encounter the risk of these consequences, and these consequences they must bear, for I cannot, as a matter of indulgence to them, inflict legal hardship upon others."

3. *This is not a case of salvage service. A contract was made for a sum certain, in consideration of which the service was to be*

* 2 W. Robinson, 110; and see The Centurion, Ware, 483.

performed. Salvage means a compensation earned by persons who *voluntarily* assist in saving a ship or her cargo from peril. In *The Calypso*,* Sir Christopher Robinson said:

"All salvage is founded on the equity of remunerating spontaneous services."

And again:†

"Considering all salvage to be so founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle."

In the case of *The Neptune*,‡ Lord Stowell defines a salvor to be "a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a *volunteer adventurer*, without any pre-existing covenant connecting him with the duty of employing himself for the preservation of that ship."

And in *The Mulgrave*,§ he held that an agreement for a sum certain vitiates any claim for salvage; and would not consider the question where a contract existed.

In *The Helen and George*,‖ Dr. Lushington, in rendering the decision of the court, said:

"The principle on which the court acts is, that if satisfied that any agreement has been made, it will carry it into effect, unless totally contrary to justice and the equity of the case."

In *The Firefly*,¶ upon a defence before the same judge, to a claim for salvage, a parol agreement was alleged to have been made by the master of a stranded vessel with the salvors, during a raging storm, and whilst both parties were on board their respective crafts. There was a total denial of such an agreement on the part of the alleged salvors, and the testimony *pro et contra*, was evenly balanced. Yet the agreement was sustained.

* 2 Haggard's Admiralty, 217.
† Ib. 218.
‡ 1 Id. 236.
§ 2 Id. 77.
‖ 1 Swabey, 369.
¶ Ib. 241; and see Ib. 226.

These doctrines of the English courts were adopted in the first circuit, where, in *The Independence*,* Curtis, J., said:

"In my judgment, a contract, to be paid at all events, either a sum certain or a reasonable sum, for work, labor, and the hire of a steamer or other vessel, in attempting to relieve a ship in distress without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage; and when such a contract has been fairly made, it must be held binding by a court of admiralty, and any claim for salvage disallowed."

4. *The amount allowed in this case violates the established principles of law and justice regulating compensation for salvage.*

The arrangement made in this case was made with the owners of the cargo, to get a large salvage at the sacrifice of the ship. Such agreements tend to fraudulent bargains, and are not allowed.†

It is no answer to say that appellate courts do not *encourage* appeals from matters of discretion. Of course they do not. At the same time, this court and all courts will admit the perfect truth of what was said by Grier, J., delivering the opinion of this court in *Post* v. *Jones*:‡

"Where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause."

But in the present case we come with an objection founded on the violation of a salutary principle of law.

Mr. E. Casserly, for the respondents:

I. *Is the Wrecking Company by the fact of its being incorporated, rendered incapable of being in law a salvor, and of receiving pay as such?*

We submit that it is not.

An enlightened public policy strongly demands that the

* 2 Curtis, 350; and see The Versailles, 1 Id. 360.

† The Westminster, 1 W. Robinson, 235.

‡ 19 Howard, 160.

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means of salvage service should be the most efficient possible, and to that end should be always prepared, prompt, powerful, and reliable. Hence the court of admiralty has not hesitated to accept all beneficial modes and instruments of salvage service, which from time to time are developed by the progressive forces of society, even though it may depart from a settled rule of decision.

Thus the old rule, that none can claim salvage reward who did not directly take part in person in the salvage service has been so often broken down, that it is now an exception, rather than the rule. As where a ship sends part of her crew on salvage service, the crew who remain on board are entitled to share in the salvage earned.

A still stronger departure, made after considerable opposition, at least in the English admiralty,* was, when salvage was allowed to the owner of the ship engaged in the salvage service, though he may have been absent and ignorant of the transaction. The same equity is extended even to the owner of the cargo where he has authorized the service; and probably also where he has not.†

This departure, in favor of the owner of the vessel, was pushed still farther in the case of steamers. The greatly increased power and efficiency of these vessels, then a new force in the maritime world, were cordially recognized and welcomed in admiralty, in the first case that arose there, and because it was the first.‡ This precedent has since been followed out and developed in numerous cases.§

Less than fifty years ago in admiralty, the claim of the salvor vessel was of but little worth, as compared with that of men salvors. Now keeping pace with the times, and their changed modes of salvage, the steamer is the real salvor, and has the lion's share of the reward. And the larger, stauncher and more powerful the steamer, the more liberal the reward;

* San Bernardo, 1 Robinson, 178.

† 2 Parson's Shipping and Admiralty, 278, and note 4. (Ed. 1869.)

‡ The Raikes, 1 Haggard, 246 (1824), per Lord Stowell.

§ The Beulah, 1 W. Robinson, 477; Kingaloch, 26 English Law & Equity, 599; The Island City, 1 Black, 130.

though the danger to such a vessel is reduced by her superior qualities to a minimum. The reason is, that society may be encouraged to give its best resources to the succor of life and property in distress at sea.

A leading consideration as to steamers is, that besides the value of the property which is generally at risk, they render salvage service with greater expedition, and often under circumstances where no other assistance could possibly avail.*

All the reasons for encouraging steamers, apply with equal force in favor of a powerful organization, such as the libellants.

So where the first set of salvors while prosecuting their operations are tortiously ousted by another set who complete the service; but the law ascribes to the first set the whole merit of the services of the second set, and awards to them the entire compensation.†

These are all cases in which salvage rewards are allowed as of course, to those who have had no personal part in the salvage service. They are all cases of a substituted service, in which persons removed from the field of operations may claim as salvors, on the strength of the actual service rendered by some person or property, which stands in their place, and is their substitute for the time being.

Should the powerful steamer of the libellants perform in the best manner a great salvage service, for which she had been at large cost expressly built and equipped, and at all times maintained in a state of the highest efficiency, could it be said, that because she was the property of a corporation, she must be denied a salvage compensation, or cut down to one which is no better than pay for work and labor?‡

If in the case of a salvage service by their steamer, the libellants here stand as favorably before the court as if they were natural persons, and not a corporation, why should

* The Kingaloch, 26 English Law & Equity, 599; Board of Trade Instructions to Receivers of Wrecks, &c., on Salvage, Art. 91, quoted in Maude & Pollock's Law of Merchant Shipping, 494, note q.

† See The Fleece, 3 W. Robinson, 280.

‡ The Perth, 3 Haggard, 416.

they not stand equally well in the case of services performed by their agents and servants? Either way, it is a case of substituted service, as sanctioned and rewarded in admiralty in numerous instances.

The well-considered decision on the circuit of the late Chief Justice in the case of *Virden* v. *The Caroline*,* asserts fully the doctrine of substituted service.

The corporation aggregate, which is but a mode of substituted service, is one of the great forces of civilization. It is the prevailing form of the associated energies, the money, enterprise, and intelligence of society. It is particularly adapted to those branches of business like salvage and wrecking, which require a permanent organization, costly appliances, trained services, and considerable capital, which is content with slow or uncertain returns.

For the carrying on of a salvage or wrecking business on a large and effective scale, there is really no comparison between the efforts of individuals casually employed for the occasion, often but poorly provided with vessels or other appliances, and under any circumstances unprepared for any long, remote, or costly enterprises, on the one hand, and on the other, a powerful company like the libellants, established expressly for the business; provided with capital, trained men, vessels, apparatus, machinery, a thorough organization, which enable it at any time to undertake and carry through the most arduous and protracted salvage services, in the face of great risks, anywhere on American waters, however remote, and at whatever expense.

Had the agents and servants sent out by the Coast Wrecking Company to save the monitor, conducted that important service as badly as they conducted it admirably, and thereby ruined or lost the cargo, the company would justly be made responsible before the law. Since it may be charged for the demerits of its servants, upon what principle is it denied credit for their meritorious services? If the company is capable in law of performing a salvage service at all, upon

* 6 American Law Register, 222, 227.

what principle can we distinguish against it, as compared with other salvors who are natural persons, in respect of the liabilities, which are the same undoubtedly, or of the rewards of the service?

The question to be now determined is, shall these powerful corporate organizations be recognized in admiralty on the same footing with individual salvors, and like them be rewarded according to the merit of the service performed? Or, shall they be put under a sort of outlawry, as unworthy of protection, and thus be hunted out of existence? They cannot exist if shut down to the pay of mere work and labor. Shall life and property on the navigable waters be deprived of their best reliance, and be cast back for succor on the old inefficient resource of casual help from individuals?

The fundamental public policy which is the supreme law of the subject, demands that every new efficient means or instrument of salvage service shall be recognized, accepted, and encouraged in admiralty. We offer here, what is proved to be the most efficient instrument yet produced by the forces of American society. Shall it be accepted or rejected?

II. *The objection that the owners of the property salved may have to pay the crew of the Wrecking Company.* Certainly they will not have to do so if the company is competent to act as a salvor. The company's men are well paid, and have made no such claim, nor is there any allegation of fear that they will. There is no tender of money in court, and because it is alleged that the owners *may* have to pay the crew, not one of whom asks to be paid by it, it will pay nobody.

Moreover, the objection is not made on the answer. It cannot be first made here.

III. *The service, in this case, was eminently a salvage service.* It presents, in a very high degree, all the ingredients of a salvage service, which are as follows: 1. The danger from which the property was rescued. 2. The value of the property. 3. The risk incurred in the salvage. 4. The value of the property employed in the service, and the risk to

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it. 5. The skill and knowledge shown in rendering the services. 6. The time and labor expended.*

Indeed, that the service was a salvage service is everywhere, in substance, admitted by the answer. The only issue really made, and this is made by implication, is as to the extent of the merit and the amount due.

If the service was thus a salvage service of vast merit, what force is there in the objection that the insurers agreed to pay for it? They agreed only to do that which the law would have made them do without agreement; that which exists impliedly in every case of salvage. For the compensation here was to be purely contingent.

Moreover, no such defence is taken in the answer. And all that is said under the second head about want of tender applies equally here.

The only remaining question is,

IV. *As to the amount allowed.* The law of salvage services to property in admiralty, as distinguished from the law of similar services on land, is founded on a great public policy, established in the general interests of the commerce and navigation of the country. This public policy requires, for the protection of those interests, that such salvage services should be sedulously fostered; and, hence, that they should receive compensation, not as mere pay for work and labor, nor even as limited to the precise quantum of benefit in the particular case; but on a scale so liberal as best to encourage such services.† With this principle borne in mind—and with it the further and perfectly settled one that appellate courts will not disturb the allowances made by inferior ones for salvage unless in cases of clear mistake, or gross overallowance—we need not discuss the matter largely. The Aquila was a vessel of no value compared with the cargo.

* The Traveller, 3 Haggard, 371; The London Merchant, Ib. 395; The Fusilier, Browning & Lushington, 350; on appeal in Privy Council.

† The Blaireau, 2 Cranch, 266; Wm. Beckford, 3 Robinson, 355–6; The Sarah, Ib. 330; Rising Sun, Ware, 380.

Restatement of the case in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Compensation, as salvage, is claimed by the libellants for services rendered by them in saving the cargo of the ship Aquila, which was wrecked in a storm, and sunk in the harbor of the port of San Francisco, to which she was bound, with all her cargo on board.

Such portion of the cargo as constitutes the basis of the investigation in this case consisted of certain materials manufactured for the construction of an iron-clad monitor, and the armament for the same, which was to be constructed at San Francisco by the claimants, under a contract with the government. They manufactured the materials and armament in New York, and the ship, with the same on board, sailed from that port on the twenty-ninth of May, 1863, and arrived and came to anchor in perfect safety, on the tenth of November following, off North Point dock, in the harbor of her port of destination, where she remained until the fourteenth of the same month.

Aided by a steamtug she attempted, on that day, to proceed to the wharf where she was to unload, but was obliged, by the state of the wind and tide, to come to anchor before she accomplished that object, and at midnight she encountered a heavy squall, which caused her to drag her anchors, and forced her into a more unfavorable position. Preparations were made on the following morning to get up to the wharf, and the wind having abated, the ship weighed anchor, and being again assisted by the steamtug, proceeded to the southern side of the wharf, where she was directed to discharge her cargo, and was there moored with her stem to the eastward and her stern towards the shore.

When she was moored the weather was good, but at ten o'clock in the evening the wind increased, and soon rose to a gale, from the southeast, which caused the ship to strike with such violence that she made a breach in her aft-port quarter to such an extent that in spite of any use which could be made of the pumps she filled with water, and at three o'clock on the following morning sunk in the dock, her stem lying in forty or fifty feet of water, and her stern

in twenty feet, and she lay with a list to the starboard at an angle of thirty-five or forty degrees.

Both the ship and the cargo belonged to the claimants, and they immediately abandoned the whole adventure to the underwriters, and the agent of the underwriters, though he declined to accept the offer of abandonment, commenced without delay to employ the best means in his power to raise the vessel and save the cargo, calling into requisition for that purpose all the nautical experience and mechanical skill at his command, but his efforts were fruitless, except that he succeeded in dismantling the ship, and in saving a small portion of the cargo.

Apprised of the failure of the measures adopted by their agent to raise the ship and save the cargo, the underwriters at that juncture employed the libellants to undertake what their agent, with all the assistance he could command in the port of the disaster, was unable to accomplish.

Pursuant to their engagement, the libellants instructed their general agent to proceed to that port and take possession of the wreck, and they also dispatched with him a party of men, selected for the occasion and having experience as divers and wreckers, and provided them with the most approved machinery and apparatus to promote the success of the enterprise.

Chosen and qualified as described, the party, under the superintendence of the general agent of the corporation, sailed from the port of New York on the twenty-fourth of December, 1863, and took possession of the wreck, in the port of the disaster, on the twenty-third of January following. Although the undertaking was beset with difficulties and dangers on all sides, they made no objection on that account, but proceeded at once to the examination of the wreck, and the plan which they adopted and executed was to get out the cargo by divers, as far as was necessary to prevent it from being injured, and to lighten the ship, so that she could be raised and secured, and then to hoist out the remainder of the cargo by the apparatus and machinery prepared for the purpose.

They completed the work of securing the cargo, so far as it was necessary to lighten the ship, in less than three months, and when that was accomplished they were able to raise the ship, stopped the leaks, removed the mud (estimated at six hundred tons), pumped out the ship by means of steam pumps, and finally hoisted out the residue of the cargo and restored it to the owners in an undamaged condition, and the proofs show that the whole was accomplished with success in less than seven months from the time they were employed by the insurance companies.

Payment of their claim being refused, they filed their libel against that portion of the cargo which consisted of the materials for the construction of the iron-clad monitor, and the armament for the same, as set forth in the record, and the District Court entered a decree in their favor for the sum of $28,428.44 as compensation for the salvage services rendered by them in raising the ship and saving the cargo. Appeal was taken by the claimants to the Circuit Court, where the decree of the District Court was affirmed; whereupon the claimants appealed to this court.

Argument to show that the libellants were entitled to compensation for the services which they rendered is hardly necessary, as the proposition is several times impliedly admitted by the claimants in their answer. They were the owners of the ship as well as of the cargo, and they admit that she sunk near the wharf where she was to unload, at the time and by the means and substantially in the manner alleged in the libel, and they also admit that the efforts made by the agent of the underwriters to raise the ship and save the cargo were wholly unsuccessful, except as to a small portion of the cargo taken out while the men employed were engaged in dismantling the ship.

Implied admissions to the effect that important services were rendered by the libellants are contained in every article of the answer, but it is unnecessary to refer to those passages with more particularity, as the claimants expressly admit in the fourth article of the answer that the libellants secured

and saved all the cargo which was on board the ship when their general agent took possession of the wreck, and they also admit that the libellants raised the ship, but they deny that any of the services rendered were attended with much difficulty or danger, and they allege that the employees of the libellants, in accomplishing the work, unnecessarily damaged the ship, her tackle, apparel, and furniture, and insist that the salvage compensation to be allowed in the case ought to be greatly diminished on that account.

Apart from these disparaging allegations, the claimants do not set up in the answer any defence to the merits of the claim made by the libellants, except that they allege that the insurance companies have paid the libellants for all the services which they rendered as to thirteen-sixteenths of that part of the cargo described in the first article of the libel.

Most of the discussion at the bar has been addressed to topics other than those here enumerated, and much of it to questions not directly presented in the pleadings. Questions not raised by the pleadings, strictly speaking, are not before the court, but inasmuch as no objection on that ground was made by the libellants to any of the propositions submitted by the claimants, they will all be considered in the order adopted at the argument. Briefly stated, they are as follows:

1. That the corporation libellants cannot maintain a salvage suit, because they are incapable as a corporation of rendering any personal services, and they insist that no party can be regarded as a salvor unless personally engaged in the service of saving the salved property.

2. That even if the corporation libellants may be regarded as salvors, still they were not the sole salvors in this case, and consequently that the decree rendered in the Circuit Court would not be a bar to a subsequent suit for the same services if instituted by their employees.

3. That the services rendered by the libellants were not salvage services, because they were rendered under and in pursuance of a contract with the underwriters.

4. That the amount allowed in the court below was exces-

sive, and that the decree in that respect violates the established principles of admiralty law regulating compensation for salvage.

I. Objection cannot be taken to the first proposition submitted by the claimants, that the question is not presented in the pleadings, as it necessarily arises upon the face of the record, and therefore if it is sustained, the decree must be reversed, as the compensation allowed is for salvage service, and not merely compensation *pro opere et labore*, as it should have been if the theory of the claimants is correct.

Decided cases are referred to in which it is said "that a party not actually occupied in effecting a salvage service is not entitled to a share in a salvage remuneration," but the learned judge who is represented as having expressed that opinion, admitted in the same case that the owners of vessels, who rarely navigate their own ships, constituted an exception to that general rule.* Similar remarks were also made in the case of *The Charlotte*,† and it is supposed by the claimants that the case of *The Lively*‡ is an authority to the same effect; but the question whether the owners of a vessel, when not personally engaged in a salvage service, were entitled to a salvage compensation for assistance rendered in the case by their vessel was not in any way involved in that record.

Examples where the suit for salvage was promoted by the owners of the salving vessel are quite numerous, in cases where the decisions were made before our judicial system was organized; and it was expressly determined in the case of *The Haidee*,§ that owners were by no means unfit persons to originate suits to recover compensation for salvage services. Strong doubts are entertained whether the court, in any of the cases before referred to, intended to decide otherwise, but the inquiry is of no importance, as all of the modern decisions in that country affirm the right and support it by reasons both satisfactory and conclusive.‖

* The Vine, 2 Haggard, 2; The Mulgrave, Ib. 79.
† 3 W. Robinson, 73. ‡ Ib. 64.
§ 1 Notes of Cases, 598.
‖ The Waterloo, 2 Dodson, 443.

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When steamers render salvage service the court held, in the case of *The Kingalock*,* that they are entitled to a greater award than any other set of salvors rendering the same service, because they can perform such services, owing to the power they possess, with much greater celerity than other vessels, and with much greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could be effectual. Consequently the court having cognizance of such cases looks with favor on the exertions of steamers in assisting vessels in peril, as they can render such assistance with greater promptitude and with much more effect than vessels propelled in any other way.†

Reported cases where the suits for salvage were promoted by the owners of steam vessels, and in many cases by the owners of steamers built for the special purpose of rendering such services, and devoted exclusively to that particular employment, are very numerous in the reports of decisions in admiralty published within the last twenty years. Indeed they have been multiplied to such an extent within that period that it would be a useless task to attempt to do more than to refer to one or two of a class as examples to illustrate the course of modern decisions upon the subject, but it may not be out of place to remark that many others to the same effect will be found in the very volumes from which the citations here made have been selected.

Take, for example, the case of *The Albion*,‡ in which the sum of £350 was awarded to the owners. *The Saratoga*,§ in which the sum of £600 was awarded, and it was wholly given to the steamtug. *The True Blue*,‖ in which the suit was promoted by the owners, master, and crew of a steamship, and the sum of £500 was awarded to the libellants.

Some discussion took place at the bar, in the case of *The Abercrombie*,¶ as to the relative claims of the owners of ships,

* 1 Spinks, 267.

† The Alfen, Swabey, 190; The Mary Anne, 9 Irish Jurist, N. S. 60; The Raikes, 1 Haggard, 246; The Merchant, 3 Id. 401; The Perth, 1b. 416.

‡ 1 Lushington, 282.

§ 1 Ib. 318.

‖ 4 Moore, Privy Council, N. S. 96.

¶ Ib. 380.

and of the masters and crews of the same, but the court said that the discussion was unnecessary, because the rights of such parties were so constantly under consideration that the principles regulating the distribution of salvage in such cases were so well understood, that the only difficulty that ever arises is in ascertaining the facts so as to be able to apply the principles to the particular case.

Services were rendered to a sailing vessel in the case of *The White Star*,* and suitable remuneration for the services having been refused, the owners, master, and crew, instituted a salvage suit against the salved vessel and her cargo, whereupon the owners of the salved property appeared and pleaded that the services had been rendered under an agreement, but it appearing that the undertaking was attended with greater difficulty and danger than the parties supposed at the time the agreement was made, the court held that the libellants were entitled to recover a certain sum beyond that tendered under the agreement.

So where salvage compensation was claimed by the master, owners, and crews of six luggers, a cutter, and a lifeboat, the court sustained the libel and awarded a sum equal to one-third of the salved property, including the ship as well as the cargo.†

Proceedings in salvage were instituted in the case of *The Canova*,‡ by the owners and crew of a steamtug, for services rendered in towing the vessel from a place of danger to her dock in her port of destination, but it appearing that there was an agreement *to do the work for an agreed price*, the court declined to allow any salvage compensation.

Modern text-writers, without an exception, uphold the right of the owners of ships and vessels, whether propelled by steam or otherwise, to claim salvage compensation when such services are rendered by their vessels, whether they are present or absent at the time the service is performed; and the author of the latest work published upon the subject states that one-tenth of all the salvage awards collated in

* Law Reports, 1 Adm. and Eccl. 71. † Ib. 50. ‡ Ib. 54.

the Digest of the Decisions in Admiralty by the English courts are to owners and vessels, boats, tugs, and steamers. Assuming his estimate to be correct, it appears that thirty-five cases collated in that work recognize owners as salvors, and twenty-five the vessels themselves as entitled to such compensation.*

Owners of the salving vessel, says MacLachlan, are entitled to remuneration, in the nature of salvage, in addition to expenses, when they show actual loss suffered, or risk in respect to their property encountered in the service, but charterers are not in the same position unless there is a stipulation giving them the control and benefit of the salvage, or unless the vessel is chartered and sailed on their responsibility.†

Under ordinary circumstances the owners of the ship which rendered the service are allowed one-third of the amount awarded as salvage compensation, but they are sometimes allowed much more where the salvage service was of a character to expose the ship to peculiar danger, especially if she was a steamer of large size and of great value.‡

Suppose it be conceded that the owners of a vessel may promote a suit for salvage and that they may be entitled to a salvage compensation, still the claimants insist that the libel in this case does not come within the operation of that rule of pleading, as the libellants are a corporation, but they assign no reasons in support of the proposition, which, if adopted and held to be sound, would not also require the court to hold that the owners of vessels are not entitled to salvage compensation, and are not competent to promote a salvage suit, which cannot be admitted.

* Roberts's Adm. 103; 2 Pritch. Dig. 727 to 909; 2 Parsons on Shipping, 277, 278; The Blaireau, 2 Cranch, 269; The Embank, 1 Sumner, 426.

† MacLachlan on Shipping, 529; Maude & Pollock on Shipping, 423; Abbott on Shipping, 571.

‡ 2 Parsons on Shipping, 299; The Waterloo, Blackford & Howland, 114; The Rising Sun, Ware, 385; The Beulah, 1 W. Robinson, 477; The Martin Luther, Swabey, 287; The Enchantress, 1 Lushington Admiralty, 96; The Splendid, 2 Mar. Law Cases, 216; The N. Hooper, 3 Sumner, 578.

Corporations, it is said, are not entitled to salvage remuneration, because no party, as the argument is, can be so entitled except such as actually engages in rendering the salvage service; but if that is the reason for denying such compensation to corporations, then it is clear that the owners of vessels must also be excluded from participating in any such reward, as they seldom or never navigate their own ships.*

Remuneration for salvage service is awarded to the owners of vessels, not because they are present, or supposed to be present when the service is rendered, but on account of the danger to which the service exposes their property and the risk which they run of loss in suffering their vessels to engage in such perilous undertakings; and if that is the legal foundation of their claim it is difficult to perceive any reason why the same rule should not be applied to corporations as the owners of ships and vessels similarly employed and exposed.

No satisfactory reason for such a discrimination can be given, because it is believed that the two cases are precisely analogous. But the question is hardly an open one in this court, as will appear by an attentive examination of the case of *The Island City*, which was elaborately argued by able counsel, and very carefully considered by the court.

Three libels were filed against the bark in that case in the District Court, but the district judge being concerned in interest, the three records were removed into the Circuit Court. By the original record it appears that one of the libels was filed by the owners of the steamer Western Port; another in behalf of the steamtug R. B. Forbes, which was owned by an incorporated company, and the third by persons on board the schooner Kensington.

Sole salvage was claimed by the owners of the Western Port, and they denied that anything should be awarded to the steamtug, but the circuit judge held otherwise; and having determined that the property saved ought justly to

* The Bark Edwin, 1 Clifford, 326.

pay the sum of $13,000 to all concerned, awarded $5200 of that amount to the owners of the steamtug.*

Dissatisfied with the decree of distribution, the owners of the Western Port appealed to this court. Even a slight examination of the decree in the case will show that the appeal involved the whole question under consideration, but this court affirmed the decree of the Circuit Court, which in effect established the rule that the owners of ships, whether individuals or corporations, may promote a salvage suit, and are entitled, in a proper case, to salvage remuneration.†

Prior to that time the same point had been decided by the late chief justice and two of the associate justices of this court as then constituted.‡

Certain unreported decisions of the district judges are referred to where a contrary doctrine is held, but they appear to overlook the fact that vessels disabled, or otherwise in need of assistance from the shore, depend, everywhere at this time on our coast, almost entirely upon steamtugs, constructed and equipped for the purpose, and whose business it is to be always ready and at command whenever assistance is required. Such steamers are generally owned by incorporated companies, and having been built and equipped for the purpose, and being manned with officers and seamen having the requisite experience and skill, the interests of commerce cannot safely dispense with their services.§

Considerations of the character suggested seem also to have induced the admiralty courts of England to adopt principles of adjudication and rules of practice consistent with the employment of these comparatively new and effective instruments of relief in cases of disasters upon the seas. Reference is made to a few cases as establishing that proposition, and to show that the course of decision in the two

* The Island City, 1 Clifford, 210, 219, and 221.

† The Island City, 1 Black, 121.

‡ The Caroline, 6 American Law Register, 222; The Independence, 2 Curtis, 351; The William Penn, 1 American Law Register, 584.

§ The Perth, 3 Haggard, 416.

countries is entirely coincident in every particular involved in this record.*

Claim in that case was made for a salvage compensation, and the suit was instituted by the Liverpool Steamtug Company. Assistance in the case of *The Paul*† was rendered to a ship and her cargo, and the salvage suit was commenced and prosecuted by the Anglo-Egyptian Steam Navigation Company. Libellants in the case of *The Collier*‡ were the Brighton Railway Company as owners of the steamship Lyons, and the master and crew, and the libel was sustained.§

II. Next proposition of the claimants is that the libellants, even if they may be regarded as salvors, were not the sole salvors, and consequently that the decree of the Circuit Court ought not to be affirmed, as it would not be a bar to a subsequent suit for the same services if instituted by their employees.

Evidently the objection is in the nature of a plea in abatement, and should have been taken in the answer, or by a proper exception in the court below. Monition, in due form, was issued at the commencement of the proceedings, which was a notice to every one interested to appear and show cause, if any, why the prayer of the libel should not be granted.

Adjudged cases, besides those already cited, are quite numerous, where salvage suits have been instituted in the name of the ship or of the owners, without any allegation that the suit was prosecuted for the benefit of the master and crew, and no case is referred to where it has been held that the claimants, even in the court of original jurisdiction, can abate the suit on that account. All persons interested may appear, on the return of the monition, and become parties to the suit, or, by some proper proceeding, have their rights

* The Pericles, 1 Browning & Lushington, 80.

† Law Reports, 1 Adm. and Eccl. 57. ‡ Ib. 83.

§ The Minnehaha, 1 Lushington, 335; The Annapolis, Ib. 355; The Pensacola, 1 Browning & Lushington, 306; The Fusilier, 1 Ib. 341, 349; The Bartley, Swabey, 198; The Galatea, Ib. 349.

adjudicated; and in many cases, even after the decree upon the merits is pronounced, they may appear at any time before the fund is distributed and claim any interest they may have in the proceeds of the property libelled, if any, in the registry of the court, but it is quite clear that the claimants in this record are in no condition to present for decision any such question as that involved in the proposition under consideration.

III. If the defence is not sustained on that ground, then the claimants contend that the services rendered were not salvage services, because, as they allege, they were rendered under an agreement for a fixed sum.

Three answers may be given to that proposition, each of which is sufficient to show that it cannot be sustained. (1.) No such defence is set up in the answer. (2.) Nothing was ever paid or tendered to the libellants for that part of their claim now in controversy, and it is well settled law that an agreement of the kind suggested is no defence to a meritorious claim for salvage, unless it is set up in the answer with an averment of tender or payment. Such an agreement does not alter the character of the service rendered, so that if it was in fact a salvage service, it is none the less so because the compensation to be received is regulated by the terms of an agreement between the master of the ship or the owners of the salved property.*

Defences in salvage suits, as well as in other suits in admiralty, must be set up in the answer, and if not, and the services proved were salvage services, the libellants must prevail.† Agreements of the kind suggested ought certainly to be set up in the answer, as it is not every agreement which will have the effect to diminish a claim for salvage compensation. On the contrary, the rule is that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage.‡

* The Emulous, 1 Sumner, 210. † The Boston, Ib. 328.

‡ The Versailles, 1 Curtis, 355; The Lushington, 7 Notes of Cases, 361;

(3.) But if the agreement had been set up in the answer, it would constitute no defence, as by the terms of the instrument the libellants were not to receive any compensation whatever, or be entitled to any lien upon the property, unless the materials and machinery were substantially saved, so that it is clear that the compensation was not to be paid at all events.

IV. Discussion as to the amount allowed in the decree is hardly necessary, as it is clear that it does not much exceed the amount the claimants agreed to pay for the services, in case the libellants were successful in raising the ship and in saving the materials intended for the construction of the monitor and her armament.

Attempt was made by the agent of the underwriters, at great expense, to pump out the ship, as before explained, but the record shows that he was unsuccessful, although the men engaged in the attempt were under the superintendence of one of the claimants. Expensive preparations became necessary before they could commence pumping, and in the course of those arrangements they were obliged to cut openings in the decks and through those openings they took out sixty or seventy tons of the cargo, but the attempt to pump out the ship proved an utter failure, from the intrinsic impracticability of raising the vessel by that plan.

Next attempt by that party was to lift the vessel, with the cargo on board, by means of chains, but the scheme as projected proved to be impracticable, as the bottom of the dock where the ship sunk was solid rock, and the divers found it impossible to get the chains under the vessel. Efforts of a similar character were continued by the agent of the underwriters until he expended $38,000 in gold, but all his efforts to raise the ship or save the cargo, except the fractional part before mentioned, were wholly unsuccessful.

The Centurion, Ware, 477; The Foster, Abbott, Admiralty, 222; The Whitaker, 1 Sprague, 283; The Brig Susan, Ib. 503; Parsons on Shipping, 275; The Phantom, Law Reports, 1 Adm. and Eccl. 61; The White Star, Ib. 70; The Saratoga, 1 Lushington, 321; MacLachlan on Shipping, 531; The John Shaw, 1 Clifford, 236.

Complete success attended the efforts of the libellants, as is admitted by the claimants in their answer.

When the property in question was insured, it was valued at $400,000, for which policies were granted by the underwriters for the sum of $340,000; and under the contract between the claimants and the libellants they adopted the same valuation. Of that sum $60,000 was uninsured, and $15,000 of the amount insured was never paid, and the record shows that the whole of the property on board when the agent of the libellants took possession of the wreck was rescued from imminent peril and was delivered to the claimants or their order.

Difficulties almost unexampled attended the undertaking, and the divers, in taking out the cargo to lighten the ship so that she could be raised and secured, were exposed to great danger. Expenses were incurred by the libellants exceeding $60,000 in rescuing and saving the property, including moneys paid out and loss of apparatus and machinery. Considering the skill required to perform the work, and the expense incurred, and the time and labor spent in completing the enterprise, the court is not satisfied that the amount awarded is excessive.

Appellate courts are reluctant to disturb an award for salvage, on the ground that the subordinate court gave too large a sum to the salvors, unless they are clearly satisfied that the court below made an exorbitant estimate of their services.*

Judge Story said, in the case of *Hobart* v. *Drogan*, † that the "court is not in the habit of reversing such decrees as to the amount of salvage, unless upon some clear and palpable mistake or gross over-allowance of the court below.‡

Evidence to show any such errors in the case is entirely

* The Fusilier, 1 Browning & Lushington, 350; Hobart *v.* Drogan, 10 Peters, 119.

† 10 Peters, 119.

‡ The True Blue, 4 Moore Privy Council, N. S. 101; The Emulous, 1 Sumner, 214.

wanting, and in view of the whole record the court is of the opinion that the decree of the Circuit Court is correct.

DECREE AFFIRMED WITH COSTS.

ALLEN *v.* KILLINGER.

1. To admit the declarations of a third person in evidence, on the ground that one party to the suit had referred the other party to him, it is necessary that the reference should be for information relating to the matters in issue.
2. A conversation between the plaintiff and such third party, in regard to a contract of the plaintiff with the defendant, cannot be given in evidence when the reference by the defendant to such party was not for information concerning such contract.
3. The plaintiff's statements, in such conversation, concerning the terms of the contract, are not evidence in his favor, especially, since he can give his own version of the contract as a witness, but under oath, and subject to cross-examination.

ERROR to the Circuit Court for the Northern District of Illinois. The case was this:

There were two firms of both which a certain B. F. Murphy was a member; the one was at Des Moines, and consisted of this B. F. Murphy and a certain Allen. This firm was under the title of Murphy & Allen. The other was at Chicago, and consisted of this same B. F. Murphy and one Miles Murphy. This firm was under the title of Miles Murphy & Co. The former was engaged in the business of *packing pork;* the latter in that of buying *and selling the "hog product"* on commission.

In this state of things, one Killinger, passing through Des Moines with a drove of hogs, and meeting with Allen, whom he had known before, entered into a contract of *some sort* about them with him, and the hogs, instead of being driven further, were killed and packed by the firm at Des Moines, and forwarded to the firm at Chicago, by whom they were sold. The Chicago firm, however, failed, soon after, and never paid the money, either to Killinger or to the Des

Moines firm. Allen, however, still remained solvent. In this state of facts, Killinger alleging that Allen was a member of the Chicago firm, and responsible for their acts, or, if he was not, that the firm of Murphy & Allen, at Des Moines, undertook, not only to slaughter and pack his hogs, but to sell them at Chicago, and account to him for the proceeds, now sued B. F. Murphy & Allen, as partners in trade, alleging, that he delivered to *them* at Des Moines, the hogs, which they agreed to slaughter and pack at that place, and forward to Chicago, and sell, on his account, and to pay to him the proceeds of the sale. To this B. F. Murphy & Allen pleaded separately. In one of his pleas, Allen said that he did not make the said promises, in partnership with said B. F. Murphy, but that, if any such were made, they were made by B. F. Murphy and others, composing the firm of Miles Murphy & Co., of which he was not a member.

B. F. Murphy filed a similar plea, saying, that if the promises were made by him at all, they were made as a member of the firm of Miles Murphy & Co., of which Allen was not a partner.

Upon the trial, the plaintiff, Killinger, Miles Murphy, who had failed, and Allen, who remained solvent, were all examined as witnesses. On the examination of Miles Murphy —that witness having stated that he remembered the fact of the plaintiff, Killinger's, coming to him with reference to the hog product, when he was in Indiana, and their having a talk—the bill of exceptions disclosed, that the following questions, objections, promises, and proceedings took place:

Question. State what conversation you had, and what you said to him.

(Question objected to by the defendant's counsel, on the ground that the conversation inquired about was incompetent as evidence, neither of the defendants being present.)

Plaintiff's counsel then stated as follows:

I shall expect to prove, by another witness, that Killinger was sent by B. F. Murphy to Miles Murphy, with reference to these hogs, and, therefore, I suppose the conversation is competent.

And, thereupon, the objection was overruled by the court, and the defendant excepted.

Answer. I will state the substance. He said he had come down to hunt his money; that he was out of money, and that he had placed some hogs in Allen's hands in Des Moines.

(Defendant here again objected to any conversation between plaintiff and witnesses, relating to defendant, Allen's, agreement or arrangement with the plaintiff, as incompetent evidence, being but hearsay; but the objection was overruled, and defendant excepted.)

Question. Did he say anything about B. F. Murphy's sending him?

Answer. I think B. F. Murphy, he said, had sent him down there.

Question. State what was said between you and him substantially.

(Defendants again objected, &c., but the objection was overruled by the court, and the defendants excepted.)

Answer. He said he had come from Des Moines, and saw B. F. Murphy there, and that B. F. Murphy refused to pay him or give him any satisfaction, and he had sent him down to me, to see if he couldn't get his money out of me. I told him he had come to a bad place; the house had failed, and I didn't know anything about his matters. I knew he had some pork here; there had been some shipped in Des Moines. *He went on to tell me he had placed it in Mr. Allen's hands, and it was sent here, and he was out* $8000 *or* $10,000; I forget the amount. I told him he couldn't get it out of me; I didn't know anything about it; didn't know anything about the details of the business, whether B. F. Murphy had sold the meat, or anything about it.

Killinger, being subsequently examined, testified, that he urged B. F. Murphy, in Chicago, for money; that Murphy, apparently aiding his object, took him to Mr. Jewett, Allen's agent, saying, that some might be had of him; that going to Mr. Jewett's, Mr. Jewett, on hearing the purpose of the visit, said to Killinger, "Did you not ask me, when you were here in the winter, to deposit your money in the Fifth National Bank?" To this Killinger answered: "Yes, I did." Jewett then said, "That would leave Allen

Argument against the evidence.

out." To which Killinger replied: "Mr. Murphy, if that's all you wanted me to come here to answer, you need not have brought me here to commit myself. I don't deny, that if you let Allen out, the hogs are all gone up." The witness went on to state, that after this, B. F. Murphy urged him to go and see Miles Murphy, then in Indiana, and try and get money from him. The witness stated that he was very reluctant to go, not regarding Miles Murphy as having anything to do with the business, and who would say, at once, that he owed him, Killinger, nothing; but, still, on the urgency of B. F. Murphy, who told him that there was "nothing like trying," and who, finally, went to his hotel, and took him in his own carriage to the railway station, he did go.

This testimony of Killinger was the testimony relied on by the plaintiff's counsel to redeem his pledge to the court.

Verdict and judgment having been given for the plaintiff, the case was now here on error, the errors relied on being all presented by the bill of exceptions. Some objections were made to the charge, but this court having been of opinion that they were not tenable, and the judgment, as it will be seen in the sequel, having been reversed on another ground, for which reason the court thought it unnecessary to examine them, it is needless to present them.

Mr. J. M. Jewett, for the plaintiff in error:

No doubt the rule laid down by Greenleaf is a settled rule,* that "the admissions of a third person are also receivable in evidence against the party, who *has expressly referred another to him* for information in regard to an uncertain or disputed matter, and that in such cases, the party is bound by the declarations of the person referred to, in the same manner and to the same extent as if they were made by himself." But being an exception to a general rule, the party seeking to avail himself of it must bring himself strictly within its provisions, and, therefore, before the con-

* Law of Evidence, vol. i, § 182.

versations referred to could be admissible, as an admission of Miles Murphy, it should have been shown, that the parties against whom the admission was offered had expressly referred the party offering the evidence, to Miles Murphy for information. The evidence was offered generally, and against both defendants, who had pleaded separately. It was not preceded by any proof that the defendants *had expressly referred* Killinger to Miles Murphy for information upon any subject; but instead of such proof, the plaintiff's counsel stated, "that he expected to prove by another witness that Killinger was sent by B. F. Murphy to Miles Murphy, *with reference to them hogs.*"

The promise of the counsel here made was insufficient for two reasons:

1st. It does not contain any statement of an expectation to prove that Killinger was sent to the witness "*for information.*"

2d. It does not connect the defendant Allen, in any way, with the sending of Killinger to the witness.

Messrs. Gookins and Roberts, contra:

In answer to the objections raised, we say:

1. The testimony elicited amounts to nothing, and could have had no influence upon the verdict. Killinger told Miles Murphy "he had come to hunt his money." Murphy replied that "he had none for him." What does that amount to?

The principle of the rule on which we rely is this: when one refers to another for information, he accredits that other to speak for him, and in effect makes the information given his own. He speaks himself through the mouth of the person referred to. But this is an act. It is part of the *res gestæ*. Killinger was sent for money. What was said in doing the errand was part of the act itself. It characterizes the act, and this was very important. Killinger all the time insisted that Murphy & Allen, and not Miles Murphy & Co., were liable to him, and he for a long time refused to go to Miles Murphy, but consenting, if not willing, to try

all expedients, however unpromising, to get his money, he finally went. This act might have been turned against him, as Murphy & Allen were endeavoring to do, by showing that he had recognized Miles Murphy & Co. as his debtors instead of themselves, if he was not allowed to show what really did take place; and the language used was much the most important part of the whole transaction, for the purpose of showing its true character.

The objection seems to be a criticism upon the statement of the plaintiff's counsel, as to how he would make the defendants answerable for this errand. He did not say he expected to prove Killinger was sent to the witness "for information."

2. It is objected that Allen is not shown to have had any hand in sending Killinger to the witness. It was not our expectation to make out our whole case by proof of this interview. It is unusual for all the partners of a firm to participate in every transaction which affects the firm, particularly when they reside in different States. No doubt there must be evidence enough in the case to show the joint liability, as one cannot make another his partner by his own statement. But suppose they both, at different times, make statements or do acts that show them to be partners, then all the acts and declarations of both are admissible.

It is true that Allen's connection with the business had not been shown when the witness testified. But when several distinct acts and declarations are relied on to show a partnership, all cannot be first in the order of proof; and if the party offering the evidence fails to adduce enough to submit the question to the jury, the opposing counsel may ask to have the evidence stricken out, which the counsel did not do, for he plainly saw that the evidence was abundant for this purpose.

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that the court erred in admitting, against the objection of the defendants, the conversation

between Miles Murphy and the plaintiff, in which the plaintiff gives his version of his contract with defendant, Allen.

The plaintiff Killinger had an opportunity to give his version of the contract made by Allen with him on behalf of Murphy & Allen, and he did so under oath, and subject to cross-examination. Miles Murphy was the plaintiff's witness, and under oath testified to what he knew. But in the examination of Miles Murphy by the plaintiff's counsel he was asked to detail a conversation which took place between himself and the plaintiff in Indiana, when neither of the defendants were present.

The witness stated, among other things, in answer to this request, that he (the witness) knew that the plaintiff had some pork in Chicago, that it had been shipped from Des Moines, and that the plaintiff went on to tell him that he had placed it in Mr. Allen's hands, and that it was sent to Chicago, and that he (the plaintiff) was out $8000 or $10,000.

When it is remembered that the only important issue before the jury was, whether Allen's contract with the plaintiff was merely to slaughter and pack for the plaintiff the seven hundred hogs, or whether he had undertaken to forward and sell at Chicago the product of the hogs after they had become converted into pork, the importance of this statement by the plaintiff is obvious. Slaughtering and packing hogs at Des Moines is one business, and buying and selling pork at Chicago, whether on commission or otherwise, is a very different business; and the plaintiff is here permitted to prove what he had told Mr. Murphy about that matter after the controversy had arisen, and when neither of the defendants were present to deny it, or to explain the matter.

It does not seem to us that the pledge made here by the plaintiff's counsel (who, when the testimony was objected to, apparently conceded that the question was improper as matters stood), was what was required to admit such testimony, if we suppose the pledge to have been fully redeemed. The rule invoked by the counsel is, that where one person is sent by another to a third party for information in reference to an uncertain or disputed matter, the person sending is

bound by the declarations of the party to whom he was referred, as if they were made by himself.

But, there is here no statement that the counsel expected to show that Killinger had been sent to Miles Murphy for information as to the extent of Killinger's contract with Allen, or even with Allen and B. F. Murphy, or with any reference to that contract. Such a supposition is absurd, as the plaintiff must have known all about that, while Miles Murphy could know very little. And so the declarations brought out by the conversation that are important are not the declarations of Miles Murphy in answer to a request for information, but they are the declarations of the plaintiff made to Murphy.

When the counsel came to fulfil this promise, it is equally clear that B. F. Murphy did not send the plaintiff to Miles Murphy for information, but for money. Killinger was urging B. F. Murphy, in Chicago, to pay him. The firm of Miles Murphy & Co. had failed, and to get rid of Killinger's personal importunities, B. F. Murphy urged him to go and see Miles Murphy, who was then in Indiana, and see if he would not pay him something. This is very clear from Killinger's own statement, being the one relied on by counsel to redeem the pledge to the court.

It seems to us that Killinger's statement to Miles Murphy was mere hearsay, made by the plaintiff in his own favor after the controversy had arisen, in the absence of defendants, and its introduction cannot be justified under the settled rules of evidence.

But if there ever could have been a justification for such testimony, there can surely be none now. For the plaintiff is permitted now to tell his own story to the jury directly, but under the sanction of an oath, and subject to the test of cross-examination. Shall he also be permitted to prove what he said to a third party about the same matter when he was under no oath, and in no danger of cross-question or contradiction?

For this error the judgment must be

REVERSED AND A NEW TRIAL AWARDED.

Mr. Justice NELSON, with whom concurred Mr. Justice DAVIS, dissenting.

The question is, whether the statement of the plaintiff, in his conversation with Miles Murphy, that he had placed the pork in the hands of Allen, that it was sent to Chicago, and that he was out of pocket some $8000 or $10,000, under the circumstances mentioned, was admissible?

It occurred in a conversation with a person to whom B. F. Murphy, one of the defendants, had sent the plaintiff to endeavor to obtain from him the proceeds of the pork. Now, this conversation was competent evidence as against B. F. Murphy as it respects the business upon which the plaintiff had been sent; he, B. F. Murphy, had accredited Miles Murphy to speak for him in respect to the transaction, and so far as it might tend to prove the partnership of B. F. Murphy with Allen, competent and pertinent. We agree it was no evidence against Allen, nor does it appear that the court gave it any effect as to him. It is not required that, in proving a partnership, the evidence must be competent as it respects each member of the firm. The proof can be given as bearing separately against each of the parties. Miles Murphy, in response to the mission of the plaintiff, stated that B. F. Murphy was a partner of Allen, and that the firm had received and sold the pork. As this response was competent testimony against B. F. Murphy, it was properly admitted. The whole conversation that occurred, or which related to the business about which the plaintiff was sent, was properly allowed. It was no evidence as against Allen, as we have already said, but was as it respected the other defendant. On this ground we cannot agree to the opinion of the court.

Statement of the case.

PARISH ET AL. *v.* UNITED STATES.

1. A contract made by a surgeon and medical purveyor of a military department of the United States, with parties for furnishing ice, for the use of the sick and wounded in the hospitals of the United States in 1864, was invalid until approved by the Secretary of War. Without such approval the surgeon could not bind the United States in any way.
2. A contract thus approved being executed by the other parties, superseded a previous contract signed by the surgeon, although the latter conformed strictly to proposals made by the parties, and accepted by the surgeon.

APPEAL from the Court of Claims. The case was thus:

On the 4th of December, 1863, D. L. Magruder, the surgeon and medical purveyor of the military department of the West, acting under instructions of the Surgeon-General of the United States, gave notice that proposals would be received at his office in Louisville, Kentucky, until the 20th of that month, for furnishing ice to all the general hospitals of the United States at the West, including the division of the Mississippi and the Department of the Gulf, in such quantities as might be required, for the use of the sick and wounded, during the year 1864. Under this notice, Parish & Co., the claimants, submitted proposals which were accepted, and, on the 13th of the same month, a contract was prepared and signed by them and Magruder, by which they were to furnish ice for twenty different places, one of which was New Orleans. It was understood between the parties that this contract was not to be binding until it should receive the approval of the Surgeon-General, to whom it was forwarded. It received such approval, and was then despatched by mail to Magruder; but, before reaching him, the approval was reconsidered, and the contract, by order of the Secretary of War, was recalled, and the draft of another contract prepared in its place. After this draft had reached Magruder, he was directed by the secretary to erase from it the name of New Orleans, as one of the places to be supplied with ice, and have it executed in lieu of the contract originally proposed, and this was done. The claimants then executed

the instrument, but, in doing so, they protested against the alteration, stating, however, that they would lay all the facts before the officials at Washington, and seek from them redress. But, notwithstanding this protest, they treated the contract thus made as the only one binding upon them, and carried out their obligations under it. They did not deliver, or offer to deliver, any ice at New Orleans.

Mr. A. L. Merriman, for the appellant; Mr. T. L. Dickey, Assistant Attorney-General, contra.

Mr. Justice FIELD, after stating the facts, delivered the opinion of the court, as follows:

Upon the facts found by the Court of Claims, it is difficult to perceive upon what ground the contractors can urge any claim for damages against the government. The contract with New Orleans erased, superseded all other proposed contracts. No other had any validity. The action of Magruder, until the approval of the Secretary of War, was merely initiatory to a contract. He could not bind the United States in any way.

If the claimants had any objections to the provisions of the contract they signed, they should have refused to make it. Having made it, and executed it, their mouths are closed against any denial that it superseded all previous arrangements.

The case of *Gilbert & Secor* v. *United States*,* is one much stronger than this. There it was insisted that the act of Congress, under which the secretary acted in making a contract with Gilbert & Secor, was itself an acceptance of certain proposals presented by them, and that, taken in connection with the proposals, it constituted a contract binding on the government. The secretary made with the parties a contract requiring, in one particular, different kind of materials from those originally proposed; but this court held that the parties were bound by the contract signed, and could not claim any compensation for the difference in value between the materials used and those proposed.

* *Supra*, 358.

Statement of the case.

But, independent of any consideration respecting the character of the contract, it nowhere appears that the claimants suffered any damages from the supposed injury alleged. They did not offer to deliver any ice at New Orleans, and it is not shown that they secured any for such delivery, or, if they secured any, that they were unable to part with it at prices as remunerative as those they might have obtained at New Orleans.

The appeal is frivolous, and the decree of the court below is AFFIRMED.

ALDRICH *v.* ÆTNA COMPANY.

1. A judgment in the highest court of law or equity of a State, if otherwise a proper subject for review here, under the 25th section of the Judiciary Act, is not rendered incapable of being reviewed by the fact that judgment was rendered on a voluntary submission of a case agreed on for judgment, under the provisions of the code of the State.
2. An allowance of a writ of error by the chief judge of the court in which the judgment was, in fact, rendered, is not ground for dismissing the writ of error, though the record, by order of such court, may have been sent to an inferior court, and an additional entry of what was adjudged in the appellate one there entered.
3. A defendant, who has waived the irregularity by an appearance, cannot object to jurisdiction, because the citation is not signed by the judge who allowed the writ of error.
4. When the question in the highest court of law or equity of a State is whether the mortgage of a vessel, duly recorded under an act of Congress, gives a better lien than an attachment issued under a State statute, and the decision is, that it does not; a proper case exists for review in this court, under the 25th section of the Judiciary Act.
5. The mortgage of a vessel, duly recorded, under an act of Congress, cannot be defeated by a subsequent attachment, under a State statute, enacting, that no mortgage of such property shall be valid, as against the interests of third persons, unless possession be delivered to and remain with the mortgagee, or the mortgage be recorded in a manner specified, in which a mortgage, whose lien in this case was the subject of controversy, was not. *White's Bank* v. *Smith* (7 Wallace, 646) affirmed.

ERROR to the Court of Appeals of New York.

The code of procedure of the State of New York* thus enacts:

* §§ 372, 374.

"Parties to a question of difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceeding in good faith to determine the rights of the parties. The court shall, thereupon, hear and determine the case, at a general term, and render judgment thereon, as if an action were depending."

"The judgment may be enforced in the same manner, as if it had been rendered in an action, and shall be subject to an appeal in like manner."

With these provisions of the code in force, the Ætna Insurance Company, as plaintiff, and one Aldrich and others, as defendants, agreed upon a case for the Superior Court of Buffalo as follows:

"Aldrich and the others sold and conveyed the schooner Stella, on the 4th of February, 1856, at Chicago, to one Jacobs, and on the same day, took a mortgage of the vessel back to secure the payment of $6000 of the purchase-money. The mortgage was in due form, and was recorded in the office of the collector, at the port of Chicago, where the vessel was permanently enrolled, and where one of her owners resided. The purchase-money was payable in sums of five hundred, and of ten hundred dollars, extending through the years 1856, 1857, and to March, 1858. Jacobs, the purchaser, who resided in Chicago, immediately took possession of the vessel, which was in port, and employed her on the lakes till attached in Buffalo by the insurance company, on the 11th December, 1856, for a debt against him.

"At the time of the execution of the mortgage, there was a statute of the State of Illinois, which enacted, that 'no mortgage on personal property shall be valid, as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to and remain with the mortgagees, or the said mortgage be acknowledged and recorded, as hereinafter directed.' This mortgage had been neither acknowledged nor recorded, according to the requirements of this statute."

It was agreed by the parties, in settling their case, that if the decision should be in favor of the company (the plaintiffs), that judgment should be given against the defendants for $475 and interest, but if in favor of the defendants, then judgment against the plaintiff for costs.

The court at a general term at Buffalo rendered a judgment in favor of the plaintiff. The cause was removed to the Court of Appeals, the highest court of the State of New York, where the judgment was affirmed, and the proceedings remitted to the Superior Court at Buffalo, in which the judgment of affirmance was entered of record. The case was then brought before this court on writ of error; it being purported to be brought here under the 25th section of the Judiciary Act, which gives this court jurisdiction to review upon a writ of error judgments in the highest court of a State, where there has been drawn in question the validity of a statute of, or an authority exercised under the United States, and the decree is against their validity; or where there is drawn in question the construction of any statute of the United States, and the decree is against the title, right, or privilege, or exemption specially set up; or where there is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the laws of the United States, and the decision is in favor of such their validity;—"the citation," says this 25th section, "being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States."

The writ in this case was allowed by Chief Justice Davies of the Court of Appeals of New York, and was addressed to the Superior Court of Buffalo. The citation was signed by Mr. Justice Miller of this court.

The case being here, the questions were,

I. As to jurisdiction.

II. As to merits.

I. On the point of jurisdiction objection was taken to the jurisdiction,

1st. On the ground that the judgment, which the writ of error purported to bring here, had not been rendered in a suit within the words of the 25th section of the Judiciary Act, but was rendered on a voluntary submission without suit, containing a statement of facts agreed on by the parties, under the code of procedure in New York.

2d. That it did not appear on the face of the record that the validity of a statute or law of the United States, or of the statute of a State as repugnant to such law, or that the construction of any statute of the United States was drawn in question.

3d. That the writ of error was allowed by the chief judge of the Court of Appeals of the State of New York, the writ being addressed to the Superior Court of Buffalo, where the record was; and that the said chief judge was not authorized to allow the writ of error.

4th. That the citation was not signed by the judge who allowed the writ of error.

Assuming jurisdiction to exist, there remained

II. *The question of merits;* the insurance company contending, upon this question, that the mortgage could not be set up as against the attachment; that it was void as against it, and that the company was entitled to a judgment declaring the lien of the attachment paramount to that of the mortgage. The mortgagees, represented here by *Mr. Robert Rae*, maintaining on the other hand the converse of these propositions, Mr. Rae referring to *White's Bank* v. *Smith** as conclusive of this part of the case.

Mr. Justice NELSON delivered the opinion of the court.

An objection is taken to the writ of error under the 25th section of the Judiciary Act, on the ground that the judgment is not rendered in a suit within the words of this section, but was rendered on a voluntary submission without suit, containing a statement of facts agreed on by the parties, under the code of procedure in New York.

* 7 Wallace, 646.

We are of opinion that this objection is untenable. The code simply provides for the institution of the suit or action by the voluntary agreement of the parties, and without any compulsory process or compulsory proceeding of any kind against the defendant. The court are to hear and determine the case at a general term, and render judgment thereon as if an action were depending; and the submission can be made only to a court which would have had jurisdiction of the case if a suit had been brought. Cases from the State of Louisiana not unfrequently come up here from the State courts, where the proceedings have been instituted substantially as in the present case.

It is also objected that it does not appear on the face of the record the validity of a statute or law of the United States, or of the statute of a State as repugnant to such law, or that the construction of any statute of the United States was drawn in question.

This we think a clear misapprehension of the material question involved in the case. That question was, whether the mortgage of the vessel to the defendants, duly recorded under an act of Congress in the collector's office, gave a better lien upon it than the subsequent attachment issued out of the Superior Court of Buffalo in favor of the plaintiff. The construction of this act of Congress, and its force and effect, as it respected the mortgage security under which the defendants claimed a right or title paramount to that of the attachment creditor, was necessarily in question, and must have been passed upon by the court; and as its decision was against this right, the very case is made provided for in this section.

A further objection is taken that the writ of error was allowed by the chief judge of the Court of Appeals of the State of New York, which writ is addressed to the Superior Court of Buffalo, where the record is, and who was not authorized to allow it.

The answer to this objection is, that the allowance of the writ is well enough, as the judgment was in fact rendered in the Court of Appeals.

It is objected also that the citation was not signed by the judge who allowed the writ of error.

The answer is that the appearance by the defendant in error waived the irregularity.

As to the merits. We are of opinion the question involved was decided in the case of *White's Bank* v. *Smith.* That was a question between two mortgages on the vessel, duly recorded in the collector's office—the first on the 12th June, 1863, in the collector's office at the port of Buffalo; the second in the collector's office at the port of Sandusky, on the 17th June, 1865.

The law existing in New York at the time of the execution of the first mortgage was as stringent as that of the State of Illinois in the present case in respect to the filing of personal mortgages at a designated office, when the possession of the property does not accompany the mortgage. White's Bank, the first mortgagee, had complied with the law in New York, and filed his mortgage, but had omitted to refile it at the end of the year, which was required in order to preserve the lien.

Now the argument in the case was, that, inasmuch as the filing of the first mortgage according to the State law was essential to protect the lien as against subsequent purchasers or mortgagees, the omission to refile it left the vessel free and subject to the lien of the second mortgage. It was upon this idea the case was disposed of at the circuit, and the proceeds of the vessel, after discharging some prior liens for seamen's wages, decreed to Smith, the second mortgagee. And this was a proper disposition, upon the assumption that the State statute governed the lien; for, although Smith had not filed his mortgage according to the statute of Ohio, this omission did not affect the question between him and White's Bank, but only as it respected subsequent purchasers or mortgagees.

A different view was taken of the case when it came before this court. It was held that the recording of the first mortgage in the collector's office under the act of Con-

gress protected the interest of the mortgagee against subsequent purchasers or mortgagees by its own force, irrespective of any State law on the subject, and hence the decree below was reversed, and the proceeds directed to be delivered over to the first mortgagee. The court regarded the law as a registration act, which excluded all State legislation in respect to the same subject; and, looking at the nature and character of the species of property Congress was dealing with, we entertained no doubt as to its power to pass this law. It was said in the opinion in that case, "Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubts but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction."

As a registry act there can be no doubt upon the recording of the mortgage, the fact that it is not accompanied by the possession of the vessel affords no ground of impeachment of the transaction, as the record is regarded as satisfactorily accounting for the non-delivery of the possession. This is the law as it respects the recording or filing of personal mortgages under State statutes.*

The protection, however, goes no further, as the consideration of the instrument may be impeached for fraud or for any other vice or infirmity in the original contract or transaction.

The judgment of the court below is

REVERSED AND THE CAUSE REMANDED TO IT, &c.

* 2 Kent, 531, note.

Statement of the case.

KENNEDY *v.* GIBSON AND OTHERS.

1. The 50th section of the National Bank Act of June 3d, 1864 (13 Stat. at Large, 116), which provides that suits under it, in which officers or agents of the United States are parties, shall be conducted by the district attorney of the district, is in so far but directory, that it cannot be set up by stockholders to defeat a suit brought against them by a receiver, under the act, which receiver, with the approval of the Treasury Department, and after the matter had been submitted to the Solicitor of the Treasury, had employed private counsel, by whom alone suit was conducted.
2. Upon a bill filed under the 50th section of that act, by a receiver, against the stockholders, where the bank fails to pay its notes, it is indispensable, that action on the part of the comptroller of the currency, touching the personal liability of the stockholders, *precede* the institution of any suit by the receiver, and the fact must be averred in the bill.
3. It is no objection to such a bill properly filed against stockholders within the jurisdiction of the court, that stockholders named in the bill, and averred in it to be without the jurisdiction, are not made co-defendants.
4. Creditors of the bank are not proper parties to such a bill. The receiver is the proper party to bring suit, whether at law or in equity.
5. Suits may be brought under the 57th section of the act, *by* any association, as well as *against* it; though the word "by" be omitted in the text of the section. Reading the section by the light of another section of a prior act, on the same general subject, the omission is to be regarded as an accidental one.

APPEAL from the Circuit Court for the District of Maryland; the case being thus:

The act of June 3d, 1864,* "to provide a National currency, &c.," and which establishes those associations for carrying on the business of banking, now known as our "National Banks," provides, by its 12th section, that the shareholders

"Shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except, &c."

* 13 Stat. at Large, 99.

Statement of the case.

Subsequent sections provide for the comptroller of the currency making examination into the truth of an allegation, that a banking association has made default in paying its circulating notes, and authorize him, upon being satisfied that the association has refused, and is in default, to sell its securities pledged to the United States, and to pay the notes from the proceeds.

The 50th section enacts:

"That on becoming satisfied, as specified in the act, that any association has refused to pay its circulating notes, and is in default, the *comptroller of the currency* may, forthwith, appoint a receiver, who, *under direction of the comptroller*, shall take possession of the books, records, and assets of every description of the association, collect all debts, dues, and claims belonging to such association, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on like order, sell the real and personal property of such association, on such terms as the court may direct, and may, if necessary to pay the debts of such association, enforce the individual liability provided for by the 12th section of this act, and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make report to the comptroller of all his proceedings."

The same section proceeds:

"The comptroller shall, thereupon, cause notice to be given by advertisement, in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association, to present the same, and to make legal proof thereof. And, from time to time, the comptroller, after full provisions shall have been first made for refunding to the United States any such deficiency, in redeeming the notes of such association, as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction; and from time to time, as the proceeds of the assets of such association shall be paid over to him, he shall make further dividends as aforesaid, on all claims previously proved or adjudicated; and

the remainder of such proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The 56th and 57th sections enact:

"That all suits and proceedings, arising out of the provisions of this act, in which the United States, or its officers or agents, shall be parties, shall be conducted *by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury.*

"That suits, actions, and proceedings AGAINST any association under this act, may be had in any Circuit, District, or Territorial court of the United States, held within the district in which such association may be established; or in any State, county, or municipal court, in the county or city in which said association is located, having jurisdiction in similar cases."

The 59th section of a previous act of February 25th, 1863, on the same general subject, had provided, that

"All suits, actions, and proceedings BY OR AGAINST any association, under the act, may be had in any Circuit, District, or Territorial court of the United States, held within the district where such association was established."

With these different enactments upon the statute-book, Kennedy, of New York, filed a bill in the Circuit Court for Maryland, against Gibson, Barry, and several other persons, all citizens of Maryland, setting forth: That he, Kennedy, was receiver of the Merchants' National Bank of Washington (having a capital of $200,000), duly appointed and qualified under the already-quoted act of Congress of 1864; that the bank had failed to redeem its circulating notes; that the comptroller of the currency thereupon appointed him the said receiver, who then took possession of the books, papers, and assets of said bank, and was, at the time of filing the bill, engaged in collecting the debts due the bank, and in discharging the other duties devolved on him by law. The bill then stated that the *receiver* had already ascertained that the assets and credits of the said bank were wholly in-

sufficient to pay its debts and liabilities, and that it would be necessary, to the complete and entire administration of his trust, that recourse should be had to the personal liability imposed on the stockholders by the already-mentioned acts of 1863 and 1864.

The bill further stated that 2000 shares of stock were duly issued by said bank, and the complainant averred *his* belief, and on it charged, that it would be necessary for the payment of the liabilities of this bank, to obtain, from its stockholders, an amount of money equal to the full amount of the stock so issued, according to its par value, that is, $200,000. He therefore insisted that *he* was entitled to have an account taken, as against the said stockholders, of the liabilities and available assets and credits of said bank, and to recover from each of them, individually, a proportionate contribution, for the purpose of making good any deficiency which might remain, after applying all the said assets and credits to the discharge of its liabilities; which deficiency, he charged, would largely exceed the said sum of $200,000, the par value of the whole capital stock.

The bill, after charging that at the failure of the bank, certain defendants, named in an exhibit to the bill, were shareholders of its stock to the amount stated in the exhibit, but, that *other stockholders named in the exhibit, were citizens, some of New York, and some of the District of Columbia*, and could not be made parties, because, being out of the jurisdiction of the court, their being joined as defendants would oust the jurisdiction of the court, and it prayed that the cause might proceed without making them parties.

Then followed a prayer for an account, and for a decree, directing each of the defendants to pay their pro rata of such balance of debt of the bank as might remain, after the application of its assets, and for further relief.

The bill, it will be observed by the reader, while sufficiently setting forth the facts necessary to warrant the appointment of a receiver, contained no averment of any action by the *comptroller*, touching the personal liability of the stockholders.

In addition, was the independent fact, that the suit had not been conducted by the district attorney for Maryland, as the already quoted 56th section of the act of 1864 directs that suits like it should be; nor was the bill even signed by him. But with the approval of the Treasury Department, after the matter had been submitted to the solicitor, and "under particular circumstances in the case," Messrs. Brent and Merrick, private counsel, had been employed, and by one or both of these gentlemen, the suit had been brought and conducted.

The defendants demurred; and the demurrer being sustained and the case coming here, the following questions arose:

1. Whether the provision in the 56th section of the act of 1864, about suits being conducted by district attorneys of the United States, was of essential obligation in all cases, or whether it was directory rather.

2. Whether the omission of the bill, to aver action by the *comptroller*, touching the personal liability of the stockholders, precedently to suit being brought by the receiver, was fatal to the bill? This being the principal question in the case, and the affirmative resolution of which by the court below was apparently the chief ground on which the demurrer there was sustained.

3. Whether the stockholders, named in the bill, and therein alleged to be non-residents of the State of Maryland, were necessary parties to any suit brought against the other stockholders, touching the matters of equity charged in the bill?

4. Whether the alleged creditors of the bank were necessary parties to any suit brought against the stockholders, touching those matters last mentioned?

5. Whether, in view of the omission in the 57th section of the act of 1864 (literally read), of the word "BY," the bill could be sustained in the court where brought?

Messrs. Brent and Merrick, for the appellant; Mr. Steele, contra.

Opinion of the court.

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 District of Maryland. The bill was filed by the appellant. For the purposes of the points necessary to be considered, the case may be briefly stated. The appellant has been duly appointed receiver of the Merchants' Bank of Washington City, under the 50th section of the act of June 3d, 1864, and brings this bill to charge the defendants, who are alleged to be stockholders of the bank, with the personal liability prescribed by the 12th section of the act. The facts necessary to warrant the appointment of a receiver are sufficiently set forth. It is averred, that he "has already ascertained that the assets and credits of the association are wholly insufficient to pay its debts and liabilities, and that it will be necessary to the complete and entire administration of the trust reposed in him, that recourse shall be had to the personal liability imposed upon the stockholders;" that two thousand shares of the capital stock, amounting to $200,000, were issued by the bank to its stockholders; that it will be necessary to collect from them this amount, to make good the deficiency in the means to meet the balance of the indebtedness of the bank, which will remain after the application of all the available assets, to the discharge of its liabilities, and, that "after such application is made, a balance of indebtedness will remain due, largely exceeding the said sum of $200,000." The stockholders, besides the defendants, are named, and it is alleged that a part of them reside in the District of Columbia, and one of them in the State of New York. The prayer of the bill is, that an account may be taken, and that each of the defendants shall be decreed to pay to the receiver his *pro rata* share of the indebtedness of the bank, which may remain, after applying to the liabilities all its effects, as required by the act before mentioned, and for general relief. The bill is signed by the special counsel of the receiver. The name of the attorney of the United States does not appear in the case. The defendants demurred. Our opinion will cover all the points brought to our attention by

their counsel in the argument, without particularly stating them.

The receiver is the agent of the United States, and according to the 56th section of the act,* this suit should have been conducted by their attorney. But this provision is merely directory. The question which arises is between the United States and its officers. The rights of the defendants are in no wise concerned, and they cannot be heard to make the objection, that this duty of the local law officer of the government has been devolved upon another. It is to be presumed there were sufficient reasons to warrant this departure from the letter of the law.

The 50th section of the act provides, that the receiver, under the direction of the comptroller of the currency, shall take possession of the books and assets of every description of the association, collect all the debts and claims belonging to it, and may—proceeding in the manner prescribed—sell, or compound bad and doubtful debts, and sell all its real and personal property; "and may, *if necessary to pay the debts* of such association, enforce the individual liability of the stockholders." He is required to pay all the moneys he may realize, to the Treasurer of the United States, subject to the order of the comptroller, and to report to the comptroller all his proceedings. The comptroller is required to give notice to all persons having claims against the association to present and prove them; and after making provision for refunding to the United States "any deficiency in redeeming the notes of such association, as mentioned in this act," to make a ratable dividend of the moneys paid over to him by the receiver, "on all claims which have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." He is to make further dividends, from time to time, as the means shall come into his hands, "on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the stockholders of such association, or their legal representatives."

* 13 Stat. at Large, 116.

Opinion of the court.

The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it

was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute, that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made codefendants.

The claims of creditors may be proved before the comptroller, or established by suit against the association. Creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit.

The 59th section of the act of February 25th, 1863, provides that all suits *by* or *against* such associations may be brought in the proper courts of the United States or of the State. The 57th section of the act of 1864, relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter, the word "*by*" in respect to such suits is dropped. The omission was doubtless accidental. It is not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued. The difference in the language of the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1864. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision

for suits *against* the associations, there is none for suits *by* them, in any court.*

The 59th section directs "that all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury." Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship.†

The bill in the case before us contains no averment of any action by the comptroller touching the personal liability of the stockholders. The demurrer of the defendants was therefore properly sustained, and the decree of the Circuit Court is

AFFIRMED.

MORRIS'S COTTON.

1. Where a seizure of property on land is made under the acts of July 13th, 1861, or of August 6th, 1861, or July 17th, 1862, passed in suppression of the rebellion, the claimants are entitled to trial by jury, though the suit be in form a libel of information; and the suit can be removed into this court by writ of error alone. *Union Insurance Company* v. *United States* (6 Wallace, 765), and *Armstrong's Foundry* (Ib. 769), affirmed.
2. This court will, however, assume jurisdiction on appeal for the purpose of reversing a decree rendered by an inferior court not having jurisdiction to proceed in the way in which it has proceeded, and of vacating any unwarranted proceedings of it which stand in the way of a new trial there in a case where, in the judgment of this court, a new trial ought to be granted. And it will in such cases either reverse the judgment or decree, and direct the proceedings to be dismissed, or remand the cause, with directions to allow the pleadings to be amended, and to grant a new trial, according to law. And if the subject in controversy be a fund lately in the registry of the court, but which has been distributed, so that a new trial would be useless unless the fund was restored to the registry where it was before the decree of distribution was exe-

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* Theriat *v.* Hart, 2 Hill, 381, note.

† United States *v.* Babbit, 1 Black, 61.

cuted, it will direct that a writ of restitution issue to the proper parties to restore the fund to the registry.

APPEAL from the District Court for the Middle District of Alabama.

Three acts of Congress, one of July 13th, 1861, another of August 6th, 1861, and a third of July 17th, 1862, passed during the late rebellion, authorized the seizure and confiscation in the District or Circuit Courts of property used for insurrectionary purposes, and to a certain extent prescribed the mode of proceeding.

Under one of these acts it was decided, in the *Union Insurance Company* v. *United States* and in *Armstrong's Foundry*,* that while proceedings for the condemnation of property or land might be shaped in the form and modes analogous to those used in admiralty, yet that issues of fact must, on the demand of either party, be tried by jury; and that while, where a proceeding under that act to enforce the forfeiture of real estate had been carried on in conformity with the practice of courts of admiralty, this court would take jurisdiction of the decree on appeal, yet that it would do so only for the purpose of reversing the decree and directing a new trial, with proceedings 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 lands.

The three acts above mentioned being in force, and in an action purporting to be in conformity to them, the United States filed an information *in rem* against certain cotton (Morris claimant) alleged to have been seized on land and forfeited to the United States under the statutes above referred to. The information was tried in the District Court as a suit in admiralty. The claimant prayed for a jury, but his prayer was denied. A decree of forfeiture having passed against the cotton, the case was brought by the claimant before this court from the District Court by *appeal*, and not by writ of error.

* 6 Wallace, 759 and 766.

Statement of details in the opinion.

Mr. P. Phillips, for the appellant (a brief of Mr. Chilton being filed), relying on certain testimony not given in the preceding statement to show that the seizure (if indeed any had been made, a fact which he denied) was wholly void, contended, on the authority of *Morris & Johnson* v. *United States*,* that a valid and subsisting seizure, at the time of filing the information, was indispensable to give this court jurisdiction; and further, on the authority of the two cases mentioned above, in the statement of the case, that the refusal of a trial by jury was erroneous. He inferred accordingly that, as in the case of *Morris & Johnson* v. *United States*, this court would dismiss the proceeding and order restitution.

Mr. Hoar, Attorney-General, and Mr. Field, Assistant Attorney-General, contra, contended that no question of merits arose; and that if this court could do anything more than dismiss the appeal, it could only order the decree to be reversed as irregular, the pleadings reformed, and a new trial had according to the course of the common law; that this was what was in fact decided in the *Union Insurance Company* v. *United States*, and in the case of *Armstrong's Foundry*, exactly like which the present case plainly was; that it could not now be known what the issues would be when the pleadings were reformed; that *Morris & Johnson* v. *United States*,† relied on to show that the proceeding should be dismissed and the property restored, differed from this one; that *it* was a suit of a species not authorized by the statutes, and not a suit in which a cause of action was defectively set forth, or one in which the trial was irregular and not according to law.

Mr. Justice CLIFFORD gave the details of the case, and delivered the opinion of the court.

Forfeiture of the property seized in this case is claimed in the libel of information, as amended, upon several distinct grounds, of which the following are the most material:

* 7 Wallace, 578. † Ib.

Statement of details in the opinion.

1. Because the owner purchased the cotton of an inhabitant of a State or district in insurrection, as lawfully declared by the President in his proclamation to that effect, and in violation of the provision which prohibited "all commercial intercourse between such States or districts" so long as such hostilities should continue.*

2. Because the property was owned by a person who knowingly used or employed, or consented to the use or employment of the same, in aiding, abetting, or promoting said insurrection and resistance to the laws.†

3. Because the owner of the property, being engaged in armed rebellion against the United States, or in aiding or abetting such rebellion, at the time when the President issued his proclamation upon the subject, did not, within sixty days thereafter, cease to aid, countenance, and abet such rebellion, and return to his allegiance.‡

Process of monition issued, and the marshal, on the eleventh of May, 1866, seized one hundred and fifty-four bales of cotton, as appears by his return. Appearance was entered by the claimant on the ninth of June following, as the agent of the bank, and he alleges in behalf of the bank that none of the material allegations of the libel of information are true. On the contrary, he alleges that the cotton was purchased by the bank, and was held by their agent as their property until the same was attached by a creditor of the bank, and that the bank had ample authority to transport the funds with which the cotton was purchased into that district, and he utterly denies that the purchase was made in violation of any act of Congress, or of any commercial regulations of the United States. Many other defences are set up in the answer, but in the view taken of the case, it is not important to enter further into those details.

Testimony was taken in the case, and, on the twentieth of December, 1866, a decree was entered in the District Court that the cotton seized be forfeited to the United States for the value thereof, estimated at $25,069.70, together with

* 12 Stat. at Large, 257. † Ib. 319. ‡ Ib. 591.

costs, against the stipulators and claimants. Dissatisfied with the decree, the claimants appealed to this court.

By the findings of the court it appears—(1.) That the cotton was grown on a plantation in the State of Alabama, and that it was purchased by the agent of the Bank of Louisiana during the period when both of those States were in rebellion against the United States. (2.) That the agent of the bank, in going from Louisiana to Alabama, passed through our military lines, and that he purchased the cotton in the latter State for the bank, and with the funds which he transported through our military lines. (3.) That neither the agent nor the bank had any license or permit from the President to trade or hold any commercial intercourse in that State or district, and that his acts in trading for, and making the purchase of, the cotton were contrary to the act of Congress prohibiting all such trade and commercial intercourse.

None of these matters, however, can be re-examined in this court, as the District Court had no jurisdiction of the cause in admiralty to render any decree upon the merits. Where the seizure is made on navigable waters, within the ninth section of the Judiciary Act, the case belongs to the instance side of the District Court; but where the seizure was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.*

Seizures, when made on waters which are navigable from the sea by vessels of ten or more tons burden, are exclusively cognizable in the District Courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common-law suits, and can only be removed into this court by writ of error.†

Want of jurisdiction in the court below, however, does not prevent this court from assuming jurisdiction on appeal

* Confiscation Cases, 7 Wallace, 462; Armstrong's Foundry, 6 Id. 769.

† Insurance Co. *v.* United States, 6 Wallace, 765; United States *v.* Hart, Ib. 772.

for the purpose of reversing the decree rendered by that court, and of vacating any unwarranted proceedings of that court, which necessarily stand in the way of a new trial there, in a case where, in the judgment of this court, a new trial ought to be granted. Where the court below has no jurisdiction of the case, in any form of proceeding, the course of this court is to direct the cause to be dismissed, if the judgment or decree was for the defendant or claimant, but if the judgment or decree was for the plaintiff or libellant, the court here will reverse the judgment or decree, and remand the cause, with directions to the court below to dismiss the proceeding.

Unless the practice were as explained, great injustice would be done in all cases where the judgment or decree was in favor of the party who instituted the suit, as he would obtain the full benefit of a judgment or decree, rendered by a court in his favor, which had no jurisdiction to hear and determine the controversy. Hence, this court will, in all such cases, reverse the judgment or decree, and direct the proceedings to be dismissed, or remand the cause, with directions to allow the pleadings to be amended, and to grant a new trial, according to law. But the fund in this case, having been distributed, a new trial would be useless, unless the fund is restored to the registry of the court, where it was deposited before the decree of distribution was executed. Although the District Court has no jurisdiction in such a case, still, this court has full jurisdiction on appeal to reverse the action of that court, and to dismiss the proceedings; or, in a case where a new trial is required, to remand the cause, and give directions to that effect, and also, to direct that a writ of restitution issue to the proper parties, to cause the fund to be restored to the registry of the court, from which it was erroneously withdrawn.

DECREE REVERSED, and the cause remanded, with directions to allow the pleadings to be amended, and to grant a new trial, and issue a writ of restitution,

IN CONFORMITY TO THE OPINION OF THE COURT.

Syllabus.

CARPENTER *v.* DEXTER.

1. A justice of the peace was not authorized by the laws of Illinois, in 1818, to take the acknowledgment or proof, without the State, of deeds of land situated within the State; but this want of authority was remedied by a statute passed on the 22d of February, 1847.
2. In aid of the certificate of acknowledgment, or proof of a deed, reference may be had to the instrument itself, or to any part of it.

   Thus, where a law of Illinois, in force in 1847, provided that no officer should take the acknowledgment of any person, unless such person should be personally known to him to be the real person who executed the deed, and in whose name such acknowledgment was proposed to be made, or should be proved to be such by a credible witness, and that such personal knowledge or proof should be stated in the certificate; and the certificate of the officer following immediately after the attestation clause of the deed, stated that the "above-named grantor, who has signed, sealed, and delivered the above instrument of writing, personally appeared" before the officer, and acknowledged the same to be his free act and deed, but omitted to state that the person making the acknowledgment was personally known to the officer to be the person who executed the deed; *Held*, that the omission was supplied by reference to the attestation clause, which declared that the instrument was "signed, sealed, and delivered," in presence of the subscribing witnesses, of whom the officer taking the acknowledgment was one.
3. It will be presumed, that a commissioner of deeds, in New York, whose authority to act is limited only to his county, exercised his office within the territorial limits for which he was appointed, although the only venue given to his certificate of acknowledgment be "State of New York." If such were not the presumption, the defect in this particular *held* to be supplied in this case by reference to the deed and the previous certificate of acknowledgment by the same person; in the first of which the grantor designated the county in which he had affixed his hand and seal to the instrument, and in the second of which the county is given in its venue.
4. When a deed showed that one Wooster was a subscribing witness with the officer, and the certificate of proof given by the officer stated that "Wooster, one of the subscribing witnesses," to the officer known, came before him, and being sworn, said, that he saw the grantor execute and acknowledge the deed; *Held*, that there was a substantial compliance with the statute, requiring the officer to certify that he knew the affiant to be a subscribing witness.
5. Unless the statute of a State requires evidence of official character to accompany the official act which it authorizes, none is necessary. And where one State recognizes acts done in pursuance of the laws of another State, its courts will take judicial cognizance of those laws, so far as it

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may be necessary to determine the validity of the acts alleged to be in conformity with them.

Thus, where a statute of Illinois provided that deeds of land within the State, which had been, or might thereafter, be executed without the State and within the United States, and which had been, or might be acknowledged or proved, in conformity with the laws of the State where executed, were admissible to record in the counties of Illinois, in which the property was situated; and a deed executed in New York was acknowledged before a judge of a court of record of that State—an officer authorized by the laws of New York to take the acknowledgment and proof of deeds; and the certificate of this judge was not accompanied by any evidence of his official character, or that his certificate was in conformity with the laws of that State; *Held*, that no such certificate of conformity was necessary for the reasons given above.

ERROR to the Circuit Court for the Northern District of Illinois.

The action was ejectment to recover the possession of certain real property, situated in the county of Bureau, in the State of Illinois. Both parties claimed title from the same source,—a patent of the United States, issued to William T. Davenport, in May, 1818. The points in dispute arose upon the deraignment of title from the patentee.

The plaintiff produced in evidence the patent; a deed from the patentee to one Hawley, dated in September, 1818; a deed from Hawley to Thaddeus Munson, dated in December, 1818; and a deed from Munson to William James, dated in February, 1819; all of which embraced the demanded premises. The deeds were inscribed upon the record, in the proper register's office, in May, 1819. Those from Davenport to Hawley, and from Hawley to Munson, contained this indorsement (*un*signed by the recorder) of the fact:

"RECORDER'S OFFICE,
EDWARDSVILLE, May 17th, 1819.

"I certify the within deeds, together with the certificates of acknowledgment, are this day recorded and examined in my office, in Book V, p. 353 and 354."*

William James died in 1832, leaving several heirs-at-law. The premises in controversy were allotted in severalty to

* See *infra*, p. 520.

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John B. James, by a decree of one of the Circuit Courts of the State, in a suit for partition between him and his co-heirs. John B. James died in 1844, leaving a will, by which he devised the premises to the plaintiff. The record of partition, and the record of the will and of its probate were produced in evidence.

The defendants, also relying upon the patent of the United States to Davenport, introduced in evidence a conveyance of the premises, from the patentee, to one De Witt, bearing date in August, 1818, and a conveyance from the heirs of De Witt to himself, bearing date in July, 1861. The first of these deeds was recorded in December, 1861, and the other was recorded in February, 1862.

Beginning with the plaintiff's case. The deed from Davenport to Hawley concluded with the following attestation clause:

"In witness of all the foregoing, I have hereunto fixed my hand and seal, *at Albany, in the county of Albany, and State of New York*, this first day of September, one thousand eight hundred and eighteen.

"WM. T. DAVENPORT, [L. S.]

"Signed, sealed, and delivered
in the presence of
"WM. D. WOOSTER,
H. WENDELL, JR."

The certificate of acknowledgment following immediately after the above clause, was thus:

"STATE OF NEW YORK,
COUNTY OF ALBANY, *ss.*

"Be it remembered, that on the first day of September, 1818, the above-named William T. Davenport, who has signed, sealed, and delivered the above instrument of writing, *personally appeared* before me, the undersigned justice of the peace, and acknowledged, in due form of law, the same to be his free act and deed, for the purposes therein set forth, and also gave his consent, that the same should be recorded wherever it might be deemed necessary. In witness of all of which, the said justice

has hereunto affixed his hand and seal, and undersigned the same.

"H. WENDELL, JR., [L. S.]
Justice of the Peace."

[The reader will note that the magistrate who takes the acknowledgment was a subscribing witness to the execution, but that nothing is said as to the grantor's being known to him, as the real party who signed the deed.]

A certificate of the official character of Wendell as a justice of the peace, at the time he took the above acknowledgment, from a clerk of a court of record of New York, accompanied the above certificate.

In addition to the record of *acknowledgment* there was upon this deed from Davenport a certificate (by the same magistrate who took the acknowledgment) of the proof of execution by the person who with him had attested the execution as a subscribing witness. That certificate ran thus, no particular city or town being given as the place where it was made:

"STATE OF NEW YORK:

"On this second day of September, 1818, before me came William D. Wooster, one of the subscribing witnesses to the within indenture, to me known, who being sworn, saith, that he saw the within-named grantor, William T. Davenport, duly execute and acknowledge the within indenture, and that he knows him to be the same person named and described in, and who acknowledged duly to have executed the same as his free act and deed. I allow the same to be recorded.

"H. WENDELL, JR.,
Commissioner, &c., &c."

[The magistrate taking this probate, it will be observed, signs himself Commissioner, &c. By the statute of New York in force on the 2d of September, 1818, commissioners of deeds were authorized to take the acknowledgment and proof of deeds* for the county where they resided.]

* Act of March 24th, 1818.

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A certificate of the official character of Wendell as a commissioner of deeds, and of his authority to take the proof of deeds at the time when the above-mentioned proof was taken, accompanied the certificate just mentioned.

So far as respected the deed from Davenport.

The commencement of the deed from Munson to James, was as follows:

"This indenture, made the thirteenth day of February, in the year of our Lord one thousand eight hundred and nineteen, between Thaddeus Munson, *of the city and county of Albany, and State of New York*, of the first part, and William James, of the *city, county, and State aforesaid*, of the second part, witnesseth, &c."

The certificate of acknowledgment to this was with the same general form of place of making as was the last deed.

"STATE OF NEW YORK, *ss.*

"Be it remembered, that on this thirteenth day of February, in the year of our Lord one thousand eight hundred and nineteen, came before me the above-named Thaddeus Munson, to me well known, and acknowledged to have signed, sealed and delivered the above deed for the uses and purposes therein expressed. All which I certify according to law, and allow the same to be recorded.

"ESTES HOWE,

Judge, Albany Common Pleas, Counsellor, &c., ex-officio performing the duties of a Judge of the Supreme Court at chambers, &c."

This certificate was unaccompanied by any evidence of the official character of this judge, or that his certificate was in conformity with the laws of New York.

To the introduction of the several deeds produced by the plaintiff, objection was made on the ground that they had not been duly proved. No specification was made of the particulars in which the proof failed.

How far certain objections made on the argument here, and which may perhaps be assumed to have been the true ground of objections below, were well founded, depended upon certain statutes of Illinois now to be mentioned.

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A statute of 1845,* which enacts that all deeds and other instruments, relating to or affecting the title to real property, shall be recorded in the county where the same was enacted, in regard to the acknowledgment, &c. (prior acts as to acknowledgments not having required a certificate of personal knowledge, &c.), as follows:

"No judge or other officer shall take the acknowledgment to any deed unless the person offering to made such acknowledgment shall be personally known to him to be the real person who executed the deed, and in whose name such acknowledgment is proposed to be made, or shall be proved to be by a credible witness; and the judge or officer taking such acknowledgment shall in his certificate thereof, state that such person was personally known to him to be the person whose name is subscribed to such deed, as having executed the same, or that he was proved to be such by a credible witness."

The statute further provided that the fact of such personal knowledge or proof should be stated in the certificate.

At the time of this act, justices of the peace could not take acknowledgments.

An act of February 27th, 1847, provided, however, that all deeds of land lying within the State might be acknowledged or proved before any commissioner of deeds and "before any justice of the peace," but it enacted that:

"If such justice of the peace reside out of this State, there shall be added to the deed a certificate of the proper clerk, setting forth that the person, before whom the proof or acknowledgment was made, was a justice of the peace at the time of making the same;"—

And then declared that:

"All deeds and conveyances *which have been*, or may be, acknowledged or proved in the manner prescribed by this section, shall be entitled to record, and be deemed as good and valid in law, in every respect, as if the same had been acknowledged or proved in the manner prescribed," by a previous law.

* Revised Laws, Chapter 24.

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The same act provided further:

"That deeds of lands situated within the State, which have been or may hereafter be executed *without* this State and within the United States, and which have been, or may hereafter be acknowledged or proved, in conformity with the laws of the state, territory, or district, *in which they were executed*, shall be admitted to record in the county wherein the lands are situated; and such deeds, &c., acknowledged or proved as aforesaid, when so recorded, may be used as evidence, without further proof of the execution thereof."

It was agreed between the parties that the statutes of New York and of Ohio were to be considered as evidence.

The court admitted the deeds notwithstanding the forms of acknowledgment and proof.

When the record of partition in the suit between James and his coheirs was produced, objection was made by the defendant, on the alleged ground that it did not show jurisdiction of the persons and subject-matter, but the objection was overruled, and exception was taken. No particulars in which the record failed to show jurisdiction were stated with the objection. The record itself showed, however, that some of the heirs were minors and that the guardian *ad litem* for these having filed his answer, and set up no opposition to the prayer of the bill, the bill had been taken *pro confesso*.

The court instructed the jury that if the heirs of William James, living at the time the proceedings for partition were commenced, were made parties to that suit, then whatever title William James had, at his death, passed, by the operation of the decree, in that case, to John B. James, and the court left the question, whether his heirs were made parties to the partition proceedings, to the jury, to be determined from the evidence.

To that part of the instructions of the court which left it to the jury to say under what circumstances the decree in partition was to vest title in John B. James, the defendant excepted.

Another question perhaps involved, or at least one which

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was discussed here, was whether, admitting the deed from Davenport to Hawley to have been in fact inscribed in the official record-books in the recorder's office, they were, with such acknowledgment and proof as they had, to be considered as being recorded in law, so as to give constructive notice to purchasers. And this matter depended in part on certain provisions of the already quoted act of 1845, thus:

"All deeds, &c., which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title-papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record.

"Deeds, &c., shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law."

The blank certificate* (not signed) on the back of the deeds by Davenport to Hawley, and from Hawley to Munson, was read on the trial of the case, without any objection thereto as evidence of the said recording; and no objection was made that the said blank certificate was not signed by the clerk or recorder, and no exception was taken to the instruction of the court, that the said deeds were recorded May 17th, 1819.

On this part of the matter the court instructed the jury that the deed from Davenport to Hawley was recorded in the proper office, under the laws of Illinois, before the deed from Davenport to De Witt, and if Hawley was a purchaser for a valuable consideration, without notice of the unrecorded deed from Davenport to De Witt, then Hawley, and those claiming under him, acquired a good title as against De Witt, and those claiming under him. The court was of the opinion, from the circumstances proven in this case, that the law would presume that the deed to Hawley was made upon and for a valuable consideration. The court left

* See *supra*, p. 514.

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the question to the jury to decide whether Hawley had such notice, and they were to determine whether there was notice or not from the evidence.

To that part of the instructions which left it to the jury to say whether or not Hawley was a *bonâ fide* purchaser, without notice of any other deed from Davenport, the defendant excepted.

The jury rendered a verdict for the plaintiff, and judgment in his favor was entered thereon.

Mr. A. Garrison, for the plaintiff in error:

I. The deed of Davenport to Hawley of September 1st, 1818, was not proved.

(1.) The acknowledgment before a justice of the peace at that time, is no proof of execution. The laws of Illinois did not then allow justices of the peace out of the State to take acknowledgments of deeds to be recorded in this State.*

(2.) The acknowledgment is in form defective because it does not state that the grantor was personally known to the officer, which was required by the laws of New York and Illinois then in force, and is an indispensable condition.†

(3.) The certificate of proof by one of the subscribing witnesses is defective.‡

(*a.*) It has no assignable locality; the venue being simply "State of New York, *ss.*" The case of *Vance* v. *Schuyler*,§ is in point. The Supreme Court of Illinois there held an acknowledgment null, because it had no other mention of place than Lincoln v. Wiscasset.

(*b.*) It does not state that the affiant Wooster was known to the officer to be a subscribing witness, nor was there any proof of that fact.‖

* Purple's Real Estate Statutes, p. 459, 462.

† 1 Revised Statutes of New York (1828), 758, §§ 9, 12; Montag *v.* Linn, 19 Illinois, 399; Tully *v.* Davis, 30 Illinois, 103; Wiley *v.* Bean, 1 Gilman, 303.

‡ 2 Rev. Statutes of New York (1828), p. 282, § 12.

§ 1 Gilman, 160.

‖ Scates's Comp. of the Laws of Illinois, 964; Montag *v.* Linn, 19 Illinois, 399, 401; Tully *v.* Davis, 30 Id. 103; Job *v.* Tebbetts, 4 Gilman, 143.

(*c.*) It does not state that the affiant declared that he became a subscribing witness at the request of the grantor, or signed the deed at the time of its execution.*

II. The deed from Hawley to Munson, dated December 12th, 1818, is not proved, because,

(*a.*) To the certificate there is no assignable locality. "State of New York, *ss.*" is not sufficient.†

Commissioners of deeds in New York had no jurisdiction to take acknowledgments beyond the county in which they resided.‡

Nor does this certificate identify the person described in the deed, as the same person who executed the same must be certified or proved.§

(*b.*) The laws of Illinois, at that time, did not authorize commissioners to take acknowledgments of deeds to be recorded in this State.‖

III. The deed from Munson to William James, of February 13th, 1819, is not proved, because—

(*a.*) The certificate of acknowledgment has no assignable locality. "State of New York, *ss.*" is not sufficient. Estes Howe could not act out of the county of Albany.¶

(*b.*) Nor was he authorized to take acknowledgments by the laws of Illinois.

(*c.*) There is no certificate that the acknowledgment was made before a proper officer, or that his certificate was in conformity to the laws of New York.

IV. There is no evidence that the deeds from Davenport to Hawley, and from Hawley to Munson, were ever recorded. The certificate of the recorder, indorsed on the deeds, but not signed by him, is not evidence.

The foregoing defects in the title of the defendant in error

* 2 Scates's Comp. 964; Hollenback *v.* Fleming, 6 Hill, 306.

† 2 Rev. Statutes of New York (1828), p. 282, §§ 38, 40; Montag *v.* Linn, 19 Illinois, 399; Vance *v.* Schuyler, 1 Gilman, 160.

‡ Adams *v.* Bishop, 19 Illinois, 395.

§ Lyon *v.* Kain, 36 Illinois, 369.

‖ Purple's Real Estate Statutes, 462.

¶ 1 Rev. Statutes of New York, 756, § 4 (ed. 1828).

are palpable and fatal; and even had the title been proved, it was defeated by the title of De Witt, through which the plaintiff in error claims, first in date and first of record. Accordingly, the court erred, in stating to the jury that the deeds from Davenport to Hawley, and Hawley to Munson, were recorded May 17th, 1819, and before the deed to De Witt. The court should have left it to the jury to say, which deeds were recorded first; and if they found that the De Witt title was first recorded, they should have been instructed to find for the defendant below.

V. The defendant in error sought to connect himself with the title of William James, by showing a decree of the Circuit Court of Pike County, Illinois, for the partition of certain lands; by the terms of which, this land was allotted to John B. James, of whom defendant in error is the devisee.

The court allowed this decree to go to the jury, against the objection of the plaintiff in error to the jurisdiction of the court.

1. The Circuit Court of Pike County, Illinois, had no jurisdiction to make the decree of partition as against the infant heirs of William James, *without full proof.* Against infants, nothing can be taken *pro confesso.* No proof was made, and this goes to the jurisdiction.*

2. A decree of partition of the Pike County Circuit Court (and this was such) without the execution of deeds in pursuance thereof, and recorded where the land lies, could not affect lands beyond the county, nor does it change the legal title in the county, and should have been rejected as evidence.†

It is decided in *Chickering* v. *Failes*,‡ "that whilst this is a proceeding in equity, a good and sufficient partition, which

* Chafflin *v.* Heirs of Kimball, 23 Illinois, 36, 38; Enos *v.* Capps, 12 Id. 255; Chafflin *v.* Heirs of Kimball, 23 Id. 37; McClay *v.* Norris, 4 Gillman, 370; Hough *v.* Doyle, 8 Blackford, 300.

† Aldridge *v.* Giles, 3 Henning & Mumford, 136; Chickering *v.* Failes, 29 Illinois, 304.

‡ 29 Illinois, 304.

a court of equity will recognize and enforce between the parties to the bill, it is not such a partition as vested in the parties a legal title to the shares assigned to each of them, for want of mutual releases;" and the court say:

"It is a settled doctrine of the court, that to vest the title in the parties to the shares allotted to each, they must execute releases for the portions not assigned to them."

There were no deeds of this kind proved, or introduced in evidence.

Mr. Goudy, contra.

Mr. Justice FIELD delivered the opinion of the court.

To the introduction of the several deeds produced by the plaintiff, objection was taken that they were not duly proved, but in what particulars the proof failed, the objection does not specify, and it is only by the brief of counsel that we are informed.

General objections of this character are too vague to serve any useful purpose, and under them particular defects in evidence, or in proceedings, cannot be urged upon our notice, if their consideration, for want of specification, be opposed by the adverse party. Here, however, no such opposition is made, and we will, therefore, proceed to the consideration of the points raised in the brief of counsel.

The deed from Davenport to Hawley was executed in New York, and was acknowledged on the day of its date, before a justice of the peace of that State. The certificate of acknowledgment states, that the person who "signed, sealed, and delivered" the instrument, "personally appeared" before the justice, but does not, in terms, state that he was personally known to that officer. The justice himself was one of the subscribing witnesses.

There is also attached to the deed, a certificate of the proof of its execution by the other subscribing witness. This certificate is signed by the same person who took the acknowledgment, but not in his capacity as justice of the peace, but

as commissioner of deeds. The certificate does not state that the commissioner knew that the affiant was one of the subscribing witnesses, nor does the affiant declare that he became such witness at the request of the grantor.

The objections taken in the brief of counsel to the proof of the deed bearing these certificates are, in substance, as follows:

1st. That the justice of the peace had no authority, at the time, to take the acknowledgment;

2d. That the certificate of acknowledgment is defective in not stating that the grantor was personally known to the officer; and

3d. That the certificate of proof by one of the subscribing witnesses is defective in not having any assignable locality, and in not stating that the affiant was known to the officer to be a subscribing witness, or that the affiant declared that he became such at the request of the grantor.

It is true, that at the time the acknowledgment was taken, in 1818, a justice of the peace was not authorized by the laws of Illinois to take the acknowledgment or proof of deeds without the State. The only officers thus authorized were "mayors, chief magistrates, or officers of the cities, towns, or places," where the deeds were executed.* But this want of authority of the justice of the peace was remedied by a statute passed on the 22d of February, 1847. The first section of that statute provides that all deeds and conveyances of land lying within the State may be acknowledged or proved before certain officers named, and among others before any commissioner of deeds and "before any justice of the peace," but enacts that "if such justice of the peace reside out of this State, there shall be added to the deed a certificate of the proper clerk, setting forth that the person, before whom such proof or acknowledgment was made, was a justice of the peace at the time of making the same;" and then declares that "all deeds and conveyances *which have been*, or may be, acknowledged or proved

* Purple's Real Estate Statutes, 462.

in the manner prescribed by this section, shall be entitled to record, and be deemed as good and valid in law, in every respect, as if the same had been acknowledged or proved in the manner prescribed" by a previous law providing for the acknowledgment and proof of conveyances before certain officers both within and without the State.*

The law of Illinois in force in 1818 did not require the officer taking the acknowledgment of a deed to certify, from his personal knowledge, to the identity of the party making the acknowledgment with the grantor. It did not require the acknowledgment to be certified in any particular form, except in case of a married woman. A certificate, without declaring such identity, or even personal knowledge of the parties making the acknowledgment, was held by the Supreme Court of that State to be as full and exact as was contemplated by the law of 1819, a law which was identical in terms, so far as it relates to the point under consideration, with the law in force in 1818, except that the word "Territory" was changed to that of "State."†

But, it may be said that the object of the act of 1847 was simply to give authority to additional officers to take the acknowledgment and proof of deeds, and to cure their defect of authority in cases where they had previously acted, and not to remedy defects in certificates already given by them; and that, therefore, the statute can only avail where the certificate conformed to the requirements of the law then in force. If this be the correct interpretation of the statute, we answer that the certificate to the deed in question did, in substance, conform, when read in connection with the deed itself, to the requirements of that law. In aid of the certificate reference may be had to the instrument itself, or to any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections.

The law of Illinois in force in 1847, upon the manner of

* Laws of 1847, 37.

† Ayres v. McConnel, 2 Scamon, 308.

taking acknowledgments, provides that no officer shall take the acknowledgment of any person, unless such person "shall be personally known to him to be the real person who [executed the deed], and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness," and such personal knowledge, or proof, shall be stated in the certificate.*

Looking, now, to the deed itself, we find that the attestation clause states that it was "signed, sealed, and delivered" in the presence of the subscribing witnesses. One of these witnesses was the justice of the peace before whom the acknowledgment was taken; and he states in his certificate following immediately after the attestation clause, that the "above-named William T. Davenport, who has signed, sealed, and delivered the above instrument of writing, personally appeared" before him and acknowledged the same to be his free act and deed. Read thus with the deed the certificate amounts to this: that the grantor personally appeared before the officer, and in his presence signed, sealed, and delivered the instrument, and then acknowledged the same before him. An affirmation, in the words of the statute, could not more clearly express the identity of the grantor with the party making the acknowledgment.

But if we lay aside this acknowledgment as evidence, there remains the certificate of proof made on the 2d of September, the day following the execution of the instrument, before a commissioner of deeds in the State of New York. At that time commissioners of deeds were authorized by a law of New York to take the acknowledgment and proof of deeds;† and by the third section of the statute of Illinois of 1847, deeds previously, or which might be subsequently, executed without the State and within the United States, acknowledged or proved in conformity with the law of the State where executed, are admissible to record in the counties of Illinois in which the property is situated, and

* Revised Statutes of Illinois of 1845, chap. 24, § 20.

† Act passed March 24th, 1818.

"when so recorded," may be used as evidence without further proof of their execution. The terms, "when so recorded," apply, we think, equally to past records as to those which might be subsequently made.

Now, the certificate of proof produced in this case shows a substantial conformity with the law of New York of 1813 on the subject, which was in force when the certificate was made.* The venue to it is simply "State of New York," and it is objected that the certificate has no assignable locality, and is, therefore, fatally defective. In support of this position the case of *Vance* v. *Schuyler*† is cited. In that case the Supreme Court of Illinois held a certificate insufficient to authorize the admission of a deed without proof of its execution, because the only means of determining where it was acknowledged was the venue, "Lincoln *v.* Wiscassett." This is a different case from the one at bar. The words, "State of New York," present some definite locality, at least, while there can be none to the words "Lincoln *v.* Wiscasset." The commissioner of deeds, in New York, had authority to act only in his county; and it will be presumed, although the State be named, that the officer exercised his office within the territorial limits for which he was appointed.‡ But if such were not the presumption, the defect in this particular is supplied by reference to the deed and the previous certificate of acknowledgment by the same person. In the attestation clause of the deed the grantor declares that he has affixed his hand and seal to the instrument, "at Albany, in the county of Albany, and State of New York;" and the venue of the certificate of acknowledgment taken on the previous day, is "State of New York, county of Albany."

As already stated, courts will uphold a certificate, if possible, and for that purpose will resort to the instrument to which it is attached. Thus, in *Brooks* v. *Chaplin*,§ the cer-

* "An act concerning deeds," passed April 12th, 1813.

† 1 Gilman, 163.

‡ Thurman *v.* Cameron, 24 Wendell, 87. § 3 Vermont, 281.

tificate of acknowledgment did not show in what State the acknowledgment was taken, and the omission was supplied by reference to the deed, in which the grantor described himself as a "resident of Suffield, in the county of Hartford, and State of Connecticut." The acknowledgment was taken two days after the date of the deed, having as its venue simply "Hartford County"—and the court said that it was a fair presumption, in the absence of evidence to the contrary, that the deed was executed at the time it bore date and at the place of the grantor's residence, and that, finding the acknowledgment taken so soon afterwards in the county of Hartford, it could intend no other than the same county of Hartford where the deed was supposed to have been executed. "It is not indispensable," said the court, "that the place of taking should fully appear from the acknowledgment itself, provided it can be discovered with sufficient certainty by inspection of the whole instrument." There is good sense in this decision, and it answers the particular objection of counsel just stated, and the further objection that the certificate does not state that the officer knew that the party produced was a subscribing witness. The deed shows that Wooster was a subscribing witness with the officer, and the certificate states that "Wooster, one of the subscribing witnesses," to the officer known, came before him, and being sworn, said that he saw the grantor execute and acknowledge the indenture. When the officer, being a subscribing witness himself with Wooster, certifies that "Wooster, one of the subscribing witnesses," came before him and was known to him, he does, in fact, certify that he knew Wooster to be a subscribing witness as plainly as if he had added those words. There is here a compliance, in substance if not in form, with the statute, and that is all which is required. In *Luffborough* v. *Parker*,* the certificate of proof stated that A. B. appeared before the officer, and made oath that he saw the grantor sign, seal, execute, and deliver the deed, without stating that A. B. was a sub-

* 12 Sergeant & Rawle, 48.

scribing witness; but as it appeared upon the deed that A. B. was a subscribing witness, the court held the certificate sufficient. The statute of Pennsylvania, under which the certificate was given, required the proof of deeds to be made by one or more of the subscribing witnesses. "The act," said the court, "must be substantially complied with; but when substance is found, it is neither the duty nor the inclination of the court to defeat conveyances by severe criticism on language."

The remaining objection to the certificate, that it does not appear from it, that the subscribing witness became such, at the request of the grantor, or signed his name, at the time the deed was executed, is answered by the fact that the statute of New York, under which the certificate was made, did not require any statement to that effect. Besides, the fact that the witness was present at the execution, which is all that is necessary, does sufficiently appear from the deed, with which the certificate is to be read. In the one, the declaration is made that the instrument was signed in his presence, and, in the other, that he saw the grantor execute the deed.

After a careful consideration of the several objections, presented by counsel, we are satisfied, that the certificate of the commissioner was sufficient, under the act of New York of 1813, to entitle the deed to be admitted to record in that State, had the land been there situated, and to be read in evidence in her courts, without further proof of execution; and was entitled to like record in the State of Illinois, and to be received in evidence in like manner, in her courts, under the third section of the statute of 1847.

The several objections urged by counsel to the other two deeds produced by the plaintiff are, with one exception, sufficiently met by what has already been said in answer to those taken to the deed from Davenport. The certificate of acknowledgment to the deed, from Munson to James, is given by the "judge of the Albany Common Pleas," an officer authorized at the time to take the acknowledgment

and proof of deeds by the laws of New York; and the objection referred to, not already met, is, that the certificate of this judge is not accompanied by any evidence of his official character, or that his certificate was in conformity with the laws of that State.

The answer to this objection is brief and conclusive. Unless the statute requires evidence of official character to accompany the official act which it authorizes, none is necessary. And, where one State recognizes acts done in pursuance of the laws of another State, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. In this case, also, the laws of New York are, by stipulation of parties, considered as evidence.*

When the record of partition in the suit between James and his coheirs was produced, objection was made by the defendant, on the alleged ground, that it did not show jurisdiction of the persons and subject-matter, but wherein it failed to show such jurisdiction, the objection does not indicate, and it is no part of our duty to act as counsel for the party, and search for particulars to give point to his objection. As it now stands, it is as vague and pointless as would be a general objection to either party's right of recovery. If the proof against the infant heirs was not as full as a due regard for their rights should have exacted, it will be time for us to consider that matter, when they, or parties representing them, are before the court. It is not a matter which defeated the jurisdiction of the local tribunal in the partition, and it is not a matter of any concern to the defendant, who was a stranger to, and in no way interested in, the proceeding.†

There was no necessity for mutual releases between the parties, in order to clothe John B. James in severalty with the entire ownership of the premises in controversy. The suit for partition was under the statute of Illinois, which dispensed with the necessity of mutual releases, and authorized

* Vance *v.* Schuyler, 1 Gilman, 160; Secrist v. Green, 3 Wallace, 749.

† Fridley *v.* Murphy, 25 Illinois, 146; Goudy *v.* Hall, 36 Id. 318.

the court to invest, by its decree, the several parties with the title to the parcels respectively allotted to them, without requiring conveyances.* And the decree rendered in the case declared, that the land allotted should be held by the parties respectively, in fee simple, in lieu of all their respective rights and interests previously enjoyed in common in the entire tract.

The law of Illinois, relating to the record of deeds, and other instruments affecting the title to real property, differs materially from the law of nearly every other State in the Union. In most States, these instruments can only be recorded after they have been acknowledged or proved before certain designated officers, and the certificate of such acknowledgment or proof is attached. An inscription upon the books of record of an instrument, without such authentication, is considered a mere unofficial entry of the register, constituting no record, and imparting no notice to purchasers or creditors.†

But, in Illinois, the law requires all "deeds and other instruments, relating to, or affecting the title to, real property," with or without such authentication, to be recorded; provides that they shall not take effect, as to creditors and subsequent purchasers without notice, until they are filed for record; and enacts, that "they shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, *though not acknowledged or proven according to law;* but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof."‡

Upon this state of the law, after the proof of the deeds

* Street *v.* McConnell, 16 Id. 126.

† Carter *v.* Champion, 8 Connecticut, 555; DeWitt *v.* Moulton, 17 Maine, 418; Tillman *v.* Cowand, 12 Smedes & Marshall, 262; Mitchell *v.* Mitchell, 3 Stewart & Porter, 83; Kerns *v.* Swope, 2 Watts, 75; Miller's Lessee *v.* Holt, 1 Tennessee, 111.

‡ Revised Laws of 1845, p. 108, 109, §§ 22, 23, and 28. See also Reed *v.* Kemp, 16 Illinois, 445.

of the parties, and of their record, and the production of the record of partition, and of the probated will of John B. James, there could only be two matters of inquiry: one respecting the identity of the heirs of William James, deceased, with the parties to the partition suit; and the other, whether there was notice to Hawley, at the time he received his conveyance, of the unrecorded deed from Davenport to De Witt. These matters were left to the jury to determine, and rightly so left.

No question was raised in the court below upon the sufficiency of the evidence, that the deeds produced by the plaintiff were recorded, at the time indicated by the indorsement thereon, in May, 1819; nor was any exception taken to the instruction of the court, that the deed from Davenport to Hawley was recorded in the proper office, before the deed from Davenport to De Witt; nor was any question raised, or ruling asked, upon the will produced of William James, and, therefore, no point is presented thereon for our consideration.

We perceive no substantial error in the record, and the judgment of the court below must, therefore, be

AFFIRMED.

VEAZIE BANK *v.* FENNO.

1. The 9th section of the act of July 13th, 1866, amendatory of prior internal revenue acts, and which provides that every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amounts of the notes of any State bank, or State banking association, paid out by them after the 1st day of August, 1866, does not lay a direct tax within the meaning of that clause of the Constitution which ordains that "direct taxes shall be apportioned among the several States, according to their respective numbers."
2. Congress having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain, by suitable enactments, the circulation of any notes, not issued under its own authority.

Statement of the case.

3. The tax of ten per centum imposed by the act of July 13th, 1866, on the notes of State banks paid out after the 1st of August, 1866, is warranted by the Constitution.

ON certificate of division for the Circuit Court for Maine.

The Constitution ordains that:

"The Congress shall have power—

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

"To coin money, regulate the value thereof, and of foreign coin."

It also ordains that:

"Direct taxes shall be apportioned among the several States . . . according to their respective numbers."

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be made."

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

With these provisions in force as fundamental law, Congress passed, July 13th, 1866,* an act, the second clause of the 9th section of which enacts:

"That every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."

Under this act a tax of ten per cent. was assessed upon the Veazie Bank, for its bank notes issued for circulation, after the day named in the act.

* 14 Stat. at Large, 146.

Argument for the United States.

The Veazie Bank was a corporation chartered by the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the act was collected, were issued under this authority. There was nothing in the case showing that the bank sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests.

The bank declined to pay the tax, alleging it to be unconstitutional, and the collector of internal revenue, one Fenno, was proceeding to make a distraint in order to collect it, with penalty and costs, when, in order to prevent this, the bank paid it under protest. An unsuccessful claim having been made on the commissioner of internal revenue for reimbursement, suit was brought by the bank against the collector, in the court below.

The case was presented to that court upon an agreed statement of facts, and, upon a prayer for instructions to the jury, the judges found themselves opposed in opinion on three questions, the first of which—the two others differing from it in form only, and not needing to be recited—was this:

"Whether the second clause of the 9th section of the act of Congress of the 13th of July, 1866, under which the tax in his case was levied and collected, is a valid and constitutional law."

The case coming here, *Messrs. Reverdy Johnson and C. Cushing, for the Veazie Bank*, contended:

1. That the tax in question was a direct tax, and that it had not been apportioned among the States agreeably to the Constitution.

In explanation of the nature of direct taxes they relied largely upon the writings of Adam Smith, and upon other treatises, English and American, of political economy.

2. That the act imposing the tax impaired a franchise granted by the State, and that Congress had no power to pass any law which could do that.

Mr. Hoar, Attorney-General of the United States, argued the case fully, *contra;* he relying upon the case of *Hylton* v. *The*

United States,* as conclusive of the question independently of principle; and referring to the brief recently published† of General Hamilton, by whom the case was argued, to explain and support his view of what was there decided; a case confirmed recently, the Attorney-General observed, in *Pacific Insurance Company* v. *Soule*.‡

In reply, it was contended that *Hylton* v. *The United States* adjudged one point alone, which was that a tax on carriages was not a direct tax, and that from the dicta of the judges, in the case, it was obvious that the great question of what were direct taxes was but crudely considered.

The arguments at the bar, by which these views of the respective counsel were maintained, are not presented, the views of both sides of the case being fully presented from the bench, in the opinion of the court, and in the dissent from it.

The CHIEF JUSTICE delivered the opinion of the court.

The necessity of adequate provision for the financial exigencies created by the late rebellion, suggested to the administrative and legislative departments of the government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in legislative acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation.

At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently, with little skill, prudence, and integrity. The acts of Congress, then in force, prohibiting the receipt or dis-

* 3 Dallas, 171.

† In The History of the Republic, by John C. Hamilton.

‡ 7 Wallace, 433.

bursement, in the transactions of the National government, of anything except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no National currency except coin; there was no general* regulation of any other by National legislation; and no National taxation was imposed in any form on the State bank circulation.//

The first act authorizing the emission of notes by the Treasury Department for circulation was that of July 17th, 1861.† The notes issued under this act were treasury notes, payable on demand in coin. The amount authorized by it was $50,000,000, and was increased by the act of February 12th, 1862,‡ to $60,000,000.

On the 31st of December, 1861, the State banks suspended specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and, for some time afterwards, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th of February, 1862,§ a new policy became necessary in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, to the amount of $150,000,000; and this amount was increased by subsequent acts to $450,000,000, of which $50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to their withdrawal from circulation.‖ These notes, until after the close of the war, were always convertible into, or receivable at par for

* See the act of December 27th, 1854, to suppress small notes in the District of Columbia, 10 Stat. at Large, 599.

† 12 Stat. at Large, 259. ‡ Ib. 338. § Ib. 345.

‖ Act of July 11th, 1862, Ib. 532; act of March 3d, 1863, Ib. 710.

bonds payable in coin, and bearing coin interest, at a rate not less than five per cent., and the acts by which they were authorized, declared them to be lawful money and a legal tender.

This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But on the 25th of February, 1863, the act authorizing National banking associations* was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this act a tax of two per cent. annually was imposed on the circulation of the associations authorized by it. Soon after, by the act of March 3d, 1863,† a similar but lighter tax of one per cent. annually was imposed on the circulation of State banks in certain proportions to their capital, and of two per cent. on the excess; and the tax on the National associations was reduced to the same rates.

Both acts also imposed taxes on capital and deposits, which need not be noticed here.

At a later date, by the act of June 3d, 1864,‡ which was substituted for the act of February 25th, 1863, authorizing National banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the States; and a few days afterwards, by the act of June 30, 1864,§ to provide ways and means for the support of the government, the tax on the circulation of the State banks was also continued at the same annual rate of one per cent., as before, but payment was required in monthly instalments of one-twelfth of one per cent., with monthly reports from each State bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

* Act of March 3d, 1863, 12 Stat. at Large, 670.
† Id. 712. ‡ 13 Ib. 111. § Id. 277.

Opinion of the court.

The first step taken by Congress in that direction was by the act of July 17, 1862,* prohibiting the issue and circulation of notes under one dollar by any person or corporation. The act just referred to was the next, and it was followed some months later by the act of March 3d, 1865, amendatory of the prior internal revenue acts, the sixth section of which provides, "that every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of the notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866."†

The same provision was re-enacted, with a more extended application, on the 13th of July, 1866, in these words: "Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."‡

The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of Congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for, rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a National currency by the issues of United States notes and of National bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent., imposed on State banks or National banks paying out the notes of individuals or State banks

* Act of March 3d, 1863, 12 Stat. at Large, 592.
† 13 Ib. 484. ‡ 14 Id. 146.

used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.

The second is that the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined.

The difficulty of defining with accuracy the terms used in the clause of the Constitution which confers the power of taxation upon Congress, was felt in the Convention which framed that instrument, and has always been experienced by courts when called upon to determine their meaning.

The general intent of the Constitution, however, seems plain. The General Government, administered by the Congress of the Confederation, had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property. And nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.

This purpose is apparent, also, from the terms in which the taxing power is granted. The power is "to lay and collect taxes, duties, imposts, and excises, to pay the debt and provide for the common defence and general welfare of the United States." More comprehensive words could not have been used. Exports only are by another provision excluded from its application.

There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government* of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.

And there are directions as to the mode of exercising the power. If Congress sees fit to impose a capitation, or other direct tax, it must be laid in proportion to the census; if Congress determines to impose duties, imposts, and excises, they must be uniform throughout the United States. These are not strictly limitations of power. They are rules prescribing the mode in which it shall be exercised. It still extends to every object of taxation, except exports, and may be applied to every object of taxation, to which it extends, in such measure as Congress may determine.

The comprehensiveness of the power, thus given to Congress, may serve to explain, at least, the absence of any attempt by members of the Convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred. The definition of particular words, therefore, became unimportant.

It may be said, indeed, that this observation, however just in its application to the general grant of power, cannot be applied to the rules by which different descriptions of taxes are directed to be laid and collected.

Direct taxes must be laid and collected by the rule of apportionment; duties, imposts, and excises must be laid and collected under the rule of uniformity.

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was

* Lane County *v.* Oregon, 7 Wallace, 73.

authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words "direct taxes" in the Constitution.

We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

And, considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

It is, as we think, distinctly shown in every act of Congress on the subject.

In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars;* in 1813, the amount of the second direct tax was fixed at three millions;† in 1815, the amount of the third at six millions, and it was made an annual tax;‡ in 1816, the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars.§ No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid and made annual;‖ but the pro-

* Act of July 14th, 1798, 1 Stat. at Large, 597.
† Act of August 2d, 1813, 3 Ib. 53.
‡ Act of July 9th, 1815, Id. 164.
§ Act of March 5th, 1816, Id. 255.
‖ Act of August 5th, 1861, 12 Ib. 294.

vision making it annual was suspended, and no tax, except that first laid was ever apportioned. In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798,* 1813,† 1815,‡ 1816,§ were lands, improvements, dwelling-houses, and slaves; and in 1861, lands, improvements, and dwelling-houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors.

This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were, by the laws of some, if not most of the States, classed as real property, descendible to heirs. Under the first view, they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years as realty. That the latter view was that taken by the framers of the acts after 1798, becomes highly probable, when it is considered, that in the States where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those States than in States where there were no slaves; for the proportion of tax imposed on each State was determined by population, without reference to the subjects on which it was to be assessed.

The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of

* Act of July 9th, 1798, 1 Stat. at Large, 586.

† Act of July 22d, 1813, 3 Ib. 26.

‡ Id. 166. § Id. 255.

direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purposes of taxation, as realty.

It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes.

And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the Convention which framed, and of the conventions which ratified, the Constitution.

What does appear in those discussions, on the contrary, supports the construction. Mr. Madison informs us,* that Mr. King asked what was the precise meaning of direct taxation, and no one answered. On another day, when the question of proportioning representation to taxation, and both to the white and three-fifths of the slave inhabitants, was under consideration, Mr. Ellsworth said: "In case of a poll tax, there would be no difficulty;" and, speaking doubtless of direct taxation, he went on to observe: "The sum allotted to a State may be levied without difficulty, according to the plan used in the State for raising its own supplies." All this doubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the States at that time usually raised their principal supplies.

This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*.

During the February Term, 1796, the constitutionality of the act of 1794, imposing a duty on carriages, came under consideration in the case of *Hylton* v. *The United States*.† Suit was brought by the United States against Daniel Hyl-

* 3 Madison Papers, 1337.

† 3 Dallas, 171.

ton, to recover the penalty imposed by the act for not returning and paying duty on a number of carriages, for the conveyance of persons, kept by the defendant for his own use. The law did not provide for the apportionment of the tax, and, if it was a direct tax, the law was confessedly unwarranted by the Constitution. The only question in the case, therefore, was, whether or not the tax was a direct tax.

The case was one of great expectation, and a general interest was felt in its determination. It was argued, in support of the tax, by Lee, Attorney-General, and Hamilton, recently Secretary of the Treasury; in opposition to the tax, by Campbell, Attorney for the Virginia District, and Ingersoll, Attorney-General of Pennsylvania.

Of the justices who then filled this bench, Ellsworth, Paterson, and Wilson had been members, and conspicuous members, of the Constitutional Convention, and each of the three had taken part in the discussions relating to direct taxation. Ellsworth, the Chief Justice, sworn into office that morning, not having heard the whole argument, declined taking part in the decision. Cushing, senior Associate Justice, having been prevented, by indisposition, from attending to the argument, also refrained from expressing an opinion. The other judges delivered their opinions in succession, the youngest in commission delivering the first, and the oldest the last.

They all held that the tax on carriages was not a direct tax, within the meaning of the Constitution. Chase, Justice, was inclined to think that the direct taxes contemplated by the Constitution are only two: a capitation or poll tax, and a tax on land. He doubted whether a tax by a general assessment of personal property can be included within the term direct tax. Paterson, who had taken a leading part in the Constitutional Convention, went more fully into the sense in which the words, giving the power of taxation, were used by that body. In the course of this examination he said:

"Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on

land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears from the practice of some of the States to have been considered as a direct tax. Whether it be so, under the Constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal—I will not say the only—objects that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land."*

Iredell, J., delivering his opinion at length, concurred generally in the views of Justices Chase and Paterson. Wilson had expressed his opinion to the same general effect, when giving the decision upon the circuit, and did not now repeat them. Neither Chief Justice Ellsworth nor Justice Cushing expressed any dissent; and it cannot be supposed if, in a case so important, their judgments had differed from those announced, that an opportunity would not have been given them by an order for reargument to participate in the decision.

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank

* 3 Dallas, 177.

circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company* v. *Soule** held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means

* 7 Wallace, 434.

of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now

consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.

The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered

AFFIRMATIVELY.

Mr. Justice NELSON, with whom concurred Mr. Justice DAVIS, dissenting.

I am unable to concur in the opinion of a majority of the court in this case.

The Veazie Bank was incorporated by the legislature of the State of Maine, in 1848, with a capital of $200,000, and was invested with the customary powers of a banking institution; and, among others, the power of receiving deposits,

discounting paper, and issuing notes or bills for circulation. The constitutional authority of the State to create these institutions, and to invest them with full banking powers, is hardly denied. But, it may be useful to recur for a few moments to the source of this authority.

The tenth amendment to the Constitution is as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." On looking into the Constitution, it will be found that there is no clause or provision which either expressly, or by reasonable implication, delegates this power to the Federal Government, which originally belonged to the States, nor which prohibits it to them. In the discussions on the subject of the creation of the first Bank of the United States, in the first Congress, and in the Cabinet of Washington, in 1790 and 1791, no question was made as to the constitutionality of the State banks. The only doubt that existed, and which divided the opinion of the most eminent statesmen of the day, many of whom had just largely participated in the formation of the Constitution, the government under which they were then engaged in organizing, was, whether or not Congress possessed a concurrent power to incorporate a banking institution of the United States?

Mr. Hamilton, in his celebrated report on a National bank to the House of Representatives, discusses at some length the question, whether or not it would be expedient to substitute the Bank of North America, located in Philadelphia, and which had accepted a charter from the legislature of Pennsylvania, in the place of organizing a new bank. And, although he finally came to the conclusion to organize a new one, there is not a suggestion, or intimation, as to the illegality or unconstitutionality of this State bank.

The act incorporating this bank, passed February 25th, 1791, prohibited the establishment of any other by Congress, during its charter, but said nothing as to the State banks. A like prohibition is contained in the act incorporating the Bank of the United States of 1816. The constitutionality of a

bank incorporated by Congress was first settled by the judgment of this court in *McCulloch* v. *The State of Maryland*,* in 1819. In that case both the counsel and the court recognize the legality and constitutionality of banks incorporated by the States.

The constitutionality of the Bank of the United States was again discussed, and decided in the case of *Osborn* v. *United States Bank*.† And, in connection with this, was argued and decided a point in the case of *The United States Bank* v. *The Planters' Bank of Georgia*, which was common to both cases. The question was, whether the Circuit Courts of the United States had jurisdiction of a suit, brought by the United States Bank against the Planters' Bank of Georgia, incorporated by that State, and in which the State was a stockholder.‡

The court held in both cases that it had. Since the adoption of the Constitution, down to the present act of Congress, and the case now before us, the question in Congress and in the courts has been, not whether the State banks were constitutional institutions, but whether Congress had the power conferred on it by the States, to establish a National bank. As we have said, that question was closed by the judgment of this court in *McCulloch* v. *The State of Maryland*. At the time of the adoption of the Constitution, there were four State banks in existence and in operation—one in each of the States of Pennsylvania, New York, Massachusetts, and Maryland. The one in Philadelphia had been originally chartered by the Confederation, but subsequently took a charter under the State of Pennsylvania. The framers of the Constitution were, therefore, familiar with these State banks, and the circulation of their paper as money; and were also familiar with the practice of the States, that was so common, to issue bills of credit, which were bills issued by the State, exclusively on its own credit, and intended to circulate as currency, redeemable at a future day. They guarded the people against the evils of this practice of the State governments

* 4 Wheaton, 316. † 9 Id. 738. ‡ Ib. 804, 904.

by the provision in the tenth section of the first article, "that no State shall" "emit bills of credit," and, in the same section, guard against any abuse of paper money of the State banks in the following words: "nor make anything but gold and silver coin a tender in payment of debts." As bills of credit were thus entirely abolished, the paper money of the State banks was the only currency or circulating medium to which this prohibition could have had any application, and was the only currency, except gold and silver, left to the States. The prohibition took from this paper all coercive circulation, and left it to stand alone upon the credit of the banks.

It was no longer an irredeemable currency, as the banks were under obligation, including, frequently, that of its stockholders, to redeem their paper in circulation, in gold or silver, at the counter. The State banks were left in this condition by the Constitution, untouched by any other provision. As a consequence, they were gradually established in most or all of the States, and had not been encroached upon or legislated against, or in any other way interfered with, by acts of Congress, for more than three-quarters of a century—from 1787 to 1864.

But, in addition to the above recognition of the State banks, the question of their constitutionality came directly before this court in the case of *Briscoe* v. *The Bank of the Commonwealth of Kentucky.**

The case was most elaborately discussed, both by counsel and the court. The court, after the fullest consideration, held that the States possessed the power to grant charters to State banks; that the power was incident to sovereignty; and that there was no limitation in the Federal Constitution on its exercise by the States. The court observed that the Bank of North America and of Massachusetts, and some others, were in operation at the time of the adoption of the Constitution, and that it could not be supposed the notes of these banks were intended to be inhibited by that instrument, or, that

* 11 Peters, 257.

they were considered as bills of credit within its meaning. All the judges concurred in this judgment, except Mr. Justice Story. The decision in this case was affirmed in *Woodruff* v. *Trapnall*;* in *Darrington* v. *The Bank of Alabama*;† and in *Curran* v. *State of Arkansas*.‡

Chancellor Kent observes, that Mr. Justice Story, in his Commentaries on the Constitution,§ seems to be of opinion that independent of the long-continued practice, from the time of the adoption of the Constitution, the States would not, upon a sound construction of the Constitution, if the question was *res integra*, be authorized to incorporate banks with a power to circulate bank paper as currency, inasmuch as they are expressly prohibited from coining money. He cites the opinions of Mr. Webster, of the Senate of the United States, and of Mr. Dexter, formerly Secretary of War, on the same side. But the Chancellor observes, that the equal, if not the greater, authority of Mr. Hamilton, the earliest Secretary of the Treasury, may be cited in support of a different opinion; and the contemporary sense and uniform practice of the nation are decisive of the question. He further observes, the prohibition (of bills of credit) does not extend to bills emitted by individuals, singly or collectively, whether associated under a private agreement for banking purposes, as was the case with the Bank of New York, prior to its earliest charter, which was in the winter of 1791, or acting under a charter of incorporation, so long as the State lends not its credit, or obligation, or coercion to sustain the circulation.

In the case of *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, he observes, that this question was put at rest by the opinion of the court, that there was no limitation in the Constitution on the power of the States to incorporate banks, and their notes were not intended nor were considered *as bills of credit*.‖

The constitutional power of the States, being thus estab-

* 10 Howard, 205. † 13 Id. 12. ‡ 15 Id. 317. § Vol. 3, p. 19.
‖ 1 Kent's Commentaries, p. 409, marg. note A, 10th ed.

lished by incontrovertible authority, to create State banking institutions, the next question is, whether or not the tax in question can be upheld, consistently with the enjoyment of this power.

The act of Congress, July 13th, 1866,* declares, that the State banks shall pay ten per centum on the amount of their notes, or the notes of any person, or other State bank, used for circulation, and paid out by them after the 1st of August, 1866. In addition to this tax, there is also a tax of five per centum per annum, upon all dividends to stockholders,† besides a duty of one twenty-fourth of one per centum, monthly, upon all deposits, and the same monthly duty upon the capital of the bank.‡ This makes an aggregate of some sixteen per cent. imposed annually upon these banks. It will be observed, the tax of ten per centum upon the bills in circulation is not a tax on the property of the institutions. The bills in circulation are not the property, but the debts of the bank, and, in their account of debits and credits, are placed to the debit side. Certainly, no government has yet made the discovery of taxing both sides of this account, debit and credit, as the property of a taxable person or corporation. If both these items could be made available for this purpose, a heavy National debt need not create any very great alarm, neither as it respects its pressure on the industry of the country, for the time being, or of its possible duration. There is nothing in the debts of a bank to distinguish them in this respect from the debts of individuals or persons. The discounted paper received for the notes in circulation is the property of the bank, and is taxed as such, as is the property of individuals received for their notes that may be outstanding.

The imposition upon the banks cannot be upheld as a tax upon property; neither could it have been so intended. It is, simply, a mode by which the powers or faculties of the States, to incorporate banks, are subjected to taxation, and, which, if maintainable, may annihilate those powers.

* 14 Stat. at Large, 146, § 9.

† 13 Id. p. 283, § 120.

‡ Ib. 277, § 110.

No person questions the authority of Congress to tax the property of the banks, and of all other corporate bodies of a State, the same as that of individuals. They are artificial bodies, representing the associated pecuniary means of real persons, which constitute their business capital, and the property thus invested is open and subject to taxation, with all the property, real and personal, of the State. A tax upon this property, and which, by the Constitution, is to be uniform, affords full scope to the taxing power of the Federal government, and is consistent with the power of the States to create the banks, and, in our judgment, is the only subject of taxation, by this government, to which these institutions are liable.

As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government, but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to governments is not new in this court. The bonds of the Federal Government have been held to be exempt from State taxation. Why? Because they were issued under the power in the Constitution to borrow money, and the tax would be a tax upon this power; and, as there can be no limitation to the extent of the tax, the power to borrow might be destroyed. So, in the instance of the United States notes, or legal tenders, as they are called, issued under a constructive power to issue bills of credit, as no express power is given in the Constitution, they are exempt from State taxation for a like reason as in the case of government bonds; and, we learn from the opinion of the court in this case, that one step further is taken, and that is, that the notes of the National banks are to be regarded as bills of credit, issued indirectly by the government; and it follows, of course, from this, that the banks used as instruments to issue and put in circulation

these notes, are also exempt. We are not complaining of this. Our purpose is to show how important it is to the proper protection of the reserved rights of the States, that these powers and prerogatives should be exempt from Federal taxation, and how fatal to their existence, if permitted. And, also, that even if this tax could be regarded as one upon property, still, under the decisions above referred to, it would be a tax upon the powers and faculties of the States to create these banks, and, therefore, unconstitutional.

It is true, that the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporations, such as railroads, turnpikes, manufacturing companies, and others.

This taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the States; and, within these limits, sustained and supported them as sovereign States.

We say nothing, as to the purpose of this heavy tax of some sixteen per centum upon the banks, ten of which we cannot but regard as imposed upon the power of the States to create them. Indeed, the purpose is scarcely concealed, in the opinion of the court, namely, to encourage the National banks. It is sufficient to add, that the burden of the tax, while it has encouraged these banks, has proved fatal to those of the States; and, if we are at liberty to judge of the purpose of an act, from the consequences that have followed, it is not, perhaps, going too far to say, that these consequences were intended.

Syllabus.

WILLARD *v.* TAYLOE.

1. A covenant in a lease giving to the lessee a right or option to purchase the premises leased at any time during the term, is in the nature of a continuing offer to sell. The offer thus made, if under seal, is regarded as made upon sufficient consideration, and therefore one from which the lessor is not at liberty to recede. When accepted by the lessee, a contract of sale is completed.
2. When a contract for the sale of real property is plain and certain in its terms and in its nature, and the circumstances attending its execution is free from objection, it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; but a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case.
3. In general the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties.
4. Where specific execution which would work hardship when unconditionally performed, would work equity when decreed on conditions, it will be decreed conditionally.
5. The kind of currency which a party offers in payment of a contract (which, in this case, consisted of notes of the United States, not equivalent at the time to gold or silver), is important, on a bill for specific performance, only in considering the good faith of his conduct. The condition of the currency in April, 1864, and the general use of notes of the United States at that time, repel any imputation of bad faith in tendering such notes instead of coin in satisfaction of a contract.
6. Where a party is entitled to a specific performance of a contract upon the payment of certain sums, and there is uncertainty as to the amount of such sums, he may apply by bill for such specific performance, and submit to the court the question of amount which he should pay.
7. Fluctuations in the value of property contracted for between the date of the contract, and the time when execution of the contract is demanded, where the contract was when made a fair one, and in its attendant circumstances unobjectionable, are not allowed to prevent a specific enforcement of the contract.
8. The general rule is that the parties to the contract are the only proper parties to the suit for its performance. Hence the assignment by the complainant, prior to his bill, of a partial interest in the entire contract is no defence to the bill for such performance.

9. Where a party, prior to filing a bill for specific performance of a contract for the sale of land, had sent to the other side for examination, and in professed purpose of execution of the contract, the draft of a mortgage which he is ready, on a conveyance being made, to execute, it is no defence to the bill, if the defendant have wholly refused to execute a deed, that the draft is not in such a form as respected parties and the term of years which the security had to run, as the vendor was bound to accept, especially where such vendor, in returning the draft, had not stated in what particulars he was dissatisfied with the draft.
10. When parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law.
11. In this case, without expressing an opinion upon the constitutionality of the provision of the act of Congress which makes United States notes a legal tender for private debts, nor whether, if constitutional, the provision is to be limited in its application to contracts made subsequent to the passage of the act, the court refused to decree a conveyance of real estate, on the tender in such notes, where the estate had greatly risen in value, where at the time of the contract gold and silver coin were the only lawful money of the United States, and where it was impossible to suppose that the parties when making their contract—which was eight years before the notes were authorized—contemplated a substitution of such notes (when tendered much depreciated), for coin; but did decree a specific execution, upon the payment in coin of the price originally agreed on, with interest, in coin also.

APPEAL from the Supreme Court of the District of Columbia.

This was a suit in equity for the specific performance of a contract for the sale of certain real property situated in the city of Washington, in the District of Columbia, and adjoining the hotel owned by the complainant, Willard, and known as Willard's Hotel.

The facts out of which the case arose were as follows:

In April, 1854, the defendant leased to the complainant the property in question, which was generally known in Washington as "The Mansion House," for the period of ten years from the 1st of May following, at the yearly rent of twelve hundred dollars. The lease contained a covenant that the lessee should have the right or option of purchasing the premises, with the buildings and improvements thereon, at any time before the expiration of the lease, for the sum of twenty-two thousand and five hundred dollars, payable as

follows: two thousand dollars in cash, and two thousand dollars, together with the interest on all the deferred instalments, each year thereafter until the whole was paid; the deferred payments to be secured by a deed of trust on the property, and the vendor to execute to the purchaser a warranty deed of the premises, subject to a yearly ground-rent of three hundred and ninety dollars.

At the time of this lease gold and silver, or bank bills convertible on demand into it, were the ordinary money of the country, and the standard of values. In 1861 the rebellion broke out, lasting till 1865. In the interval, owing to the influx of people, property in the metropolis used for hotels greatly increased in value, and as was alleged by Tayloe, who produced what he deemed a record to show the fact, the complainant, Willard, assigned an undivided half of the property which had been leased to him as abovementioned to a brother of his. In December, 1861, the banks throughout the country suspended payments in specie, and in 1862 and 1863, the Federal Government issued some hundred millions of notes, to be used as money, and which Congress declared should be a tender in the payment of debts. Coin soon ceased to circulate generally, and people used, in a great degree, the notes of the government to pay what they owed.

On the 15th of April, 1864, two weeks before the expiration of the period allowed the complainant for his election to purchase—the property having greatly increased in value since 1854, the year in which the lease was made—the complainant addressed a letter to the defendant, inclosing a check, payable to his order, on the Bank of America, in New York, for two thousand dollars, as the amount due on the 1st of May following on the purchase of the property, with a blank receipt for the money, and requesting the defendant to sign and return the receipt, and stating that if it were agreeable to the defendant he would have the deed of the property, and the trust deed to be executed by himself, prepared between that date and the 1st of May. To this letter the defendant, on the same day, replied that he had

no time then to look into the business, and returned the check, expressing a wish to see the complainant for explanations before closing the matter.

On the following morning the complainant called on the defendant and informed him that he had two thousand dollars to make the first payment for the property, and offered the money to him. The money thus offered consisted of notes of the United States, made by act of Congress a legal tender for debts. These the defendant refused to accept, stating that he understood the purchase-money was to be paid in gold, and that gold he would accept, but not the notes, and give the receipt desired. It was admitted that these notes were at the time greatly depreciated in the market below their nominal value.* On repeated occasions subsequently the complainant sent the same amount—two thousand dollars—in these United States notes to the defendant in payment of the cash instalment on the purchase, and as often were they refused by him. On one of these occasions a draft of the deed of conveyance to be executed by the defendant, and a draft of the trust deed to be executed by the complainant, were sent for examination, with the money. This last was prepared for execution by the complainant alone, and contained a provision that he might, if he should elect to do so, pay off the deferred payments at earlier dates than those mentioned in the lease. These deeds were returned by the defendant, accompanied with a letter expressing dissatisfaction at the manner in which he was induced to sign the lease with the clause for the sale of the premises, but stating that as he had signed it he "should have carried the matter out" if the complainant had proffered the amount which he knew he had offered for the property, meaning by this statement, as the court understood it, if he had proffered the amount stipulated in gold. No objection was made to the form of either of the deeds.

* Between the 15th of April and May 1st, 1864, one dollar in gold was worth from one dollar and seventy-three cents to one dollar and eighty cents in United States notes.

Statement of the case.

Soon afterwards the defendant left the city of Washington, with the intention of being absent until after the 1st of May.

On the 29th of April the complainant, finding that the defendant had left the city, and perceiving that the purchase was not about to be completed within the period prescribed by the covenant in the lease, and apprehensive that unless legal proceedings were taken by him to enforce its execution his rights thereunder might be lost, instituted the present suit.

In the bill he set forth the covenant giving him the right or option to purchase the premises; his election to purchase; the notice to the defendant; the repeated efforts made by him to obtain a deed of the property; his offer to pay the amount required as the first instalment of the purchase-money in United States notes, and to execute the trust deed stipulated to secure the deferred payments, and the refusal of the defendant to receive the United States notes and to execute to him a deed of the premises. It also set forth the departure of the defendant from the city of Washington, and his intended absence beyond the 1st of May following, and alleged that the appeal was made to the equitable interposition of the court, lest on the return of the defendant he might refuse to allow the complainant to complete the purchase, and urge as a reason that the time within which it was to be made had passed. The bill concluded with a prayer that the court decree a specific performance of the agreement by the defendant, and the execution of a deed of the premises to the complainant; the latter offering to perform the agreement on his part according to its true intent and meaning.

The bill also stated some facts, which it is unnecessary to detail, tending to show that the acquisition of the property in question was of especial importance to the complainant.

The answer set up that the complainant, even on his own showing, had no case; that there was no proper tender; that even if the complainant once had a right to file a bill in his sole right—the way in which the present bill was filed—he had lost this right by the transfer of the half to his brother; that the complainant had not demanded an execution even

of the contract which he himself set forth, but by the drafts of the trust deed sent to Tayloe, and which was the trust deed of which he contemplated the execution, he proposed to pay, at his own option, the whole purchase-money before the expiration of the ten years, and thus would interfere with the duration of that security and investment in the identical property leased, which had been originally contemplated and provided for; thus subjecting the defendant to risk and expense in making a new investment. The answer concluded with an allegation, that "by the great national acts and events which had occurred when the complainant filed his bill, and which were still influencing all values and interests in the country, such a state of things had arisen and now existed, as according to equity and good conscience ought to prevent a decree for specific performance in this case, upon a demand made on the last day of a term of ten years, even if in strict law (which was denied) the complainant was entitled to make such demand."

Both Tayloe and Willard were examined as witnesses. The former testified, that when the lease was executed he objected to a stipulation for a sale of the premises, and that Willard said it should go for nothing. Willard swore that he had said no such thing.

The court below dismissed the bill, and Willard took the present appeal.

Messrs. Curtis, Poland, and Howe, for the appellant, contended, that when Willard, within the prescribed time, notified to the respondent his election to purchase, the contract became complete.

That where a contract for the conveyance of lands was in its nature and circumstances unobjectionable, it was as much a matter *of course* for a court of equity to decree its specific performance, as it was for a court of law to give damages for its breach.

That the money payable by Willard to Tayloe became a debt, as soon as Willard had signified to Tayloe his option to make the purchase, and that being a "debt," it was capable

of being discharged in notes of the United States made a legal tender for debts by the act of Congress; the counsel here going into a learned argument to show that Congress had power under the Constitution to make its notes a valid tender for payment of private debts.

Messrs. Cox and McPherson, contra, and in support of the decree below, argued—

That in point of fact the purpose of the arrangement between Tayloe and Willard, was but to give to Willard, well known as a hotel-keeper in Washington, a control, during ten years, of property adjoining his hotel, in order to prevent competition with it; and that this was presumable from the lease itself, and was made certain by the testimony of Tayloe, who swears that on his objecting to the clause giving the right to purchase, Willard agreed that *it* should "go for nothing."

That the specific performance of contracts was a matter to be regulated pre-eminently by the suggestions of good conscience; that the rebellion, which between 1861 and 1865 brought countless numbers of strangers to Washington, had made a great and unexpected augmentation in the value of property used for hotels; that this might be ground even for rescinding a contract; or if not so, that certainly it was ground for requiring a complainant asking performance to show a most exact compliance with *his* obligations.

That in this case there was no proper tender; that the statutes under which the notes were tendered by Willard to Tayloe—if indeed they were meant to operate on then existing contracts—were unconstitutional; moreover, that they were not so meant to operate, and of course that this contract was without their scope. Independently of which, that payment of the amount to be paid by Willard to entitle himself to a conveyance, was not the payment of a debt, but the performance of a condition.

That the deed of trust tendered by Willard contemplated an execution by himself alone; whereas it ought to have been by himself and his brother, to whom he had conveyed

a half of his interest in the property, and moreover that it changed the dates at which the deferred payments should be made.

To this it was replied, that even if the tender in notes was bad, still, since Congress had declared them a good tender, and this court had never yet decided the reverse of such a position, that Willard did nothing wrong in tendering them; especially since he subjected himself to the court's direction, and was ready to tender coin if this court thought that he was bound to do so.

That the contract having been fair when made, each party took the risk of changes in value; and that here when made it was highly advantageous to Tayloe.

That the defence, that the covenant was obtained by some parol assurance that it would not be enforced was not set up in the answer, and was inconsistent with admitted facts, and in all violation of a leading rule of evidence.

That the fact, that the draft of a trust deed sent by Willard to Tayloe did not conform to the contract, could, under the circumstances, have no legal bearing on the case.

That the omission of the name of Willard's brother was unimportant, since only parties to the contract are proper parties to a bill; and a sub-purchaser of an undivided interest in the contract is not a necessary party.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed.* This contract is plain and certain in its terms, and

* Boston and Maine Railroad Company *v.* Bartlett, 3 Cushing, 224;

in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under fifteen thousand dollars, and a greater increase than one-half in value during the period of ten years could not then have been reasonably anticipated.

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine,* "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under [the] circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it."

And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In *Joynes* v. *Statham*,† Lord Hardwicke said: "The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law." And in *Underwood* v. *Hitchcox*‡ the same great judge said, in refusing to enforce a contract: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances."

Later jurists, both in England and in the United States, have reiterated the same doctrine. Chancellor Kent, in *Seymour*

Welchman *v.* Spinks, 5 Law Times, N. S. 385; Warner *v.* Willington, 3 Drewry, 523; Old Colony Railroad *v.* Evans, 6 Gray, 25.

* 12 Vesey, Jr. 332. † 3 Atkyns, 388. ‡ 1 Vesey, Sen. 279.

v. *Delancy*,* upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and Chancellor Bates, of Delaware, in *Godwin* v. *Collins*, recently decided, upon a very full consideration of the adjudged cases, says, that a patient examination of the whole course of decisions on this subject has left with him "no doubt that, as a matter of judicial history, such a discretion has always been exercised in administering this branch of equity jurisprudence."

It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties.

In the case of the *City of London* v. *Nash*,† the defendant, a lessee, had covenanted to rebuild some houses, but, instead of doing this, he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance Lord Hardwicke held that the covenant was one which the court could specifically enforce; but said, "the most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them." In *Faine* v. *Brown*,‡ similar hardship, flowing from the specific execution of a contract, was made the ground for refusing the decree prayed. In that case the defendant was the owner of a small estate, devised to him on condition that if he sold it within twenty-five years one-half of the purchase-money should go to his brother. Having contracted to sell

* 6 Johnson's Chancery, 222. † 1 Vesey, Sen. 12.

‡ Cited in Ramsden v. Hylton, 2 Vesey, Sen. 306.

the property, and refusing to carry out the contract under the pretence that he was intoxicated at the time, a bill was filed to enforce its specific execution, but Lord Hardwicke is reported to have said that, without regard to the other circumstance, the hardship alone of losing half the purchase-money, if the contract was carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave the parties to the law.

The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in *Davis* v. *Hone*,* that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing,

* 2 Schoales & Lefroy, 348.

take a decree upon condition of doing or relinquishing certain things to the other party.

In the present case objection is taken to the action of the complainant in offering, in payment of the first instalment stipulated, notes of the United States. It was insisted by the defendant at the time, and it is contended by his counsel now, that the covenant in the lease required payment for the property to be made in gold. The covenant does not in terms specify gold as the currency in which payment is to be made; but gold, it is said, must have been in the contemplation of the parties, as no other currency, except for small amounts, which could be discharged in silver, was at the time recognized by law as a legal tender for private debts.

Although the contract in this case was not completed until the proposition of the defendant was accepted in April, 1864, after the passage of the act of Congress making notes of the United States a legal tender for private debts, yet as the proposition containing the terms of the contract was previously made, the contract itself must be construed as if it had been then concluded to take effect subsequently.

It is not our intention to express any opinion upon the constitutionality of the provision of the act of Congress, which makes the notes of the United States a legal tender for private debts, nor whether, if constitutional, the provision is to be limited in its application to contracts, made subsequent to the passage of the act.* These questions are the subject of special consideration in other cases, and their solution is not required for the determination of the case before us. In the view we take of the case, it is immaterial whether the constitutionality of the provision be affirmed or denied. The relief which the complainant seeks rests, as already stated, in the sound discretion of the court; and, if granted, it may be accompanied with such conditions as will prevent hardship and insure justice to the defendant. The suit itself is an appeal to the equitable jurisdiction of the

* See *infra*, Hepburn *v.* Griswold, p. 603.

court, and, in asking what is equitable to himself, the complainant necessarily submits himself to the judgment of the court, to do what it shall adjudge to be equitable to the defendant.

The kind of currency which the complainant offered, is only important in considering the good faith of his conduct. A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract, if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required. The condition of the currency at the time repels any imputation of bad faith in the action of the complainant. The act of Congress had declared the notes of the United States to be a legal tender for all debts, without, in terms, making any distinction between debts contracted before, and those contracted after its passage. Gold had almost entirely disappeared from circulation. The community at large used the notes of the United States in the discharge of all debts. They constituted, in fact, almost the entire currency of the country in 1864. They were received and paid out by the government; and the validity of the act declaring them a legal tender had been sustained by nearly every State court before which the question had been raised. The defendant, it is true, insisted upon his right to payment in gold, but before the expiration of the period prescribed for the completion of the purchase, he left the city of Washington, and thus cut off the possibility of any other tender than the one made within that period. In the presence of this difficulty, respecting the mode of payment, which could not be obviated, by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he

ought in equity and conscience to do in the execution of the contract.

Nothing further could have been reasonably required of him under the circumstances, even if we should assume that the act of Congress, making the notes of the United States a legal tender, does not apply to debts created before its passage, or, if applicable to such debts, is, to that extent, unconstitutional and void.

In the case of *Chesterman* v. *Mann*,* it was held by the Court of Chancery of England, that where an underlessee had a covenant for the renewal of his lease, upon paying to his lessor a fair proportion of the fines and expenses to which the lessor might be subjected in obtaining a renewal of his own term from the superior landlord, and of any increased rent upon such renewal, and there was a difference between the parties as to the amount to be paid by the underlessee, he might apply for a specific performance of the covenant, and submit to the court the amount to be paid. So here in this case, the complainant applies for a specific performance, and submits the amount to be paid by him to the judgment of the court.

We proceed to consider whether any other circumstances have arisen since the covenant in the lease was made, which renders the enforcement of the contract of sale, subsequently completed between the parties, inequitable. Such circumstances are asserted to have arisen in two particulars; first, in the greatly increased value of the property; and second, in the transfer of a moiety of the complainant's original interest to his brother.

It is true, the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts, in case of the lessee's election to purchase, the payment of one-half more than its then estimated value. If the actual increase has exceeded the estimate then made, that circumstance furnishes no ground for interference with the arrangement of the parties. The ques-

* 9 Hare, 212.

tion, in such cases, always is, was the contract, at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement.* Here the contract, as already stated, was, when made, a fair one, and in all its attendant circumstances, free from objection. The rent reserved largely exceeded the rent then paid, and the sum stipulated for the property largely exceeded its then market value.

The transfer, by the complainant to his brother, of one-half interest in the lease, assuming now, for the purpose of the argument, that there is, in the record, evidence, which we can notice, of such transfer, in no respect affects the obligation of the defendant, or impairs the right of the complainant to the enforcement of the contract. The brother is no party to the contract, and any partial interest he may have acquired therein, the defendant was not bound to notice. The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern.

If the entire contract had been assigned to the brother, so that he had become substituted in the place of the complainant, the case would have been different. In that event, the brother might have filed the bill, and insisted upon being treated as representing the vendee. The general rule is, that the parties to the contract are the only proper parties to the suit for its performance, and, except in the case of an assignment of the entire contract, there must be some special circumstances to authorize a departure from the rule.

The court, says Chancellor Cottenham, in *Tasher* v. *Small*,† "assumes jurisdiction in cases of specific performance of

* Wells *v.* The Direct London & Portsmouth Railway Company, 9 Hare, 129; Low *v.* Treadwell, 3 Fairfield, 441; Fry on Specific Performance of Contracts, §§ 235 and 252.

† 3 Mylne & Craig, 69.

contracts, because a court of law, giving damages only for the non-performance of the contract, in many cases, does not afford an adequate remedy. But in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining, as nearly as possible, in the same situation as the defendant had agreed that he should be placed in. It is obvious, that persons, strangers to the contract, and, therefore, neither entitled to the rights nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

When the complainant has received his deed from the defendant, the brother may claim from him a conveyance of an interest in the premises, if he have a valid contract for such interest, and enforce such conveyance by suit; but that is a matter with which the defendant has no concern.

It seems that the draft of the trust deed, to secure the deferred payments, sent to the defendant for examination, was prepared for execution by the complainant alone, and contained a stipulation that he might, if he should so elect, pay off the deferred payments at earlier dates than those mentioned in the covenant in the lease; and it is objected to the complainant's right to a specific performance, that the trust deed was not drawn to be executed jointly by him and his brother, and that it contained this stipulation. A short answer to this objection is found in the fact, that the parties had disagreed in relation to the payment to be made, and until the disagreement ceased no deeds were required. It is admitted that the form of the trust deed was not such a one as the defendant was bound to receive, but as it was sent to him for examination, good faith and fair dealing required him to indicate in what particulars it was defective, or with which clauses he was dissatisfied. Whether it was the duty of the complainant or defendant to prepare the trust deed, according to the usage prevailing in Washington, is not entirely clear from the evidence. There is testimony both ways. The

true rule, independent of any usage on the subject, would seem to be that the party who is to execute and deliver a deed should prepare it. It is, however, immaterial for this case, what rule obtains in Washington. Until the purchase-money was accepted, there was no occasion to prepare any instrument for execution. So long as that was refused the preparation of a trust deed was a work of supererogation. Besides, the execution of the trust deed by the complainant was to be simultaneous with the execution of a conveyance by the defendant. The two were to be concurrent acts; and if the complainant was to prepare one of them, the defendant was to prepare the other, and it is not pretended that the defendant acted in the matter at all.

The objection to the trust deed, founded upon the omission of the name of the complainant's brother as a co-grantor, does not merit consideration. All that the defendant had to do was to see that he got a trust deed, as security for the deferred payments, from the party to whom he transferred the title.

The defendant states in his testimony that when the lease was executed he objected to the stipulation for a sale of the premises, and that the defendant told him that it should go for nothing. And it has been argued by counsel that this evidence should control the terms of the covenant. The answer to the position taken is brief and decisive. First, nothing of the kind is averred in the answer; second, the testimony of the defendant in this particular is distinctly contradicted by that of the complainant, and is inconsistent with the attendant circumstances; and third, the evidence is inadmissible. When parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law.

Upon a full consideration of the positions of the defendant we perceive none which should preclude the complainant from claiming a specific performance of the contract.

The only question remaining is, upon what terms shall the decree be made? and upon this we have no doubt.

The parties, at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable to compel a transfer of the property for notes, worth when tendered in the market only a little more than one-half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity.

The decree of the court below will, therefore, be REVERSED, and the cause remanded with directions to enter a decree for the execution, by the defendant to the complainant, of a conveyance of the premises with warranty, subject to the yearly ground-rent specified in the covenant in the lease, upon the payment by the latter of the instalments past due, with legal interest thereon, in gold and silver coin of the United States, and upon the execution of a trust deed of the premises to the defendant as security for the payment of the remaining instalments as they respectively become due, with legal interest thereon, in like coin; the amounts to be paid and secured to be stated, and the form of the deeds to be settled, by a master; the costs to be paid by the complainant.

The CHIEF JUSTICE with NELSON, J., concurred in the conclusion as above announced—that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin—but expressed their inability to yield their assent to the argument by which, in this case, it was supported.

Statement of the case

BUTZ *v.* CITY OF MUSCATINE.

1. The limitation in the act of 22d January, 1852, of the legislature of Iowa, amendatory of the charter of the city of Muscatine, and which authorized the council to levy a tax *not exceeding one per cent.* on the assessed value, in any one year, of the property of the city, is a limitation touching the exercise of the power of taxation in the ordinary course of municipal action.
2. It does not apply to a case where a judgment has been recovered against the city. Such a case, on the contrary, falls within the provisions of the code of 1851 (re-enacted in 1860), which make obligatory the levy of a tax as early as practicable *sufficient* to pay off the judgment with interest and costs: the extent of the limitation, in such a case, is the only limitation of the amount to be levied.
3. Where a question involved in the construction of State statutes practically affects those remedies of creditors which are protected by the Constitution, this court will exercise its own judgment on the meaning of the statutes, irrespectively of the decisions of the State courts, and if it deems these decisions wrong will not follow them; and this whether the case come here from the Circuit Court in ordinary course, or from the Supreme Court of the State under the 25th section of the Judiciary Act.
4. A remedy, which the statutes of a State, on what this court considers a plainly right construction of them, give for the enforcement of contracts, cannot be taken away, as respects previously existing contracts, by judicial decisions of the State courts construing the statutes wrongly.
5. The extent to which the writ of mandamus from the Federal courts can give relief against decisions in the State courts, involves a question respecting the process of the Federal courts; and, that being so, it is peculiarly the province of this court to decide all questions which concern the subject.

IN error to the Circuit Court of the United States for the District of Iowa.

The case was this:

A code of the State of Iowa, adopted in 1851, and known as the code of that year, after enacting that neither the public property of any city corporation necessary to carrying on the general purposes for which the corporation was established, nor the property of private citizens shall be levied on to pay the debt of such corporation, goes on to enact that if any corporation against which judgment has been obtained has no property which can be seized, "a tax must be levied

on as early as practicable sufficient to pay off the judgment, with interest and costs." And by the code a failure on the part of the officers of the corporation to levy such a tax in the case prescribed, makes them personally responsible for the debt.

With this code in force, the city of Muscatine was incorporated; and in 1852, it was enacted specially in reference to that city, by an amendment to its charter, that an assessor should be appointed, whose duty it should be "to make an assessment of the property of the city subject to taxation, and upon whose assessment the council may levy a tax of not exceeding one per cent. upon the value, in any one year."

With this provision in force, the city, which under its charter had "power to borrow money for any purpose in its discretion," &c., did borrow, under that power, in the year 1854, money, issuing bonds, of which one Butz, of Pennsylvania, bought a large amount.

In 1860, the State of Iowa re-enacted the provisions of its already mentioned code of 1851, on the subject of executions. But on a question whether those general provisions of the code applied to a case like that of the charter of Muscatine, where there was a limitation about taxes, the Supreme Court of Iowa determined, more than once, that it did not.*

With these State decisions unquestioned in any way in the State courts, Butz, whose bonds were unpaid, and who had a return of *nulla bona* to an execution against the city of Muscatine, after judgment had by him on them against the city, applied in 1867 to the court below, the *Circuit Court of the United States* for Iowa, for a *mandamus* against the city officers to levy, under the provisions of *the code*, a tax "sufficient to pay off the judgment, with interest and costs." The city, relying on the limitation in its amended charter, and on the decisions of the Supreme Court of the State, made return, that under the laws of Iowa they were not permitted to levy a tax exceeding in amount one per cent. upon the taxable property of the city for all purposes in any one year;

* See Clark *v.* Davenport, 14 Iowa, 494; Porter *v.* Thompson, 22 Id. 391.

that this amount had been levied for the year 1867; that a part of it had been collected, and that for a part the taxpayers were delinquent; that the entire amount collected had been expended for the necessary current and incidental expenses of the city, and that the entire amount levied and collected for the year 1868 would be needed for the same purposes for that year, and that those expenses were a paramount lien upon the fund.

The plaintiffs demurred to the return. The Circuit Court overruled the demurrer. The plaintiffs elected to abide by it, and judgment was entered against them.

The questions now here were—

1. Whether the construction given by the Supreme Court of Iowa to the provisions of the codes and to the charter of the city was one which in the judgment of this court could, in itself, be sustained?

2. If not, then—since the effect of the decisions in question was to deprive creditors of the only practicable means of enforcing against certain corporations which had made them, contracts solemnly entered into by those corporations prior to the date of the decisions—whether this was a case where the Supreme Court would adhere to its rule, confessedly obligatory in most cases, that it would follow, irrespectively of what it might itself think of the correctness of such decisions, the decisions given by the State courts in the construction of their own State statutes; the question here more particularly arising on a writ of error in ordinary course to a Circuit Court of the United States, and not on a writ to the Supreme Court of the State, in which case this court has power by the Judiciary Act to re-examine and reverse any decision of such a court, where there has been drawn in question the *validity* of a statute of or an authority exercised under any State, on the ground of their being repugnant to the laws of the United States, and the decision has been in favor of such their validity.

Mr. Grant, for the creditor, plaintiff in error; no counsel appearing for the city of Muscatine.

Statement of the case in the opinion.

Mr. Justice SWAYNE delivered the opinion of the court, first stating the case.

This case is brought before us by a writ of error to the Circuit Court of the United States for the District of Iowa.

The case as presented in the record is as follows: Upon the petition of the relator an alternative writ of mandamus was issued to the defendants in error, wherein it was set forth that it had been represented to the court that the relator, on the 16th of May, 1867, recovered a judgment against the city of Muscatine for the sum of $\$57{,}615\frac{16}{100}$, with interest at the rate of seven per cent. per annum, upon which judgment an execution had been issued and returned "no property found;" that the business of the corporation was managed by the mayor and aldermen, whose duty it was to cause its taxes to be levied and collected, and to provide for the payment of all judgments recovered against it; that this judgment was for interest on certain bonds executed by the city in 1854; that it was the duty of the mayor and aldermen to provide for the payment of the interest as it fell due; that it was their duty to levy and collect taxes and pay such judgments when recovered; that a demand had been made on the mayor and aldermen to levy and collect the taxes necessary to pay this judgment, interest, and costs; that they had refused and denied their authority to do so; that the city has no property liable to execution; that by the laws of Iowa when the debt was created and when the judgment was recovered, the public property of the city and the private property of its citizens were exempt from levy and sale to pay this debt and judgment, but that it was made the duty of the mayor and aldermen, as early as practicable after it was recovered, to levy a tax sufficient to pay the judgment, with interest and costs; that they had refused to perform that duty, and that the relator was without other adequate remedy at law.

The mayor and aldermen were therefore commanded forthwith to levy a sufficient tax on the taxable property of the city—for the year 1867—to pay the judgment, interest, and

Statement of the case in the opinion.

costs, and to pay them, or to appear and show cause why they refused to do so.

The defendants in their return set forth—

(1.) A denial of the duties alleged to rest upon them.

(2.) That under the laws of Iowa they are not permitted to levy or collect a tax exceeding in amount one per cent. upon the taxable property of the city for all purposes in any one year; that this amount has been levied for the year 1867; that a part of it has been collected and a part is delinquent; that the entire amount collected has been expended for the necessary current and incidental expenses of the city, and that the entire amount levied and collected for the year 1868 will be needed for the same purposes for that year, and that those expenses are a paramount lien upon the fund.

Other matters are set forth in the return which it is not necessary particularly to mention.

The plaintiffs demurred to the return. The court overruled the demurrer. The plaintiffs elected to abide by it, and judgment was entered against them.

By the statute of Iowa of 22d of January, 1852, entitled "An act to amend the charter of the city of Muscatine, approved February 1, 1851," it was enacted that an assessor should be appointed, whose duty it should be "to make an assessment of the property of the city subject to taxation, and upon whose assessment the council may levy a tax of not exceeding one per cent. upon the value in any one year." This statute was in force when the writ was issued and when the return was made. If there were no other statutory provisions bearing on the subject it would be conclusive in support of the judgment rendered by the court below.

The code of 1860, chapter 110, title "Execution," declares as follows: "Sec. 3274. Public buildings owned by the State, or any county, city, school district, or other civil corporation, and any other public property which is necessary and proper for carrying out the general purpose for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation."

"Sec. 3275. In case no property is found on which to levy, or which is not exempted by the last section, or if, after judgment, the creditor elect not to issue execution against such corporation, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation; and, if the debtor corporation issues no scrip or evidence of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs."

"Sec. 3276. A failure on the part of the officers of the corporation to comply with the requirements of the last section, renders them personally responsible for the debt."

These regulations were contained in the code of 1851, and have been in force ever since. They were re-enacted in the code of 1860, and have a controlling effect upon the determination of this case. The limitation in the act of 1852, touching the exercise of the power of taxation by the city council, applies to the ordinary course of their municipal action. Whenever that action is voluntary, and there is no debt evidenced by a judgment against the city, to be provided for, one per cent. is the maximum of the tax they are authorized to impose. But when a judgment has been recovered, the case is within the regulations of the code. Those provisions are then brought into activity, and operate with full force, until the judgment, interest, and costs are satisfied. The limitation in the act of 1852 has no application in such cases, and imposes no check, if larger taxation be necessary. The contingency is one not contemplated, and not provided for by the act of 1852. If the legislature had intended to qualify the requirement prescribed by the code, it is to be presumed it would have done so, in language as clear as that which it has employed to express the duty to be performed. It leaves no room for doubt or construction. Nothing can be more simple and direct than the terms in which the levy of a sufficient tax is enjoined. The extent of the necessity is the only limitation, express or implied, in the code of the amount to be levied. We cannot interpolate a restriction by importing it from another act which has no necessary rela-

tion to the class of cases for which the code intended to provide. When the judgment is recovered the duty arises, and it can be satisfied only by paying the debt, interest, and costs, in the manner prescribed. The source whence the means are to be drawn is described, and full power is given to collect them.

There is no difficulty as to authority to levy a tax of the requisite amount, whatever it may be. Section 3276 of the code declares, that a failure on the part of the officers of the corporation to perform the duty enjoined, shall render them "personally responsible for the debt."

In the construction of a statute, what is clearly implied is as effectual as what is expressed.*

The minutest details could not have made the meaning and effect of these provisions clearer than they are. The limitation in the act of 1852 is confined to the city of Muscatine. The regulations of the code are general in their terms, and apply to all the municipal corporations mentioned in section 3274.

If these views be not correct, the position of the judgment creditor is a singular one. All the corporate property of the debtor is exempt by law from execution. The tax of one per cent. is all absorbed by the current expenses of the debtor. There is neither a surplus nor the prospect of a surplus which can be applied upon the judgment. The resources of the debtor may be ample, but there is no means of coercion. The creditor is wholly dependent for payment upon the bounty and the option of the debtor. Until the debtor chooses to pay, the creditor can get nothing. The usual relations of debtor and creditor are reversed, and the judgment, though solemnly rendered, is as barren of results as if it had no existence. Such are the effects which must necessarily follow from the theory, if maintained, of the defendants in error. Nothing less than the most cogent considerations could bring us to the conclusion that it was the intention of the law-making power of so enlightened a State

* United States v. Babbit, 1 Black, 61.

to produce, by its action, such a condition of things in its jurisprudence.

The writ of mandamus is the appropriate remedy, and the relator is entitled to the benefit of it.

There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part, by blindly following in the footsteps of others and substituting their judgment for our own.

Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence.

The defendants in error have not submitted any brief or argument. We have had no assistance from them in this way. But it has been suggested in their behalf that we are concluded by the more limited interpretation of the provisions of the code which have been given to them by the Supreme Court of the State.

To this we think there are several answers:

1. In all the cases brought here under the 25th section of the Judiciary Act this court has never hesitated to determine for itself the construction and effect of any statute of a State, brought under review, without reference to the previous adjudications of the highest court of the State upon the subject. In the opinion delivered in the case of the *Jefferson Branch of the State Bank of Ohio* v. *Skelley*,* it was well asked of what value would the appellate power of this court be to

* 1 Black, 436.

the party aggrieved, if such were not the rule. In that case and in all the other cases brought here, involving the same question, an act of the legislature of Ohio was pronounced invalid, and the judgments of the Supreme Court of the State were reversed. Cases may be brought here from the Circuit Court of such a character that it is necessary to the right administration of justice that we should proceed upon the same principle in deciding them. Indeed, questions which are identical, may be brought here in both ways. Under such circumstances it will hardly be insisted that State adjudications are to control in one case and not in the other. Our duty depends upon the questions involved, and not upon the channel through which the case comes before us. Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it always has done, follow such adjudications. The cases of a different character, involving State statutes, in which the adjudications of the courts of the States in relation to them have been departed from by this court, extend in an unbroken series from an early period after its organization to the present time.

2. It is set forth in the writ that the judgment was recovered upon bonds issued by the city in 1854. This not being denied by the return, according to the settled law of pleading, is admitted. The act of 1852 and the provisions of the code were in force at that time, and entered into and formed a part of the contract of the parties. They prescribed one of the remedies to which the bondholders were entitled in the event of default by the city. It has been uniformly held by this court that such remedies are within the protection of the Constitution of the United States, and that any State law which substantially impairs them is as much prohibited by that instrument as legislation which impairs otherwise the obligation of the contract.* If the remedy be taken away the contract is in effect annulled. Nothing is left of

* Bronson *v.* Kinzie, 1 Howard, 297; McCracken *v.* Hayward, 2 Id. 608.

it, of any value to the party whose rights are thus invaded. This subject was fully considered in *Van Hoffman* v. *The City of Quincy*.* It was there held that laws for the collection of the requisite taxes, existing when the bonds were issued, subsequently repealed, still subsisted for the purposes of the contract, and that a writ of mandamus might issue from the Circuit Court to enforce them. Here the remedy is taken away; not by a subsequent repeal, but by subsequent judicial decisions. The effect upon the contract is the same as if the provisions of the code had been repealed. This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the State courts, which may have exercised their judgment upon the same subject.† This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the State does affect the legal result.‡ We are of the opinion that under the statutes of Iowa, in force when the contract was made, the relator is entitled to the remedy he asks, and that this right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by one than the other. We cannot in any other way give effect to the contract of the parties as we understand it. This contract was entered into in 1854. The earliest of the adjudications to which we have referred was made in 1862. If the construction ultimately given to the statute had preceded the issuing of the bonds, and become the settled law of the State before that time, the case, as regards this point, would have presented a different aspect.

3. The case involves the process of the courts of the United States. It is peculiarly the province of this court to decide all questions relating to that subject.§

The judgment is REVERSED and the cause will be remanded

* 4 Wallace, 557. † Swift *v.* Tyson, 16 Peters, 19.

‡ Jefferson Branch of the State Bank *v.* Skelley, 1 Black, 436.

§ Riggs *v.* Johnson County, 6 Wallace, 166.

to the court below, with instructions to sustain the demurrer, and to proceed

IN CONFORMITY WITH THIS OPINION.

Mr. Justice FIELD did not sit in the case.

Mr. Justice MILLER, dissenting; the CHIEF JUSTICE concurring in the dissent.

In the case of *Warren* v. *Leffingwell*,* this court, speaking by my learned brother who has just read its opinion, declared that "the construction given to a State statute by the highest judicial tribunal of such State, is regarded as a part of the statute and is as binding upon the courts of the United States as the text;" and it was further said that "if the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute and reverse its former decision, this court will follow the latest settled adjudications." This was announced as the doctrine of this court on a full review of numerous reported cases.

When at the succeeding term of the court the first of a series of suits based on bonds issued by municipalities in Iowa came before us, it was found that such bonds could not be sustained consistently with that doctrine. Accordingly the court, by the same learned member, in the case of *Gelpcke* v. *Dubuque*,† delivered its opinion declaring that, in cases of contracts, it would not follow the later decisions of the State courts construing their own constitution where the consequence would be to declare such contracts void, *if there had been prior decisions that they were valid.* And as late as the last term, in the case of *Lee County* v. *Rogers*,‡ the court, speaking by Mr. Justice Nelson, distinctly recognizes the existence of those prior decisions of the State courts, under which the bonds were taken by the holders, as the ground on which the subsequent decisions of the same court are disregarded.

The opinion of the court in the present case, delivered by the same learned judge who, on its behalf, in *Leffingwell*

* 2 Black, 599. † 1 Wallace, 175. ‡ 7 Id. 181.

v. *Warren*, declared that this court would follow the latest settled adjudication of the State courts, and in *Gelpcke* v. *Dubuque* only claimed to modify that doctrine so far as to hold contracts valid which had the support of some prior decisions of the State courts, now holds, in a matter which does not involve the validity of contracts, but a construction of State statutes on the amount of tax which may be levied under them, that the repeated decisions of the State courts on that subject, in which courts there have never been any contrary decisions, will be disregarded entirely, and that this court will give to such statutes a construction directly opposed to that by which the State courts are governed.

It is an entire and unqualified overthrow of the rule imposed by Congress and uniformly acted on by this court up to the year 1863, that the decisions of the State courts must govern this court in the construction of State statutes.

There is not here even the excuse that the decisions concern the validity of a contract, for the contract is admitted, and the bondholder has his judgment in the Circuit Court, based on the contract.

But it relates to the question of what taxes are authorized to be levied by State statutes, a question it would seem of all others most proper to be determined by the State courts.

Nor is there any pretence that the statute as construed by the State court impairs the obligation of a contract, because the limitation of the amount of taxes which might be levied by the city of Muscatine existed long before the bonds were issued which are sought to be enforced by this proceeding, and this limitation was a part of the very statute under which those bonds were claimed to be issued, namely, the charter of the city of Muscatine. It was under this very charter, with this express limitation of the taxing power, that this court held these bonds to be valid.*

The provision of the code of 1851, which required the officers of municipalities to levy the taxes necessary to pay judgments against them, was in existence when the charter

* Meyer *v.* The City of Muscatine, 1 Wallace, 384.

of Muscatine was created, which limited the taxing power of its authorities to one per cent. per annum. The later law must repeal the former if they are inconsistent. But they are not so. It is only necessary to hold that persons giving credit to the city, with a knowledge of this limit to its taxing powers, must do so on the condition of waiting until that amount of tax will pay them, or until the legislature shall remove the restriction; and that within that limit the code gives them a right to compel the exercise of the taxing power to pay the debt so created. Such has been the reasonable construction given to the code by the courts of Iowa for many years and by the Circuit Court of the United States for that district for several years past, and never contradicted by any court until the present time.

These frequent dissents in this class of subjects are as distasteful to me as they can be to any one else. But when I am compelled, as I was last spring, by the decisions of this court, to enter an order to commit to jail at one time over a hundred of the best citizens of Iowa, for obeying as they thought their oath of office required them to do, an injunction issued by a competent court of their own State, founded, as these gentlemen conscientiously believed, on the true interpretation of their own statute, an injunction which, in my own private judgment, they were legally bound to obey, I must be excused if, when sitting here, I give expression to convictions which my duty compels me to disregard in the Circuit Court.

UNITED STATES v. SMITH.

Under the act of June 30th, 1864, to provide internal revenue to support the government, &c., which requires a license to persons exercising certain occupations, and fixes the limit to its duration, the parties to the bond given on the granting of the license, are not bound to answer for any breach of the condition of the bond after the expiration of the license.

ON certificate of division between the judges of the Northern District of Ohio; the case being this:

Statement of the case.

The act of June 30th, 1864, "to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," enacts, by its 71st section,* that no person shall carry on the business of a coal oil distiller until he have obtained a license in the manner prescribed.

The 73d section subjects all persons who violate the enactment to fine and imprisonment.

"The 74th section enacts that all licenses granted after the 1st day of May in any year, shall continue in force *until the 1st day of May in any year next succeeding.*"

The 53d section of the same act provides that any person required by law to be licensed as a distiller, before distilling any spirits, shall, in addition to what is required by other provisions of law, make an application for a license to the assessor of the district; and that before the same is issued the person applying shall give bond with surety conditioned that he will render to the assessor, on the certain days of each month, *during the continuance of the license*, an exact account of the number of gallons of spirits distilled, &c., and that he will pay to the collector the duties on them.

And the 94th section provides that "distillers of coal oil shall be subject to all the provisions of laws applicable to distillers of spirits with regard to licenses, bonds, &c., and all other provisions designed for the purpose of securing the payment of duties, so far as the same may, *in the judgment of the Commissioner of Internal Revenue, and under regulations prescribed by him*, be deemed necessary for that purpose."

The act of June 30th, 1864—which is one of great length, and contains a hundred and eighty-two sections, some of them with numerous subdivisions and schedules—repeals a prior act of July 1st, 1862, with a title similar to its own.

With this statute of 1864 in force, Smith got a license as a distiller of coal oil on the 27th May, 1865, and gave bond with surety conditioned that he, Smith, should conform to all the provisions of an act entitled "An act to provide internal revenue," &c., approved July 1st, 1862, and of *such*

* 13 Stat. at Large, 248; and see § 79, art. 19.

other act or acts as were then or might thereafter be in that behalf enacted.

Upon suit brought by the United States against him and his surety in the court below, for breaches of the condition of the bond at various times during the months of *June and July*, 1866, the judges there were divided in opinion upon the question whether he or his surety were liable for any breach after the 1st of May, 1866; to wit, after the expiration of the license granted to them in May, 1865.

Mr. Hoar, Attorney-General, and Mr. Field, Assistant Attorney-General, for the United States; Mr. Wills, contra.

Mr. Justice GRIER delivered the opinion of the court.

The act of July 1st, 1862, has been inserted in the bond *ex majori cautela;* for it is admitted that the act of June 30th, 1864, entitled "An act to provide internal revenue, to support the government, to pay the interest on the public debt, and for other purposes," is the only act applicable to this case. The act of 1862 was repealed by it.

As might be expected in an act embracing the almost innumerable subjects of taxation contained in this one, and covering more than seventy pages of the statute-book, provisions may probably be found in one part of it difficult to be reconciled with some contained in other parts. Yet, when carefully examined, we find no difficulty in answering the question proposed.

The seventy-first section of the act is the one which prescribes the conditions under which licenses shall be given.

The seventy-third section subjects all persons who neglect it, to fine and imprisonment.

The seventy-fourth section fixes the limit to the license, beyond which time the parties to the bond are not bound to answer for any breach of the condition.

The provisions of the fifty-third and ninety-fourth sections of the act, which subject distillers of coal oil to the provisions of the act applicable to the distillers of spirits, "so far as the same may, in the judgment of the Commissioner of

Internal Revenue, be deemed necessary," have no application to the point. The commissioner has exercised no judgment, and prescribed no regulations on the subject, so far as appears. The bond has no reference to such conditions as are required in distillery bonds, and cannot be affected by them. "'Tis not so written in the bond."

ORDERED that it be certified to the judges of the Circuit Court, in answer to the question submitted, that the defendants are

NOT LIABLE.

THE POTOMAC.

1. Although the duty of vessels propelled by steam is to keep clear of those moved by wind, yet these latter must not, by changing their course, instead of keeping on it, put themselves carelessly in the way of the former, and so render ineffective their movements to give the sailing vessels sufficient berth.
2. The confessions of a master, in a case of collision, are evidence against the owner.

APPEAL from a decree of the Circuit Court of New York, in a case of collision between the schooner Bedell and the steamer Potomac, in the Chesapeake Bay, resulting in the total loss of the schooner. The collision occurred on a starlight night in July. The schooner was heading about north, going up the bay, sailing by the wind, closehauled, with a fresh breeze, west-northwest. Whether or not she had a light on board was a matter about which the evidence was contradictory; the weight of it being to the effect that she had not. The steamer, with a good lookout and a full number of seamen, was descending the bay and sailing due south at about nine miles an hour, with all her lights set and brightly burning. When about three-quarters of a mile off the schooner was discovered on the starboard bow of the steamer by the lookout of the steamer, who reported the fact to the officer in charge. The order was immediately given to starboard the helm two points, and after this was

done, and the mate who had the command saw the vessel about half a point on the starboard bow, the further order was given and executed to steady the helm.

In addition to this, the mate, in watching the movements of the schooner, discovered, notwithstanding his efforts to give her a wide berth to the west, that she was still approaching nearer the steamer, and again starboarded his helm, and slowed and backed. The captain of the schooner, however, about two minutes before the collision, ordered her helmsman to put her helm hard up; and the movements of the steamer thus proved ineffectual to prevent the boats coming together. He had not seen the steamer until when within half a mile of her. When the vessels struck, the schooner had fallen off from about a north course to nearly an east one.

The helmsman of the steamer testified, that the mate of the steamer was asleep when the schooner was reported to him; but this the mate denied. It was certain that he was on deck immediately afterwards, unconfused and energetic.

When the vessels struck, the captain of the schooner, who was hauled over the railing upon the steamer, and so saved, was asked by the mate why he had kept his vessel right across the steamer's bows; to which he replied that he did not understand the steamer's lights till too late; and while talking afterwards with the captain said that he had "no one to blame but himself." Subsequently, in a conversation at the notary's office, where he happened to be, making his protest, he stated that he "mistook the steamer's lights, and supposed them to be on the stern instead of on the bow."

The District Court decreed against the steamer; a decree which the Circuit Court reversed. The question in this court was whether the reversal was right.

Mr. E. C. Benedict, for the appellant; Mr. B. R. Curtis, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is a rare occurrence in the history of cases of this kind,

where a sailing vessel and steamship approaching each other in opposite directions, or on intersecting lines, have come in contact, that the sailing vessel has been adjudged to be in fault. The law casting the greater responsibility on the steamer on account of her motive power, and the sailing vessel having an easy duty to perform, it has been generally found on investigation, that the collision was the result of a relaxation of vigilance on the part of the officers of the steamer. It has sometimes happened, however, that the steamer was not to blame, and the present case, in our opinion, is one of that character. It is unnecessary to restate the rules of navigation, obligatory upon vessels in the predicament these were on the night in question. They were elaborately presented by this court in the case of *The Steamship Co.* v. *Rumball*,* and were recently affirmed in the case of *The Carroll*.† One of these rules requires the steamer to keep out of the way of the sailing vessel; but to enable her to do this effectively, the law imposes the corresponding obligation on the sailing vessel to keep her course. If, therefore, the steamer adopts proper measures of precaution to avoid the collision, which would have been effective if the schooner had not changed her course, she is not chargeable for the consequences of the collision. Any other rule would condemn the steamer, no matter how gross the misconduct of the sailing vessel.

That the steamer, on this occasion, seasonably employed the proper measures to have prevented this disaster, and that it would not have occurred, if the schooner had been equally mindful of her duty, is, we think, unmistakably shown by the evidence. The proceedings taken on board the steamer were enough, if the schooner had kept her course, to have placed the respective boats out of reach of danger. The accident could have happened in no other way than by a change of the schooner's course, and that this was made is evident, for when the vessels collided the schooner had fallen off from about a north course to nearly

* 21 Howard, 372.

† *Supra*, 302.

an east course. Besides, the only man on board the schooner who was examined as a witness, says that he put his helm hard up, by the captain's order, about two minutes before the collision. If the schooner had kept her course, instead of porting her helm and changing it to the eastward, the collision would not have occurred.

The effect of the change of course was to bring the schooner directly across the steamer's track, and to render what followed inevitable. There is nothing in the record to show a justification for this change of course, and it will not do to say it was taken on account of the dangerous proximity of the vessels, for at the united rate at which they were running, they were, according to the testimony of the wheelsman of the schooner as to the point of time when he ported her helm, at least half a mile apart. We think it is clear that this change of course was adopted earlier than the wheelsman says; but be this as it may, whenever adopted there was no necessity for it, either real or apparent, and the persons in charge of the schooner do not furnish even an excuse for their conduct.

It is not seen in what respect the steamer was remiss. She had the full complement of competent seamen, the necessary lookout and lights, and began her measures to keep clear of the schooner as soon as she was observed. That she was not sooner observed was not the fault of those in charge of the steamer, for the schooner was sailing without a light; and there is nothing to show that the lookout of the steamer, by vigilant watching, could have reported her any sooner. It is true the evidence is somewhat conflicting on the point of whether the schooner had a light or not, but the better opinion on the whole case is, that she had no light.

If the persons on board the steamer were watchful, it was not the case with those in control of the schooner, for, if they had been equally attentive to their business, they would not have allowed the steamer—sailing as she was in a starlight night, and with her lights brightly burning—to have approached within a half mile, without being seen by them.

We have considered this case thus far without reference to the admissions of the master of the schooner on this subject, but if we give them their proper weight, they corroborate very strongly the view we take of the cause of this collision. The master admitted, as soon as he was taken on board the steamer after the disaster, that the collision occurred through his fault, and this admission was repeated when he noted his protest. His statements on the point were full and explicit, and could not have been easily misunderstood; but if they were not true, or were misunderstood, why was he not called to contradict or explain them? The legality of this evidence cannot be questioned, for courts of admiralty have uniformly allowed the declarations of the master, in a case of collision, to be brought against the owner, on the ground that when the transaction occurred, the master represented the owner, and was his agent in navigating the vessel. This sort of evidence is confined to the confessions of the master, and cannot be extended to any other person in the employment of the boat, for in no proper sense has the owner intrusted his authority to any one but the master. The authorities on this subject are collected in the case of *The Enterprise*.*

It has been argued that the lookout and helmsman of the steamer, whose testimony was taken by the owner of the schooner, prove want of vigilance on the part of the steamer. We have carefully examined this testimony, and cannot see that it materially contradicts the testimony given by the officers of the steamer, save in one particular. The helmsman says the mate was asleep when the schooner was reported to him, but this the mate expressly denies. It is not necessary, however, to determine this point, because the evidence clearly shows that as soon as the schooner was discovered and reported, and there was a necessity for action, the mate was wide awake, and promptly gave the necessary order to starboard the helm, which order was as promptly executed. This was timely done, and would have been effectual but for

* 2 Curtis, 320.

Statement of the case.

the subsequent fault of the schooner, for which she is adjudged to bear the loss caused by this collision.

JUDGMENT AFFIRMED.

DREHMAN *v.* STIFLE.

1. Section 4 of the constitution of Missouri, which ordains that—

> "No person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the Government of the United States, or that of this State, to do such act, or in pursuance to orders received by him from any person vested with such authority; *and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof*—"

is not a bill of attainder within the meaning of that clause of the Constitution of the United States, which ordains that no State shall pass any such bill.

2. Nor does it impair the obligation of a contract, within the meaning of the same constitution, because, in the case of a contract relating to real property—as, *ex. gr.*, a landlord's covenant that he will keep his tenant in possession—its effect is to prevent a determination under particular State statutes of a party's mere right of possession, irrespectively of the merits of title, and where the same result might have confessedly been lawfully brought about by the State legislature, by a repeal of the particular statute, and without impairing the obligation of any contract.
3. *Semble*, that the case might be different if by giving effect to the provision, the party was precluded from asserting a title and enforcing a right.

IN error to the Supreme Court of Missouri; the case being thus:

In 1854, Mrs. Tyler leased to one Drehman, a house and lot in St. Louis for twenty years, that is to say, till 1874; and by the terms of the lease convenanted *to keep the said Drehman in lawful possession of the premises during the term for which they were leased to him.* In 1860, Mrs. Tyler sold the fee of the premises to one Stifle, who thus became landlord to Drehman, her lessee.

In 1861, during the late rebellion, Stifle, as "colonel of

the home guards," pursuant to an order from his military superior, took possession of the lot, removed all the buildings, and held and used the property for his own private purposes. Stifle being thus in possession and use of the property, Drehman, proceeding under the statutes of Missouri concerning landlords and tenants, in force when the lease was made, and still in force, brought in 1863 an action of forcible entry and detainer against him, before a justice of the peace, to recover possession of the premises and the value of the rents. The section of the statute of Missouri, under which the suit was brought, enacts that "the merits of the title shall in no wise be inquired into, on any complaint, which shall be exhibited by virtue of the provisions of the act." The justice, on the 31st of December, 1863, rendered a judgment in his favor for restitution, for $5000 damages, and for rent at the rate of $60 per month, to be paid from the time of the recovery until restitution should be made, and for costs. Stifle removed the case by appeal to the St. Louis Land Court, where a verdict and judgment were rendered in his favor. Drehman appealed to the Circuit Court of St. Louis County. Before, however, the case came on to be heard there, a constitution of Missouri, adopted in 1865, ordained as follows:

"No person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States, or that of this State, to do such acts, or in pursuance to orders received by him from any person vested with such authority; *and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof.*"

The case coming on to be heard in the Circuit Court in May, 1866, that is to say, after the constitution containing the above-quoted clause passed into force, Stifle relied for his defence upon it. Drehman, on the other hand, set up

Argument for the plaintiff in error.

that it was in the face of that clause of the Constitution of the United States, which declares that "no State shall pass any bill of attainder, . . . or law impairing the obligation of contracts."

The court instructed the jury, that if the facts established by the evidence to their satisfaction brought the case within this provision of the constitution of Missouri, the defence was valid, and that the defendant was entitled to the verdict. Drehman excepted. The jury found for Stifle, and the court gave judgment accordingly. Drehman, therefore, appealed to the Supreme Court of the State, which affirmed the judgment, and he accordingly brought the case to this court, under the 25th section of the Judiciary Act, for review.

Mr. J. Hughes, for the plaintiff in error (*a brief of Mr. J. C. Moody being filed*), contended that the clause of the Missouri constitution, by which alone the action of Drehman was defeated, did contain the elements both of a bill of attainder, and of a law impairing the obligation of contracts.

1. *It was a bill of attainder.* The constitution in which it is attempted to be ordained, was reviewed in *Cummings* v. *Missouri.** In that case another clause of the same constitution sought to divest Cummings, a priest, of his power to preach, that is to say, of his right to his profession, by requiring priests to take an oath which he could not take. Here another clause forbids persons to prosecute claims for loss of property, by providing a bar to suits if pending when the ordinance passed. Though the owner is neither charged with nor convicted of a crime, he is deprived of his property without judicial trial as completely as if he were both charged and convicted. If the Convention had declared, by ordinance, that Drehman had committed treason, and that because of his crime his property was forfeited, and his right of action against the defendant barred, this would unquestionably have been a "bill of pains and penalties." Is it any less a bill of pains and penalties when it inflicts the

* 4 Wallace, 277.

penalty without imputing the crime as a foundation? Does the Constitution of the United States prohibit the bill of attainder with a crime imputed as a pretext, and permit an enactment containing all the essential elements of attainder, when there is no pretext assigned?

On this question, *Cummings* v. *Missouri* seems to us to be conclusive.

The court there says:

"The deprivation is effected with equal certainty in one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed, would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not with shadows. Its inhibition was levelled at the thing, not the name."

That depriving a man of his property is a punishment as well as an injury, can hardly be denied since the cases of *Cummings* v. *Missouri* and *Ex parte Garland.** And the same thing is true as to depriving him of a *possession* secured to him by the law even irrespectively of the question of merits. He is deprived of a legal *right;* a *primâ facie* right and title; which may prove an absolute one in the end.

It is admitted that plaintiff had the right to the property since 1854, by lease extending until 1874; that he obtained two judicial determinations of that right in this cause in 1863; that an appeal was taken by the respondent from such judicial determinations, and pending an appeal that this constitution was adopted by the Convention. The court below says by its instructions, that since the adoption the plaintiff has no right to the property, or, which is the same thing, that the respondent is protected by the new constitution in forcibly depriving the plaintiff of his property, and that the subsequent detainer of it cannot afford any cause of action, under the proceedings in the cause.

* 4 Wallace, 227, 333.

Recapitulation of the case in the opinion.

2. *It impairs the obligation of a contract.* By the lease, Mrs. Tyler covenanted to keep her tenant in lawful possession of the premises during the whole term of the lease. This was a contract; it became obligatory upon Stifle, by virtue of his being the assignee of the reversion of the estate. The contract had reference to the laws of the State concerning landlords and tenants, in force when it was made and when the suit was commenced; laws which protected the rights of the landlord and tenant respectively. One of these laws gave a remedy to Drehman to enforce the contract by the proceeding of forcible entry and detainer. That law was yet unrepealed and in force. In 1863 the judicial tribunals rendered a judgment against the defendant, and in favor of the plaintiff, for possession, rents, damages, and costs, found to be due under the contract and the laws then in force. The ordinance pleaded in bar of this action was passed in 1865,—eleven years after the contract was made, four years after the breach alleged and liabilities had accrued, and two years after judgment had been rendered in this cause in favor of the plaintiff. Yet the court says the ordinance, by its retrospective operation, is now a complete bar and defence to this action. Before the ordinance was passed, the defendant was adjudged to owe the plaintiff $7000, upon his obligation assumed in this contract. Since the passage the courts say that there is no liability; that the ordinance is a complete bar, and furnishes a new defence. Does it not impair and annul the obligations of the contract?

Numerous authorities, as early as *Sturgis* v. *Crowninshield*,* and only ending with *Hawthorne* v. *Calef*,† show that it does.

Mr. Hoar, Attorney-General, and Mr. M. Blair, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This case is brought here by a writ of error issued under the 25th section of the Judiciary Act of 1789, to the Supreme Court of the State of Missouri.

Drehman held the lot to which the controversy between

* 4 Wheaton, 122. † 2 Wallace, 110

Recapitulation of the case in the opinion.

the parties relates by a lease terminating in 1874, and built upon the premises a dwelling-house, store, and other improvements. The lessor sold and conveyed the reversion to Stifle. The house was rendered untenantable by fire. Stifle, as colonel of the "home guards," pursuant to an order from his military superior, took possession of the lot, removed all the buildings, and has since held and used the property for his own private purposes. Thereafter, on the 22d of December, 1863, Drehman commenced an action of forcible entry and detainer against Stifle, before a justice of the peace, to recover possession of the premises. The justice rendered a judgment in his favor for restitution, for a large amount of damages, for a specified sum for rent per month, to be paid from the time of the recovery until restitution should be made, and for costs. Stifle removed the case by appeal to the St. Louis Land Court, where a verdict and judgment were rendered in his favor. Drehman appealed to the Circuit Court of St. Louis County.

Upon the trial at that court Stifle relied for his defence upon the 4th section of the constitution of Missouri, adopted in 1865, which is as follows:

"Section 4. No person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States, or that of this State, to do such acts, or in pursuance to orders received by him from any person vested with such authority; *and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof.*"

The court instructed the jury, substantially, that if the facts established by the evidence to their satisfaction, brought the case within this provision, the defence was valid and the defendant was entitled to their verdict. Drehman excepted. The jury found for Stifle, and the court gave judgment accordingly. Drehman thereupon appealed to the Supreme

Court of the State, which affirmed the judgment, and he has brought the case to this court for review.

Two grounds of jurisdiction here and of error below are relied upon:

I. It is alleged that this section of the constitution of Missouri "is a bill of pains and penalties within the meaning of the Constitution of the United States, and therefore invalid."

The Constitution of the United States declares that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." When the Constitution was adopted, *bills of attainder* and *bills of pains and penalties* were well known in the English law. Each of those terms had a clear and well-defined meaning. Bills of attainder were acts of Parliament whereby sentence of death was pronounced against the accused. Courts of justice were employed only to register the edict and carry the sentence into execution. Bills of pains and penalties were acts denouncing milder punishments. The term "bill of attainder" in the National Constitution is generical, and embraces bills of both classes.* It is too clear to require discussion that the provision in question of the constitution of Missouri belongs to neither of the categories mentioned. If not the opposite of penal, there is certainly nothing punitive in its character. It simply exempts from suits in a certain class of cases those who might otherwise be harassed by litigation and made liable in damages. It is rather in the nature of the indemnity acts, also well known in the English law.†

II. It is insisted that this section "is a law impairing the obligation of contracts, in violation of the Constitution of the United States."

This proposition is founded upon a provision in the lease that the lessor should keep the lessee "in lawful possession

* 2 Woodeson's Lectures, 622–624; Gaines et al. *v.* Buford, 5 Dana, 509; Story on the Constitution, § 1344; Ex parte Garland, 4 Wallace, 324.

† Rowland on the English Constitution, 563; 2 May, 267, 324.

of the said leased premises during this lease," &c. It is said that this covenant became obligatory upon Stifle by virtue of his being the assignee of the reversion of the estate; that the law of landlord and tenant of Missouri, in force when the lease was executed, became a part of the contract; that one of the remedies to which Drehman was entitled by this law to enforce the covenant in question was the proceeding by forcible entry and detainer; that this section of the constitution of Missouri, as construed by the Supreme Court of the State, has deprived him of that remedy, and thus impairs the obligation of his contract. This view of the subject is supported by the counsel for the plaintiff in error with ingenuity, research, and ability; but they have failed to convince us of the soundness of the proposition.

The 26th section of the statute of Missouri upon the subject of forcible entry and detainer declares as follows: "The merits of the title shall in no wise be inquired into on any complaint which shall be exhibited by virtue of the provisions of this act." This proceeding has no relation to the rights of property of the parties. It turns entirely on the facts of lawful possession by the plaintiff and unlawful entry by the defendant. The defendant may have a valid title, the plaintiff possession without any title; and yet the defendant, having entered without the plaintiff's consent, may be dispossessed, and the plaintiff be restored to possession. If a party desires to assert his title and enforce his rights, he must resort to the remedies provided for that purpose. This form of procedure is not one of them.* It cannot, therefore, be maintained that this remedy entered into the contract between the lessor and lessee. The legislature might have abolished it, by repealing the statute, without impairing any right within the meaning of the contract provision of the Federal Constitution, acquired while the statute was in force. In this respect it stands on the same footing with any other action *ex delicto*.

Whether the instructions excepted to were right or wrong

* Gibson *v.* Ting, 29 Missouri, 134; Butler *v.* Cardwell, 33 Id. 86.

is an inquiry which lies beyond the sphere of our powers and duties. If an action of covenant or ejectment had been brought, and it had been held that the constitution of Missouri affected the right of recovery, the question would perhaps have presented a different aspect. But no such case is before us, and we have not had occasion to consider the subject. The right of a State legislature to pass retroactive laws, where there is no inhibition in the constitution of the State, provided they do not impair the obligation of a contract, and are not *ex post facto* in their character, is too well settled to admit of doubt.* We find no error in the record of which we can take cognizance.

JUDGMENT AFFIRMED.

HEPBURN *v.* GRISWOLD.

1. Construed by the plain import of their terms and the manifest intent of the legislature, the statutes of 1862 and 1863, which make United States notes a legal tender in payment of debts, public and private, apply to debts contracted before as well as to debts contracted after enactment.
2. The cases of *Lane County* v. *Oregon*, *Bronson* v. *Rodes*, and *Butler* v. *Horwitz* (7 Wallace 71, 229, and 258), in which it was held that, upon a sound construction of those statutes, neither taxes imposed by State legislation nor dues upon contracts for the payment or delivery of coin or bullion are included, by legislative intent, under the description of "debts, public and private," are approved and reaffirmed.
3. When a case arises for judicial determination, and the decision depends on the alleged inconsistency of a legislative provision with the Constitution, it is the plain duty of the Supreme Court to compare the act with the fundamental law, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute.
4. There is in the Constitution no express grant of legislative power to make any description of credit currency a legal tender in payment of debts.
5. The words "all laws necessary and proper for carrying into execution" powers expressly granted or vested have, in the Constitution, a sense

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* Williamson *v.* Leland, 2 Peters, 627; Watson *v.* Mercer, 8 Id. 88; Kearney *v.* Taylor, 15 Howard, 494; Sattelee *v.* Mathewson, 2 Peters, 380; Society *v.* Pawlet, 4 Id. 480; Railroad *v.* Nesbit, 10 Howard, 401; Albee *v.* May, 2 Paine, 74; Andrews *v.* Russell, 7 Blackford, 475.

equivalent to that of the words laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends, which are not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.

6. Among means appropriate, plainly adapted, not inconsistent with the spirit of the Constitution, nor prohibited by its terms, the legislature has unrestricted choice; but no power can be derived by implication from any express power to enact laws as means for carrying it into execution unless such laws come within this description.
7. The making of notes or bills of credit a legal tender in payment of pre-existing debts is not a means appropriate, plainly adapted, or really calculated to carry into effect any express power vested in Congress, is inconsistent with the spirit of the Constitution, and is prohibited by the Constitution.
8. The clause in the acts of 1862 and 1863 which makes United States notes a legal tender in payment of all debts, public and private, is, so far as it applies to debts contracted before the passage of those acts, unwarranted by the Constitution.
9. Prior to the 25th of February, 1862, all contracts for the payment of money, not expressly stipulating otherwise, were, in legal effect and universal understanding, contracts for the payment of coin, and, under the Constitution, the parties to such contracts are respectively entitled to demand and bound to pay the sums due, according to their terms, in coin, notwithstanding the clause in that act, and the subsequent acts of like tenor, which make United States notes a legal tender in payment of such debts.

ERROR to the Court of Appeals of Kentucky, the case being this:

On the 20th of June, 1860, a certain Mrs. Hepburn made a promissory note, by which she promised to pay to Henry Griswold on the 20th of February, 1862, eleven thousand two hundred and fifty "dollars."

At the time when the note was made, as also at the time when it fell due, there was, confessedly, no lawful money of the United States, or money which could lawfully be tendered in payment of private debts, but gold and silver coin.

Five days after the day when the note by its terms fell due, that is to say, on the 25th of February, 1862, in an exigent crisis of the nation, in which the government was engaged in putting down an armed rebellion of vast magnitude, Congress passed an act authorizing the issue of $150,000,000

of its own notes,* and enacted in regard to them, by one clause in the first section of the act, as follows:

"And *such notes*, herein authorized, *shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States*, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; *and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States*, except duties on imports and interest as aforesaid."

The note given by Mrs. Hepburn not being paid at maturity, interest accrued on it. And in March, 1864, suit having been brought on the note in the Louisville Chancery Court, she tendered in United States notes issued under the act mentioned, $12,720, the amount of principal of the note with the interest accrued to the date of tender, and some costs, in satisfaction of the plaintiff's claim. The tender was refused. The notes were then tendered and paid into court; and the chancellor, "resolving all doubts in favor of the Congress," declared the tender good and adjudged the debt, interest and costs to be satisfied accordingly.

The case was then taken by Griswold to the Court of Errors of Kentucky, which reversed the chancellor's judgment, and remanded the case with instructions to enter a contrary judgment.

From the judgment of the Court of Errors of Kentucky, the case was brought by Mrs. Hepburn here.

The cause was first argued at the Term of December, 1867, upon printed briefs submitted by Mr. Preston for the plaintiff in error, and Mr. Griswold *contra*. Subsequently, upon the suggestion of Mr. Stanbery, then Attorney-General, as to the great public importance of the question, the court ordered the cause and other causes involving, incidentally, the same question, to stand over to December Term, 1868, for reargument, with leave to the government to be heard. Accordingly, at that term the constitutionality of the provision in

* For the general form of the notes, see 7 Wallace, 26.

the act making the notes above-described a legal tender, was elaborately argued by *Mr. B. R. Curtis* (*counsel for the plaintiff in error, in Willard* v. *Tayloe*), *and by Mr. Evarts, Attorney-General, for the United States, in support of the provision, and by Mr. Clarkson N. Potter* (*of counsel for the defendant in error in this case*), *against the provision.*

And the constitutionality of the provision had been argued at different times, by other counsel, in five other cases, which it was supposed by their counsel might depend on it, but four of which were decided on other grounds; to wit, in support of the constitutionality by Mr. Carlisle, Mr. W. S. Cox, Mr. Williams, Mr. S. S. Rogers, Mr. B. R. Curtis, Mr. L. P. Poland, Mr. Howe, and against it by Mr. Bradley, Mr. Wilson, Mr. Johnson, Mr. John J. Townsend, Mr. McPherson, Mr. Wills, in *Thomson* v. *Riggs*,* in *Lane County* v. *Oregon*,† in *Bronson* v. *Rodes*,‡ in *Willard* v. *Tayloe*,§ and in *Broderick* v. *Magraw*.‖ The question was therefore thoroughly argued. And it was held long under advisement.

It is deemed unnecessary here to present the arguments, already in part presented, in some of the cases named, the matter in the present case being fully argued on both sides, from the bench.

The CHIEF JUSTICE delivered the opinion of the court.

The question presented for our determination by the record in this case is, whether or not the payee or assignee of a note, made before the 25th of February, 1862, is obliged by law to accept in payment United States notes, equal in nominal amount to the sum due according to its terms, when tendered by the maker or other party bound to pay it? And this requires, in the first place, a construction of that clause of the first section of the act of Congress passed on that day, which declares the United States notes, the issue of which was authorized by the statute, to be a legal tender in payment of debts. The clause has already received much consideration here, and this court has held that, upon a sound con-

* 5 Wallace, 663. † 7 Id. 73. ‡ Id. 229.
§ *Supra*, 557. ‖ *Infra*, 639.

struction, neither taxes imposed by State legislation,* nor demands upon contracts which stipulate in terms for the payment or delivery of coin or bullion,† are included by legislative intention under the description of debts public and private. We are now to determine whether this description embraces debts contracted before as well as after the date of the act.

It is an established rule for the construction of statutes, that the terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them. But this rule cannot prevail where the intent is clear. Except in the scarcely supposable case where a statute sets at nought the plainest precepts of morality and social obligation, courts must give effect to the clearly ascertained legislative intent, if not repugnant to the fundamental law ordained in the Constitution.

Applying the rule just stated to the act under consideration, there appears to be strong reason for construing the word *debts* as having reference only to debts contracted subsequent to the enactment of the law. For no one will question that the United States notes, which the act makes a legal tender in payment, are essentially unlike in nature, and, being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. The lawful money then in use and made a legal tender in payment, consisted of gold and silver coin. The currency in use under the act, and declared by its terms to be lawful money and a legal tender, consists of notes or promises to pay impressed upon paper, prepared in convenient form for circulation, and protected against counterfeiting by suitable devices and penalties. The former possess intrinsic value, determined by the weight and fineness of the metal; the latter have no intrinsic value, but a purchasing value, determined by the

* Lane County *v.* Oregon, 7 Wallace, 71.

† Bronson *v.* Rodes, 7 Id. 229; Butler *v.* Horwitz, Ib. 258.

quantity in circulation, by general consent to its currency in payments, and by opinion as to the probability of redemption in coin. Both derive, in different degrees, a certain additional value from their adaptation to circulation by the form and impress given to them under National authority, and from the acts making them respectively a legal tender.

Contracts for the payment of money, made before the act of 1862, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was, in legal import, a contract for the payment of coin.

There is a well-known law of currency, that notes or promises to pay, unless made conveniently and promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal conditions, be at par in circulation with coin. It is an equally well-known law, that depreciation of notes must increase with the increase of the quantity put in circulation and the diminution of confidence in the ability or disposition to redeem. Their appreciation follows the reversal of these conditions. No act making them a legal tender can change materially the operation of these laws. Their force has been strikingly exemplified in the history of the United States notes. Beginning with a very slight depreciation when first issued, in March, 1862, they sank in July, 1864, to the rate of two dollars and eighty-five cents for a dollar in gold, and then rose until recently a dollar and twenty cents in paper became equal to a gold dollar.

Admitting, then, that prior contracts are within the intention of the act, and assuming that the act is warranted by the Constitution, it follows that the holder of a promissory note, made before the act, for a thousand dollars, payable, as we have just seen, according to the law and according to the intent of the parties, in coin, was required, when depreciation reached its lowest point, to accept in payment a thousand note dollars, although with the thousand coin dollars, due under the contract, he could have purchased on that day two thousand eight hundred and fifty such dollars.

Every payment, since the passage of the act, of a note of earlier date, has presented similar, though less striking features.

Now, it certainly needs no argument to prove that an act, compelling acceptance in satisfaction of any other than stipulated payment, alters arbitrarily the terms of the contract and impairs its obligation, and that the extent of impairment is in the proportion of the inequality of the payment accepted under the constraint of the law to the payment due under the contract. Nor does it need argument to prove that the practical operation of such an act is contrary to justice and equity. It follows that no construction which attributes such practical operation to an act of Congress is to be favored, or indeed to be admitted, if any other can be reconciled with the manifest intent of the legislature.

What, then, is that manifest intent? Are we at liberty, upon a fair and reasonable construction of the act, to say that Congress meant that the word "debts" used in the act should not include debts contracted prior to its passage?

In the case of *Bronson* v. *Rodes*, we thought ourselves warranted in holding that this word, as used in the statute, does not include obligations created by express contracts for the payment of gold and silver, whether coined or in bullion. This conclusion rested, however, mainly on the terms of the act, which not only allow, but require payments in coin by or to the government, and may be fairly considered, independently of considerations belonging to the law of contracts for the delivery of specified articles, as sanctioning special private contracts for like payments; without which, indeed, the provisions relating to government payments could hardly have practical effect. This consideration, however, does not apply to the matter now before us. There is nothing in the terms of the act which looks to any difference in its operation on different descriptions of debts payable generally in money—that is to say, in dollars and parts of a dollar. These terms, on the contrary, in their obvious import, include equally all debts not specially expressed to be payable in gold or silver, whether arising under past

contracts and already due, or arising under such contracts and to become due at a future day, or arising and becoming due under subsequent contracts. A strict and literal construction indeed would, as suggested by Mr. Justice Story,* in respect to the same word used in the Constitution, limit the word "debts" to *debts existing;* and if this construction cannot be accepted because the limitation sanctioned by it cannot be reconciled with the obvious scope and purpose of the act, it is certainly conclusive against any interpretation which will exclude existing debts from its operation. The same conclusion results from the exception of interest on loans and duties on imports from the effect of the legal tender clause. This exception affords an irresistible implication that no description of debts, whenever contracted, can be withdrawn from the effect of the act if not included within the terms or the reasonable intent of the exception. And it is worthy of observation in this connection, that in all the debates to which the act gave occasion in Congress, no suggestion was ever made that the legal tender clause did not apply as fully to contracts made before as to contracts made after its passage.

These considerations seem to us conclusive. We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the act.

We are thus brought to the question, whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin.

The delicacy and importance of this question has not been overstated in the argument. This court always approaches the consideration of questions of this nature reluctantly; and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise.

* 1 Story on the Constitution, § 921.

But the Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. No department of the government has any other powers than those thus delegated to it by the people. All the legislative power granted by the Constitution belongs to Congress; but it has no legislative power which is not thus granted. And the same observation is equally true in its application to the executive and judicial powers granted respectively to the President and the courts. All these powers differ in kind, but not in source or in limitation. They all arise from the Constitution, and are limited by its terms.

It is the function of the judiciary to interpret and apply the law to cases between parties as they arise for judgment. It can only declare what the law is, and enforce, by proper process, the law thus declared. But, in ascertaining the respective rights of parties, it frequently becomes necessary to consult the Constitution. For there can be no law inconsistent with the fundamental law. No enactment not in pursuance of the authority conferred by it can create obligations or confer rights. For such is the express declaration of the Constitution itself in these words:

"The Constitution, and the laws of the United States which shall be *made in pursuance thereof*, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Not every act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every act of Congress that the judges are bound. This character and this force belong only to such acts as are "made in pursuance of the Constitution."

When, therefore, a case arises for judicial determination, and the decision depends on the alleged inconsistency of a

legislative provision with the fundamental law, it is the plain duty of the court to compare the act with the Constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute. This seems so plain that it is impossible to make it plainer by argument. If it be otherwise the Constitution is not the supreme law; it is neither necessary or useful, in any case, to inquire whether or not any act of Congress was passed in pursuance of it; and the oath which every member of this court is required to take, that he "will administer justice without respect to persons, and do equal right to the poor and the rich, and faithfully perform the duties incumbent upon him to the best of his ability and understanding, agreeably to the Constitution and laws of the United States," becomes an idle and unmeaning form.

The case before us is one of private right. The plaintiff in the court below sought to recover of the defendants a certain sum expressed on the face of a promissory note. The defendants insisted on the right, under the act of February 25th, 1862, to acquit themselves of their obligation by tendering in payment a sum nominally equal in United States notes. But the note had been executed before the passage of the act, and the plaintiff insisted on his right under the Constitution to be paid the amount due in gold and silver. And it has not been, and cannot be, denied that the plaintiff was entitled to judgment according to his claim, unless bound by a constitutional law to accept the notes as coin.

Thus two questions were directly presented: Were the defendants relieved by the act from the obligation assumed in the contract? Could the plaintiff be compelled, by a judgment of the court, to receive in payment a currency of different nature and value from that which was in the contemplation of the parties when the contract was made?

The Court of Appeals resolved both questions in the negative, and the defendants, in the original suit, seek the reversal of that judgment by writ of error.

It becomes our duty, therefore, to determine whether the act of February 25th, 1862, so far as it makes United States notes a legal tender in payment of debts contracted prior to its passage, is constitutional and valid or otherwise. Under a deep sense of our obligation to perform this duty to the best of our ability and understanding, we shall proceed to dispose of the case presented by the record.

We have already said, and it is generally, if not universally, conceded, that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution.

It is not necessary, however, in order to prove the existence of a particular authority to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.

But the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included under the description of "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government or in any of its departments or officers."

The same apprehension is equally apparent in the tenth article of the amendments, which declares that "the powers not delegated to the United States by the Constitution, nor

prohibited by it to the States, are reserved to the States or the people."

We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers; while the words "necessary and proper" were intended to have a "sense," to use the words of Mr. Justice Story, "at once admonitory and directory," and to require that the means used in the execution of an express power "should be *bonâ fide*, appropriate to the end."* The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated.

It has not been maintained in argument, nor, indeed, would any one, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts.

We must inquire then whether this can be done in the exercise of an implied power.

The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *McCullough* v. *The State of Maryland*;† and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." And in another part of the

* 2 Story on the Constitution, p. 142, § 1253. † 4 Wheaton, 421.

same opinion the practical application of this rule was thus illustrated: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground."*

It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.

The question before us, then, resolves itself into this: "Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?"

It is not doubted that the power to establish a standard of value by which all other values may be measured, or, in other words, to determine what shall be lawful money and a legal tender, is in its nature, and of necessity, a governmental power. It is in all countries exercised by the government. In the United States, so far as it relates to the precious metals, it is vested in Congress by the grant of the power to coin money. But can a power to impart these qualities to notes, or promises to pay money, when offered in discharge of pre-

* 4 Wheaton, 423.

existing debts, be derived from the coinage power, or from any other power expressly given?

It is certainly not the same power as the power to coin money. Nor is it in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power. Nor is there more reason for saying that it is implied in, or incidental to, the power to regulate the value of coined money of the United States, or of foreign coins. This power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States.

Nor is the power to make notes a legal tender the same as the power to issue notes to be used as currency. The old Congress, under the Articles of Confederation, was clothed by express grant with the power to emit bills of credit, which are in fact notes for circulation as currency; and yet that Congress was not clothed with the power to make these bills a legal tender in payment. And this court has recently held that the Congress, under the Constitution, possesses, as incidental to other powers, the same power as the old Congress to emit bills or notes; but it was expressly declared at the same time that this decision concluded nothing on the question of legal tender. Indeed, we are not aware that it has ever been claimed that the power to issue bills or notes has any identity with the power to make them a legal tender. On the contrary, the whole history of the country refutes that notion. The States have always been held to possess the power to authorize and regulate the issue of bills for circulation by banks or individuals, subject, as has been lately determined, to the control of Congress, for the purpose of establishing and securing a National currency; and yet the States are expressly prohibited by the Constitution from making anything but gold and silver coin a legal tender. This seems decisive on the point that the power to issue notes and the power to make them a legal tender are not the same power, and that they have no necessary connection with each other.

But it has been maintained in argument that the power to

make United States notes a legal tender in payment of all debts is a means appropriate and plainly adapted to the execution of the power to carry on war, of the power to regulate commerce, and of the power to borrow money. If it is, and is not prohibited, nor inconsistent with the letter or spirit of the Constitution, then the act which makes them such legal tender must be held to be constitutional.

Let us, then, first inquire whether it is an appropriate and plainly adapted means for carrying on war? The affirmative argument may be thus stated: Congress has power to declare and provide for carrying on war; Congress has also power to emit bills of credit, or circulating notes receivable for government dues and payable, so far at least as parties are willing to receive them, in discharge of government obligations; it will facilitate the use of such notes in disbursements to make them a legal tender in payment of existing debts; therefore Congress may make such notes a legal tender.

It is difficult to say to what express power the authority to make notes a legal tender in payment of pre-existing debts may not be upheld as incidental, upon the principles of this argument. Is there any power which does not involve the use of money? And is there any doubt that Congress may issue and use bills of credit as money in the execution of any power? The power to establish post-offices and post-roads, for example, involves the collection and disbursement of a great revenue. Is not the power to make notes a legal tender as clearly incidental to this power as to the war power?

The answer to this question does not appear to us doubtful. The argument, therefore, seems to prove too much. It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

Can this proposition be maintained?

It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative

power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are constitutional or unconstitutional.

Undoubtedly among means appropriate, plainly adapted, really calculated, the legislature has unrestricted choice. But there can be no implied power to use means not within the description.

Now, then, let it be considered what has actually been done in the provision of a National currency. In July and August, 1861, and February, 1862, the issue of sixty millions of dollars in United States notes, payable on demand, was authorized.* They were made receivable in payments, but were not declared a legal tender until March, 1862,† when the amount in circulation had been greatly reduced by receipt and cancellation. In 1862 and 1863‡ the issue of four hundred and fifty millions in United States notes, payable not on demand, but, in effect, at the convenience of the government, was authorized, subject to certain restrictions as to fifty millions. These notes were made receivable for the bonds of the National loans, for all debts due to or from the United States, except duties on imports and interest on the public debt, and were also declared a legal tender. In March, 1863,§ the issue of notes for parts of a dollar was authorized to an amount not exceeding fifty millions of dollars. These notes were not declared a legal tender, but were

* 12 Stat. at Large, 259, 313, and 338.
† Ib. 370.
‡ Ib. 345, 532, and 709.
§ Ib. 711.

made redeemable under regulations to be prescribed by the Secretary of the Treasury. In February, 1863,* the issue of three hundred millions of dollars in notes of the National banking associations was authorized. These notes were made receivable to the same extent as United States notes, and provision was made to secure their redemption, but they were not made a legal tender.

The several descriptions of notes have since constituted, under the various acts of Congress, the common currency of the United States. The notes which were not declared a legal tender have circulated with those which were so declared without unfavorable discrimination.

It may be added as a part of the history that other issues, bearing interest at various rates, were authorized and made a legal tender, except in redemption of bank notes, for face amount exclusive of interest. Such were the one and two years five per cent. notes and three years compound interest notes.† These notes never entered largely or permanently into the circulation; and there is no reason to think that their utility was increased or diminished by the act which declared them a legal tender for face amount. They need not be further considered here. They serve only to illustrate the tendency remarked by all who have investigated the subject of paper money, to increase the volume of irredeemable issues, and to extend indefinitely the application of the quality of legal tender. That it was carried no farther during the recent civil war, and has been carried no farther since, is due to circumstances, the consideration of which does not belong to this discussion.

We recur, then, to the question under consideration. No one questions the general constitutionality, and not very many, perhaps, the general expediency of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts.

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* 12 Stat. at Large, 669.

† 13 Id. 218, 425.

The only ground upon which this power is asserted is, not that the issue of notes was an appropriate and plainly adapted means for carrying on the war, for that is admitted; but that the making of them a legal tender to the extent mentioned was such a means.

Now, we have seen that of all the notes issued those not declared a legal tender at all constituted a very large proportion, and that they circulated freely and without discount.

It may be said that their equality in circulation and credit was due to the provision made by law for the redemption of this paper in legal tender notes. But this provision, if at all useful in this respect, was of trifling importance compared with that which made them receivable for government dues. All modern history testifies that, in time of war especially, when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the government, and made receivable for dues of the government, always obtain at first a ready circulation; and even when not redeemable in coin, on demand, are as little and usually less subject to depreciation than any other description of notes, for the redemption of which no better provision is made. And the history of the legislation under consideration is, that it was upon this quality of receivability, and not upon the quality of legal tender, that reliance for circulation was originally placed; for the receivability clause appears to have been in the original draft of the bill, while the legal tender clause seems to have been introduced at a later stage of its progress.

These facts certainly are not without weight as evidence that all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts. It is denied, indeed, by eminent writers, that the quality of legal tender adds anything at all to the credit or usefulness of government notes. They insist, on the contrary, that it impairs both. However this may be, it must be remembered that it is as a means to an end to be attained by the action of the government, that the implied

power of making notes a legal tender in all payments is claimed under the Constitution. Now, how far is the government helped by this means? Certainly it cannot obtain new supplies or services at a cheaper rate, for no one will take the notes for more than they are worth at the time of the new contract. The price will rise in the ratio of the depreciation, and this is all that could happen if the notes were not made a legal tender. But it may be said that the depreciation will be less to him who takes them from the government, if the government will pledge to him its power to compel his creditors to receive them at par in payments. This is, as we have seen, by no means certain. If the quantity issued be excessive, and redemption uncertain and remote, great depreciation will take place; if, on the other hand, the quantity is only adequate to the demands of business, and confidence in early redemption is strong, the notes will circulate freely, whether made a legal tender or not.

But if it be admitted that some increase of availability is derived from making the notes a legal tender under new contracts, it by no means follows that any appreciable advantage is gained by compelling creditors to receive them in satisfaction of pre-existing debts. And there is abundant evidence, that whatever benefit is possible from that compulsion to some individuals or to the government, is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money. It is true that these evils are not to be attributed altogether to making it a legal tender. But this increases these evils. It certainly widens their extent and protracts their continuance.

We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued. Nor can it, in our judgment, be upheld as such, if,

while facilitating in some degree the circulation of the notes, it debases and injures the currency in its proper use to a much greater degree. And these considerations seem to us equally applicable to the powers to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts.

But there is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by Chief Justice Marshall, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end.

Let us inquire, then, first, whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the Constitution.

Among the great cardinal principles of that instrument, no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it is, happily, not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts.

When the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory northwest of the Ohio, the only territory subject at that time to its regulation and control. By this ordinance certain fundamental articles of compact were established between the original States and the people and States of the territory, for the purpose, to use its own language, "of extending the fundamental principles of civil and religious liberty, whereon these republics" (the States united under the Confederation), "their laws, and constitutions are erected."

Among these fundamental principles was this: "And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements *bonâ fide* and without fraud previously formed."

The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that "no State shall pass any law impairing the obligation of contracts."

It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

Another provision, found in the fifth amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National government. It does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand how it can be so

taken for the benefit of a part without violating the spirit of the prohibition.

But there is another provision in the same amendment, which, in our judgment, cannot have its full and intended effect unless construed as a direct prohibition of the legislation which we have been considering. It is that which declares that "no person shall be deprived of life, liberty, or property, without due process of law."

It is not doubted that all the provisions of this amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution. The only question is, whether an act which compels all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value deprives such persons of property without due process of law.

It is quite clear, that whatever may be the operation of such an act, due process of law makes no part of it. Does it deprive any person of property? A very large proportion of the property of civilized men exists in the form of contracts. These contracts almost invariably stipulate for the payment of money. And we have already seen that contracts in the United States, prior to the act under consideration, for the payment of money, were contracts to pay the sums specified in gold and silver coin. And it is beyond doubt that the holders of these contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property.

But it may be said that the holders of no description of property are protected by it from legislation which incidentally only impairs its value. And it may be urged in illustration that the holders of stock in a turnpike, a bridge, or a manufacturing corporation, or an insurance company, or a bank, cannot invoke its protection against legislation which, by authorizing similar works or corporations, reduces its price in the market. But all this does not appear to meet the real difficulty. In the cases mentioned the injury is purely contingent and incidental. In the case we are considering it is direct and inevitable.

If in the cases mentioned the holders of the stock were required by law to convey it on demand to any one who should think fit to offer half its value for it, the analogy would be more obvious. No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary privation of property.

We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what act would take private property without process of law if such an act would not.

We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution.

It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions,

and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution.

We are obliged, therefore, to hold that the defendant in error was not bound to receive from the plaintiffs the currency tendered to him in payment of their note, made before the passage of the act of February 25th, 1862. It follows that the judgment of the Court of Appeals of Kentucky must be affirmed.

It is proper to say that Mr. Justice Grier, who was a member of the court when this cause was decided in conference,* and when this opinion was directed to be read,† stated his judgment to be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment; but that upon the construction given to the act by the other judges he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution.

JUDGMENT AFFIRMED.

Mr. Justice MILLER (with whom concurred SWAYNE and DAVIS, JJ.), dissenting.

The provisions of the Constitution of the United States which have direct reference to the function of legislation may be divided into three primary classes:

1. Those which confer legislative powers on Congress.
2. Those which prohibit the exercise of legislative powers by Congress.
3. Those which prohibit the States from exercising certain legislative powers.

The powers conferred on Congress may be subdivided into the positive and the auxiliary, or, as they are more commonly called, the express and the implied powers.

As instances of the former class may be mentioned the power to borrow money, to raise and support armies, and to coin money and regulate the value thereof.

* November 27th, 1869. † January 29th, 1870.

The implied or auxiliary powers of legislation are founded largely on that general provision which closes the enumeration of powers granted in express terms, by the declaration that Congress shall also "have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The question which this court is called upon to consider, is whether the authority to make the notes of the United States a lawful tender in payment of debts, is to be found in Congress under either of these classes of legislative powers.

As one of the elements of this question, and in order to negative any idea that the exercise of such a power would be an invasion of the rights reserved to the States, it may be as well to say at the outset, that this is among the subjects of legislation forbidden to the States by the Constitution. Among the unequivocal utterances of that instrument on this subject of legal tender, is that which declares that "no State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts;" thus removing the whole matter from the domain of State legislation.

No such prohibition is placed upon the power of Congress on this subject, though there are, as I have already said, matters expressly forbidden to Congress; but neither this of legal tender, nor of the power to emit bills of credit, or to impair the obligation of contracts, is among them. On the contrary, Congress is expressly authorized to coin money and to regulate the value thereof, and of foreign coins, and to punish the counterfeiting of such coin and of the securities of the United States. It has been strongly argued by many able jurists that these latter clauses, fairly construed, confer the power to make the securities of the United States a lawful tender in payment of debts.

While I am not able to see in them standing alone a sufficient warrant for the exercise of this power, they are not without decided weight when we come to consider the ques-

tion of the existence of this power, as one necessary and proper for carrying into execution other admitted powers of the government. For they show that so far as the framers of the Constitution did go in granting *express* power over the lawful money of the country, it was confided to Congress and forbidden to the States; and it is no unreasonable inference, that if it should be found necessary in carrying into effect some of the powers of the government essential to its successful operation, to make its securities perform the office of money in the payment of debts, such legislation would be in harmony with the power over money granted in express terms.

It being conceded, then, that the power under consideration would not, if exercised by Congress, be an invasion of any right reserved to the States, but one which they are forbidden to employ, and that it is not one in terms either granted or denied to Congress, can it be sustained as a law necessary and proper, at the time it was enacted, for carrying into execution any of these powers that are expressly granted either to Congress, or to the government, or to any department thereof?

From the organization of the government under the present Constitution, there have been from time to time attempts to limit the powers granted by that instrument, by a narrow and literal rule of construction, and these have been specially directed to the general clause which we have cited as the foundation of the auxiliary powers of the government. It has been said that this clause, so far from authorizing the use of any means which could not have been used without it, is a restriction upon the powers necessarily implied by an instrument so general in its language.

The doctrine is, that when an act of Congress is brought to the test of this clause of the Constitution, its necessity must be absolute, and its adaptation to the conceded purpose unquestionable.

Nowhere has this principle been met with more emphatic denial, and more satisfactory refutation, than in this court. That eminent jurist and statesman, whose official career of

over thirty years as Chief Justice commenced very soon after the Constitution was adopted, and whose opinions have done as much to fix its meaning as those of any man living or dead, has given this particular clause the benefit of his fullest consideration.

In the case of *The United States* v. *Fisher*,* decided in 1804, the point in issue was the priority claimed for the United States as a creditor of a bankrupt over all other creditors. It was argued mainly on the construction of the statutes; but the power of Congress to pass such a law was also denied. Chief Justice Marshall said: "It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government, or in any department thereof. In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be attained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution."

It was accordingly held that, under the authority to pay the debts of the Union, it could pass a law giving priority for its own debts in cases of bankruptcy.

But in the memorable case of *McCulloch* v. *The State of Maryland*,† the most exhaustive discussion of this clause is found in the opinion of the court by the same eminent expounder of the Constitution. That case involved, it is well known, the right of Congress to establish the Bank of the United States, and to authorize it to issue notes for circulation. It was conceded that the right to incorporate or create such a bank had no specific grant in any clause of the Constitution, still less the right to authorize it to issue notes for

* 2 Cranch, 358.

† 4 Wheaton, 316.

circulation as money. But it was argued, that as a means necessary to enable the government to collect, transfer, and pay out its revenues, the organization of a bank with this function was within the power of Congress. In speaking of the true meaning of the word "necessary" in this clause of the Constitution, he says: "Does it always import an absolute physical necessity so strong, that one thing to which another may be termed necessary cannot exist without it? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful, or essential to another. To employ means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable."

The word necessary admits, he says, of all degrees of comparison. "A thing may be necessary, very necessary, absolutely or indispensably necessary. . . . This word, then, like others, is used in various senses, and in its construction the subject, the context, the intention of the person using them are all to be taken into view. Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to various crises of human affairs. To have prescribed the means by which the government should in all future time execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at

all, must have been but dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

I have cited at unusual length these remarks of Chief Justice Marshall, because though made half a century ago, their applicability to the circumstances under which Congress called to its aid the power of making the securities of the government a legal tender, as a means of successfully prosecuting a war, which without such aid seemed likely to terminate its existence, and to borrow money which could in no other manner be borrowed, and to pay the debt of millions due to its soldiers in the field, which could by no other means be paid, seems to be almost prophetic. If he had had clearly before his mind the future history of his country, he could not have better characterized a principle which would in this very case have rendered the power to carry on war nugatory, which would have deprived Congress of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances, by the use of the most appropriate means of supporting the government in the crisis of its fate.

But it is said that the clause under consideration is admonitory as to the use of implied powers, and adds nothing to what would have been authorized without it.

The idea is not new, and is probably intended for the same which was urged in the case of *McCulloch* v. *The State of Maryland*, namely, that instead of enlarging the powers conferred on Congress, or providing for a more liberal use of them, it was designed as a restriction upon the ancillary powers incidental to every express grant of power in general terms. I have already cited so fully from that case, that I can only refer to it to say that this proposition is there clearly stated and refuted.

Does there exist, then, any power in Congress or in the

government, by express grant, in the execution of which this legal tender act was necessary and proper, in the sense here defined, and under the circumstances of its passage?

The power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defence and general welfare, are each and all distinctly and specifically granted in separate clauses of the Constitution.

We were in the midst of a war which called all these powers into exercise and taxed them severely. A war which, if we take into account the increased capacity for destruction introduced by modern science, and the corresponding increase of its cost, brought into operation powers of belligerency more potent and more expensive than any that the world has ever known.

All the ordinary means of rendering efficient the several powers of Congress above-mentioned had been employed to their utmost capacity, and with the spirit of the rebellion unbroken, with large armies in the field unpaid, with a current expenditure of over a million of dollars per day, the credit of the government nearly exhausted, and the resources of taxation inadequate to pay even the interest on the public debt, Congress was called on to devise some new means of borrowing money on the credit of the nation; for the result of the war was conceded by all thoughtful men to depend on the capacity of the government to raise money in amounts previously unknown. The banks had already loaned their means to the treasury. They had been compelled to suspend the payment of specie on their own notes. The coin in the country, if it could all have been placed within the control of the Secretary of the Treasury, would not have made a circulation sufficient to answer army purchases and army payments, to say nothing of the ordinary business of the country. A general collapse of credit, of payment, and of business seemed inevitable, in which faith in the ability of the government would have been destroyed, the rebellion would have triumphed, the States would have

been left divided, and the people impoverished. The National government would have perished, and, with it, the Constitution which we are now called upon to construe with such nice and critical accuracy.

That the legal tender act prevented these disastrous results, and that the tender clause was necessary to prevent them, I entertain no doubt.

It furnished instantly a means of paying the soldiers in the field, and filled the coffers of the commissary and quartermaster. It furnished a medium for the payment of private debts, as well as public, at a time when gold was being rapidly withdrawn from circulation, and the State bank currency was becoming worthless. It furnished the means to the capitalist of buying the bonds of the government. It stimulated trade, revived the drooping energies of the country, and restored confidence to the public mind.

The results which followed the adoption of this measure are beyond dispute. No other adequate cause has ever been assigned for the revival of government credit, the renewed activity of trade, and the facility with which the government borrowed, in two or three years, at reasonable rates of interest, mainly from its own citizens, double the amount of money there was in the country, including coin, bank notes, and the notes issued under the legal tender acts.

It is now said, however, in the calm retrospect of these events, that treasury notes suitable for circulation as money, bearing on their face the pledge of the United States for their ultimate payment in coin, would, if not equally efficient, have answered the requirement of the occasion without being made a lawful tender for debts.

But what was needed was something more than the credit of the government. That had been stretched to its utmost tension, and was clearly no longer sufficient in the simple form of borrowing money. Is there any reason to believe that the mere change in the form of the security given would have revived this sinking credit? On the contrary, all experience shows that a currency not redeemable promptly in coin, but dependent on the credit of a promissor whose re-

sources are rapidly diminishing, while his liabilities are increasing, soon sinks to the dead level of worthless paper. As no man would have been compelled to take it in payment of debts, as it bore no interest, as its period of redemption would have been remote and uncertain, this must have been the inevitable fate of any extensive issue of such notes.

But when by law they were made to discharge the function of paying debts, they had a perpetual credit or value, equal to the amount of all the debts, public and private, in the country. If they were never redeemed, as they never have been, they still paid debts at their par value, and for this purpose were then, and always have been, eagerly sought by the people. To say, then, that this quality of legal tender was not necessary to their usefulness, seems to be unsupported by any sound view of the situation.

Nor can any just inference of that proposition arise from a comparison of the legal tender notes with the bonds issued by the government about the same time. These bonds had a fixed period for their payment, and the Secretary of the Treasury declared that they were payable in gold. They bore interest, which was payable semi-annually in gold, by express terms on their face, and the customs duties, which by law could be paid in nothing but gold, were sacredly pledged to the payment of this interest. They can afford no means of determining what would have been the fate of treasury notes designed to circulate as money, but which bore no interest, and had no fixed time of redemption, and by law could pay no debts, and had no fund pledged for their payment.

The legal tender clauses of the statutes under consideration were placed emphatically by those who enacted them, upon their necessity to the further borrowing of money and maintaining the army and navy. It was done reluctantly and with hesitation, and only after the necessity had been demonstrated and had become imperative. Our statesmen had been trained in a school which looked upon such legislation with something more than distrust. The debates of the two houses of Congress show, that on this necessity alone could

this clause of the bill have been carried, and they also prove, as I think, very clearly the existence of that necessity. The history of that gloomy time, not to be readily forgotten by the lover of his country, will forever remain, the full, clear, and ample vindication of the exercise of this power by Congress, as its results have demonstrated the sagacity of those who originated and carried through this measure.

Certainly it seems to the best judgment that I can bring to bear upon the subject that this law was a necessity in the most stringent sense in which that word can be used. But if we adopt the construction of Chief Justice Marshall and the full court over which he presided, a construction which has never to this day been overruled or questioned in this court, how can we avoid this conclusion? Can it be said that this provision did not conduce towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection? or that it was not calculated to effect these objects? or that it was not useful and essential to that end? Can it be said that this was not among the choice of means, if not the only means, which were left to Congress to carry on this war for national existence?

Let us compare the present with other cases decided in this court.

If we can say judicially that to declare, as in the case of *The United States* v. *Fisher*, that the debt which a bankrupt owes the government shall have priority of payment over all other debts, is a necessary and proper law to enable the government to pay its own debts, how can we say that the legal tender clause was not necessary and proper to enable the government to borrow money to carry on the war?

The creation of the United States Bank, and especially the power granted to it to issue notes for circulation as money, was strenuously resisted as without constitutional authority; but this court held that a bank of issue was necessary, in the sense of that word as used in the Constitution, to enable the government to collect, to transfer, and to pay out its revenues.

It was never claimed that the government could find no

other means to do this. It could not then be denied, nor has it ever been, that other means more clearly within the competency of Congress existed, nor that a bank of deposit might possibly have answered without a circulation. But because that was the most fitting, useful, and efficient mode of doing what Congress was authorized to do, it was held to be necessary by this court. The necessity in that case is much less apparent to me than in the adoption of the legal tender clause.

In the *Veazie Bank* v. *Fenno*, decided at the present term,* this court held, after full consideration, that it was the privilege of Congress to furnish to the country the currency to be used by it in the transaction of business, whether this was done by means of coin, of the notes of the United States, or of banks created by Congress. And that as a means of making this power of Congress efficient, that body could make this currency exclusive by taxing out of existence any currency authorized by the States. It was said "that having, in the exercise of undoubted constitutional power, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate means." Which is the more appropriate and effectual means of making the currency established by Congress useful, acceptable, perfect—the taxing of all other currency out of existence, or giving to that furnished by the government the quality of lawful tender for debts? The latter is a means directly conducive to the end to be attained, a means which attains the end more promptly and more perfectly than any other means can do. The former is a remote and uncertain means in its effect, and is liable to the serious objection that it interferes with State legislation. If Congress can, however, under its implied power, protect and foster this currency by such means as destructive taxation on State bank circulation, it seems strange, indeed, if it cannot adopt the more appropriate and the more effectual means of declaring these notes

* *Supra*, 533.

of its own issue, for the redemption of which its faith is pledged, a lawful tender in payment of debts.

But it is said that the law is in conflict with the spirit, if not the letter, of several provisions of the Constitution. Undoubtedly it is a law impairing the obligation of contracts made before its passage. But while the Constitution forbids the States to pass such laws it does not forbid Congress. On the contrary, Congress is expressly authorized to establish a uniform system of bankruptcy, the essence of which is to discharge debtors from the obligation of their contracts; and in pursuance of this power Congress has three times passed such a law, which in every instance operated on contracts made before it was passed. Such a law is now in force, yet its constitutionality has never been questioned. How it can be in accordance with the spirit of the Constitution to destroy directly the creditor's contract for the sake of the individual debtor, but contrary to its spirit to affect remotely its value for the safety of the nation, it is difficult to perceive.

So it is said that the provisions, that private property shall not be taken for public use without due compensation, and that no person shall be deprived of life, liberty, or property, without due course of law, are opposed to the acts under consideration.

The argument is too vague for my perception, by which the indirect effect of a great public measure, in depreciating the value of lands, stocks, bonds, and other contracts, renders such a law invalid as taking private property for public use, or as depriving the owner of it without due course of law.

A declaration of war with a maritime power would thus be unconstitutional, because the value of every ship abroad is lessened twenty-five or thirty per cent., and those at home almost as much. The abolition of the tariff on iron or sugar would in like manner destroy the furnaces, and sink the capital employed in the manufacture of these articles. Yet no statesman, however warm an advocate of high tariff, has claimed that to abolish such duties would be unconstitutional as taking private property.

If the principle be sound, every successive issue of gov-

ernment bonds during the war was void, because by increasing the public debt it made those already in private hands less valuable.

This whole argument of the injustice of the law, an injustice which if it ever existed will be repeated by now holding it wholly void; and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National legislature.

Upon the enactment of these legal tender laws they were received with almost universal acquiescence as valid. Payments were made in the legal tender notes for debts in existence when the law was passed, to the amount of thousands of millions of dollars, though gold was the only lawful tender when the debts were contracted. A great if not larger amount is now due under contracts made since their passage, under the belief that these legal tenders would be valid payment.

The two houses of Congress, the President who signed the bill, and fifteen State courts, being all but one that has passed upon the question, have expressed their belief in the constitutionality of these laws.

With all this great weight of authority, this strong concurrence of opinion among those who have passed upon the question, before we have been called to decide it, whose duty it was as much as it is ours to pass upon it in the light of the Constitution, are we to reverse their action, to disturb contracts, to declare the law void, because the necessity for its enactment does not appear so strong to us as it did to Congress, or so clear as it was to other courts?

Such is not my idea of the relative functions of the legis-

lative and judicial departments of the government. Where there is a choice of means the selection is with Congress, not the court. If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the legislature and not for the court to determine. In the case in Wheaton, from which I have already quoted so fully, the court says that "where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretences to such a power." This sound exposition of the duties of the court in this class of cases, relieves me from any embarrassment or hesitation in the case before me. If I had entertained doubts of the constitutionality of the law, I must have held the law valid until those doubts became convictions. But as I have a very decided opinion that Congress acted within the scope of its authority, I must hold the law to be constitutional, and dissent from the opinion of the court.

NOTE.

At the same time with the decision of the preceding case was decided a case in error to the Supreme Court of California, argued some time before it;—the case, namely, of

BRODERICK'S EXECUTOR *v.* MAGRAW,

In which the principles of the preceding case of *Hepburn* v. *Griswold* were affirmed.

The case was this:

Magraw preferred a claim by petition in the Probate Court of the city of San Francisco, upon a note made by Broderick to the petitioner at New York, on the 1st of July, 1858. Broderick dying, his executor defended the suit.

Statement of the case.

The defence set up by the executor was a tender of the amount due in United States notes.

To this it was answered that the executor had collected the debts due to the estate in coin, and was bound, as trustee, to pay the coin thus collected to the creditors; and, further, that the debt was contracted prior to the passage of the legal tender act, and could, therefore, be satisfied only in coin, according to the terms of the contract.

Judgment was rendered in favor of the petitioner, and the judgment was affirmed by the Supreme Court of the State. From that court it was brought by the other party here.

Mr. Carlisle, for the plaintiff in error; Mr. Wills, contra.

The CHIEF JUSTICE now gave the opinion of the court, to the effect that it was not necessary to examine the several questions presented by the record, for that the principles of the decision just rendered required the affirmation of the judgment of the Supreme Court, and that it was

AFFIRMED ACCORDINGLY.

McVeigh v. United States.

A clerical mistake in a writ of error may be amended by the citation.

Mr. Assistant-Attorney Field, for the United States, moved to dismiss this case for imperfection in the writ, an exhibition of which showed that it was dated December 2d, 1868, and was returnable to "the 3d Monday of December *next*." But a production by *Mr. Cushing, contra*, of the citation, showed that *it* commanded the party to "be and appear at a Supreme Court of the United States on the 3d Monday of December *instant, pursuant to a writ of error filed in the clerk's office, &c.*" And he argued that the citation was in fact the effective document, and the issuing of the writ but an antiquated and really useless ceremony, practised still but from deference to ancient form; that accordingly the writ might be amended by the citation. C. A. V.

MOTION DENIED.

CHICOPEE BANK *v.* PHILADELPHIA BANK.

1. Although a bill payable at a particular bank, be physically, and in point of fact, in the bank, still, if the bank be wholly ignorant of its being there—as when, *ex. gr.*, a letter in which the bill was transmitted when brought from the post-office to the bank has been laid down with other papers on the cashier's desk, and before being taken up or seen by the cashier has slipped through a crack in the desk, and so disappeared—the fact of the bill being thus physically present in the bank does not make a presentment.

   And this is so, although the acceptor had no funds there, did not call to pay the bill, and in fact did not mean to pay it anywhere.
2. In such a case, therefore, the holder cannot look to prior parties, even though, by having been informed after inquiry by him, that the bill had not been received at the collecting bank, they could have inferred that it had not been paid at maturity by the acceptor.
3. A court having fairly submitted to a jury the evidence in a case, and charged as favorably to a party as he could properly have asked, may, in the exercise of its discretion, refuse a request by that party to charge as to which side the burden of proof belongs.
4. An accidental loss or disappearance in a bank of a bill sent to it to collect, from the bank's not taking sufficient care of letters brought to it from the mail, carries with it a presumption of negligence in the bank; and on a suit against it, the burden of proof is on the bank to explain the negligence.
5. If, through this negligence alone, it is inferable that notice of presentment, demand, and non-payment, were not given to the holder, so as to enable him to hold parties prior to him, the bank guilty of the negligence is responsible to the holder for the amount of the bill, even though the holder himself have not been so entirely thoughtful, active, and vigilant as he perhaps might have been.

THIS was a suit by the Seventh National Bank of Philadelphia against the Chicopee Bank of Springfield, Massachusetts, founded upon the allegation, that by reason of the neglect of the latter bank, the former lost its remedy against the prior parties on a bill of exchange, to wit, the drawer and payee.

The bill was drawn by one Coglin, of Philadelphia, on Montague, of Springfield, payable to one Rhodes, of Philadelphia, for $10,000, and accepted by Montague specially payable at the Chicopee Bank. The day of payment was Saturday, February 18th, 1865. On the 13th, Rhodes, the

holder, indorsed the bill for value to the Philadelphia bank, which sent it at once by mail, inclosed in a letter, to the Chicopee Bank, to receive payment. The course of the mail between Philadelphia and Springfield, is two days. On the 15th, this letter with other letters and papers, was duly delivered by the postman, and placed on the cashier's table; but (as was afterwards ascertained), this letter slipped from the pile, through a crack in the table, into a drawer of loose papers, and its presence in the bank was not known to the cashier, and as the two banks had no previous dealings, he was not expecting anything from the other bank. On the 18th, Montague, the acceptor, made no attempt to pay the bill, either by calling for it, or depositing funds, and subsequently, at the trial, made oath that he intended not to pay the bill, and had a defence against it. The cashier of the Philadelphia bank, not receiving, on the 17th, an acknowledgment of the letter which he had sent on the 13th, felt somewhat anxious; and on the 18th consulted the president. On Monday, the 20th, he telegraphed to the cashier of the Chicopee Bank as follows:

"Did not you receive ours of 13th instant, with Montague's acceptance, $10,000?"

The dispatch did not indicate either the time or place of payment of the draft; and the reply was sent,

"Not yet received."

This dispatch was received by the cashier of the Philadelphia bank, at noon of the 20th. He testified at the trial, that he wrote to Mr. Rhodes the same day, informing him of what he had learned, that he had no recollection of writing to Coglin, but, as he knew they were jointly concerned in dealings in petroleum lands, he presumed Rhodes would inform him. This was the only step the cashier took toward charging the prior parties. They both did business at that bank: Coglin was a director; both were frequently there, and well known to the cashier. As the mail required two days, and the 19th was Sunday, there was no question but the cashier

had until and including the 24th, to give notice to Rhodes and Coglin. After the receipt of the reply of the 20th, at noon, he took no steps, by post or telegraph, to ascertain from the Chicopee Bank, whether the acceptor had or had not been ready to pay on the 18th. The Philadelphia bank brought no suit against Rhodes or Coglin, but sued the Chicopee Bank for the amount of the note, on the ground that by its negligence, they had lost the power to charge the prior parties.

The court below instructed the jury, that the prior parties were absolutely discharged by what took place at the Chicopee Bank, on the 18th; that where a bill is accepted payable at a particular bank, the bank need not seek the acceptor, but that there must still be a presentment, in order to charge prior parties; that the presence of the bill at the bank, ready to be delivered to the acceptor upon his tendering payment, was equivalent to a presentment, but that if the bill is not at the bank on the day of payment, ready to be delivered as aforesaid, there is a failure of presentment, and the prior parties are discharged, although the acceptor made no attempt to pay; that in this case, therefore, the prior parties could not be held by any notice of whatever description, whenever or by whomsoever given; and that if the loss or mislaying of the bill during the whole of the 18th, was owing to the negligence of its cashier, the Chicopee Bank was liable for the amount of the note.

After the charge was fully delivered, the court was asked by the counsel of the Chicopee Bank, to instruct the jury as to the burden of proof. This the court refused to do, considering that it had already sufficiently instructed the jury.

The verdict and judgment were accordingly for the plaintiffs.

R. H. Dana, Jr., for the Chicopee Bank, plaintiffs in error.

The instructions given by the court cut off all inquiry whether the Philadelphia bank was not guilty of negligence, which discharged or contributed to discharge the prior parties. It is well-settled law, and was ruled by the court below,

that where a bill is sent to a bank for collection, and is dishonored, that bank may either itself give notice to the prior parties, or may send notice to the owner of the bill, and he may give notice to them. In the latter case, the owner is allowed the same time for notice from his agent, as is allowed between parties to negotiable paper. The Chicopee Bank had no means of giving notice to the prior parties, as it did not know their names or residence. As the 19th was Sunday, it was sufficient if the Philadelphia bank received notice on the 23d, and it had the 24th, in which to give notice to the prior parties. It made no attempt to learn from the Chicopee Bank, whether the acceptor was in default. If it had inquired, it could have learned the fact and given notice to the prior parties that the bill was not paid. This would have held the prior parties, unless the instruction of the court that nothing could hold them, is sustained to its fullest extent. If the notice actually given was not sufficient, the means of giving a full notice could have been obtained, by the use of reasonable diligence. There must, therefore, be a new trial, unless the prior parties were discharged, by law, on the 18th.

2. The ruling below rests rather upon a literal application of phrases used by courts and commentators, than upon reasons of commercial law, applicable to the particular case. Undoubtedly, where a bill is accepted payable generally, the holder is to be the actor, and must demand payment, presenting the bill. But where the acceptor promises to pay the bill at a certain bank, on a day certain, he is to be the actor, and must go to the bank and tender payment. If he does not tender payment, he is in default. If he does, and the bank is not ready to surrender the bill, he is not obliged to pay at that time, although he remains generally liable. Still, he may pay, even then, if the bank substitutes sufficient security. Now, some judges and commentators have used language of this sort. They say "that although a bill is accepted payable at a certain bank, still the bank must make presentment to the acceptor, and the only difference between that and a general acceptance, is that the presence of the bill

at the bank is equivalent to a presentment." Such language is not scientific. It leaves the impression that the bank is the actor, and has the first step to take, that is, to make the presentment, which is sufficiently made by having the bill in possession. It is natural to reason from this that if the bank has not the bill in possession, so as to be able to make presentment at any hour of the day when the acceptor may appear, there is a failure of presentment, whatever the acceptor may do or leave undone. In the present case, the acceptor was as much in default as an acceptor can be, yet the court below (apparently following the above course of reasoning), held that this was of no consequence, because the bank was not in condition to make presentment, that is, had not the bill so in hand as to be able to surrender it, if called for.

The actual obligations of the parties and the course of business show that this reasoning is not founded on principle. The duty of the acceptor is to become the actor. He must either have funds for the payment within the control of the cashier, or must call and tender payment in the course of the day. If he fails to do either without legal excuse, the prior parties can be held. If he tenders payment, and the bank has not the bill to surrender, he has a legal excuse for not paying on the day. This discharges the prior parties. But if he makes no attempt to pay, and the prior parties receive notice that the bill is not paid, is it just that the prior parties should defend themselves from making good to those to whom they have sold the bill, guaranteeing payment by the acceptor, by the fact that if he had tendered payment the bank could not have surrendered his bill? No case has been decided directly to that point, as is admitted on the other side, under like circumstances. It has been often said that the bank must have the bill ready to surrender. This means that it must do so, at its peril, in case tender is made. So, it has been said, that the presence of a bill is a presentment. This is only a technical compliance with a requirement technically raised. No actual presentment is necessary, and no substitute or equivalent for it is actually required.

Suppose the acceptor should send a written notice to the cashier that he should not pay a certain acceptance payable at the bank that day, would there be any act for the bank to do? Why, then, should not the notice of non-payment hold the prior parties? Such is the case here. The acceptor made no attempt to pay, had no suspicion that the bank had not the bill in hand, and testified that he intended not to pay it. Even if an acceptor at large, meeting the holder on the day, refuses to pay, without waiting for demand or presentment, it is a default.

There are several authorities which are founded on the recognition of the principle that if the acceptor is in default, the prior parties may be held on notice of non-payment, although the bill was not at the bank during the whole day, or any part of it, or was practically not there, that is, was not known to be there by the officers, provided the owner was not in default, or the prior parties were not in any way injured by the state of things.*

In these cases, the principle seems to be acknowledged that if the owner of the bill is in no default of getting it to the bank of payment, and the acceptor does not tender payment, and notice is given to the prior parties, they cannot excuse themselves from making good the guaranty which they gave to the person who purchased the note of them, by mere proof that the bill was not known to be in the bank by its officers, or was absent part of the day, or indeed was absent altogether, without the fault of the owner, and where such absence had no connection with the default of the acceptor, and does no injury to prior parties.

The truth is, that the word *presentment* is inappropriate to a case of acceptance payable at a certain time and place, as much as the word *demand*, and the use of the word has led

* Smith *v.* Rockwell, 2 Hill, 482; State Bank *v.* Napier, 6 Humphreys, 270; United States *v.* Smith, 11 Wheaton, 171; Merchants' Bank *v.* Elderkin, 25 New York, 178; Bank of United States *v.* Carneal, 2 Peters, 543; Whitwell *v.* Johnson, 17 Massachusetts, 450; Folger *v.* Chase, 18 Pickering, 63; Lockwood *v.* Crawford, 18 Connecticut, 368; Fullerton *v.* Bank of United States, 1 Peters, 604; Windham *v.* Norton, 22 Connecticut, 214.

to the following of false analogies and fallacious deductions. This court has now an opportunity to rectify the reasoning without positively overruling any case, and to place the subject upon the ground that if there is a positive refusal or default of the acceptor, and the owner is in no neglect as to having the bill at the place, and gives due notice of nonpayment, the prior party cannot defend if he suffers no injury.

3. But the instructions in this case are subject to a further serious objection. They assumed that the bill was lost, or so mislaid that it could not be found, and treated it as if it was not at the bank at all. Now, it cannot be assumed as certain that if the acceptor had made a deposit to meet this bill, the cashier, not finding it in his mail of the 18th, would not have telegraphed, made search in the bank, and found it. If the acceptor had called and tendered payment, and after search the bill was not found that day, it would, of course, have discharged the prior parties, but as he did not deposit or tender payment, the cashier was not put on inquiry. It can never be known whether, if the acceptor had taken the first step, which it was his duty to take, and which the prior parties had promised he would take, the bill might not have been found and surrendered. It may be said, therefore, that the ruling in some measure exempts the prior parties from making good their promise that the acceptor would deposit or tender payment, by the fact that he did not do as they promised.

4. The court refused to give instructions as to the *burden of proof*. By the *burden of proof* is not meant the preponderance of testimony, or a *primâ facie* case, or the obligation to prove this or that detail. It is the determination which way the law requires a jury in *equilibrio* to render its verdict. That is a pure question of law, as to which the jury cannot inform itself, and must be informed by the court. The instruction was not asked during the trial, but after the charge, and applied to the entire issue of negligence, the only issue submitted to the jury. There was an appreciable danger that the jury might think the defendants bound to clear themselves from the charge of negligence, the fact being

established that the bill had been put in the usual place by the postman. The defendant was therefore entitled to an instruction that they must take all the circumstances together, and find for the defendant, unless they were reasonably satisfied of his neglect, although they might not have a preponderance of belief in his favor, but be in what may be called *equilibrium*.

Mr. George Putnam, contra.

Mr. Justice NELSON delivered the opinion of the court.

The case was put to the jury, whether or not the loss of the bill, and consequent inability of the collection bank to take the proper steps against the acceptors to charge the prior parties, was attributable to negligence, and want of care on the part of the Chicopee Bank, and that, if it was, the bank was responsible. The jury found for the plaintiffs.

In cases where the drawee accepts the bill, generally, in order to charge the drawer or indorser, the holder must present the paper, when due, at his place of business, if he has one, if not, at his dwelling or residence, and demand payment; and, if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place, and payment demanded. In these instances, as a general rule, the bill must be present when the demand is made, as in case of payment the acceptor is entitled to it as his voucher. When the bill is made payable at a bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to payment of the paper, constitute a sufficient presentment and demand; and, if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is, that the paper was in the bank, and the burden rests upon the defendant to show that the acceptor called to pay it.*

* Chitty on Bills, p. 365 *a*, 353, Springfield ed. 1842; 1 Parsons on Notes and Bills, pp. 363, 421, 437; Byles on Bills, p. 251 and note; Fullerton *v.*

In the present case, it is argued that the bill was in the Chicopee Bank at the time of its maturity, and, as the acceptors had no funds there, a sufficient presentment and demand were made, according to the law merchant. It is true the bill was there physically, but, within the sense of this law, it was no more present at the bank than if it had been lost in the street by the messenger on his way from the post-office to the bank, and had remained there at maturity; and this loss, which occasioned the failure to take the proper steps, or, rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties, and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant. The radical vice in the defence being the failure to prove a presentment and demand upon the acceptors at the maturity of the bill, the question of notice is unimportant.

But, if it had been otherwise, the notice itself was utterly defective. That relied on is the answer of the defendant to the telegram of the plaintiff of the 20th February, which was, that the bill had not yet been received. This was after its maturity, and it simply advised the holder and payee indorser, to whom the information was communicated the same day, that the drawer and indorser were discharged from any liability on the paper. It showed that the proper steps had not been taken against the acceptors to charge them.

Some criticism is made upon the refusal of the court below to charge, as to which side the burden of proof belonged, in respect to the question of negligence and want of care, after the paper came into the hands of the defendant. No objection is taken to the charge itself, upon this question,

Bank of United States, 1 Peters, 604; Bank of United States *v.* Carneal, 2 Id. 543; Seneca Co. Bank *v.* Neas, 5 Denio, 329; Bank *v.* Napier, 6 Humphry, 270; Folgar *v.* Chase, 18 Pickering, 63.

and, indeed, could not have been, as the point was submitted to the jury as favorably to the defendants as could have been asked. We think the court, after having submitted fairly the evidence on both sides bearing upon the question, had a right, in the exercise of its discretion, to refuse the request.

If, however, the court had inclined to go further, and charge as to the burden of proof, it should have been that it belonged to the defendant. The loss of the bill by the bank carried with it the presumption of negligence and want of care; and, if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is that the loss or damage was occasioned by his negligence, or want of care of himself or of his servants. This presumption arises with respect to goods lost or injured, which have been deposited in a public inn, or which had been intrusted to a common carrier. But the presumption may be rebutted.*

JUDGMENT AFFIRMED.

MAGUIRE v. TYLER.

1. When the documentary evidence of title produced by a claimant of an incomplete title to land in the territory ceded by France in 1803 contains no sufficient boundary lines marking a definite parcel of land so as to sever it from the public domain, the concession, in such case, creates no right of private property which can be asserted in a court of justice without an antecedent survey and location.
2. Although there are cases in which it has been held that when there had been a confirmation of an incomplete title, and a subsequent confirmation of another claim to the same land, that the elder confirmation de-

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* Dawson *v.* Chamney, 5 Q. B. 164; Coggs *v.* Bernard, 2 Lord Raymond, 918; Day *v.* Riddle, 16 Vermont, 48; 1 Phillips on Evidence, Cowen's & Hill's Notes, p. 633.

feated the younger, yet as between two claimants setting up distinct imperfect titles under the former government to the same parcel of land, the courts have no jurisdiction to determine the controversy. The political power alone is competent to determine to which the perfect title shall be made.

3. While Congress may confirm such claims without previously ascertaining the boundaries, they have not thought it proper to do so, but have organized boards of commissioners to adjudicate such claims, and provided for surveys.
4. When there is a specific tract of land confirmed according to ascertained boundaries, the legal effect of confirmation is to establish the right, and locate the claim. But it is otherwise when the claim has no certain limits, and the confirmation is on the condition that the land is to be surveyed.
5. When a patent has issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the Secretary of the Interior may recall it.
6. When the decree of a State court sought to be reversed is silent as to the ground upon which it was rendered, jurisdiction under the 25th section of the Judiciary Act is maintainable if the case shows that Federal questions were involved, though it also appears that there were other defences not re-examinable in this court if these defences afford no legal answer to the suit. This court will not presume that the court below decided these defences erroneously, in order to defeat their own jurisdiction.
7. Where a patent is issued, on a claim which has no certain limits, reserving "all valid adverse rights," a second patent to another claimant for a portion of the same land is valid, and operative to convey the title.

[See the opinion of Clifford, J., on the motion to reform the entry judgment, *infra*, pp. 670–671.]

IN error to the Supreme Court of Missouri.

The controversy involved a question of ancient French proceedings, and of boundary near St. Louis; a good deal of the testimony being of an early kind. Except to persons already acquainted with the topography of the place where the controversy lay, and with the controversy itself, any attempt to state it would be unsuccessful without explanatory diagrams. The execution of these requires time and the reporter's personal supervision; and had the report been deferred till another volume, when his attention would not have been engaged in attending the court, they would have been given. A request, however, from a source entitled to great

respect to present the opinion in this volume will account for their absence; a matter the less important since the case presents nothing which ministers to juridical science, or that is interesting except to parties concerned in the controversy. To such diagrams are unnecessary.

Messrs. Ewing and Glover, for the plaintiff in error; Messrs. B. A. Hill and P. Phillips, contra.

Mr. Justice CLIFFORD delivered the opinion of the court, stating the case.

Complete titles to land in the territory ceded by France to the United States, under the treaty concluded at Paris on the thirtieth of April, 1803, needed no legislative confirmation, as they were fully protected by the third article of the treaty of cession; but persons holding incomplete titles were required by the act of the second of March, 1805, to deliver, before the day therein named, to the register of the land office or the recorder of land titles, in the district where the land was situated, a notice in writing, stating the nature and extent of the claim, together with a plat of the same, and also every grant, order of survey, and conveyance, or other written evidence of the claim, in order that the same might be recorded.*

Prior to the passage of that act, the province ceded by the treaty had been subdivided by Congress and organized into two territories, and the fifth section of the act before referred to, made provision for the appointment of commissioners in each of those territories, to ascertain and adjudicate the rights of persons claiming such titles. Power was conferred on those commissioners to hear and decide, in a summary manner, all matters respecting such claims; and the provision was that their decisions should be laid before Congress, and be subject to their determination.

Amendments to that act were subsequently passed before

* 8 Stat. at Large, 202; United States *v.* Wiggins, 14 Peters, 350; 2 Stat. at Large, 326.

the title in controversy in this case was adjudicated; but it will not be necessary to enter into those details in this investigation, except to say that the fourth section of the act of the third of March, 1807, provided that the decision of the commissioners, when in favor of the claimant, should be final against the United States.*

Present suit was commenced in the Land Court of St. Louis, but was subsequently transferred by change of venue to the Court of Common Pleas of that county. Claim of the plaintiff, as set forth in his petition, was for four by four arpents of land, being part of a concession made under Spanish rule by Governor Zenon Trudeau to Joseph Brazeau, and which was confirmed to the donee by the land commissioners appointed under that act of Congress.

Accurate description of the land included in the claim, and of the several muniments of title proposed to be introduced to establish its validity, is given in the petition. Those muniments of title, as there described, are in substance and effect as follows:

1. The petition of Joseph Brazeau, a citizen of St. Louis, dated June 1, 1794, for a tract of land, situate in the western part of the town beyond the foot of the mound called La Grange de Terre, of four arpents in width, to extend from the bank of the Mississippi in the west quarter southwest, by about twenty arpents in depth, beginning at the foot of the hill, on which stands the mound, and ascending in a northwest course to the environs of Rocky Branch, so that the tract shall be bounded on the east side by the bank of the river, and on the other sides in part by the public domain, and in part by the lands reunited to that domain.

2. Ten days later the governor executed a certificate, in which he declared that the tract belonged to the public domain, and certified that he had put the petitioner in possession of the four arpents front by twenty arpents in depth, and specified in a general way the boundaries of the tract. Next evidence of title, there described, was the concession

* 2 Stat. at Large, 283, 327, 353, 391, 440.

of the governor to Joseph Brazeau, bearing date on the twenty-fifth of June in the same year, in which he formally conceded to the donee, in fee simple, for him, his heirs, assigns, or whosoever may represent his rights, a tract of land . . . of four arpents front by twenty arpents in depth, situate north of the town, . . . to begin beyond the mound, extending north-northwest to the environs of Rocky Branch, bounded on one side by the bank of the river, and on the opposite by lands reunited to the public domain, through which land passes the present concession, of which one end is to be bounded by the concession to one Esther, a free mulatto woman.

Invested with a title to four arpents front by twenty arpents in depth, as described in his concession, the donee, Joseph Brazeau, on the ninth of May, 1798, by a deed of that date duly executed before the governor, sold, ceded, relinquished, and transferred to Louis Labeaume "a concession of land to him given," as aforesaid, consisting of four arpents of land, to be taken from the foot of the hill called La Grange de Terre, by twenty arpents in depth, bounded by the Rocky Branch, or creek, at the extremity opposite to the hillock, east by the river, and west by the land belonging to the royal domain; the said Brazeau reserving to himself four arpents of land, to be taken at the foot of the hillock in the southern part of said land, . . . selling only sixteen arpents in depth to the said Labeaume, who accepts the sale on those terms and conditions, and the instrument was signed by both parties. Reference must also be made to certain other ancient documents as showing the origin of the controversy, and as affording the means of ascertaining the true location of the premises claimed by the plaintiff.

Evidently the out-boundaries of the tract of land described in the deed include the entire concession previously obtained by the grantor; but the reservation, as plainly expressed in the instrument of conveyance, is of four arpents of land *to be taken at the foot of the hillock in the southern part of the tract.*

Rights of the parties, as described in the preceding instruments, may be easily ascertained and defined; but the

purchaser of the four by sixteen arpents of that tract desired to enlarge his possession, and with that view he obtained from the governer a concession to himself of an additional parcel of land from the public domain. By his petition he asked the governor to grant to him three hundred and sixty arpents of land, including that which he had antecedently acquired, and then held by purchase. Express reference is made to the tract he acquired by purchase, and he asked for twenty arpents in depth from the river, ascending to the Rocky Branch, west quarter south "by *sixteen arpents front along the river, which is the same front as that of the petitioner's land.*"

Nothing could be more precise than that description, and the further statement of the petition was, that "the angle made by the perpendicular line from the road to the river by the creek, and by the river, will about complete the quantity," as described in the petition. On the fifteenth of February, 1799, the governor made the concession, and in the same instrument he directed the surveyor "*to make out the survey in continuation*" of his antecedent purchase, and to put the interested party in possession of the described premises. Description of that concession, as given in the certificate of the surveyor, bearing date April 10, 1799, is that the tract is bounded on the north side by the bank of Rocky Branch and the public domain, on the south side by the lands of other donees, on the east by the river, and on the west side by vacant public lands; but it is evident that the boundaries of the tract, as given in the certificate of the surveyor, include the whole of the former concession, and that the certificate entirely overlooks the fact that the donee of that tract reserved to himself four arpents of the same, "to be taken at the foot of the hillock in the southern part of said land."

Such a survey, however the error may have arisen, cannot have the effect to enlarge the rights of the purchaser, or to diminish or impair the rights of the grantor to the four arpents reserved in that deed, and which were never conveyed to the grantee. Repetition of the reservation in the

certificate of survey may have been omitted by mistake, but the proofs in the record to show that the boundaries as given in the certificate are erroneous, are full and satisfactory. Manifest differences exist between the concession of the governor and the boundaries of the tract, as given in the certificate of the surveyor, which deserve particular notice. He takes the sixteen arpents front on the river, not from "*the descent of the road into the creek*," but from a point four arpents south of that line, making the distance from that line, or from the descent of the road into the creek to the south line of the concession as surveyed, twenty arpents instead of sixteen, as it should have been, whether tested by the deed of conveyance or by the terms of the concession.

Three lines only were called for by the concession, but the figure formed at the branch or creek by the survey is composed of four lines, which shows conclusively that the survey was erroneous. Plain duty of the surveyor, in executing the order of survey, was to follow the directions of the instruments of title, and inasmuch as the concession referred to the petition for description and boundaries, he was bound to give the interested party "the same front" as that he acquired by the conveyance described in the petition, and to be governed by the statement therein contained, that "the angle made by the perpendicular line from the road to the river" would complete the quantity of the land asked for by the petitioner. What he asked for was twenty arpents in depth by sixteen arpents front, which is the same front as that which he had previously acquired by purchase. This purchase included sixteen arpents in depth, and was a part of a concession of four arpents in front by twenty arpents in depth, which was, by the terms of the deed as well as by the true construction of the several documents constituting the evidences of title, to be taken from the foot of the hillock, and was bounded at the opposite extremity by Rocky Branch.

Compliance with the directions of the concession as expressed in the petition would have done exact justice to both

parties, but the surveyor instead of obeying those directions commenced his field operations four arpents further down the river, and measuring south for quantity necessarily absorbed the whole reservation before described and adopted the northern line of the concession to the mulatto woman as the southern line of the tract he was ordered to survey. Doubtless the change of location was acceptable to the interested party, as it gave him better back land, and excluded from his concession the hilly broken land on Rocky Branch, but it left nothing between his south line and the north line of the concession belonging to the mulatto woman for the owner of the four by four arpents, as reserved in his own deed.

Support to these views is also derived from the terms of the concession to the mulatto woman, bearing date October 5, 1793, which, as therein described, has four arpents front, on its two extremities, and the description given of the location is that the northern portion of the grant is situated between the mound Le Grange de Terre and the borders of the Mississippi River running down the river to the "complement and extension" of twenty arpents in depth, and is bounded on three sides by the public domain, and on the other side, to wit, the east-northeast side, by the bluff or high bank of the river.

Viewed in the light of these original documents, even when unaided by the maps in the case, it is quite clear how this controversy arose, but when the several documents are compared with the maps and the parol testimony in the record, the conclusion is irresistible that the reservation in controversy was bounded on the south by the north line of the concession to the mulatto woman, and on the north by the south line of the tract sold and conveyed to the party under whom the respondents claim.

Although the documents are genuine and regular in form, still the respective donees acquired nothing under them but what is called an incomplete title, as the governor did not possess the power to do more than make a concession. He could not grant a patent, and as no such evidence of title

had been obtained from the former government it became necessary for the plaintiff to prove that his claim had been confirmed under some act of Congress. Evidence of the proceedings before the board of commissioners for the adjustment of such claims was accordingly introduced by the respective parties.

Entries in the minutes of the commissioners made September 3, 1806, show that Louis Labeaume presented a claim to the board for three hundred and seventy-four arpents of land, situate on the Mississippi, and that he produced a concession, duly registered, from Zenon Trudeau, for four by twenty arpents, dated 25th June, 1794, granted to one Joseph Brazeau, and another concession from the same governor to himself for three hundred and seventy-four arpents, including the said four by twenty arpents, dated the 15th of February, 1799, which was the true date of his concession; also a survey of the same taken the 2d of March, and certified the 10th of April in the same year, together with a certificate from the governor, dated May 12, 1798, of the sale of said four by twenty arpents by said Joseph Brazeau, reserving to himself four by four or sixteen arpents in superficies, which is the true meaning of the reservation as expressed in the deed.

Statement in the minutes also is to the effect that testimony was introduced showing that the original donee of the four by twenty arpents obtained the concession of that tract, and that he and the claimant had actually inhabited and cultivated the same or caused it to be inhabited and cultivated to that date. Proofs were also introduced as stated in the minutes, which showed that the original donee was the head of a family, and that he inhabited and cultivated the tract at a period sufficiently early to bring the case within the condition specified in the act of Congress for ascertaining and adjusting such titles and claims to land.

Further statement in the minutes is that the claimant subsequently abandoned his right to the concession, of four by twenty arpents, and claimed directly under the concession to himself, which, as surveyed, it will be remembered, in-

cluded the whole of the antecedent concession to his grantor; as well the four by four arpents, reserved in the deed to him from the donee of the tract, as the sixteen arpents which were actually conveyed.

Argument for the respondents is, that the minutes were made by the clerk of the board, and not by the claimant, and the suggestion is doubtless correct, but it is not denied that the applicant presented his claim to the board in two forms, and there does not appear to be any just ground to question any part of those several representations. Constituting as they do a part of the proceedings of the commissioners, they are the proper subjects of reference, but they are not very important except as tending to show that the true state of the respective claims was early before the board, and that the claimant knew that he had no title to the four by four arpents, reserved in his deed, which is also fully proved by all the documentary evidence of title exhibited in the record.

When considered in connection with the documentary evidence of title the clear inference from the minutes is, that the claimant shifted his ground before the commissioners to avoid the danger that they might refuse to confirm to him the four by four arpents to which he showed no title under his deed. Unless he had entertained doubts of his success in that particular, he would not have changed his position; but he gained nothing by it, as the board rejected his claim because the concession to himself had not been duly registered.

Next entry in the minutes, as exhibited in the record, is the decree of confirmation, passed September 22, 1810, which is in substance and effect as follows, omitting unimportant words:

Louis Labeaume claiming three hundred and seventy-four arpents of land. . . The board confirm to him three hundred and fifty-six arpents, and four arpents to Joseph Brazeau, and order that the same, meaning the confirmation to the claimant, be surveyed agreeably to the concession from Zenon Trudeau to Louis Labeaume, and as respects the four

arpents, agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume.

Nothing can be plainer than the fact that the commissioners fully understood the rights of these parties, and that they confirmed the four arpents therein described to the original donee; that they did not intend and did not confirm that tract to Labeaume, nor to any one except to the rightful owner.

Supported, as these propositions are, by clear and irrefragable proofs, further argument upon the subject is unnecessary. Confirmation of the same, however, if any be needed, may be found in the certificate of the commissioners, which they issued to the party June 14th, 1811, in which they state that they have decided that Joseph Brazeau, the original claimant, is entitled to a patent for four arpents of land situate in the district of St. Louis, on the Mississippi, and they therein "order that the same be surveyed agreeably to a reserve made in a sale of Joseph Brazeau to Louis Labeaume, recorded in Book C, page 339, of the recorder's office, by virtue of a concession or order of survey from Zenon Trudeau, lieutenant-governor." Obvious effect of these proceedings was to blot out forever the error committed by the Spanish surveyor, and to place the rights of the contestants upon their true basis. Attempts at injustice were defeated, but the hopes of cupidity were not entirely crushed.

Where the documentary evidences of title produced by the claimant contain no sufficient lines or boundaries to show that any definite and distinct parcel of land was severed from the public domain, the universal rule as settled by repeated decisions of this court is that the concession in such a case creates no right of private property in any particular tract of land which can be maintained in a court of justice without an antecedent survey and location.*

Cases may be found in which it was held that where Congress had confirmed an incomplete title, and subse-

* United States *v.* King et al., 3 Howard, 786; Same *v.* Forbes, 15 Peters, 173; The Houmas Claim, 4 Opinions of the Attorney-General, 693.

quently confirmed another and a different claim for the same land, that the elder confirmation defeated the younger. But the settled rule of the court is that, as between two claimants under the former government, setting up independent imperfect claims to the same parcel of land, the courts of justice have no jurisdiction to determine the controversy; that in such cases it belongs to the political power to decide to whom the perfect title shall issue.*

Congress undoubtedly might confirm such claims without any previous ascertainment of their location or boundaries, but they have decided, in respect to claims like these, not to exercise that power, and created a board of commissioners to adjudicate the claims; and this court held, when considering this very title, that the judicial tribunals in the ordinary administration of justice had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey or for any other purpose, but that such a title, until the survey was made, attached to no land, nor could a court of justice ascertain its boundaries, as that power was reserved to the executive department of the Federal government.†

Several cases determine that where there is a specific tract of land confirmed according to ascertained boundaries, the legal effect of the confirmation is to establish the right and locate the claim, but where the claim has no certain limits, and the decree of confirmation carries along with it the condition that the land must be surveyed, and severed from the public domain and the concessions of other parties, then it is beyond controversy that the title of the claimant, although confirmed, attaches to no land, nor has a court of justice any authority in law to ascertain and establish the boundaries, as that power is reserved either to the executive department or to Congress.‡

Authority to appoint a surveyor of lands in that territory was conferred by the first section of the act of twenty-ninth of April, 1816, and it was therein made his duty, among

* Landers *v.* Brant, 10 Howard, 370.

† West *v.* Cochran, 17 Howard, 414.

‡ Stanford *v.* Taylor, 18 Howard, 412; Bissell *v.* Penrose, 8 Id. 334.

other things, to cause to be surveyed the lands in the same which have been or may hereafter be confirmed under the conditions therein provided.*

Application was accordingly made by Louis Labeaume that the tract confirmed to him might be surveyed, and Joseph C. Brown, a deputy surveyor, appointed under that act in November, 1817, complied with his request, and certified that he had "surveyed for the applicant two tracts in one," which was a direct acknowledgment that he had committed the same error as that made in the Spanish survey. Those two tracts were, first, the one consisting of three hundred and fifty-six arpents, as confirmed to Louis Labeaume, and the other was the four by four arpents confirmed to Joseph Brazeau, which was properly located by that survey in the southeast corner of his original concession. Correctness of that survey cannot be doubted, except that both tracts were included in one survey, and it was upon that ground that the recorder of land titles, when it was presented to him to obtain a patent certificate, refused to issue one, holding that the confirmation certificates required separate surveys.

Express statement of the certificate of survey is that the beginning of the survey was at the mouth of the branch, and the field notes show that the surveyor proceeded down the river, "bending therewith," to the mouth of an old ditch, where he placed a stone at the lower corner on the river.

In consequence of the refusal of the recorder to issue a patent certificate conforming to that survey, the surveyor-general, on the second of May, 1833, returned the same to the deputy surveyor who made it, and gave him authority to resurvey the tract, but with instructions not to include within the lines of the new survey any more than the exact quantity of three hundred and fifty-six arpents, and under those instructions he, on the eighth of June, in the same year, certified a plat and description of survey of the tract confirmed to Louis Labeaume, including the whole of the Brazeau tract, beginning on the south line of his prior survey

* 3 Stat. at Large, 325.

and running north for quantity, in plain violation of all the original documentary evidences of title.

Second survey of Joseph C. Brown was also set aside, and the Secretary of the Interior, on the twenty-fifth of July, 1851, decided, contrary to the views of the Land Office throughout the controversy, that those claiming under Labeaume were entitled to a patent to the land above the ditch according to Soulard's survey, and that the reservation of four by four arpents to Brazeau, and which he subsequently conveyed to Chouteau, was bounded on the north by Labeaume's south ditch, and that it extended to the foot of the mound. Directions were accordingly given that the necessary surveys should be made, and that patents should be issued in conformity with those principles.

New surveys of the respective lands were made in pursuance of those directions, and on the twenty-sixth of February, 1852, patent certificates, in a special form, were executed by the recorder of land titles. Both the patent certificates were founded upon that decision of the Secretary of the Interior, and the material matters certified in the one intended for Joseph Brazeau were, that the recorder was of the opinion that the confirmation of four arpents was intended to mean four arpents front by four arpents in depth towards the west, or sixteen superficial arpents, and that the same had been surveyed in strict conformity with the decision of the Secretary of the Interior.

Extended comments upon those proceedings are not necessary, as they are obviously characterized by error and injustice from their inception to their final consummation. Patents were executed March 25, 1852, in conformity with the patent certificates; but the one to Louis Labeaume, or his legal representatives, contains an important reservation in these words, namely: "Saving and reserving any valid adverse right which may exist to any part" of the tract, which is also substantially repeated in the habendum clause of the patent.

Two months before the patent was executed locating the four by four arpents south of the ditch, the plaintiff, as the legal representative of the orignal donee, protested against

the survey on which the patent certificate was issued, and the record shows that he never accepted the patent. None of the representatives of the donee ever asked for that survey, nor ever consented to receive the patent, and on the fourth of February, 1858, the Secretary of the Interior recalled it, and it was promptly returned as having been improvidently issued. Justice and truth were both subserved in the course pursued, as the patent gave no title to any land whatever to the patentee, because the location was upon an elder concession. Doubt as to the power of the secretary to recall the patent cannot be entertained, as the point has been directly decided by this court. Brazeau's representatives, say this court, in the case of *Maguire* v. *Tyler et al.*,* refused to accept the patent for the sixteen arpents, and caused it to be recalled, and his claim, therefore, stands before the court just as it existed in 1810, when the board of commissioners confirmed it as valid.

Objection is made to the jurisdiction of this court to hear the case and decide the controversy under the twenty-fifth section of the Judiciary Act; but there is no proper ground for doubt upon the subject.

Explicit description of the premises claimed, and of the title under which they are claimed, is set forth in the petition, and the answer in several forms alleges in substance and effect that the pretended confirmation to Joseph Brazeau was wholly void for want of jurisdiction in the board of commissioners over the case, and that no title to any land ever passed to him thereunder, and that the patent—meaning the one executed without his consent, and recalled at his request as having been improvidently issued—vested in his legal representatives the only title to land he ever had by virtue of his claim and confirmation.

Additions might be made to these selections from the answer, but it is unnecessary, as the respondents do not deny that there are issues in the pleadings involving questions reexaminable in this court under that section of the Judiciary

* 1 Black, 199.

Act; but what they contend is, that the answer presented other defences not re-examinable in this court, and they insist that the Supreme Court of the State, for aught that appears to the contrary, may have decided the cause against the plaintiff, and reversed the decree of the Court of Common Pleas upon some of the defences set up in the answer which are not re-examinable in this court. Certain it is that Federal questions are directly involved in the pleadings, and if it appears that none of the other defences afford any legal answer to the suit, the conclusion must be that the case is properly here, as this court will not presume that the court below decided the other issues erroneously in order to defeat their own jurisdiction.*

Respondents pleaded the statute of limitations, that they and those under whom they claim had been in the actual adverse and continuous possession of the premises for more than twenty years next before the commencement of the suit. Such a defence could not have been adjudged good in this case without a direct denial of the foundation of the plaintiff's claim, as will be readily seen by a brief reference to the facts. When the patent, improvidently issued, was recalled, the claim of Brazeau stood before the court just as it existed in 1810, when it was confirmed as valid.

Having never been surveyed at the request of the confirmee, or by order of the Land Office, and never patented to the claimant, it remained as it had been throughout, an incomplete title attached to no land, and it could not be converted into a complete title, except by legal survey and by a patent executed in due form, as required by law.

Conscious that he had a good claim, and undismayed by the law's delay, Brazeau again applied to the land department, and requested that steps might be taken for the protection of his rights; and after a full examination of the case, the Secretary of the Interior, on the ninth of April, 1862, ordered that a survey of the four by four arpents confirmed to him should be made, to be taken from the southeast part

* Nelson *v.* Lagow et al., 12 Howard, 110.

of the tract surveyed to the other claimant, and referred the matter to the Commissioner of the General Land Office to have the survey made in accordance with the order.

Corresponding survey was made on the eighth of May in that year, and on the tenth of June following the patent was executed and duly signed by the President. Particular reference is made in it to the survey for the description of the tract, and the patent contains the same reservation as that contained in the patent to the other claimant. Prior to the execution and delivery of that patent the title was in the United States, as is apparent from the documents exhibited in the record. Conceded originally to Joseph Brazeau, his incomplete title to the same remained unextinguished throughout the whole period of the litigation. He never sold the claim of four by four arpents to the other claimant, nor did he ever request that it should be surveyed or located in any place other than the one where it was ascertained to be by the first survey, and it is equally true that Labeaume never had any concession of that tract, that he never purchased it, and never had any title of any kind to any part of the concession, except the sixteen arpents as described in his deed from the rightful owner of the residue of the tract.

Even those most interested to do so will hardly contend, in view of these circumstances, that the court below could have sustained the defence set up in the answer, that the claim was barred by the statute of limitations, as the suit was commenced in less than five months after the official survey was made. Before that time the legal title was in the United States, and the claim of the plaintiff attached to no particular land. Obviously the same facts are also a complete answer to the defence set up by the respondents of a former recovery founded on the decree in the case of *Maguire* v. *Tyler et al.*, before cited, as the title to the land at that date was in the United States and continued to be so for a long time after the commencement of that suit.

Power to revise the surveys of confirmed claims was, by the act of the fourth of July, 1836, conferred upon the Commissioner of the General Land Office, subject in certain cases

to an appeal to the Secretary of the Treasury, but since the passage of the act of the third March, 1849, such supervision is devolved upon the Secretary of the Interior.*

Plaintiff in that suit claimed title under the survey made by Joseph C. Brown in 1817, and he denied that the Secretary of the Interior had the power to set it aside, but this court held that the secretary, under the last-named act of Congress, had that power, and, consequently, that the claim in question had no specific boundaries, and that it attached to no particular land, so that a court of justice could not give him a remedy.

Theory of the plaintiff in that case was, that the survey, under which he claimed to maintain the suit, had been illegally set aside, and if he had been right, the court would have had jurisdiction of the merits, as the case was one brought here from a State court, where the distinction, as to the remedy between legal and equitable titles, is not observed. But the respondent insisted that the survey had been legally set aside, and the court so held, and, in that state of the case, this court could not decide anything, under the twenty-fifth section of the Judiciary Act, except the question as to the power of the Secretary of the Interior to set aside that survey.

Some of the judges were of the opinion that there was no jurisdiction of the case, but it is apparent that those who were of a different opinion never, for a moment, supposed that the decree in the case would determine the ultimate rights of the parties. By affirming the decree rendered in the court below in that case, this court decided that the survey then in question was legally set aside by the Secretary of the Interior, but the court did not consider the merits, and did not decide anything upon that subject.

The respondents also allege that some of their number were innocent purchasers, without notice, but the defence is not sustained by the proofs, and there does not appear to be any foundation for the theory that the decree of the Supreme Court of the State was placed upon any such ground.

* 5 Stat. at Large, 108; 9 Id. 395.

Statement of the case.

Want of jurisdiction in the commissioners is also set up in the answer, and the argument is, that the Supreme Court of the State may have decided that the decree of confirmation was a nullity on that account. Unsupported, however, as the proposition is by anything appearing in the recorded proceedings of the board, it does not seem to be necessary to enter into any extended argument to show its fallacy. Suffice it to say that the question involved in the proposition is one which may be revised in this court, and the proper answer to it is, that if the court below so decided, the decision, in our opinion, was clearly erroneous.

Apart from the question of jurisdiction, it is also contended, by the respondents, that the patent under which the plaintiff claims is void, because the land therein granted is included in their patent, which is the elder title, but the error of the proposition consists in the theory of fact on which it is founded. Their patent does not include the same land. On the contrary, the land included in the plaintiff's patent was excepted out of their patent by the reservation therein contained, because it was a valid adverse right to four by four arpents of land within those boundaries, existing at the time their patent was executed.

Decree of the Supreme Court of the State REVERSED, with costs, and the cause remanded, with directions to affirm the decree of the St. Louis Court of Common Pleas.

Mr. Justice NELSON did not sit in this case; and GRIER, J., dissented from the judgment.

NOTE.

On the announcement of this decision, *Mr. P. Phillips, for the defendants in error,* moved to reform the entry of judgment just above ordered to be made, and argument was directed on the question "whether the decree should require the Supreme Court of Missouri to affirm the decree of the Court of Common Pleas of St. Louis."

Opinion of the court reforming the decree.

Messrs. P. Phillips and B. R. Curtis contended that as to the question of jurisdiction in the court below, and the several special defences set up in the answer of the defendants involving the statute of limitations, *res adjudicata*, *bonâ fide* purchase, and other matters of a similar character, this court had no jurisdiction.

The appellees here, who were appellants in the court below, were entitled to have these questions adjudicated by the Supreme Court of the State, which alone has jurisdiction over them.

The decree of that court dismissed the bill, but is silent as to the ground of dismissal. If it proceeded on either of these pleas, then this court has no jurisdiction to reverse it. If, on the other hand, the decree passed merely on the title derived from the government, then this court has jurisdiction to reverse the decree; but its reversal is limited to this question alone, leaving still open for adjudication by the State court the defences presented by the record, and which are of local jurisdiction, and no *opinion* of this court that they are invalid can deprive the parties of this right to have the judgment of the State court.

The mandate, as framed, directing the Supreme Court of the State to affirm the judgment of the Court of St. Louis, is in effect an affirmance by this court. Thus this court concludes questions which have never been passed upon by the Supreme Court of the State, questions not argued here, because the court is without jurisdiction to determine them.

The limitation of the judicial power of the United States is clearly defined by the Constitution, as well as by the Judiciary Act. Under the 25th section of that act this court may have a case brought here for review from a State court, but it does not follow that the case being here that this court has jurisdiction of all questions which arise on it.

In the present case the opinion of the court is limited to the question of title derived under the government. This properly concludes the controversy on that point. The complaint is that the judgment directed to be entered covers a much broader field. The mandate should direct proceedings in conformity with the opinion.

Messrs. Carlisle and Ewing, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Explanations as to the nature of the controversy involved in

the suit, or the proceedings in the courts of the State before the cause was removed into this court for revision, are unnecessary, as they are given with sufficient fulness in the opinion of the court delivered on the 5th of April last, on the same day and immediately before the decree was entered reversing the judgment of the Supreme Court of the State; and all those matters are well known to the parties before the court.

Pursuant to the order given at that time, the decree entered was, "that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed, with costs, and that this cause be, and the same is hereby remanded to the said Supreme Court, with directions to enter a decree affirming the decree of the St. Louis Court of Common Pleas." Dissatisfied with the directions given in the decree, the respondents moved the court that the decree in that respect might be modified, and the court, on the 15th of the same month, passed an order that the motion should be continued to this session, for oral argument on the question, whether the decree should require the Supreme Court of the State to affirm the decree of the Court of Common Pleas, as therein directed. Leave for any further argument upon the merits was not granted in that order, nor has the court reconsidered the questions previously examined and decided when the opinion was delivered. The court at that time decided the following propositions:

1. That the documentary evidences of title exhibited in this case, as derived under Spanish rule, did not invest Joseph Brazeau, the donee of the tract of four by twenty arpents, with a complete title to the tract.

2. That the legal title to the same under the treaty vested in the United States, as the successor of the former sovereign.

3. That the donees of incomplete titles in the territory ceded by the treaty, could not convert an incomplete title, derived from the former government, into a complete title under the United States in any other mode than that prescribed by an act of Congress.

4. That the incomplete title to the whole tract of four by twenty arpents was granted by Governor Zenon Trudeau to Joseph Brazeau, as described in the concession evidencing the grant.

5. That the deed from the donee of the tract to Louis Labeaume did not convey the four by four arpents now in contro-

versy, but that the title to the same, as acquired under the concession, still remained in the donee of the tract, by virtue of the reservation contained in the deed.

6. That the survey made by the Spanish surveyor did not have the effect to impair the incomplete title of the donee, nor to convey, assign, or transfer any interest whatever in the tract of four by four arpents to the grantee in that deed.

7. That the tract of four by four arpents was confirmed to the donee by the decree of the commissioners of September 10, 1810, and that the same was never confirmed to Louis Labeaume.

8. That the survey of Joseph C. Brown, in which he certified that he had surveyed for the applicant "two tracts in one," was in that particular erroneous, and that the survey so made did not have the effect to impair in any way the incomplete title held by the donee of the tract.

9. That Louis Labeaume did not acquire the legal title to the tract of four by four arpents under the patent granted to him, as the saving clause in the same reserved any valid adverse right which may exist to any part of the tract.

10. That the patent granted to Joseph Brazeau at the same time never became operative, as he refused to accept the same, and promptly returned it to the land department.

11. That the subsequent action of the Secretary of the Interior in cancelling the same, and in ordering a new survey, was authorized by law.

12. That Joseph Brazeau, by virtue of that survey and the patent granted to him, June 10, 1862, acquired the legal title to the tract of four by four arpents, notwithstanding the saving clause in the patent, as he was the rightful owner of the incomplete title to the same as acquired by the concession granted under Spanish rule.

13. That the tract as granted by the governor was bounded on the north by Rocky Branch, and on the south by the concession to one Esther, a free mulatto woman, and the reservation in the deed was of a tract of four arpents of land, to be taken at the foot of the hillock in the southern part of the land.

14. That the land reserved is bounded on the south by the concession to the mulatto woman, and north by the south line of the "sixteen arpents in depth" conveyed by the deed, and lies north of the ditch.

15. That the legal title to the tract of four by four arpents remained in the United States until June 10, 1862, when the patent was granted to the donee of the incomplete title under the former sovereign.

16. That the title of the donee before he obtained his patent was incomplete and attached to no land, and could not be converted into a complete title except by legal survey and by a patent, as required by law — because it stood as it existed in 1810, when the board of commissioners confirmed it as valid.

17. That the title of the donee, as perfected by the last survey and patent, is wholly unaffected by the judgment of this court in the case of *Maguire* v. *Tyler et al.*,* as this court in that case had no jurisdiction of the merits and did not decide any question, except that the action of the Secretary of the Interior, in setting aside the survey therein described, was a rightful exercise of authority.

Based upon these conclusions of law, the court gave the directions recited in the order passed at the regular session of this term, for an oral argument on the motion now pending before the court. In conformity to that order, the question involved in the motion, and therein recited, has been argued by counsel, and the court has reconsidered that part of the decree, and has come to the conclusion that a different direction would be more in accordance with the usual practice of the court in such cases than the one contained in the decree.

Governed by that consideration the court will modify the particular direction specified in the order for an oral argument; but the court adheres to the several propositions of law here recited, and refers to the opinion of the court delivered at the time the decree was entered for further explanations, as to the grounds upon which these conclusions rest.

The decree of reversal will stand unchanged; but the directions, as modified, will be, that the cause be remanded for further proceedings, in conformity to the opinion of the court.

NELSON, J., took no part in these directions; and GRIER, J., dissented from the judgment even as thus modified. The modification was ordered at the close of December Term, 1868.

* 1 Black, 195.

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