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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1869.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. IX.

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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. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. WILLIAM STRONG,
HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY.

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 APRIL 4, 1870, 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.		
HON. S. P. CHASE, Ohio.	FOURTH. MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	1864. December 6th. PRESIDENT LINCOLN.
ASSOCIATES.		
HON. SAML. NELSON, New York.	SECOND. NEW YORK, VERMONT, AND CONNECTICUT.	1845. February 14th. PRESIDENT TYLER.
HON. WM. STRONG, Pennsylvania.	THIRD. PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	1870. February 18th. PRESIDENT GRANT.
HON. N. CLIFFORD, Maine.	FIRST. MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	1858. January 12th. PRESIDENT BUCHANAN.
HON. J. P. BRADLEY, New Jersey.	FIFTH. GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	1870. March 21st. PRESIDENT GRANT.
HON. N. H. SWAYNE, Ohio.	SIXTH. OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	1862. January 24th. PRESIDENT LINCOLN.
HON. S. F. MILLER, Iowa.	EIGHTH. MINNESOTA, IOWA, MISSOURI, KANSAS, AND ARKANSAS.	1862. July 16th. PRESIDENT LINCOLN.
HON. DAVID DAVIS, Illinois.	SEVENTH. INDIANA, ILLINOIS, AND WISCONSIN.	1862. December 8th. PRESIDENT LINCOLN.
HON. S. J. FIELD, California.	NINTH. CALIFORNIA, OREGON, AND NEVADA.	1863. March 10th. PRESIDENT LINCOLN.

GENERAL RULES,

MADE AT DECEMBER TERM, 1869.

Amendment to the 67th Rule.

Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December Term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause unless by agreement of the parties, or by leave of court first obtained on motion for cause shown.

Additional Rules in relation to Appeals from the Court of Claims.

Rule 4. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

Rule 5. In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal, to this court.

TABLE OF CASES.

PAGE

Adams, United States *v.* 554
" " *v.* 661
Alexandria, Downham *v.* 659
Alleghany, The 522
Allis, Wise *v.* 737
Anderson, United States *v.* 56
Assessor, The, *v.* Osbornes, ... 567
Ayres, United States *v.* 608

Bank of Washington *v.* Nock, ... 373
Barney *v.* Schmeider, ... 248
Basset *v.* United States, ... 38
Belle, The Northern 526
Bennett *v.* Hunter, ... 326
Bernal, Lynch *v.* 315
Biessel, Mephams *v.* 370
Bigelow *v.* Forrest, ... 339
Bischoff *v.* Wethered, ... 812
Bolles, Jones *v.* 364
Bonner *v.* United States, ... 156
Bourne, Merryman *v.* 592
" *v.* Goodyear, ... 811
Bradley, Noonan *v.* 394
Burnett *v.* Caldwell, ... 290
Burns, Steamboat, ... 237
Bushnell *v.* Kennedy, ... 387
Butler *v.* Maples, ... 766

Caldwell, Burnett *v.* 290
Carpenter *v.* Williams, ... 785
Cheever *v.* Wilson, ... 108

PAGE

Chicago *v.* Greer, ... 726
" *v.* Sheldon, ... 50
City, The, *v.* Lamson, ... 477
" of Paris, ... 634
Collector, The, Hornthall *v.* 560
Commissioners, The, Worthy *v.* 611
Commonwealth, National Bank *v.* 353
Copelin *v.* Insurance Company, ... 461
Corsica, The, ... 630
Cox, Pierce *v.* 786

Deming's and Latham's Appeals, ... 145
Dewitt, United States *v.* 41
Downham *v.* Alexandria, ... 659
Durant, Supervisors *v.* 736

Eagle, The Gray, ... 505
Eldred, Michigan Bank *v.* 544
Ellett, Administrator, Wilkins *v.* 740
Ex parte Morris and Johnson, ... 605
" Zellner, ... 244

Fairbanks, The, ... 420
Filor *v.* United States, ... 45
Flanders *v.* Tweed, ... 425
Florida, Gleason *v.* 779
Forrest, Bigelow *v.* 339
Fremont County, Railroad Company *v.* 89
Frisbie *v.* Whitney, ... 187

Gleason *v.* Florida, ... 779
Goodyear, Bourne *v.* 811
" Rubber Company *v.* 788
" " 805
" " 807
Grapeshot, The, ... 129
Gray Eagle, The, ... 505
Green *v.* United States, ... 655
Greer, Chicago *v.* 726
Gregory The, The Washington and, ... 513

PAGE
Grossmayer, United States *v.* 72
Gut *v.* The State, ... 35
Guy, The, ... 758

Hammond, The Maggie, ... 435
Harriman, The, ... 161
Haver *v.* Yaker, ... 32
Herndon *v.* Howard, ... 664
Hickman *v.* Jones, ... 197
Hoe *v.* Wilson, ... 501
Hope, Star of, ... 203
Hornthall *v.* The Collector, ... 560
Hosmer, United States *v.* 432
Howard, In the matters of, ... 175
" Herndon *v.* 664
Hunter, Bennett *v.* 326

Ingle *v.* Jones, ... 486
Insurance Company, Copelin *v.* 461
" " *v.* Van Duser, ... 784
" " *v.* Weide, ... 677
In the matters of Howard, ... 175
Irvine *v.* Irvine, ... 617

Jackson, Norris *v.* 125
Johnson, Morris and, *Ex parte*, ... 605
" The, ... 146
Jones *v.* Bolles, ... 364
" Hickman *v.* 197
" Ingle *v.* 486
Justices, The, *v.* Murray, ... 274

Keehler, United States *v.* 83
Kennedy, Bushnell *v.* 387
Keokuk, The, ... 517

Lamson, The City *v.* 477
Latham's and Deming's Appeals, ... 145
Linthicum *v.* Ray, ... 241
Lionberger *v.* Rouse, ... 468
Litchfield *v.* Register and Receiver, ... 575

PAGE

Lobrano *v.* Neligan, ... 295
Lord, The Mayor *v.* 409
Lynch *v.* Bernal, ... 315

McGarrahan, The Secretary *v.* 298
McGoon *v.* Scales, ... 23
Maggie Hammond, The, ... 435
Maples, Butler *v.* 766
Mayor, The, *v.* Lord, ... 409
Meade *v.* United States, ... 691
Mephams *v.* Biessel, ... 370
Merill, United States *v.* 614
Merryman *v.* Bourne, ... 592
Michigan Bank *v.* Eldred, ... 544
Morris and Johnson, *Ex parte,* 605
Morse, Smith *v.* 76
Murray, The Justices *v.* 274

National Bank *v.* Commonwealth, ... 353
Neale *v.* Neales, ... 1
Nelligan, Lobrano *v.* 295
Nock, Bank of Washington *v.* 373
Nonesuch, The, ... 504
Noonan *v.* Bradley, ... 394
Norris *v.* Jackson, ... 125
Northern Belle, The, ... 526

Osbornes, The Assessor *v.* 567

Pacific Railroad Company, Thomson *v.* 579
Padelford, United States *v.* 531
Paris, City of, ... 634
Pelham *v.* Rose, ... 103
Pierce *v.* Cox, ... 786
Portsmouth, The, ... 682
Protector, The, ... 687
Public Schools *v.* Walker, ... 282
" " " 603

Quickstep, The 665

PAGE

Railroad Company *v.* Fremont County, ... 89
" " *v.* Smith, ... 95
" Pacific, Thomson *v.* 579
Ray, Linthicum *v.* 241
Reese *v.* United States, ... 13
Register and Receiver, Litchfield *v.* 575
Rocha, United States *v.* 639
Rose, Pelham *v.* 103
Rouse, Lionberger *v.* 468
Rubber Company *v.* Goodyear, ... 788
" " 805
" " 807

Scales, McGoon *v.* 23
Schmeider, Barney *v.* 248
Seamens, Swain *v.* 254
Secretary, The, *v.* McGarrahan, ... 298
Sheldon, Chicago *v.* 50
Smith *v.* Morse, ... 76
" Railroad Company *v.* 95
Star of Hope, ... 203
State, The, Gut *v.* 35
Steamboat Burns, ... 237
Suffolk County, ... 651
Supervisors *v.* Durant, ... 736
Swain *v.* Seamens, ... 254
Syracuse, The 672

The Alleghany, ... 522
" Assessor *v.* Osbornes, ... 567
" City *v.* Lamson, ... 477
" " of Paris, ... 634
" Collector, Hornthall *v.* 560
" Commissioners, Worthy *v.* 611
" Corsica, ... 630
" Fairbanks, ... 420
" Grapeshot, ... 129
" Gray Eagle, ... 505
" Gregory, The Washington and, ... 513
" Guy, ... 758

PAGE

The Harriman, ... 161
" Johnson, ... 146
" Justices *v.* Murray, ... 274
" Keokuk, ... 517
" Maggie Hammond, ... 435
" Mayor *v.* Lord, ... 409
" Nonesuch, ... 504
" Northern Belle, ... 526
" Portsmouth, ... 682
" Protector, ... 687
" Quickstep, ... 665
" Secretary *v.* McGarrahan, ... 298
" Star of Hope, ... 203
" State, Gut *v.* 35
" Steamboat Burns, ... 237
" Suffolk County, ... 651
" Syracuse, ... 672
" Washington and The Gregory, ... 513
Thomson *v.* Pacific Railroad, ... 579
Tweed, Flanders *v.* 425

United States *v.* Adams, ... 544
" " 661
" *v.* Anderson, ... 56
" *v.* Ayres, ... 608
" Basset *v.* 38
" Bonner *v.* 156
" *v.* Dewitt, ... 41
" Filor *v.* 45
" Green *v.* 655
" *v.* Grossmayer, ... 72
" *v.* Hosmer, ... 432
" *v.* Keehler, ... 83
" Meade *v.* 691
" *v.* Merrill, ... 614
" *v.* Padelford, ... 531
" Reese *v.* 13
" *v.* Rocha, ... 639
" Watkins *v.* 759

Van Duser, Insurance Co. *v.* 784

PAGE
Walker, Public Schools *v.* 282
" " *v.* 603
" *v.* Walker, ... 743
Washington, The, and The Gregory, ... 513
Watkins *v.* United States, ... 759
Weide, Insurance Company *v.* 677
Wethered, Bischoff *v.* 812
Whitney, Frisbie *v.* 187
Wilkins *v.* Ellett, Administrator, ... 740
Williams, Carpenter *v.* 785
Wilson, Cheever *v.* 108
" Hoe *v.* 501
Wise *v.* Allis, ... 737
Worthy *v.* The Commissioners, ... 611

Yaker, Haver *v.* 32

Zellner, *Ex parte*, ... 244

DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1869.

PROPERTY OF UNITED STATES SENATE LIBRARY

NEALE *v.* NEALES.

1. In the absence of obligatory rules of court to the contrary, a court of equity, after a cause has been heard and a case for relief made out, but not the case disclosed by the bill, has power to allow an amendment of the pleadings on terms that the party not in fault has no reasonable ground to object to.
2. And this amendment will be allowed on a bill for specific performance, where the subject-matter and general purpose of both bills is the same, and the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision, and are supported by proofs, taken under the original bill, which entitle the complainants to the relief which they seek.
3. Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. And this is particularly true where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift.
4. The principle applied in the case of an antenuptial parol promise, by a father, to give to a lady about to marry his son (an improvident person), a lot of ground, she promising at the time to lay out her own money in building a house upon it, for the benefit of herself and family; and where possession was delivered and the house was so built, but the father refused to convey the lot.
5. In case of an alleged contract, by a father, of this kind, reasonable certainty as to the fact and terms of it is all that equity requires.

Statement of the case.

6. The breach of such a contract is not to be compensated by damages, nor is the purpose of the contract so answered. It is a case for specific performance.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

Benjamin Neale and wife filed a bill in the court just named, against John E. Neale, father of the said Benjamin, stating that, he the father, was, in 1858, owner of lots Nos. 16 and 18 in Washington; that at the time mentioned, he, the son, one of the complainants, was seeking the hand of Mary Hamilton, the other complainant, and his now wife, in marriage; that this intended marriage met with the approval and encouragement of the father, who, in promotion thereof, and as an inducement thereto, promised and agreed that if said marriage should be consummated, he would, in consideration thereof, convey one, or a part of one, of the lots owned by him to *his son*, and Mary, his intended wife, *or to one of them*, in fee, to the end that with money then belonging to, or expected to belong to the intended wife, *they* might erect thereon a dwelling-house for *their* habitation and home; that confiding in the promise so made, and influenced thereby, and *partly* in consideration thereof, the said Benjamin and Mary did intermarry in September, 1858; that at or immediately after the marriage, the said father, mindful of the promise he had made, and with reference thereto, declared that he had given to his daughter-in-law, Mary, a lot in Washington on which to erect a dwelling-house for herself; that shortly after the marriage, and in part performance of his agreement, he put *his son* and daughter, the complainants, in possession of the unimproved part of lot No. 18, that *they* accepted the possession, and, with the consent of the father, erected thereon, with money belonging to the said Mary, and which was her separate estate, a dwelling-house, at the cost of $5000; that the said Mary consented to this application of the money belonging to her, cheerfully, because it was understood between herself and her husband that the said ground, with the house, was to be conveyed to her and her heirs, or in trust for her and their use; that, after the house was erected,

the complainants, Mary and Benjamin, took possession of it, with the knowledge and full approval of the father, who lived next door, and had been cognizant of the erection, and in part superintended it; and with his knowledge and approval, rented it to a Mrs. Degges; that the daughter-in-law received and applied the rents to her own uses; and that during the erection of said house, and after its completion, the father often avowed his intention to execute and deliver a deed of the lot and premises to his daughter-in-law, in accordance with his promise.

The bill further stated that in 1861, whilst the said husband and wife, complainants in the case, were temporarily absent from the city of Washington, the father, without their consent, took possession of the house, and had continued to occupy it ever since, against the wishes of the complainants; that even since taking possession of the house, in the manner mentioned, he, the father, had promised to execute a deed for the property to his daughter-in-law, but had, when applied to, refused to make such deed; and the bill charged that the dwelling-house and ground belonged in equity to said daughter-in-law, and that she was entitled to a conveyance thereof from the father, and to an account of the rents and profits thereof since he took possession of the same; and prayed that he might be accordingly ordered to convey to the complainant, Mary, and her heirs, or to some one in trust for her and their benefit, the said parcel of ground and premises, and to render an account of the rents during his occupancy.

The father in his answer admitted, that in 1858 he was possessed as owner of the lots, and that the complainant, Benjamin, was his son; but denied that he was desirous that his son should be married to the said Mary and settled in life, and promised to convey to the said Benjamin and Mary, or either of them, the lot, if such marriage should be consummated; or that in consideration of any such promise on his part such marriage did take place, or that in part performance of such promise he put the complainants in possession of such lot, or that confiding in such promise the

complainants did enter upon and take possession thereof and proceed to erect a dwelling-house thereon, as was alleged in the bill. He admitted that a dwelling-house worth about $5000 was erected by the complainant, Benjamin, on the ground; that he knew that the house was erected by the said Benjamin, who, after its completion, held the same until 1861; and he admitted that in July, 1861, during the absence of the complainants, he took possession of the house which had been abandoned by its tenant, and had since occupied it with his family.

The father denied further "that, after taking possession he promised, as alleged, to convey the ground, or that he so promised at any time," but *admitted* "that after the marriage of complainants, and in 1859, when the complainant, Benjamin, was about to receive certain moneys belonging to his wife from her guardian, he, the respondent, *knowing that the habits of the complainant, Benjamin, were intemperate, and wishing to secure to his said wife and children the said moneys, and satisfied that the same would be in jeopardy if paid over to complainant, Benjamin, and by him used in business*, consented, on the application of complainant, Benjamin, to give him lot No. 16 in said square, provided he would allow the respondent, or his wife's guardian, to build with the said moneys a dwelling-house thereon, and provided that the said moneys should not be paid into the hands of the complainant, Benjamin, but should, for the said purpose, be applied and disbursed by the respondent or by the said guardian; that the complainant, Benjamin, agreed to these terms, provided the said described part of lot 18, instead of lot 16, was given; and to this change that the respondent assented, subject to the terms and conditions aforesaid; that under this agreement the dwelling-house was begun, but that the said conditions were wholly violated by the complainant, Benjamin, who, without the knowledge or approbation of the respondent, received the said moneys from his wife's said guardian, and used the same in his own business, or otherwise, contrary to the agreement, disposed of same." That the erection of the house having progressed as far as the first story, his son in-

formed him that he, the son, would be disgraced and ruined if the work was stopped, and that he was without means to proceed further; that he, the father, then borrowed from one Mrs. Sears $2008, for which he gave his note, in which his son joined, and that the note was secured by a deed of trust upon said described portion of lot 18, that *this loan was paid over by him* (*the father*) *to the son, with the express agreement that it should be devoted to the erection of said dwelling-house*, and should not be otherwise disposed of; but that the agreement was violated, and the money used by the son in his business. That this debt was one of those due when the son failed in business, and *was paid by him, the father;* and the father averred that he never intended to give any part of lot 18, save upon the terms and conditions aforesaid, and that upon the violation thereof he considered himself absolved from his said promise, and more especially so, as his son *was largely beyond the value of the house indebted to him.*

The testimony, which was marked by some temper, was contradictory and conflicting; but the weight of it showed that the father did encourage the marriage of his son with Miss Hamilton, his now wife, one of the complainants. That he did promise to give the lot in question to *her*, as a bridal present, at the time and in furtherance of said marriage, it being understood that a dwelling-house was to be built on it with her money. And that with the father's consent, and upon the faith of the promise made by him, a house was erected on the lot with the wife's money. That the house was, after its erection, rented out by the complainants as their property, with the consent of the father, and that the rents thereof were received by them and applied to the use of the wife, with like consent, down to a certain time, when the tenants, becoming alarmed at the threatened invasion of the capital by the rebel army, abandoned the house, and when the possession of the father took place; his son and daughter-in-law being at the time in Maryland, from which State the latter originally came.

That the allegation of debt from the son to the father was not made out.

The father, however, set up and endeavored to show that a part of the money expended in the erection of the said dwelling-house was not the money of his daughter-in-law, but was, in reality, advanced by himself.

The evidence on this point showed that, the son having received from his wife's trustee enough to build the house, did not use it all in this way; but put about $2000 of it into his business; that early in 1861 he failed, and made an assignment of his entire stock and effects, amounting to about $23,000, to his father, the appellant, upon secret trusts. The father testified that he himself paid the $2008 borrowed from Mrs. Sears, from his own private funds; but the son testified, and in this he seemed to be supported by documentary and other evidence, that in making the assignment to his father, he made it subject to the prior payment of certain confidential debts, among which plainly was this one of $2008, for which the lot was mortgaged to Mrs. Sears; and that it was paid out of the proceeds of the stock and effects assigned.

The cause being at issue and set down for hearing, was heard in the first instance upon the original bill, answer, and testimony taken thereunder, by the Supreme Court of the District of Columbia, and after it had been heard, and the proceedings had been read and considered, the said court, of its own motion, and without assigning any reason for their action, "ordered that the complainants have leave to amend their bill filed in the cause *on payment of costs*, the amendment to be filed on or before the 15th of November, 1866."

The case was accordingly heard on an amended bill, which, instead of alleging that the father had promised to give the son or his wife the lot, alleged that he promised to give the lot to *the wife*, it being understood that she would allow her money to be expended in building upon it a dwelling-house for *herself and her heirs*. On the amended pleadings, and on substantially the original evidence, the case was heard again, and a decree made that the father should make a deed to a trustee of the house and lot, for the sole use and benefit of his son's wife, freed from liability for the

son's debts, or those of any other husband; and that he should account for the rents since the filing of the bill. From that decree the case was now here on appeal.

Messrs. Davidge and P. Phillips, for the father, appellant in the case, contended—

1. That after publication had passed, and the case had been set down for hearing, the bill could not be amended in any other respect than by making new parties. That here the original bill alleged that possession was given to *both* husband and wife, and accepted by *both*, and the house erected by the husband with moneys which had been reduced into possession by him; that the whole scheme of it was for the recovery of property in which a married woman might have an interest subject to the marital rights of her husband, whereas the amended bill set up a claim adverse to said marital rights; that this changed the framework of the bill, and made a new case.

2. That to take a case out of the statute of frauds upon the ground of part performance, it was indispensable, not only to show that there was *some* contract, but to show a contract, clear, definite, and unequivocal in all its terms; that here the terms, as set out in the original bill, were to give and convey, in consideration of the marriage of the complainants, to *both* of them, or *one* or the *other* of them, *one* or *part* of *one* of the lots whereof defendant was seized, to the end that with money then belonging or expected to belong to the oratrix, *they* might erect thereon a dwelling-house for their habitation and home. How could such a contract be specifically performed? Here were three distinct and inconsistent contracts averred in the bill, and each alleged to have been made in reference to real estate, but to what real estate was left wholly uncertain by the contract. If the contracts were to be regarded as in the alternative, which was not alleged, to which of the three parties belonged the election as to how it should be executed, and when was that election to be exercised?*

* See Cox *v.* Cox, 26 Pennsylvania State, 375.

That, independently of all other things, as a repayment of whatever money of the wife had passed into the lot, would make her whole, the case, if a case for anything, was one for damages, and not for specific performance.

Messrs. Webb and Kennedy, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It would seem clear, from the manner in which the court below, of its own motion, and without assigning any reasons for this action, gave the complainants leave to amend their bill, that on the original hearing it was satisfied that the evidence made out a case for relief, but a case different from the one stated in the bill; and, that as the pleadings must correspond with the evidence, it was necessary either to dismiss the bill without prejudice, or to give the leave to amend. The court adopted the latter alternative, doubtless, with a view to save expense to the parties, and because such a course could not, by any possibility, work any harm to the defendant.

It is insisted that this proceeding was erroneous; that after a cause has been heard, the power of allowing amendments ceases, or if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, although on the same subject-matter, as, it is contended, was done in this instance under the leave to amend.

This doctrine would deny to a court of equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief

made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities.*

Necessarily, in a Federal tribunal the matter of amendment at this stage of the progress of a cause rests in the sound discretion of the court. At an earlier stage, this discretion is controlled by the rules of equity practice adopted by this court, but not so upon the hearing, for there is no rule on the subject of amendments applicable to a cause which has advanced to this point. As, therefore, the leave to amend in this instance was within the discretion of the court, we will proceed to dispose of the case on its merits.

It is unnecessary, in the view we have taken of the power of the court over amendments at the hearing, to discuss the question whether the amended bill is materially different from the original bill. It is enough to know, if different, that the subject-matter of both bills is the same, and that the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision, and, if supported by proof, entitle the complainants to the relief which they seek at the hands of a court of equity. The statute of frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed. And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by

* Mitford's Chancery Pleading, 326, 331; Story's Equity Pleading, §§ 904 and 905; Daniel's Chancery Practice and Pleading, 463, 466; Smith v. Babcock, 3 Sumner, 583; McArtee v. Engart, 13 Illinois, 242.

the promise to give it, has made valuable improvements on the property. And this is particularly true, where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift.*

Was this gift in question made to Mary H. Neale and her children, and has the condition on which it was given been performed so as to make it inequitable for the donor to escape from his engagement? We do not propose to discuss the evidence at length, in order to vindicate the conclusion we have reached in regard to it. It is in many respects conflicting and contradictory, and it is to be regretted that the contest over this property, like all contests between near relations, has elements of bitterness in it. It is enough to say, for the purposes of this suit, that on the whole evidence it is reasonably certain that John E. Neale agreed to give to Mary Hamilton, who was about to marry his son, in furtherance of the marriage, the lot in controversy, for the benefit of herself and children, and for a home for the family, if, with her means, a suitable dwelling-house was erected on it, and that *this* has been done. On no other theory of this case are the undisputed facts reconcilable with the conduct of the parties. There is no dispute that the husband, before and after marriage, was of dissipated habits; that the father knew it, and had but little confidence in his ability to manage money with judgment, and was desirous that the property of the wife should not be embarked in the husband's business. What so natural as that a father, having a son of this character about to marry a lady of property, should wish to have her property secured against the consequences of her husband's improvidence and dissipation. This could not be done, as he had a lot to give on the occurrence of the marriage, by agreeing to give it to the son if he improved it with his wife's means, because he might sell it and waste the money, or become involved in debt and lose it in that way. Indeed, we are assured from the father's own estimate of his

* 1 Leading Cases in Equity, American note to Lester *v.* Foxcroft, 625.

son's character, he feared the happening of one or the other of these events in case he donated the lot to the son, and, to avoid placing his own gift and the wife's inheritance in equal peril, he did what any other parent under like circumstances would have done, gave the lot to the wife, so that, if improved by her, it would be safe at all times from the effects of the husband's folly, and be a secure home for the family. It is true, the declarations of the father on the subject, are, literally taken, contradictory, but we place but little reliance as evidence on his statements made to some witnesses, that the gift was to the son, because they are in conflict with statements frequently made at different times to other persons, that the gift was to the wife, and are inconsistent with his conduct and motives fairly deducible from the other evidence in the case. Besides, in one sense, it is true the gift was to the son, as it was for his benefit, and would not have been made if he had remained single, and in this sense the father doubtless meant his declarations on the subject to be received.

As, therefore, the gift was to the wife, and in fee simple, for a less estate would not secure the object the father had in view, it remains to be seen what was done with the property after the intermarriage of the parties. And here the character of the evidence, and its effect on the issue we are considering, cannot be misapprehended. It appears that shortly after the marriage the house was built with money belonging to the wife, and with the knowledge of the appellant, who lived on an adjoining lot and acted, according to one witness, as general supervisor in the matter. It further appears that on the completion of the house the newly married couple lived in it, for a season, and afterwards rented it, and that during their absence on a casual visit to Maryland in 1861, it having become temporarily vacant by the withdrawal of the tenant, the appellant, without their knowledge and consent, moved into it and still retains possession of it. It is impossible, in view of these facts, which prove that the condition of the gift had been performed, to escape the conclusion that the father at the outset was satisfied with the arrangement,

and that his subsequent conduct, tending to show that he had disavowed it, was an afterthought.

It is insisted that a part of the money used in building the house was advanced by the father, who, in conjunction with the son, borrowed it from Mrs. Sears, and that, therefore, the consideration, *pro tanto*, for the gift has failed. It is clear that the husband received from the wife's guardian more money than was required to build the house, and had agreed with her to devote enough of it to this purpose, but, instead of doing this, unfortunately, he employed a portion of it in his store, which rendered necessary the Sears loan. This loan, secured by the father on the property in controversy, stood on the books of the son as a confidential debt due his wife, and when he failed and assigned his property, he recognized it as such and preferred it over all other debts. There was certainly nothing wrong in this provision, which relieved the property of the wife of an incumbrance created because the husband had misappropriated her money, and, as the father accepted the trust under the assignment, with this debt thus preferred, and at the same time received sufficient property to pay it, it is hard to see wherein he has cause of complaint in this matter, or how he can truthfully say he paid any part of the money that went into the house. In any proper sense the house was built with the wife's money, and equity will give her the benefit of it in this controversy with the father.

As before remarked, the case as stated is made out with reasonable certainty, which is all that is required.* Any other degree of certainty in a case of this character is unattainable.

Damages will not compensate for the breach of this contract, nor answer the intention of the parties to it, and a specific performance is therefore essential to the complete ends of justice.

DECREE AFFIRMED.

* 1 Leading Cases in Equity, American note to Lester *v.* Foxcroft, *supra*; Mundy *v.* Jolliffe, 5 Mylne & Craig, p. 177.

REESE *v.* UNITED STATES.

1. Where the condition of a recognizance of bail in a criminal action pending in a circuit court of the United States, provided that the party held to bail should appear for trial at the next regular term of the court, and *at any subsequent term thereafter*, the latter clause is construed to mean that the party shall appear at any subsequent term which may follow in regular succession in the course of business of the court, and not at any distant future term to which either party might be disposed to postpone the trial, without reference to any intervening term.
2. Where a stipulation was made between the parties to a criminal action (the government and the prisoner), and entered in the minutes of the court, to postpone the trial of the action until the determination of cases pending in another court; *held*, that the stipulation was inconsistent with the condition of a recognizance of bail, that the principal should appear for trial at any subsequent term following the then next term in regular succession; and that it released the principal from the obligation to appear at any such subsequent term.
3. Although the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts, yet their positions are similar in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent.
4. By a recognizance of bail in a criminal action the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is subjected or can be subjected by them to constant imprisonment, but that he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty.
5. This power of arrest can only be exercised within the territory of the United States; and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their assent. There is also an implied covenant on the part of the government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him.
6. Accordingly when in a criminal action a stipulation was made and entered in the minutes of the court, between the government and the defendant, who had given bail for his appearance for trial, that he might depart without the territory of the United States to a foreign country, and remain there until certain civil cases pending in another court were

finally disposed of, and such stipulation was made without the knowledge or assent of the sureties on the recognizance of bail, *held* that the sureties were released.

ERROR to the Circuit Court for the District of California; the case being thus:

In December, 1856, one Limantour was indicted at San Francisco by the grand jury of the Circuit Court of the United States for uttering and publishing as true, to the board of land commissioners created under the act of March 3d, 1851, to ascertain and settle private land claims in the State of California, a false writing, purporting to be a grant of certain described lands in California from the Mexican government, with intent to defraud the United States, knowing the same to be false. To this indictment Limantour appeared and pleaded not guilty. He was then admitted to bail, on motion of his counsel, the amount being fixed, by order of the court, at $30,000.

Soon after the issue was thus joined, a motion was made on the part of the United States to set the case for trial early in January, 1857. This motion was resisted, and at the same time application was made on the part of Limantour for a continuance of the cause, and in support of the application his affidavit was read, in which he asserted the genuineness of the grant alleged by the United States to have been forged, and that it was made at the time and by the officers as averred by him. For alleged perjury in making this affidavit the grand jury soon afterwards found a second indictment against him. To this indictment he also appeared and pleaded not guilty, and, upon the motion of his counsel, was admitted to bail, its amount being fixed at $5000.

By order of the court the recognizance of bail was taken in one instrument, the obligation of the sureties being the amount required in both cases. The defendant, Reese, and one Castro, became the sureties of Limantour, binding themselves jointly and severally in the sum designated. Upon this recognizance the United States brought suit; the present action. The recognizance recited the finding and presentment of the two indictments, the commitment of Limantour

thereon, and the order of the court for his discharge on furnishing the required bail, and was conditioned that Limantour should personally appear at the next regular term of the Circuit Court to be held in the city of San Francisco, *and at any subsequent term to be thereafter held in that city*, to answer all such matters and things as should be objected against him, and to abide the order of the court and not depart therefrom without leave first obtained. This recognizance was dated the 5th of February, 1857.

At the subsequent term of the Circuit Court, in August of that year, Limantour appeared and was ready and pressing for trial in both cases, with witnesses in attendance from the city of Mexico. The district attorney thereupon moved for a postponement of the trials. At this time two cases of Limantour for land claimed under alleged Mexican grants were pending in the District Court of the United States on appeal from decrees of the land commissioners, by whom the claims had been confirmed. One of the cases was for a claim under the alleged forged grant. The witnesses in attendance were persons who had been brought from Mexico to testify in the land cases, and they were obliged to return without delay. It was therefore stipulated between the district attorney and the counsel of Limantour, on the one side that the postponement desired by the government should be assented to, and on the other side that neither of the criminal actions should be brought to trial until after final decrees had been rendered in the two land cases by the District Court; and if both or either of the decrees were in favor of the claimant that the criminal actions should be dismissed by the United States; but if the decrees were adverse to the claimant that reasonable time should be given him to prepare for the trial of the criminal actions, and to procure the attendance of such of his witnesses as resided without the State of California. The stipulation was entered upon the minutes of the court, and the postponement desired was granted, by order of the court, in accordance with its terms.

With this stipulation, the sureties on the recognizance had nothing to do in any way, and had, in fact, no knowledge of it.

Argument for the plaintiff in error.

It was proved at the trial, without objection, that it was fully understood by all parties at the time that if the stipulation should be made, Limantour and his witnesses would return to Mexico and remain there until the civil cases in the United States District Court were finally disposed of, and that Limantour should afterwards have time enough allowed him to give notice to his witnesses and get them and return with them to San Francisco.

The result was that the witnesses of Limantour returned at once to Mexico, and after two or three months' delay Limantour followed them, and never returned to California.

In November, 1858, the District Court by its decrees rejected the claims of Limantour in both of the land cases, and soon afterwards the district attorney moved that the criminal actions be set for trial. After repeated adjournments the motion was finally argued and decided in March, 1859, and on the 26th of that month were set for trial for the 25th of April following. On this latter day the two actions were called, and Limantour was called in both, but he did not appear in either of them, and thereupon an order was entered forfeiting the recognizance of bail.

By stipulation of the parties the case was tried in the Circuit Court without the intervention of a jury, and that court gave judgment for the United States. The surety, Reese, accordingly brought the case here by writ of error.

Mr. E. Casserly, in his behalf, citing, and relying particularly upon *Rees* v. *Berrington*,* and the English and American notes to it, as given in the Leading Cases in Equity,† in which case Lord Loughborough states that it was "the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern with the principal debtor," argued that though the recognizance here was, when taken, a valid obligation, yet that the sureties had been discharged by matter subsequently arising out of the written stipulation for a post-

* 2 Vesey, 540.

† Vol. 3, pp. 819, 822, 827, 559, 560.

ponement of the criminal actions against their principal, Limantour, for a long and uncertain period, made, without their knowledge or privity in any way, between him and the United States, in August, 1857, and then entered as an order of court; and by the circumstances connected with the same.

The Attorney-General, Mr. Hoar, submitted the case on the record, which contained the opinion of the court below, in which the court observed on this particular point that the stipulation of August, 1857, though most unusual in all its features, might be justified. The court said:

"The grant alleged to be forged, and in swearing to the genuineness of which the forgery was charged, had been adjudged valid by the board of land commissioners, and the appeal from its decree was at the time pending undetermined. The postponement of the trial until this appeal was disposed of was a very proper exercise of the power of the court, provided the accused waived his right to a speedy trial and assented to the postponement. In this act we do not perceive any ground upon which the bail can claim exemption from liability on their recognizance. They were not bound to continue as sureties any longer from this circumstance than without it. They could at any time afterwards have surrendered the defendant and been exonerated. In the theory of the law he was in their custody, as jailers of his own choosing, subject to be surrendered at any moment. If they failed to exercise their power over him they must bear the responsibility attached to the position they voluntarily assumed."

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

As a defence to this action the defendant relied in the Circuit Court upon several grounds, the principal of which were these:

First. That the acts charged in the two indictments did not, at the time of their alleged commission, constitute any offence under the laws of the United States; and, as a consequence, that the indictments and all proceedings there-

under, including the requiring of bail for the appearance of the party indicted, were void.

Second. That if the indictments and proceedings thereunder were not void, the stipulation of August, 1857, for a postponement of the trials, released the sureties from liability on their recognizance; and

Third. That the recognizance was void in embracing the amount required as bail upon both indictments.

The third ground here stated is not pressed in this court. The other two grounds are substantially the same which are urged here, differing only in their form of statement. Upon the first of these we express no opinion. Upon the second we are of opinion that the Circuit Court erred, and for reasons which may be briefly stated.

The condition of the recognizance provided for the personal appearance of Limantour at the then next regular term of the Circuit Court in San Francisco, and also at any subsequent term to be thereafter held in that city. It has been suggested that the provision for the appearance of the party at any term subsequent to that succeeding his arrest is unusual and invalid, but we do not pass upon the suggestion, and for the purposes of this case we shall treat the recognizance as unobjectionable in form. At the next regular term after its execution the party personally appeared with his witnesses and pressed the trial of the indictments. The first portion of the condition of the recognizance was thus complied with. The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. It was inserted to obviate the necessity of renewing the bail every time the cases were, from any cause, continued from one term to another. It was not intended to apply to any distant future term to which either party might be disposed to postpone the trials without reference to any intervening term. The principal and sureties by their recognizance covenanted with the United States that the principal should appear before the court and answer all such matters as might be objected against him at the next term, and from

term to term until the cases were disposed of; not that he should appear at the next term, and then at a term years later, depending for its designation upon the happening of a contingent event.

The stipulation in this case was for a postponement of the trial of the criminal actions for a period of uncertain duration; until final decrees should be rendered by the District Court of the United States in certain cases pending on appeal from the board of commissioners created under the act of March 3d, 1851, to ascertain and settle private land claims in the State of California. Cases on appeal from that board were not heard upon the record transmitted to the court, and therefore were not subject to be disposed of whenever they could be argued. They were tried anew upon the testimony and proceedings had before the board and such further testimony as might be produced by the parties in the District Court.* The proceedings in the court advanced slowly when new testimony was produced, as it was required to be taken in writing and by question and answer. Independent of this circumstance it was difficult to anticipate the period which any case, meeting with opposition and seriously contested, would occupy. The difficulty of determining in advance the duration of litigated proceedings, which exists in all cases, was increased with respect to Mexican land cases, appealed from the board to the District Court of the United States, by a variety of causes; among others, from the manner in which the testimony was taken, as already stated; the necessity of looking into the archives of the former department of California, and sometimes of the supreme government at the city of Mexico; of examining Mexican witnesses, ignorant of our language, and of interpreting Mexican and Spanish usages, ordinances, and laws. In the cases of the city of San Francisco and of the city of Sonoma,† the appeals were pending in the District Court for over eight years. These cases of Limantour involved lands in the city of San Francisco

* United States v. Ritchie, 17 Howard, 533; Grisar v. McDowell, 6 Wallace, 375.

† 3 Wallace, 684.

and adjoining it, covered with buildings and expensive and permanent improvements, which were of the value of many millions. His claims were, for this reason, as well as their supposed fraudulent character, vigorously contested, not only by the United States, but by citizens of San Francisco, acting in concert with the district attorney. A final disposition of them until after the lapse of many months, and perhaps of several years, could not, therefore, have been reasonably anticipated.

The stipulation to postpone the trials until after such final disposition was inconsistent with the condition of the recognizance. It released Limantour from the obligation of appearing at any subsequent term following the then next term in regular succession. It substituted for it an agreement that he need not appear at any such subsequent term, but only at such term as might be held after the happening of an uncertain and contingent event. The stipulation, in other words, superseded the condition of the recognizance.

This will readily appear if we consider the condition, which, subsequent to that stipulation, must have been exacted in a new recognizance, if the sureties on the present recognizance had surrendered their principal. It could not have been for the appearance of the defendant at the next regular term thereafter, or any succeeding term, for such a condition would have been inconsistent with the stipulation. It could only have been for his appearance at such term as might be designated by the district attorney or the Circuit Court, after the final decrees were rendered by the District Court in certain land cases pending therein on appeal from the board of land commissioners; provided always, that such decrees were against the claimant; and provided further, that the term designated allowed reasonable time to the defendant to prepare for trial, and to procure the attendance of witnesses residing out of the State. It requires no argument to show that a condition like this would be a very different one from that embodied in the existing recognizance.

If, now, we apply the ordinary and settled doctrine, which

controls the liabilities of sureties, it must follow that the sureties on the recognizance in suit are discharged. The stipulation, made without their consent or knowledge, between the principal and the government, has changed the character of his obligation; it has released him from the obligation with which they covenanted he should comply, and substituted another in its place.

It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking.

There is also another view of the stipulation which leads to the same result. By the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is, in point of fact, in this country at least, subjected or can be subjected by them to constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty. This power of arrest can only be exercised within the territory of the United States; and there is

an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their assent. There is also an implied covenant on the part of the government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him.

The stipulation in this case was made with the distinct understanding of the parties, that upon its execution Limantour and his witnesses would return to Mexico, and would remain there until the civil cases in the District Court were finally disposed of, and that he should afterwards have time allowed him to obtain his witnesses and return to this country with them. The government thus consented that Limantour might depart out of the territory of the United States to a foreign country, where it would be impossible for the bail to exercise their right to arrest and surrender him; and further, it consented that he might remain abroad for a period of indefinite duration. This was all done without the concurrence or even knowledge of the sureties, whose risks were thus greatly increased.

It would be against all principle and all justice to allow the government to recover against the sureties for not producing their principal, when it had itself consented to his placing himself beyond their reach and control.*

Judgment REVERSED, and the cause remanded for a new trial.

* Rathbone *v.* Warren, 10 Johnson, 587, 589; Niblo *v.* Clark, 3 Wendell, 24, 27; S. C. on error, 6 Wendell, 236, 245; Bowmaker *v.* Moore, 7 Price, 223, 231, 234; S. C., 3 Price, 214.

Statement of the case.

McGoon *v.* Scales.

1. A sale of the public land for State taxes while the land is still owned by the United States is invalid.
2. The law of the State in which land is situated, governs its alienation and transfer, and the effect and construction of deeds conveying it, wherever they may be made.
3. The statute of Wisconsin of 1850 abolishes all passive trusts which require no duty to be performed by the trustee, and vests the title in the *cestui que trust.*
4. The statutes of Illinois of March 1st, 1847, and those previous thereto, and the deed of the late Bank of Illinois made under them to close its affairs, left the real estate of the bank liable to execution for its debts.
5. The proceedings of a creditor of the bank to subject such real estate lying in Wisconsin to the payment of its debts, had in the courts of Wisconsin, must be governed by the laws of that State made for such cases.
6. The State of Wisconsin had a right to pass laws to subject such lands to the payment of the debts of the bank, though the corporation had ceased to exist as such by the laws of Illinois. The only limitations on the right of the legislature to prescribe the mode of doing this, being the Constitution of the State and of the United States.
7. A sale made to one not a party to the suit, under a judgment or decree, will be valid, though the judgment may afterwards be reversed.
8. If the court rendering the judgment had jurisdiction, and the officer who sold had authority to sell, the sale will not be void by reason of errors in the judgment or irregularities in the officer's proceedings, which do not reach the jurisdiction of the one or the authority of the other.

Error to the Circuit Court for the District of Wisconsin; the case, or the only parts of it, which the court deemed it necessary to notice, being thus:

McGoon brought ejectment against Scales in the court below for a piece of land in *Wisconsin Territory*, which the United States had granted to one Gear. Both parties claimed under Gear.

The defendant Scales's title, which it will most conduce to clearness to consider first, was thus:

On the 2d of November, 1842, Gear and wife conveyed the land in question to James Campbell as trustee of the State Bank of Illinois, and though the patent from the United States issued to Gear ten years later, it is conceded

by both parties that its effect was to make good the title conveyed by him to Campbell. The deed, after reciting that Gear was indebted to the bank in the sum of fifty thousand dollars, to satisfy which debt the bank had agreed to take the real estate mentioned in the deed, conveyed the land to Campbell, who was to stand seized of the premises upon the trust and confidence that they should be sold by him for such a sum as should be directed by the bank, and the proceeds applied to the sole use and benefit of the bank; and if not sold, then that Campbell was to stand seized to the use of the bank and its assigns.

Campbell did not sign the deed nor accept the trust otherwise than by silence.

In 1850 the legislature of Wisconsin passed a statute which abolished uses and trusts except as preserved in the act. One of the provisions of the statute was that—

"Every person who, by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof in law or equity, shall be deemed to have the legal estate therein."

Other provisions of the statute defined the only cases in which valid express trusts might be made.

On the 31st October, 1848, the bank made a conveyance of the lands to Manly, Calhoun, and Ridgely for the benefit of the creditors of the institution and for the payment of its debts. The deed, however, was special in form, and made under circumstances which it is necessary to state. For many years before it was made the bank had been embarrassed, and several statutes were passed by the legislature of Illinois for the purpose of enabling and compelling it to close its business and pay its liabilities. The last of these, approved March 1st, 1847, required the officers of the bank, if they should not have closed up its affairs prior to the 1st day of November, 1848, to turn over to three persons to be named by the governor, all the property, rights, and credits of the bank, when the trustees were to proceed to wind up its affairs. The

governor, under this act, named Manly, Calhoun, and Ridgely as the persons to take charge of the bank, and on the day before the power of the bank to act ceased by law the conveyance we have mentioned was made by order of the board of directors. In this deed of conveyance they recited that it was made in pursuance of the act of March 1st, 1847, and for the purpose of carrying into effect its provisions, and that it was made to those persons because they had been so appointed by the governor under that act.

The last section of the act just referred to, after that previous section of it, and, indeed, previous statutes had fully defined the duties and powers of these trustees, declared that "the real estate of said bank shall be liable to taxation and sale on execution in the same manner as the property of individuals."

In this state of things, a statute of Wisconsin having declared that "lands, tenements, and real estate holden by any one in trust for another, shall be liable to debts, judgments, decrees, executions, and attachments against the person to whose use they are holden," one Henry Corwith, in August, 1853, commenced a suit in the State court of Wisconsin against the State Bank of Illinois, and attached these lands. Manly, Calhoun, and Ridgely entered an appearance to the suit, and moved to dissolve the attachment; and the bank, by its attorney, appeared and defended the suit.

Under these proceedings (the legislature of Wisconsin having made provision by special statute for a case in which a bank, whose functions had ceased, but which yet owned property, and owed debts in Wisconsin, might be sued and the property subjected to the payment of those debts), Corwith got judgment; and by a writ of execution, which had no seal at the time, though one was afterwards put by order of the court, upon motion to amend, sold the land to one Earnest (no party to the suit), who transferred his certificate to Scales, the defendant. The judgment under which this sale was made was afterwards set aside; but after many efforts in the State courts to set aside this *sale*, it was finally affirmed

in the courts of Wisconsin, including the Supreme Court, and the defendant, Scales, received the sheriff's deed on that sale on the 17th March, 1868.

Such was the defendant's title. The plaintiff claimed under several different titles. Among them was:

1st. By deed of quit-claim from Gear, dated January 17th, 1867.

2d. By deed dated July 12th, 1865, from James Campbell, trustee under Gear's trust deed of November, 1842.

3d. By deeds under tax sales, in 1849, from the clerk of the board of supervisors of the county in Wisconsin where the lands were, to the county, and from the county to him, McGoon, the plaintiff.

The court below told the jury that the defendant's title was the true title, and the verdict and judgment having gone accordingly, the case was now here for review.

Messrs. Carlisle and Magoon, for the plaintiff in error, contended,

That the deeds under the tax sales, in 1849, of themselves passed title.

That Gear's deed of trust to Campbell vested the estate in Campbell alone; that the estate was not a dry estate, but an active trust, and the trustee's title in ejectment good against the world. The recent and as yet unreported case of *Goodrich* v. *City of Milwaukee*, in the Supreme Court of Wisconsin, on which the counsel much relied, showed this, as they argued. Accordingly, the Wisconsin statute of 1850 had not vested the estate in the bank, but it remained in Campbell, and by his deed of 1865 passed to McGoon.

Even if this were not so, that the bank, by its general assignment of 31st October, 1848, had passed the lands to those trustees, and that nothing remained on which Corwith's attachment of 1853 against the bank could operate.

That, independently of all these, the bank, in 1853, was dead in law, its charter having expired, and itself having assigned all its estate.

That the judgment under which the sale was made was reversed, and that the sale made under it fell accordingly.

That the execution had no seal, a defect which by common law and the statutes of Wisconsin made the writ void.*

Mr. Justice MILLER delivered the opinion of the court.

The shortest and most satisfactory mode of showing the reasons for our judgment is to examine the title of defendant, which the jury were told was the true one.

If the attachment proceedings conveyed a good title, it must prevail; and we proceed to an examination of some of the objections to it.

1. It is claimed that the land was sold for State taxes in April, 1849, and that the title under that sale became vested in plaintiff.

The answer to this is, that the land was then owned by the United States and was not subject to State taxation, the sale to Gear having been made in 1851, and the patent issued in 1852.

2. It is claimed that at the time the attachment in favor of Corwith was levied on these lands, in his suit against the State Bank of Illinois, they were not subject to attachment and sale for the debts of that institution.

In establishing this proposition it is first asserted that the legal title never vested in the bank.

The deed from Gear to Campbell, in our judgment, did vest the legal title in the bank after the act of 1850. It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances.

The effect of the statute of Wisconsin, passed in 1850, was to abolish all passive trusts in which the trustee held a mere naked or dry trust for the use of the *cestui que trust*, and to vest the title in the beneficiary. And the only question

* Insurance Company *v.* Hallock, 6 Wallace, 556.

to be decided in this connection is whether the deed of Gear to Campbell is of this character.

The bank buys the land of Gear for fifty thousand dollars, the amount of its debt against Gear, which is thereby satisfied. Campbell does not sign the deed or accept the trust otherwise than by silence. If the land is not sold, he holds the naked legal title to the use of the bank and its assigns. The only possible event in which he may be called into action is on a sale of the land. It is equally clear, that in this sale the only part to be performed by him was to make conveyance. He is to sell for such sum or sums as shall be directed by the president, directors, &c., of the bank, and they are to receive the proceeds of sale. In other words, they find a purchaser at such price as they may be willing to take, they receive the purchase-money, and Mr. Campbell makes a conveyance. It is difficult to conceive of a more passive trust, or one in which the trustee may be called upon to do less than in this.

A case decided recently by the Supreme Court of Wisconsin is produced to us in manuscript, and much relied on as holding views adverse to those above stated. But we think it supports them. That court says, that "by the statute of uses and trusts passive trusts are abolished. By passive trusts we mean those which are express, or created by the words of some deed or other instrument of writing, and not those arising or resulting by implication of law. Every express passive trust is abolished, and the deed or instrument by which it is created, or attempted to be, takes effect as a conveyance directly to the *cestui que trust* in whom the legal title vests, and the trustee acquires no estate or interest whatever. A conveyance of land from A. to B. to the use of or in trust for C., the trustee having no active duties to perform, constitutes a passive trust."

We think this is a sound construction of the statute, and that the deed to Campbell comes within it. In the case before the Wisconsin court the trustee was directed to bargain, sell, and convey, to lease, demise, and mortgage the lands as he might be directed by the *cestui que trust*, and to

pay over to her all the moneys arising from said property, whether from rents, sale, or mortgage, and take her written receipt therefor, and to reinvest the same from time to time as she should in writing direct.

There can be no doubt that this trust was an active one, and as little that the one before us was not.

But if this were otherwise, a statute of Wisconsin in force when the land was sold under Corwith's judgment declares, that "lands, tenements, and real estate holden by any one in trust for another, shall be liable to debts, judgments, decrees, executions, and attachments against the person to whose use they are holden." So that if the trust in Campbell was a valid one, these lands were still liable to be sold on execution for the debt of the bank. Nor can it be doubted that such a sale, when lawful in all other respects, and completed by the conveyance of the sheriff, vested in the grantee the legal title to the land.

But it is said, secondly, that conceding the title to have been vested in the bank, that corporation had made a conveyance of the lands, before Corwith's proceedings were instituted, to Manly, Calhoun, and Ridgely, for the benefit of the creditors of the bank and for the payment of its debts.

There is no question that such a deed was made, nor is it denied that a valid deed of assignment, for the benefit of creditors, generally places the property so assigned beyond the reach of the ordinary process of attachment or execution directed against the property of the assignor.

But the deed in question was a peculiar deed, and made under very peculiar circumstances.

Under the circumstances, it cannot be doubted that the effect of this conveyance is to be measured by the terms of the act, and that if any of its provisions are in conflict with that act they must to that extent give way. Now, the very last section of that act, after the previous sections, and, indeed, previous statutes had fully defined the duties and powers of these trustees, declares expressly that "the real estate of said bank shall be liable to taxation and sale on execution in the same manner as the property of individuals." So far,

then, as this conveyance by the bank to the trustees affected the liability of these lands to judicial sale for the debts of the bank, it left them in precisely the same condition they were before, and this whether the deed to Campbell is to be construed as a passive or an active trust, and the title of the bank under it a legal or an equitable one.

It must, therefore, be taken as established that the land in question was liable to be subjected to judicial sale for the debts of the bank, and the only remaining question concerns the validity of the proceeding under which this was attempted.

Most of the objections urged under this head relate to the regularity of those proceedings, and many errors are pointed out which are supposed to affect the title acquired under them. But the doctrine of this court, and of all the courts of this country, is firmly established, that if the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceeding void; nor can such errors be considered when the judgment is brought collaterally into question. With this cardinal principle in mind many of the alleged errors in the proceeding under the attachment must be disregarded.

There can be no question of the right of the legislature of Wisconsin to pass such laws as will subject property within her territory, held or owned by non-residents, to the payment of the debts of such owners; and the manner of doing this is also entirely within legislative control, provided it does not violate some of the provisions of the Federal or State constitutions.

The court in which these proceedings were had was a court of general jurisdiction, and had undoubted authority to attach the property of the bank for the payment of its debts, and every presumption must be made in favor of the validity of its proceeding not inconsistent with the record.

We will, however, notice a few of the alleged errors which are supposed to touch the point of the court's jurisdiction.

1. It is said that the bank was dead in law, and that as

the suit was instituted against the bank by name, no jurisdiction was acquired.

It is by no means certain that the bank had no capacity to sustain a suit, notwithstanding the expiration of its charter and the transfer of its property to trustees. But, however this may be, those very trustees, in whom plaintiff claims that the title was vested, and from whom he derives title by deed, appeared to this suit and moved to dissolve the attachment, and the bank appeared by attorney and defended the suit. Both must then be bound by these proceedings, and neither can deny a jurisdiction to which they voluntarily submitted.

2. The legislature of Wisconsin had made provision by special statute for a case in which a bank, whose functions had ceased, but which yet owned property and owed debts in Wisconsin, might be sued and the property subjected to the payment of those debts. The constitutionality of this act is denied; but no provision of the constitution of Wisconsin or of the United States is pointed out which is opposed to such legislation. It would, on the contrary, be a strange defect in the legislative power if, under such circumstances, a State could not frame laws which would enable her citizens to subject the lands of a corporation whose charter had expired to the debts which it owed to her citizens.

3. It is said that the judgment under which this sale was made was reversed, and this is true.

But the sale was made while the judgment was in force to one who was no party to the suit, and the reversal of the judgment could not, as is well settled, affect the purchaser.

4. It is said the sale was void because made under an execution which had no seal.

The court from which the execution issued permitted it to be amended after sale by affixing a seal. Whether the sale would have been void without the seal, and whether the amendment was rightfully made, were questions of Wisconsin law, and this and all other such questions were decided in favor of the sale by the Wisconsin court on motion to set aside the sale. That decision must control us as to all that concerns the regularity of these proceedings.

As we have examined all that can be said to affect the jurisdiction of the court and the authority of the officer to make the sale, we need inquire no further.

JUDGMENT AFFIRMED.

HAVER *v.* YAKER.

Although it is true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature, and that in this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date; a different rule prevails where the treaty operates on individual rights. There the principle of relation does not apply to rights of this character which were vested before the treaty was ratified, and in so far as it affects *them* it is not considered as concluded until there is an exchange of ratifications.

ERROR to the Court of Appeals of Kentucky; the case being thus:

One Yaker, a Swiss by birth, who had come many years ago to the United States and become a naturalized citizen thereof, died in Kentucky in 1853, intestate, seized of real estate there. He left a widow, who was a resident and citizen of Kentucky, and certain heirs and next of kin, aliens and residents in Switzerland.

By the laws of Kentucky in force in 1853, the date of his death, aliens were not allowed to inherit real estate except under certain conditions, within which Yaker's heirs did not come, and if the matter was to depend on those laws, the widow was, by the laws then in force in Kentucky, plainly entitled to the estate.

However, in 1850, a treaty was "concluded and signed" by the respective plenipotentiaries of the two countries, between the Swiss Confederation and the United States,* upon the proper construction of which, as Yaker's heirs asserted—although the widow denied that the construction put upon

* 11 Stat. at Large, 587.

the treaty by the heirs was a right one—these heirs were entitled to take and hold the estate. The treaty provided by its terms that it should be submitted on both sides to the approval and ratification of the respective competent authorities of each contracting party, and that the ratifications should be exchanged at Washington as soon as circumstances should admit. It was so submitted, but was not duly ratified, nor were the respective ratifications exchanged in Washington till November 8th, 1855, at which time the ratification and exchange was made. And on the next day the President, by proclamation—the treaty having been altered in the Senate—made the treaty public.

In 1859 the Swiss heirs, who had apparently not heard before of their kinsman's death, instituted proceedings to have the real estate of their kinsman, now in possession of the widow, assigned to them, and arguing that on a right construction of the treaty it was theirs.

But a preliminary question, and in case of one resolution of it, a conclusive objection to their claim was here raised; the question, namely, at what time the treaty of 1850–55, as it regarded private rights, became a law. Was it when it bore date, or was it only when the ratifications were exchanged between the parties to it? If not until it was ratified, then there was no necessity of deciding whether by its terms the heirs of Yaker had any just claim to this real estate, because in no aspect of the case could the treaty have a retroactive effect so as to defeat the title of the widow, which vested in her, by the law of Kentucky of 1853, on the death of her husband.

The Court of Appeals of Kentucky, where the heirs set up the treaty as a basis of their title, decided that it took effect only when ratified, and so deciding against their claim, the case was now here for review under the twenty-fifth section of the Judiciary Act.

Messrs. Carlisle and McPherson, for the heirs, citing Kent's Commentaries,* and *United States* v. *Reynes*,† in this court,

* Vol. i, 170.

† 9 Howard, 148, 289.

contended that a treaty binds the contracting parties from its conclusion; and that this is understood to be from the day it is signed. If that view was right, the treaty was operative at the date of Yaker's death, and as they argued carried the estate to the heirs.

Mr. Montgomery Blair, contra; a brief of Messrs. Porter and Beck being filed on the same side, argued that while the position of the other side might be admitted so far as respected the contracting governments, the position was not true as respected private rights. And this for a good reason. For that with us a treaty must be agreed to by the Senate, and this in secret session, before it becomes a law. While before the Senate it may be amended and largely altered. This particular treaty, the President's proclamation shows, was amended, and for aught that appears to the contrary, the very article upon which the heirs of Yaker now found their claim, may have been the only amendment made, and it may have been inserted long after Yaker's death and the accrual of the widow's rights.

If this view is right we need not inquire into the meaning of the treaty.

Mr. Justice DAVIS delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date.* But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in Arredondo's case, reported in 6th Peters.† The reason of

* Wheaton's International Law, by Dana, 336, bottom paging.

† Vol. vi, p. 749.

Statement of the case.

the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

JUDGMENT AFFIRMED.

GUT v. THE STATE.

1. A law of a State changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offence was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offence or the finding of the indictment. An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offence after its commission.
2. The decision of the highest court of a State, that an act of the State is not in conflict with a provision of its constitution, is conclusive upon this court.

ERROR to the Supreme Court of Minnesota. The case was thus:

A statute of Minnesota, in force in 1866, required that criminal causes should be tried in the county where the offences were committed. The offence charged against the defendant was committed in December of that year, in the

county of Brown, in that State. At that time four other counties, which were unorganized, were attached to Brown County for judicial purposes. On the 9th of March, 1867, a statute was passed by the legislature of the State authorizing the judge of the District Court, in cases where one or more counties were attached to another county for judicial purposes, to order, whenever he should consider it to be in furtherance of justice, or for the public convenience, that the place of holding the court should be changed from the county then designated by law to one of the other counties thus attached.

Under this act the judge of the district embracing Brown County ordered that the place of holding the court should be changed from that county to the county of Redwood, within the same district, and the change was accordingly made. The court subsequently held its sessions in Redwood County, where the defendant, in September, 1867, was indicted for murder in the first degree. The plea of not guilty having been interposed the case was transferred, on his motion, to Nicollet County, in an adjoining district, where he was tried, convicted, and sentenced. On appeal to the Supreme Court of the State the judgment was affirmed, and the case was now brought to this court under the 25th section of the Judiciary Act.

Mr. E. M. Wilson, for the plaintiff in error, contended in this court, as it was also contended in the court below, that the act of Minnesota, under which the court was held in Redwood County, and the grand jury were summoned, was unconstitutional so far as it authorized an indictment or trial there of an offence previously committed in Brown County; that it was in effect an *ex post facto* law, and, therefore, within the inhibition of the Federal Constitution.

Mr. F. R. E. Cornell, Attorney-General of Minnesota, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The objection to the act of Minnesota, if there be any,

does not rest on the ground that it is an *ex post facto* law, and, therefore, within the inhibition of the Federal Constitution. It must rest, if it has any force, upon that provision of the State constitution which declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." But the Supreme Court of the State has held that the act in question is not in conflict with this provision; that the act does not change the district, but merely the place of trial in the district, which is not forbidden. And it appears that jurors for the trial of criminal offences committed in one of the counties of the several attached together for judicial purposes, are chosen from all the counties; and that this was the law before, as it has been since the passage of the act which is the subject of complaint. Therefore the defendant, had he not secured, by his own motion, a change of venue, would have had a jury of the district in which the crime was committed, and which district was previously ascertained by law.

The ruling of the State court is conclusive upon this court, upon the point that the law in question does not violate the constitutional provision cited.*

Undoubtedly the provision securing to the accused a public trial within the county or district in which the offence is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character; but its enforcement in cases arising under State laws is not a matter within the jurisdiction of the Federal courts.

A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offence was committed, or the

* Randall *v.* Brigham, 7 Wallace, 541; Provident Institution *v.* Massachusetts, 6 Id. 630.

indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offence or the finding of the indictment. An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offence after its commission. It is defined by Chief Justice Marshall, in *Fletcher* v. *Peck*,* to be a law, "which renders an act punishable in a manner in which it was not punishable when it was committed;" and in *Cummings* v. *Missouri*,† with somewhat greater fulness, as a law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required."

The act of Minnesota under consideration has no feature which brings it within either of these definitions.

JUDGMENT AFFIRMED.

BASSET *v.* UNITED STATES.

1. Where a court sitting in place of a jury finds the facts, this court cannot review that finding.
2. A plea of *nul tiel record* raises a question of law, where the supposed record is of the court in which the plea is filed.
3. Therefore, where the record relied on is produced in such a case, and made part of the record by a statement of facts agreed on, it is a question of law whether it supports or fails to support the plea, and can be reviewed in this court.
4. It is competent for a court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction on confession, though the defendant had entered upon the imprisonment ordered by the sentence.
5. In such case the original indictment is still pending, and a bail bond given after this, for the prisoner's appearance from day to day, is valid.

ERROR to the Circuit Court for the Northern District of Ohio.

The United States sued Basset and another on a recognizance of bail, to which they pleaded two pleas:

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* 6 Cranch, 138. † 4 Wallace, 326.

Statement of the case.

1. That there was no record of any such recognizance in the court.

2. That there was no indictment, as recited in said recognizance, pending against their principal when the recognizance was entered into, because they say that he had pleaded guilty to the indictment, and judgment had passed against him, and he had been delivered to the jail of Erie County, and had entered upon the expiation of his sentence.

The United States took issue on both these pleas, and the case was submitted to the court without a jury.

1. In respect to the first plea, the production of the record of the case showed that the recognizance was taken, and remained among the rolls and records of the court; so that there seemed nothing in the plea.

2. As regarded the second, it appeared by the record that to the indictment which the prisoner was held to answer by the recognizance, he had at an earlier period of the same term pleaded guilty, and had been sentenced to imprisonment in the jail of Erie County for six months, and was sent to that prison. But a few days after, on motion of the district attorney, he was brought back on a writ of *habeas corpus*. When he was thus brought again into court, on motion of the district attorney, the former judgment was set aside, and the prisoner had leave to withdraw his plea of guilty formerly entered. It was after this was done that the recognizance on which this action was brought was given, conditioned for the appearance of the prisoner from day to day during the term; and on his failing to appear the second day his recognizance was declared to be forfeited. *All of this took place during the same term of the court.*

The court below decided that there was a record of the recognizance denied by the first plea, and that there was no such record of conviction and sentence as that set up in the second plea. On motion of defendants a new trial was granted, which was also by the court, and on this trial a statement of facts, agreed to and signed by counsel for both parties, was presented to the court, on which it rendered the same judgment that it had before. This statement of facts con-

sisted of extracts from the records of the court, and it was upon the inspection of this record that the court decided the case.

The judgment was now brought here by Basset and the other obligors in the recognizance, and was *submitted by them, without counsel, upon the record;* and *contra, upon a brief of Mr. Hoar, A. G., and Mr. Field, Assistant A. G.*

Mr. Justice MILLER delivered the opinion of the court.

Both the pleas of the defendants were pleas of *nul tiel record*, the first denying the existence of the recognizance, and the second denying the pending of the indictment at the time the recognizance was taken. A plea of *nul tiel record* to a supposed record of the court in which the plea is made is tried by the court, because it is an issue to be determined by the inspection of its own records. But where the record of a foreign court is denied by this plea the issue is to be tried by a jury, because the existence of the record to be inspected must first be made by proof, which it may be necessary to submit to a jury.*

When a court sits in place of a jury and finds the facts this court cannot review that finding. If there is any error in such case, shown by the record, in admitting or rejecting testimony, it can be reviewed here. But when the court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict.

In the case before us, however, the court did not sit to supply the place of a jury, because the record, the existence of which was denied by both pleas, was the record of the court in which the pleas were made. When, therefore, such record as did exist in regard to the matters in issue, was presented to the court, the only question to be determined, on which the court could exercise any judgment, was a question of law, namely, whether in legal effect there was found a

* 1 Institute, 117, 270; Collins *v.* Matthews, 5 East, 473; Hall *v.* Williams, 6 Pickering, 117; Pattin *v.* Miller, 13 Sergeant & Rawle, 254.

record of the recognizance, and a subsisting legal judgment of conviction and punishment prior to the taking of the recognizance.

Both these questions of law are proper for review here, and are fairly presented by the agreed statement of what the record is.

1. In regard to the first, there is no doubt that the recognizance was taken, and remains in the records of the court.

2. As regards the second plea, it appears by the record that all which took place took place during the same term of the court, and we see no reason to doubt that the court had power during that term, for proper cause, to set aside the judgment rendered on confession. This control of the court over its own judgment during the term is of every-day practice.*

The judgment then being set aside the indictment remained, and the recognizance of the prisoner and his sureties to appear and answer to it was valid.

JUDGMENT AFFIRMED.

UNITED STATES v. DEWITT.

1. The 29th section of the Internal Revenue Act of March 2d, 1867 (14 Stat. at Large, 484), which makes it a misdemeanor, punishable by fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale, or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit, is in fact a police regulation, relating exclusively to the internal trade of the States.
2. Accordingly, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation.

ON certificate of division in opinion between the judges of the Circuit Court for the Eastern District of Michigan; the case being this:

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* King v. Price, 6 East, 323; Cheang-kee v. United States, 3 Wallace, 320.

Section 29 of the act of March 2d, 1867,* declares,

"That no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale, or offer for sale such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit; and any person so doing, shall be held to be guilty of a misdemeanor, and on conviction thereof by indictment or presentment in any court of the United States having competent jurisdiction, shall be punished by fine, &c., and imprisonment," &c.

Under this section one Dewitt was indicted, the offence charged being the offering for sale, at Detroit, in Michigan, oil made of petroleum of the description specified. There was no allegation that the sale was in violation or evasion of any tax imposed on the property sold. It was alleged only that the sale was made contrary to law.

To this indictment there was a demurrer; and thereupon arose two questions, on which the judges were opposed in opinion.

(1.) Whether the facts charged in the indictment constituted any offence under any valid and constitutional law of the United States?

(2.) Whether the aforesaid section 29 of the act of March 2d, 1867, was a valid and constitutional law of the United States?

Mr. Field, Assistant Attorney-General, for the United States.

Instances of the exercise of police power over certain *instruments* or *agencies* of commerce, for the protection of life and property, are found in various acts of Congress.†

In the *License Tax Cases*,‡ it is *held* that the provisions of the internal revenue laws requiring the payment of a license tax, and prohibiting under penalties the exercise of certain kinds of business within a State without such tax having

* 14 Stat. at Large, 484.

† Acts of March 3, 1843, 5 Stat. at Large, 626; August 30, 1852, 10 Id. 61; May 5, 1864, 13 Id. 63; July 25, 1866, 14 Id. 228.

‡ 5 Wallace, 462.

been paid, are only modes of enforcing the payment of excise taxes; that the payment of such special tax or license tax conveys to the licensee no authority to carry on the business licensed within a State which prohibits its being carried on; but that such provisions of law as incidental to the taxing power are not unconstitutional.

So far as appears, there was no law of the State of Michigan regulating the sale of oil made from petroleum at the time when the alleged offence was committed. There is no decision of this court that Congress cannot enact a law regulating trade in a State, in the absence of any regulation by the State, when the articles of the trade thus regulated may enter into commerce with other States or with foreign countries. It has been decided by this court that Congress may prohibit the exercise of a trade within a State under a penalty, in aid of, or for the purpose of collecting excise taxes levied upon the exercise of such trade.

One reason for the enactment *may* have been the protection of transportation companies between the States and between the United States and foreign countries from danger to property and life in transporting oil, mixed or sold in violation of this statute; and the protection of revenue officers in the examination, gauging, marking, and storing of such oil, and the proper distinction between and classification of different kinds of mineral oils made necessary for the convenient assessment and collection of excise taxes. If this was the reason, then the regulations are fairly incidental to the exercise of the power to regulate commerce or of the taxing power, and, as such, constitutional.

Mr. Wills, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The questions certified resolve themselves into this: Has Congress power, under the Constitution, to prohibit trade within the limits of a State?

That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this

express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

Syllabus.

As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions,* that we think it unnecessary to enter again upon the discussion.

The first question certified must, therefore, be answered in the negative.

The second question must also be answered in the negative, except so far as the section named operates within the United States, but without the limits of any State.

FILOR *v.* UNITED STATES.

1. The act of Congress of July 4th, 1864 (13 Stat. at Large, 381), declares "that the jurisdiction of the Court of Claims shall not extend to, or include, any claim against the United States, growing out of the destruction or *appropriation* of, or damage to, property by the army or navy, or any part of the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof." Under this act *held*, that the term "appropriation" includes all taking and use of property by the army or navy, in the course of the war, not authorized by contract with the government.
2. No lease of premises at Key West for the use of the quartermaster's department, or any branch of it, in 1862, made by the acting assistant quartermaster at that place, was binding upon the government until approved by the quartermaster-general, though the action of the subordinate officer in making such lease was taken by direction of the military commander at that station. Until such approval the action of the officers at Key West was ineffectual to fix any liability upon the government. The obligation of the government for the use of the property is what it would have been if the possession had been taken and held without the existence of the lease.

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* License Cases, 5 Howard, 504; Passenger Cases, 7 Id. 283; License Tax Cases, 5 Wallace, 470; and the cases cited.

Statement of the case.

3. The unauthorized acts of the officers at Key West cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States.

APPEAL from the Court of Claims. The material facts of this case, as found by the court, were thus:

In 1861 one Asa F. Tift, a citizen of Florida, was the owner in fee of certain real property, situated in Key West, in that State, known as Tift's wharf. In January of that year he was a member of the convention which passed the ordinance of secession, purporting to dissolve the connection of the State with the National Union, and signed the ordinance. In May following, with the intention of joining the Confederates against the United States, he left Key West and removed to the State of Georgia, where he resided during the continuance of the rebellion. Before leaving Key West he executed a power of attorney to one Charles Tift, authorizing him to sell and convey all his property, or any part of it, situated on that island. In December, 1861, through his attorney, he sold and conveyed the premises to the petitioners, as tenants in common, for the consideration of eighteen thousand dollars, for which sum they gave their several promissory notes, according to their respective proportions, of which three, each for one thousand dollars, were payable on demand, and the residue were payable from one to five years, with annual interest at six per cent. These notes were retained by the attorney under an agreement between him and the makers until after Asa S. Tift had received from the President a full pardon for offences committed by participation in the rebellion, which was granted in July, 1865. They were then delivered to him.

After the purchase made by the petitioners the officers of the quartermaster's department at Key West desired possession of the wharf, and its appurtenances, for the use of the United States, but the petitioners refused to lease the property. Thereupon the commanding officer at Key West, "for the purpose of effecting a lease of it" (such is the language of the finding), issued an order for its seizure "for the use of

the quartermaster's department of the United States army." Under the pressure of this order an agreement was concluded between Filor, one of the petitioners, acting for all of them, and Lieutenant Gibbs, of the United States army, at the time assistant quartermaster, who assumed to act on behalf of the United States, which agreement purported to lease the property, and various pieces of machinery, and other articles connected with it, to the United States for one year from January 1st, 1862, and as much longer as might be required by the quartermaster's department, at an annual rent of six thousand dollars, payable quarterly. This agreement was approved by the commanding officer at Key West, but was not approved by the quartermaster-general, nor was it disapproved by him until February 8th, 1866. Under the agreement the officers of the quartermaster's department at Key West entered upon and took possession of the premises, and used them in the service of the United States until the 1st of January, 1867.

No rent was ever paid to the petitioners under the agreement, or for the use and occupation of the premises, and to recover the full amount stipulated for the five years, the present suit was brought.

When the agreement was made, and possession was taken of the premises, the officers of the quartermaster's department at Key West had full knowledge of the fact that Asa F. Tift had adhered to Florida in her attempted secession from the Union, and had joined the Confederates in Georgia, and was, with them, in open war against the United States at the time the deed was executed to the petitioners.

The Court of Claims held that the deed was void, as a contract between enemies, and that the officers of the quartermaster's department at Key West were not authorized to hire for the United States the premises, the title to which was invalid, from the circumstances stated, which were known to them at the time.

Mr. Thomas Wilson, for the appellant. Mr. Talbot, contra, for the United States, was stopped by the court.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The determination of this case does not depend upon the validity or invalidity of the title of the petitioners to the property in question. The difficulty with their claim does not arise, as the court below appears to have considered, solely from the supposed invalidity of their title. There is a difficulty from another quarter. We do not find, in any regulation of the army, or in any act of Congress, that the acting assistant quartermaster at Key West was invested with power to bind the United States to the agreement or lease produced, even though his action was taken by direction of the military commander at that station, and the instrument was approved by him. No lease of premises for the use of the quartermaster's department, or any branch of it, could be binding upon the government until approved by the quartermaster-general. Until such approval the action of the officers at Key West was as ineffectual to fix any liability upon the government as if they had been entirely disconnected from the public service. The agreement or lease was, so far as the government is concerned, the work of strangers. The obligation of the government for the use of the property is exactly what it would have been if the possession had been taken and held without the existence of the agreement. Any obligation of that character cannot be considered by the Court of Claims. The jurisdiction of that court, says the act of Congress of July 4th, 1864, "shall not extend to, or include, any claim against the United States, growing out of the destruction or *appropriation* of, or damage to, property by the army or navy, or any part of the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof."* The premises of the petitioners were thus appropriated by a portion of the army. It matters not that the petitioners, supposing that the officers at Key West could bind the government to pay a stipulated rent for the premises, consented to such appropriation. The manner of

* 13 Stat. at Large, 381.

the appropriation, whether made by force or upon the consent of the owner, does not affect the question of jurisdiction. The consideration of *any* claim, whatever its character, growing out of such appropriation, is excluded. The term appropriation is of the broadest import: it includes all taking and use of property by the army or navy, in the course of the war, not authorized by contract with the government. The use may be permanent or temporary, and it may result in the destruction of or mere injury to the property. If the right to the property, or to its use, is not obtained by valid contract with the government, the taking or use of it is an appropriation within the meaning of the act of Congress.

The learned counsel of the petitioners is correct in stating that leasing and appropriation are different acts, but he errs when he assumes that the instrument in this case has any greater validity as the act of the government than if it had been signed by himself.

The doctrine of estoppel, which the counsel invokes, has no application. There is no place where the doctrine can come in. The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so. In signing the agreement, and in taking possession of the premises claimed by the petitioners, they acted on their own responsibility. Their unauthorized acts cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States. If the petitioners are entitled to compensation for the use of the property they must seek it from Congress. The Court of Claims can award them none.

JUDGMENT AFFIRMED.

CHICAGO *v.* SHELDON.

1. The clause in the ordinance of May 23d, 1859, by which the city of Chicago granted to the North Chicago City Railway Company the right to construct a railway, the company agreeing, that it should—

> "As respects the *grading, paving, macadamizing, filling, or planking of the streets or parts of the streets*, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, *in good repair and condition*"—

> does not make the company liable for curbing, grading, and paving the streets with an entirely new pavement. The obligation of the company extended to repairs only.

2. A contract having been entered into between parties, valid at the time, by the laws of the State, no decision of the courts of the State, subsequently made, can impair its obligation.

IN error to the Circuit Court for the Northern District of Illinois; the case being thus:

The constitution of Illinois ordains that taxes shall be levied so that each person shall pay in proportion to the value of his property; and that where corporate authorities of counties, cities, &c., are authorized to levy and collect taxes for corporate purposes, the taxes shall be uniform in respect to persons and property.

With these provisions in force, as fundamental law, the legislature of the State, in February, 1859, authorized the North Chicago City Railway Company to construct and operate a single or double track of a horse railway on certain streets of the city, "in such manner and upon such terms and conditions, and with such rights and privileges as the said common council may, by contract with said parties, prescribe."

On the 23d May, of the same year, the common council passed an ordinance by which they granted to the company permission to lay, for twenty-five years, a single or double track of railway on certain streets of the city, upon certain conditions prescribed; these conditions relating chiefly to the sort of motive power, the purposes for which the railway

was to be used, the style and class of car, the sort of track and degree of its elevation, and the rates of fare. Then followed a section thus:

"The said company shall, *as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them*, keep eight feet in width along the line of said railway on all the streets wherever one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, *in good repair and condition* during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the *ordinary repairs* thereof may be adopted by the common council of said city."

After this contract was made, and carried into execution by the railway company, and up to the year 1866, the common council passed several ordinances for the improvement of some of the streets occupied by the company, thereby providing for curbing them with curbstone, grading and paving them with wooden blocks, known as the Nicholson pavement. Under none of these, however, was the railway property of the street railway corporation assessed, except under one passed in the year last named. In that year the proprietors of certain lots fronting on streets where the railway was laid, refused to pay the assessments made on them, upon the ground that the railroad property ought to be assessed. The question between these proprietors of lots and the city was taken to the Supreme Court of the State, in the case of the *City of Chicago* v. *Baer*,* where it was held (the previous case of *Chicago* v. *Larned*,† being considered as in principle asserting that doctrine), that the legislature could not constitutionally grant power to the city to make such a contract as had been here granted to the railway company, that it was void, and that, as a consequence, the city was bound to assess the railroad property. A special tax or

* 41 Illinois, 306. † 34 Id. 265.

assessment of $28,677 was now accordingly imposed upon the property of the railway company, and the collection being threatened, one Sheldon, a large stockholder in the company—the company itself having declined to act—filed a bill in the court below to enjoin the collection, and the court enjoined it accordingly. From that decree the city of Chicago brought the case here, the main question being whether under their contract to keep the road for a certain number of feet "in good condition and repair," the company could be made to pay for what was a new curbing, grading, and paving, altogether, there being also some minor questions as to the effect of the decisions already mentioned.

To complete the history of the matter in hand, a fact somewhat collateral to it should be mentioned. It is that in 1864, under the authority of the charter of the railway company, the common council entered into *another* contract with it in respect to laying tracks in *other* streets. The grant in this new case was made, "subject to all the restrictions and conditions, rights and privileges in the previous ordinance of the 23d of May, 1859, to the same company, *except as herein* otherwise provided." The fifth section provided, *as in the first contract*, for keeping the eight and sixteen feet of the street in good condition and repair, but it *provided further, and in addition, that, when any new improvement, paving*, &c., should be ordered by the common council in any of the streets, the *railway company should make the improvement* the width of the eight or sixteen feet, as the case might be.

Mr. Tuley, for the city, argued—

That a party, and especially a monopoly, setting up exemption from city assessment, should show its privilege under an *express* contract; such exemption being against common rights, and not to be favored; that, plainly, no such exemption was contracted for here.

That as the Supreme Court of Illinois had jurisdiction of the parties, and had power to decide the subject-matter in controversy in the case of *Chicago* v. *Baer*, that decision was final and conclusive; the decision there not coming before

this court on writ of error, as required by the twenty-fifth section of the Judiciary Act, if it was to be re-examined; and it being the established doctrine of this court that it will adopt and follow the decisions of the State courts in the *construction of their own constitution* and statutes, when that construction has been settled by the decisions of its highest judicial tribunal.

That if any prior decisions appeared to authorize the legislature to make contracts commuting the right of specific taxes or assessments, the case just named and that of *Chicago* v. *Larned*, had essentially modified them.

That the legislature could not authorize the city of Chicago, and did not mean to authorize it, to make a valid contract by which the railway company would be exempted from the payment of its portion for street improvements, in proportion to the benefits received; which was what the railway corporation did, in fact, pretend was done by the contract set up.

Mr. Justice NELSON delivered the opinion of the court.

It is asserted, on the part of the railway company, that by the true construction of their contract, they are exempt from the assessment made upon their property, and the seventh section of the ordinance of the 23d May, 1859, is referred to and relied on in support of this construction. That section prescribes the obligations and duties of the company in respect to the condition and repairs of the streets during the whole period of the running of the contract, and imposes certain burdens upon it as to repairs, from which, to their extent, the city, or adjoining owners of lots, are relieved. It is insisted that this provision was intended, and so understood by both parties, as regulating the whole subject as it respects improvements of the streets occupied by the company, and to fix in the contract the extent of their liability.

The language of it is somewhat peculiar, and it cannot well be denied but that a fair and reasonable interpretation favors this view. It is as follows: "The said company shall, as respects the *grading*, *paving*, *macadamizing*, *filling*, *or plank-*

ing of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition." Now, it is quite clear that the above recitals embrace the whole subject of improvements of the streets, and that it was present to the minds of the parties when entering into the stipulation respecting repairs that followed. And this being so, it is difficult to deny, but that these stipulations were made as fixing the proportion or share of these general improvements which should be imposed on the company, namely, they should keep in good condition and repair eight or sixteen feet, as they used a single or double track, along the entire length of the road. They were not to grade, pave, macadamize, fill, or plank even the above width or distance, except so far as such work came within the category of repairs.

What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23d May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company. Nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.

There is another consideration in the case entitled to weight in the interpretation of this contract; and that is the language of the contract made between the city and the company in 1864.* This ordinance is *in pari materia* with the one of 1859, and helps to explain any ambiguity in it.

We may add, also, that the learned judge who delivered the opinion of the court, maintaining the liability of this company to the payment of the assessment, does not place his opinion upon the ground that the contract did not exempt it, but that the legislature were disabled by the constitution of the State from conferring any such power on the city. The objection is founded on the clauses of the constitution, which provide that taxes shall be levied so that each person shall pay in proportion to the value of his property; and that where corporate authorities of counties, cities, &c., are authorized to levy and collect taxes for corporate purposes, the taxes shall be uniform in respect to persons and property.

We are not concerned to deal with these provisions, as it is perfectly settled by the decisions of the Supreme Court of the State that, according to the true construction of them, they do not forbid the legislature commuting with individuals or corporate bodies the burdens of general or specific taxes or assessments, of the character of those in question, for what they may deem an equivalent. This has been so frequently decided that we need only refer to the cases.† It is supposed by the counsel for the city that this doctrine has been modified by the recent cases of *Chicago* v. *Larned*, decided in 1864, and *The Same* v. *Baer*, in 1866. But, on looking into these cases, we find no references to the cases above cited, or to the doctrine they maintain. If it were otherwise, however, we could not agree that such decisions could have the effect to invalidate the contract in question. A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent

* See it, *supra*, p. 52.

† Illinois Central Railroad *v.* County of McLean, 17 Illinois, 291; Hunsaker *v.* Wright, 30 Id. 146; Neustadt *v.* Illinois Central Railroad, 31 Id. 484.

even for its legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect.

A point is made, that the legislature have not conferred, or intended to confer, authority upon the city to make this contract. We need only say that full power was not only conferred, but that the contract itself has been since ratified by this body.

JUDGMENT AFFIRMED.

UNITED STATES *v.* ANDERSON.

1. Under the act of March 12th, 1863, commonly called the "Abandoned or Captured Property Act," it is not necessary that a party preferring his claim in the Court of Claims for the proceeds of property taken and sold under it, to prove, in addition to his own loyalty, the loyalty of the persons from whom he bought the property taken and sold; the property having been purchased by him in good faith, and without intent to defraud the government or any one else.
2. Notwithstanding the 4th section of the act of June 25th, 1868, the vendors of the property so taken and sold are competent witnesses, on a claim preferred by the owners in the Court of Claims, in supporting such claim, if they themselves never had any title, claim, or right against the government, and are not interested in the suit.
3. As respects rights intended to be secured by the above-mentioned Abandoned or Captured Property Act, "the suppression of the rebellion" is to be regarded as having taken place on the 20th of August, 1866, on which day the President by proclamation declared it suppressed in Texas "and throughout the whole of the United States of America," that same date being apparently adopted by Congress in a statute continuing a certain rate of pay to soldiers in the army "for three years after the close of the rebellion, as announced by the President of the United States, by proclamation bearing date August 20th, 1866."
4. Under the Captured or Abandoned Property Act, the Court of Claims may render judgment not only generally for the claimant, but for a specific sum as due to him.

APPEAL from the Court of Claims; the case being this:

Congress, by act of July 13th, 1861,* passed soon after the outbreak of the late rebellion, enacted that it might be

* 12 Stat. at Large, 257.

Statement of the case.

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 in a state of such insurrection, and that thereupon (with a proviso that the President might, to a limited extent and under regulations to be prescribed by the Secretary of the Treasury, license it) 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." By a 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 several classes of persons; and the section concludes by declaring that

"All sales, transfers, or conveyances of any such property shall be null and void."

Another section goes on to say:

"And if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, money, stocks, and credits of such persons shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof. *And all sales, transfers, or conveyances of any such prop-*

* 12 Stat. at Large, 590.

erty, after the expiration of the said sixty days from the date of such warning and proclamation, shall be null and void."

By a still later act, one passed when the armies of the United States were beginning to march into the rebellious regions—the act, namely, of March 12th, 1863*—entitled "An act to provide for the collection of abandoned property, &c., in insurrectionary districts within the United States," it was provided as follows:

"Any person claiming to have been the owner of any such abandoned or captured property may, *at any time within two years after the suppression of the rebellion*, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court (1) of his ownership of said property, (2) of his right to the proceeds thereof, and (3) that he has never given any aid or comfort to the present rebellion, receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."*

The time mentioned in this act as that within which a party might prefer his claim, "any time," to wit, "within two years after the suppression of the rebellion," was one which, as events in the conclusion of the rebellion subsequently proved, was not, to common apprehension, entirely definite. As matter of fact, rebellious districts were brought under the control of the government in different parts of the South at different times, and in April, 1865, the armies of the rebel generals Lee and Johnston surrendered; their surrender being followed by that of Taylor's army, on the 4th of May, and by that of Kirby Smith's, on the 26th of the same month. With this last-named surrender, all armed resistance, in the least formidable, to the authority of the government ceased, and, as *matter of fact*, the rebellion was prostrate, though rebel cruisers continued their depredations on our commerce, and though there were, in Texas and else-

* 12 Stat. at Large, 820.

where, some wandering bands of robbers. Still, after Kirby Smith's surrender, May 26th, 1865, intercourse, commercial and other, between the inhabitants of the different sections, began to resume itself; trade opened, more or less, on its ancient basis, remittances were made, debts were paid or compromised, and bills of exchange were drawn between the inhabitants of the two sections.

The courts, which, in each section, had been closed to the inhabitants of the other, were soon opened, in form at least. The Court of Claims assumed jurisdiction of cases under the Abandoned Property Act, and between the termination of actual hostilities and the date fixed by the court below as the legal suppression of the rebellion (20th August, 1866), thirty causes were commenced in that court under the act, and jurisdiction of them entertained.

In this court, the causes pending at the beginning of the war to which inhabitants of the States in rebellion were parties, and which had been suspended and postponed from term to term during the continuance of the war, were, at the December Term, 1865, by the order of the court, called and heard in their order on the calendar, or on special days to which they were assigned.

Post-offices were reopened;* the letting of contracts for mail service throughout the rebellious States resumed;† and the revenue system extended throughout the same States.‡

The Federal courts, too, were reopened in the insurrectionary districts.

But notwithstanding all this, the late rebellious States were not politically restored to the Union, nor were many of them so restored till long afterwards. On the contrary, many of them were kept under military government, in virtue of statutes of the United States known as the reconstruction acts. And the complete *status ante bellum* was not yet visible.

So far as executive recognitions of the date when the rebellion was to be assumed to have been "suppressed" were

* Postmaster-General's Report, 1868, p. 263. † Ib. 1865, pp. 9, 10.

‡ Report of the Secretary of the Treasury, 1865, pp. 29, 30.

concerned, the government issued three proclamations, one dated June 13th, 1865,* in relation to the suppression of the rebellion in Tennessee; another, dated April 2d, 1866,† in regard to the suppression of the rebellion in the States of Georgia, *South Carolina*, Virginia, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida; *and the third, dated August 20th*, 1866,‡ *declaring the rebellion suppressed in Texas*, "*and throughout the whole of the United States of America.*"

And an act of Congress, passed March 2d, 1867,§ declared that a previous act of Congress, passed June 20th, 1864,‖ to increase the pay of soldiers in the army, should be "continued in full force and effect for three years after *the close of the rebellion, as announced by the President of the United States, by proclamation bearing date August 20th*, 1866."

In this state of enactments, proclamation, and fact, one Anderson, a free man of color, possessed of real and personal property, by occupation a drayman and cotton sampler, and a resident of Charleston, South Carolina, preferred, on the *5th of June*, 1868, to the Court of Claims, under the provisions of the already-mentioned "Abandoned Property Act" of 1863, as it was familiarly styled, a claim for the residue of the proceeds of some cotton.

Twenty days after Anderson preferred his claim to the Court of Claims—that is to say, on the 25th June, 1868—Congress passed a law,¶

> "That no plaintiff, or claimant, or any person, from or through whom any such plaintiff or claimant derives his alleged title, claim or right against the United States, or any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting any such title, claim, or right."

When the matter came on afterwards to be heard, Anderson proved this case (proving it, in part, by two persons, the one named Fleming, and the other Doucen, who resided within the insurrectionary district, and from whom he had

* 13 Stat. at Large, 763. † 14 Id. 811. ‡ Ib. 814.
§ Ib. 422, § 2. ‖ 13 Id. 144. ¶ 15 Id. § 4.

bought the cotton), the case, to wit, that he had bought part of the cotton in the early part of the war, and the rest in the autumn of 1864, before the evacuation of Charleston by the rebels; that on the 5th March, 1865, the military authorities of the United States being now in possession of Charleston, he reported it to them, and that on the 5th of April following, it was removed, under their direction, from its place of deposit to the Charleston custom-house, whence it was shipped to New York, and there sold for the United States, and the gross proceeds paid into the treasury; the net proceeds amounting to $6723. The loyalty of Fleming and Doucen, from whom the cotton was purchased, was not proven, but that of Anderson was, and that he had never given any aid or comfort to the rebellion, or to the persons who were engaged in it.

In the Court of Claims, the counsel for the government urged four principal grounds of objection to the allowance of the claim.

1st. That the action was barred by the limitation in the statute of March 12th, 1863.

2d. That if in this they were mistaken, still that the suit must fail, because the persons who sold the property to Anderson, being residents of an insurrectionary district, were unable, under the state of the law on this subject, to convey title to him.

3d. That the vendors of the cotton in question were incompetent witnesses, by reason of the act of 25th June, 1865, and that their testimony should have been excluded.

4th. That the court had no authority to render judgment for a specific sum, its power being limited to the point of deciding whether the claimant was entitled to recover at all, leaving the amount to be determined by computation by the proper officers of the Treasury Department.

But the Court of Claims held:

1st. That the claim was not barred by the limitation mentioned.

2d. That the cotton had not been *ipso facto* forfeited because it had belonged to persons resident in the insurrec-

tionary district, no proceedings having been instituted to confiscate the same as the property of such persons.

3d. That the vendors of the property were not incompetent witnesses.

4th. That upon the whole case the claimant was entitled to judgment for the net proceeds as proved.

The correctness of these several rulings was the matter now here for review.

Mr. Hoar, Attorney-General, and Mr. R. S. Hale, special counsel, for the United States:

1. Was Anderson's claim, which was preferred on the 5th of June, 1868, preferred at any time within two years after the suppression of the rebellion?

The question when a suppression of the rebellion was made is a question of the actual termination of the war, and one distinct from the political question of the continuance of the rights of war, after the termination in fact of hostilities. The true test of the existence of civil war was tersely stated by Grier, J., speaking for the court in the *Prize Cases.** "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, *civil war exists*," &c. The test of its termination is logically the same. When the armed organization against the government has ceased to exist, when the courts of justice are no longer prevented by violence, there is no longer civil war, and the rebellion is suppressed. Now, after the surrender of Kirby Smith, armed resistance to the authority of the United States ceased, the civil war was ended, and the rebellion suppressed, as *matter of fact.* In the universal speech of the people, "the war was over." This is an historical fact, of which this court will take judicial cognizance. Their own proceedings and the call of their docket show it. But the fact is part of public history, and universally known. From that date, all claimants were entitled to sue in the Court of Claims, under the act of 12th

* 2 Black, 667.

March, 1863, and at the expiration of two years from that date (26th May, 1867), their right to sue terminated. The claim was therefore too late.

The various proclamations of the President did not create the condition of peace, but were executive recognitions of the fact that peace was restored, just as the actions of the courts were judicial recognitions of the same fact.

But if executive action is requisite to establish the fact of the suppression of the rebellion, then the proclamation of April 2d, 1866, does it as respects South Carolina; and the cause of action having arisen in that State the statute began to run whenever the rebellion was suppressed *there*. If this is so, the claim is still too late.

As to the act of Congress of March 2d, 1867, its object was not to determine the end of the rebellion, either for judicial or legislative purposes, but to fix a definite time when the additional pay given to soldiers by the act of 20th June, 1864, should terminate. And it does not, in terms, fix the end of the rebellion; but fixes the desired day by recital from "the close of the rebellion, *as announced by the President*," &c. To give to it the effect of fixing the close of the rebellion for the purposes of the Abandoned and Captured Property Act, or for any other judicial or legislative purpose, would be to give it an effect not contemplated by Congress.

2. The loyalty of Fleming and Doucen, who sold the cotton to Anderson, is not proven. They resided in South Carolina, and such residence fixes on them, in the absence of proof of loyalty, rebel character. Sales by them, under the act of July 17th, 1862, are "null and void." Nor is the act of 1862 repealed by the Abandoned and Captured Property Act. These acts are to a limited extent *in pari materia*, and are so far to be construed by the aid of each other. But in their principal scope they relate to different subjects, provide for different ends, and contain no provisions inconsistent with each other, so that both cannot stand. The proof of ownership required under the latter act is of necessity lawful ownership, as well under the act of 1862 as under all other subsisting laws.

But this is no longer an open question in this court since the case of *McKee* v. *United States.** The language of the court is:

"This statute prohibited a person occupying the position A. W. McKee did 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."

[The remaining two points taken below, though still insisted on, were less pressed by the learned counsel here.]

Messrs. J. A. Wills, G. Taylor, T. J. D. Fuller, A. G. Riddle, and W. P. Clarke, contra, for the claimant in this case, or for claimants in other cases involving the same general questions, and argued with this one and disposed of by the opinion in it.

Mr. Justice DAVIS delivered the opinion of the court.

Whether the positions taken by the learned counsel of the United States in the court below, and maintained in this court also, are well taken or not depends on the construction to be given the act concerning abandoned and captured property, and the 4th section of the act of June 25th, 1868.

The act of March 12th, 1863, in one particular, inaugurated a policy different from that which induced the passage of other measures rendered necessary by the obstinacy and magnitude of the resistance to the supremacy of the National authority. To overcome this resistance, and to carry on the war successfully, the entire people of the States in rebellion were considered as public enemies; but it is familiar history that there were many persons whom necessity required should be treated as enemies who were friends, and adhered with fidelity to the National cause. This class of people, compelled to live among those who were combined to overthrow the Federal authority, and liable at all times to be stripped of their property by the usurped government, were

* 8 Wallace, 163.

objects of sympathy to the loyal people of this country, and their unfortunate condition was appreciated by Congress.

During the progress of the war it was expected that our forces in the field would capture property, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this condition of things Congress acted. While providing for the disposition of this captured and abandoned property, Congress recognized the status of the loyal Southern people, and distinguished between property owned by them, and the property of the disloyal. It was not required to do this, for all the property obtained in this manner could, by proper proceedings, have been appropriated to the necessities of the war. But Congress did not think proper to do this. In a spirit of liberality it constituted the government a trustee for so much of this property as belonged to the faithful Southern people, and while directing that all of it should be sold and its proceeds paid into the treasury, gave to this class of persons an opportunity, at any time within two years after the suppression of the rebellion, to bring their suit in the Court of Claims, and establish their right to the proceeds of that portion of it which they owned, requiring from them nothing but proof of loyalty and ownership.

It is true the liberality of Congress in this regard was not confined to Southern owners, for the law is general in its terms, and protects all loyal owners; but the number of Northern citizens who could, in any state of the case, be *bonâ fide* owners of this kind of property was necessarily few, and their condition, although recognized in the law, did not induce Congress to incorporate in it the provision we are considering.

The measure, in itself of great beneficence, was practically important only in its application to the loyal Southern people, and sympathy for their situation doubtless prompted Congress to pass it. It is in view of this state of things, as it is the duty of a court in construing a law to consider the circumstances under which it was passed and the object to

be accomplished by it, that we are called upon to apply this particular provision to the facts of this case. The loyalty of the claimant is not questioned, but his ownership, in the sense of the law, of the property in dispute is denied.

It is not denied that he purchased the property in good faith for value, and with no purpose to defraud the government or any one else; but it is said the persons from whom he bought resided in South Carolina, were presumed to be rebels, and were, therefore, prohibited from selling.

This is an attempt to import from the confiscation law of July 17th, 1862, into this law, a disability which it does not contain. If this could be done, but very little benefit would accrue to the loyal people of the South from the privilege conferred on them by the law in question. It is well known that nearly all the Southern people were engaged in the rebellion, and that those who were not thus employed furnished the exception rather than the rule. Few as they were, the necessities of life required that they should buy and sell, and, equally so, that their trading should be free and unrestricted.

This condition of things Congress was aware of, and if it had been its purpose to limit the privilege in controversy to the loyal citizen, who happened to acquire his property from another person equally loyal, they would have said so. But Congress had no such narrow policy in view. Its policy in the matter was broad and comprehensive, and embraced within its range all persons who had adhered to the Union. It treated all alike, and did not discriminate in favor of the person who could trace his title through a loyal source, and against him who was not so fortunate. It did not consider the loyal planter, who raised his own cotton and rice, as entitled to any more protection than the dweller in the cities and towns who lived by traffic, and bought where he could buy the cheapest.

The confiscation law, however, was not intended to apply to a person occupying the status of this claimant. The purpose which Congress had in view in passing that law was very different from that which induced it, in the Captured

and Abandoned Property Act, to extend a privilege to the loyal owner. The confiscation law concerns rebels and their property; was intended as a measure to cripple their resources; and, in so far as it claims the right to seize and condemn their property, as a punishment for their crimes, recognizes that certain legal proceedings are necessary to do so. But by the act in question the government yielded its right to seize and condemn the property which it took in the enemy's country if it belonged to a faithful citizen, and substantially said to him, "We are obliged to take the property of friend and foe alike, which we will sell and deposit the proceeds of in the treasury; and if, at any time within two years after the suppression of the rebellion, you prove satisfactorily that of the property thus taken you owned a part, we will pay you the net amount received from its sale."

The two acts cannot be construed *in pari materiâ*. The one is penal, the other remedial; the one claims a right, the other concedes a privilege.

It is said the vendors of the cotton were incompetent witnesses by reason of the 4th section of the act of June 25th, 1868, which declares that no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim, or right against the United States, or any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting any such title, claim, or right.

There are three classes of persons who are, by this section, prohibited from testifying. The claimant cannot testify, nor can the person who, after a claim has accrued to him against the United States, has sold or transferred it to the claimant, nor can any one who is interested in the event of the suit. Doucen and Fleming, the immediate vendors of Anderson, are not excluded by this rule. They were not interested in the suit, and in no sense did Anderson derive his claim against the United States through them. They never had any claim against the United States, because when the property was taken it belonged to Anderson, and it is

only after the property was sold that Anderson's claim even to the proceeds attached. If the property *in transitu* from Charleston to New York had been lost, no claim could arise under the law in favor of Anderson against the United States, his claim being contingent upon the proceeds of the property finally reaching the treasury.

But the point most pressed in the argument against the right to recover in this case relates to the limitation in the law. It is contended that the claim was barred by this limitation, as it was not preferred until the 5th of June, 1868. It is, therefore, necessary to determine when the time for preferring claims commenced, and when it ended. The words of the statute on this subject are, that any person claiming to be the owner of abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims. There is certainly nothing in the words of this provision which disables a person from preferring his claim immediately after the proceeds of his property have reached the treasury, and there is no good reason why a different interpretation should be given them. On the contrary, there is sufficient reason in the nature of the legislation on this subject, apart from the letter of the law, to bring the mind to the conclusion that Congress intended to give the claimant an immediate right of action. The same motive that prompted Congress to grant the privilege to prefer a claim at all, operated to allow it to be done so soon as the property had been converted into money. If in the condition of the country, it was known that the Union men of the South, as a general thing, would be unable to prosecute their claims while the war lasted, still it was recognized that some persons might be fortunate enough to do so, and to meet the requirements of their cases the right to sue at once was conferred. In the progress of the war, as our armies advanced and were able to afford protection to the Union people, it was expected that many of them, availing themselves of the opportunity, would escape into the National

lines, and be thus in a condition to secure the rights conceded to them by this statute; and the history of the times informs us that this expectation was realized. To impute to Congress a design to compel these people, impoverished as they were known to be, to wait until the war was over before they could institute proceedings in the Court of Claims, would be inconsistent with the general spirit of the statute, and cannot be entertained. If, then, the right to prefer a claim attached as soon as the money reached the treasury, when did it expire? The law says two years after the rebellion was suppressed; but the question recurs, when is the rebellion to be considered suppressed, as regards the rights intended to be secured by this statute? It is very clear that the limitation applied to the entire suppression of the rebellion, and that no one was intended to be affected by its suppression in any particular locality. It might be suppressed in one State and not in another, but the citizen of the State that had ceased hostilities was in no better or worse position in this regard than the citizen of the State where hostilities were active. The limitation was not partial in its character, but operated on all persons alike who are affected by it; was dependent on the solution of a great problem, and an interpretation of it which would prescribe one rule for the people of one State, and a different rule for those living in another State, cannot be allowed to prevail.

The point, therefore, for determination is, when, in the sense of this law, was the rebellion entirely suppressed. And in this connection it is proper to say, that the purposes of this suit do not require us to discuss the question—which may have an important bearing on other cases—whether the rebellion can be considered as suppressed for one purpose and not for another, nor any of the kindred questions arising out of it, and we therefore express no opinion on the subject.

The inquiry with which we have to deal concerns its suppression only in its relation to those persons who are within the protection of this law. It is argued, as the rebellion was in point of fact suppressed when the last Confederate general

surrendered to the National authority, that the limitation began to run from that date. If this were so, there is an end to the controversy; but did Congress mean, when it passed the statute in question, that the Union men of the South, whose interests are especially cared for by it, should, without any action by Congress or the Executive on the subject, take notice of the day that armed hostilities ceased between the contending parties, and if they did not present their claims within two years of that time, be forever barred of their recovery? The inherent difficulty of determining such a matter, renders it certain that Congress did not intend to impose on this class of persons the necessity of deciding it for themselves. In a foreign war, a treaty of peace would be the evidence of the time when it closed, but in a domestic war, like the late one, some public proclamation or legislation would seem to be required to inform those whose private rights were affected by it, of the time when it terminated, and we are of the opinion that Congress did not intend that the limitation in this act should begin to run until this was done. There are various acts of Congress and proclamations of the President bearing on the subject, but in the view we take of this case, it is only necessary to notice the proclamation of the President, of August 20th, 1866, and the act of Congress of the 2d of March, 1867.

On the 20th day of August, 1866, the President of the United States, after reciting certain proclamations and acts of Congress concerning the rebellion, and his proclamation of 2d of April, 1866, that armed resistance had ceased everywhere except in the State of Texas, did proclaim that it had ceased there also, and that the whole insurrection was at an end, and that peace, order, and tranquillity existed throughout the whole of the United States of America. This is the first official declaration that we have, on the part of the Executive, that the rebellion was wholly suppressed, and we have shown, in a previous part of this opinion, that the limitation, in its effects on the persons whose rights we are considering, did not begin to run until the rebellion was suppressed throughout the whole country. But we are not

without the action of the legislative department of the government on this subject. On the 20th day of June, 1864, Congress fixed the pay of non-commissioned officers and privates, and declared that it should continue during the rebellion; and on the 2d day of March 1867, it continued this act in force for three years from and after the close of the rebellion, as announced by the proclamation of the President.

Congress, then, having adopted the 20th day of August, 1866, in conformity with the announcement of the President, as the day the rebellion closed, for the purpose of regulating the pay of non-commissioned officers and privates, can it be supposed that it intended to lay down a harsher rule for the guidance of the claimants under the Captured and Abandoned Property Act, than it thought proper to apply to another class of persons whose interests it equally desired to protect. In order to reach this conclusion, it is necessary to ascribe to Congress a policy regarding the statute under which this claim is preferred foreign to the views we have expressed concerning it. Besides, it would require us to construe two acts differently, although relating to the same general subject, in the absence of any evidence that such was the intention of the legislature. If we are right as to the motive which prompted Congress to pass the law in question, and the object to be accomplished by it, it is clear the point of time should be construed most favorably to the person who adhered to the National Union, and who has proved the government took his property, and has the money arising from its sale in the treasury.

As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it. That day will, therefore, be accepted as the day when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act.

The point taken that the court below was not authorized

to render judgment for a specific sum, but only to determine whether the claimant was entitled to receive the proceeds of his property, leaving it for an officer of the treasury to fix the amount, cannot be sustained. To sustain this position, would require us to hold that for this class of cases Congress intended to constitute the Court of Claims a mere commission. This court will not attribute to Congress a purpose that would lead to such a result, in the absence of an express declaration to that effect.

It is proper to say, in conclusion, that the case of *McKee* v. *United States*,* cited as an authority against the claimant's right to recover, has no application whatever to this case.

JUDGMENT AFFIRMED.

NOTE.

Soon after judgment was rendered in the case which precedes, was decided also another case under the same acts of Congress, but presenting a state of facts distinguishing it from that case. It was the case of

UNITED STATES *v.* GROSSMAYER.

1. Intercourse during war with an enemy is unlawful to parties standing in the relation of debtor and creditor as much as to those who do not.
2. Conceding that a creditor may have an agent in an enemy's country to whom his debtor there may pay a debt contracted before the war, yet the agent must be one who was appointed before the war. He cannot be one appointed during it.
3. A transaction originally unlawful—such as a person's unlawful trading in behalf of another with an enemy—cannot be made lawful by any ratification.

THIS case, like the one immediately preceding, was an appeal from the Court of Claims, and was thus:

Elias Einstein, a resident of Macon, Georgia, was indebted, when the late rebellion broke out, to Grossmayer, a resident of

* 8 Wallace, 163.

New York, for goods sold and money lent, and while the war was in progress a correspondence on the subject was maintained through the medium of a third person, who passed back and forth several times between Macon and New York. The communication between the parties resulted in Grossmayer requesting Einstein to remit the amount due him in money or sterling exchange, or, if that were not possible, to invest the sum in cotton and hold it for him until the close of the war.

In pursuance of this direction—and, as it is supposed, because money or sterling exchange could not be transmitted—Einstein purchased cotton for Grossmayer, and informed him of it; Grossmayer expressing *himself satisfied with the arrangement.* The cotton was afterwards shipped as Grossmayer's to one Abraham Einstein, at Savannah, who stored it there in his own name, in order to prevent its seizure by the rebel authorities. It remained in store in this manner until the capture of Savannah, in December, 1864, by the armies of the United States, when it was reported to our military forces as Grossmayer's cotton, and taken by them and sent to New York and sold.

Grossmayer now preferred a claim in the Court of Claims for the residue of the proceeds, asserting that he was within the protection of the Captured and Abandoned Property Act.

That court considering that the purchase by Elias Einstein for Grossmayer was not a violation of the war intercourse acts set forth in the preceding case, decided that he was so, and gave judgment in his favor. The United States appealed.

Mr. George Taylor, for Grossmayer, and in support of the judgment below:

The cotton, the proceeds of which are in question, was purchased during the rebellion, by an *agent* of the claimants, residing within the Confederacy, and therefore was not a violation of the Non-intercourse Act; it being a settled principle of public law that a citizen of a country at war with another may have an agent in the enemy's country, and may enforce the contracts or accept the beneficial acts of his agent after peace; and, in this respect, he may do by an agent what he could not do himself.*

* Potts *v.* Bell, 8 Term, 548; Denniston *v.* Imbrie, 3 Washington Circuit Court, 396; Paul *v.* Christie, 4 Harris & McHenry, 161; Buchanan *v.* Curry, 19 Johnson, 137; Ward *v.* Smith, 7 Wallace, 452.

Even if the messages from Grossmayer to his agent were illegal, and no authority were given to the agent, yet the agent had a right, voluntarily on his own motion, to purchase and appropriate this property to his creditor, and by the appropriation of it, and the shipment of it to Savannah for storage for him, the title passed, subject only to the ratification of Grossmayer.*

The case shows that the purchase was ratified by Grossmayer. Claiming the cotton, and instituting suit for it, is itself a ratification. This ratification reverts back, and is equivalent to a previous permission or command.

Mr. Hoar, Attorney-General, and Mr. R. S. Hale, special counsel for the United States, contra.

Mr. Justice DAVIS delivered the opinion of the court.

Grossmayer insists that he is within the protection of the Captured and Abandoned Property Act, but it is hard to see on what ground he can base this claim for protection. It was natural that Grossmayer should desire to be paid, and creditable to Einstein to wish to discharge his obligation to him, but the same thing can be said of very many persons who were similarly situated during the war, and if all persons in this condition had been allowed to do what was done in this case, it is easy to see that it would have produced great embarrassment and obstructed very materially the operations of the army. It has been found necessary, as soon as war is commenced, that business intercourse should cease between the citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, without any express declaration of the sovereign on the subject.

But Congress did not wish to leave any one in ignorance of the effect of war in this regard, for as early as the 13th of June, 1861, it passed a Non-intercourse Act, which prohibited all commercial intercourse between the States in insurrection and the rest of the United States. It is true the President could allow a restricted trade, if he thought proper; but in so far as he did

* Ogle *v.* Atkinson, 5 Taunton, 759; Mitchel *v.* Ede, 11 Adolphus & Ellis, 888; Fowler *v.* Down, 1 Bosanquet & Puller, 47; Wilkes *v.* Ferris, 5 Johnson, 335; Coit *v.* Houston, 3 Johnson's Cases, 243, and remarks upon it in 19 Wendell, 517.

allow it, it had to be conducted according to regulations prescribed by the Secretary of the Treasury.

There is no pretence, however, that this particular transaction was authorized by any one connected with the Treasury Department, and it was, therefore, not only inconsistent with the duties growing out of a state of war, but in open violation of a statute on the subject. A prohibition of all intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted. In this case, if Einstein is to be considered as the agent of Grossmayer to buy the cotton, the act appointing him was illegal, because it was done by means of a direct communication through a messenger who was in some manner not stated in the record able to pass, during the war, between Macon and New York. It was not necessary to make the act unlawful that Grossmayer should have communicated personally with Einstein. The business intercourse through a middle man, which resulted in establishing the agency, is equally within the condemnation of the law.

Besides, if, as is conceded, Grossmayer was prohibited from trading directly with the enemy, how can the purchase in question be treated as lawful when it was made for him by an agent appointed after his own disability to deal at all with the insurgents was created?

It is argued that the purchase by Einstein was ratified by Grossmayer, and that being so the case is relieved of difficulty; but this is a mistaken view of the principle of ratification, for a transaction originally unlawful cannot be made any better by being ratified.

In any aspect of this case, whether the relation of debtor and creditor continued, or was changed to that of principal and agent, the claimant cannot recover.

Syllabus.

As he was prohibited during the war from having any dealings with Einstein, it follows that nothing which both or either of them did in this case could have the effect to vest in him the title to the cotton in question.

Not being the owner of the property he has no claim against the United States.

The judgment of the Court of Claims is REVERSED, and the cause is remanded to that court with directions to enter an order

DISMISSING THE PETITION.

SMITH *v.* MORSE.

1. Where the covenant in a submission to arbitration, after referring certain claims to the decision of arbitrators, and an umpire, if necessary, adds the words, "as provided in articles of submission this day executed," and no such articles, in fact, ever had any existence, the declaration in an action for breach of the covenant need not refer to any such articles. Proof that no such articles ever had any existence will answer any objection of a variance between the covenant stated in the declaration and the covenant contained in the submission.
2. Where the agreement in a submission to arbitration provides that certain claims shall "be referred to the final decision and arbitration" of parties designated, "and an umpire, if needful," the arbitrators are authorized, in case of their disagreement, to appoint an umpire. It will be presumed that the parties intend that the usual mode shall be followed in the appointment, in the absence of any different designation; and the usual mode is by the act of the arbitrators themselves.
3. An agreement to submit matters to arbitrators, and to an umpire, if needful, carries with it the further agreement to abide the award which they may render, or, in case of their disagreement, which he may render. The law implies an agreement to abide the result of an arbitration from the fact of submission.
4. Where an agreement providing for the settlement of certain claims, and the submission of other claims to arbitration is signed by an agent for his principal in the name of the latter, and the latter accepts the settlement and brings an action upon the covenant contained in the submission, he thereby adopts and ratifies the acts of the agent.
5. Where an instrument, executed by an agent, shows on its face the names of the contracting parties, the agent may sign his own name first and add to it, "agent for his principal," or he may sign the name of his principal first, and add, by himself as agent. Either form may be followed; all that is required in such case is that the contract shall purport on its face to be the contract of the principal.

Statement of the case.

6. Where an instrument provides for the settlement of certain claims between certain parties, and the submission of other claims between other parties, the latter parties should only be named in actions upon the covenant of submission, although the instrument be signed by all the parties named therein.

ERROR to the Circuit Court for the Southern District of New York. The case being this:

Litigation had been subsisting between S. B. F. Morse and the executors of Alfred Vail, against F. O. I. Smith, arising out of certain agreements concerning Morse's telegraph; all suits and causes of action, however, between the parties, and also, all causes of action, of which it was alleged there were some, between Amos Kendall (who stood in certain relation to Morse and the executors) and this same F. O. I. Smith, had been amicably adjusted and settled, with two exceptions:

1st. A claim for stock and dividends in the Washington and New Orleans Telegraph Company, on the part of Smith against Morse, and the executors of Vail, and also, a like claim on the part of Morse and executors against Smith.

2d. A claim of Smith against Morse for moneys received for the invention of the telegraph from sources out of the United States.

The former of these, by an instrument under seal, containing covenants of settlement of various disputes, in which Kendall was personally interested, and reciting that Kendall was the agent of Morse and of the executors of Vail, and as such agent had made settlement between them of the other disputes, it was agreed should "be referred to the final decision and arbitration of T. R. Walker and W. H. O. Alden, and an umpire, if needful, *as provided in articles this day executed.*" The covenant of submission was exclusively between Morse and the executors on one side, and Smith on the other, the parties to the suit, in which Kendall had no personal interest, and concluded thus, it being properly witnessed:

"In testimony of all which, said [parties] have hereunto signed

their names and affixed their respective seals at the city of New York, on this 8th day of October, A.D. 1859, in duplicate.

"F. O. I. SMITH, [SEAL.]
"AMOS KENDALL, [SEAL.]
"For himself, and as agent for S. F. B. Morse, and the executors of Alfred Vail, deceased."

On the back of the submission a memorandum was made about two months after the submission itself, thus:

"We, the within-named parties, hereby agree and bind ourselves to abide and perform the award of *the within-named arbitrators*, without exception to or appeal from *their* decision.

"F. O. I. SMITH,
"AMOS KENDALL,
"For himself, and as agent for S. F. B. Morse, and the executors of Alfred Vail.

"NEW YORK, December 13th, 1859."

The case was heard before the arbitrators, who disagreed, and appointed one Mann as umpire. The case was again heard before him, all parties appearing with their proofs—Kendall appearing throughout, without objection from Smith, as agent of Morse and Vail's executors—and he made his award in favor of Morse and the executors, of certain amounts, payable in stock and in money. These Smith refused to pay. Thereupon Morse and the executors brought suit in the court below against Smith, for an alleged breach to perform the award. The declaration counted on the submission already set forth, but omitted the words above given in italics "*as provided in articles this day executed.*" And on that submission being offered in evidence its introduction was objected to on the ground of variance. The articles were not produced at the trial, nor before the arbitrators or umpire, and, in truth, had no existence. The facts, as appeared from the proofs, were, that the parties through their friends had informally agreed on the terms of the submission which were incorporated in the formal submission under seal, and that the draftsman, who as shown by the way in which he had drawn his instrument, was not an accomplished clerk, had

probably in his mind this informal previous arrangement in the reference made by him. Both parties, at all events, appeared before the arbitrators and umpire, and no notice was taken of this part of the submission, and no objection made on account of the non-production of the articles, all parties assuming that the submission under seal contained the whole of the terms agreed upon. The court below admitted the submission in evidence.

Another objection was that there was no authority to appoint an umpire. On this point some correspondence between one Cooper, and Kendall, and Smith, was offered in evidence, containing a proposition to submit a claim of Smith to arbitrators, in one letter of which, dated October 5th, referring to the submission, the words "an umpire to be appointed if they do not agree," did not appear; and also the memorandum of December 13th, 1859, indorsed on the policy. The court received the evidence under objection.

Another objection was that the submission was signed by Kendall individually, and that he was not made a party to the suit.

And a final one, that Kendall, who executed the submission as agent for Morse and the executors of Vail, had no power or authority as agent, nor was any shown, to do the act; and that the manner in which his authority, if he had any, was exercised, was defective in this, that he did not sign the name of his principal and then add by himself as agent.

The court overruled all the objections, and verdict and judgment having been given for the plaintiffs, Smith now brought the case here.

Mr. R. H. Huntley, for the plaintiff in error:

1. Greenleaf, in his work on Evidence,* says:

"If a qualified covenant be set out in the declaration as a general covenant, *omitting the exception or limitation*, the variance between the allegation and the deed will be fatal."

* § 69.

Counsel for the defendant in error.

That the covenant in the submission did not contain the final agreement of the parties as to arbitration, and was not intended to contain such final agreement, is clear from the fact that the parties deemed a further agreement necessary, and intended at once and on the same day to "provide" and "execute" "articles of submission." But this was not done. The parol proof received was a dangerous and improper sort of testimony.

2. The appointment of an umpire was unauthorized.

The Cooper letter of October 5th shows this. And on the 13th of December an indorsement is made on the submission, by which the parties agree to abide the award of the within-named *arbitrators*, the idea of an umpire being palpably excluded.

3. The submission was not signed by any authorized agent of the plaintiffs. There is no proof that Kendall was their agent, or that they authorized him to sign for them, or to affix their seal to this instrument.

The *mode* of signing here also claims attention. Kendall first binds himself; but, as he is not a party to the suit, that is immaterial at present; and then he adds, "and as agent for S. F. B. Morse and the executors of Alfred Vail, deceased." This does not bind Morse, even, much less "the executors of Alfred Vail, deceased," who are not even named.*

4. Kendall should have been made a party to this action. This rule is as old as the time of Yelverton. In a case from that authoritative reporter† we find the law thus laid down:

"In an action between A. and B. of one part, and C. of the other part, among other covenants there is one thus, viz.: It is agreed between the parties that C. shall enter into a bond to B., to pay him £100 at a day; in an action for nonperformance A. and B. must join."

Mr. C. Tracey, contra.

* Bacon's Abridgment, Tit. Leases, I, 10; Clarke *v.* Courtney, 5 Peters, 319–350; Stackpole *v.* Arnold, 11 Mass. 27.

† Page 177.

Opinion of the court.

Mr. Justice FIELD delivered the opinion of the court.

Several objections were taken, in the court below, to a recovery by the plaintiffs, the principal of which, and the only objections requiring notice, were substantially these: that there is a variance between the covenant to submit, stated in the declaration, and the covenant in the submission produced; that the submission contains no authority to the arbitrators to appoint an umpire, and no agreement to abide any award rendered by him; that Kendall was not authorized to sign the submission for the plaintiffs, and, if authorized, the manner in which his authority was exercised was defective; and that there is a defect of parties plaintiffs, Kendall having signed the submission and not having joined in the action.

1st. The supposed variance between the covenant stated in the declaration and the covenant contained in the submission, arises from the fact that the submission, after referring the claims mentioned to the decision of the arbitrators, and an umpire, if necessary, adds the words, "as provided in articles of submission this day executed," and the declaration makes no mention of any such articles. In truth, no such articles ever had any existence, and the insertion of the words relating to such supposed articles probably arose from the carelessness or unskilfulness of the draftsman who prepared the formal submission. Previous to its preparation, the parties had informally agreed upon the terms of the submission, which were incorporated into the instrument signed, and the draftsman no doubt had this informal arrangement in his mind in the reference made. Be this as it may, the articles named having no existence—and this fact was established by the proofs in the case—formed no part of the contract of submission, and ought not, therefore, to have been stated in the pleadings.

On the hearing before the arbitrators, and subsequently before the umpire, no allusion was made to any such articles, nor was any objection taken on account of their absence. The parties treated the instrument under which the submission was made, as embracing the whole of the terms stipulated between them.

2d. The agreement in the submission that the claims designated should "be referred to the final decision and arbitration" of parties designated, "and an umpire, if needful," authorized the arbitrators, in case of their disagreement, to appoint an umpire. It will be presumed that the parties intended that the usual mode should be followed in the appointment, in the absence of any different designation; and the usual mode is by the act of the arbitrators themselves. So the agreement to submit the matter to arbitrators, and to an umpire, if needful, carried with it the further agreement to abide the award which they might render, or, in case of their disagreement, which he might render. The law implies an agreement to abide the result of an arbitration from the fact of submission.

3d. The objection from Smith that Kendall was not authorized to sign the submission for the plaintiffs comes too late. That instrument recites that Kendall was the agent of Morse and the executors of Vail, and as such agent he makes the settlement mentioned therein between them and Smith, and agrees to submit the disputed claims between them to arbitration. That instrument Smith signs, and thus becomes a party to the settlement and submission, and must have been satisfied of the sufficiency of the authority upon which Kendall acted. And this is not all: throughout all the proceedings before the arbitrators and the umpire, Kendall represented the plaintiffs, and Smith, who appeared in person on the other side, took no exception to his authority. But if the authority had been originally insufficient, the plaintiffs have adopted and ratified his acts by accepting the settlement made by him on their behalf, and by bringing the present action upon the covenant contained in the submission.

The manner in which Kendall executed his authority is not open to the criticism of counsel. Where an instrument shows on its face the names of the contracting parties, the agent may sign his own name first, and add to it, as in the present case, agent for his principal, or he may sign the name of his principal first, and add, by himself as agent. Either

form may be followed; all that is required in such case is that the contract shall purport on its face to be the contract of the principal.*

4th. There is no defect of parties plaintiffs. Kendall had no cause of action against Smith, or against any other party to the submission. He signed that instrument only for the purpose of settling various causes of action in which he was personally interested. The agreement of submission was exclusively between the parties to the present action. The award followed the submission, and neither adjudged anything to Kendall or against him.

In coming to the conclusion we have upon the objections of the defendants, we have not regarded the memorandum between the parties, made on the 13th of December, 1859, or the previous correspondence with Cooper, as affecting in any respect the terms or character of the submission. Those documents were admissible to show that no articles of submission were ever executed, as mentioned in the sealed instrument, that the defendant recognized the authority of Kendall, and that both Smith and Kendall treated the sealed instrument as containing the whole of the stipulations between the parties, and went to the hearing before the arbitrators and umpire with that understanding.

JUDGMENT AFFIRMED.

UNITED STATES *v.* KEEHLER.

1. The voluntary payment by an officer of the Federal government, of money held by him for the government, to a creditor of the United States, cannot be set up by him or his sureties as a defence in a suit on his official bond.
2. The whole Confederate power must be regarded by this court as a usurpation of unlawful authority, and its Congress as incapable of passing any valid laws; whatever weight may be given under some circumstances to its acts of force, on the ground of irresistible power, or to the legislation of the *States* in domestic matters; as to which the court decides nothing now.

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* 1st American Leading Cases, 605; notes to Elwell *v* Shaw.

Statement of the case.

3. A depositary of the money of the United States or a public debtor, cannot defend against a suit on his official bond by proving that he paid the money due the United States to one of its creditors, under an order of the Confederate authorities, where he shows no force or physical coercion which compelled obedience to such order.
4. In a suit on an official bond the obligation is not that of a mere depositary, but of a person who has made a contract, which he must at his own peril perform.
5. The acts of Congress of April 29th, 1864, and March 3d, 1865, furnish the only exceptions to this rule which this court can act upon.

ON certificate of division of opinion between the judges of the Circuit Court of North Carolina; whence the matter came in the form of a case agreed on and stated.

The case was this: Keehler, the defendant, had been appointed postmaster at Salem, in the State just named, some years before the rebellion broke out. His official bond, with sureties, was in the ordinary form, and was conditioned well and truly to execute the office of postmaster, and among other things, to render accounts once in three months, and to pay all balances, and to keep safely, without lending, using, depositing in banks, or exchanging for other funds, than as allowed by law, all the public money at any time in his custody, till the same was ordered by the Postmaster-General to be transferred or paid out; and that when such orders for transfer or payment were received, that he should faithfully and promptly make the transfer or payment as directed.

Keehler was still postmaster when the rebellion broke out in the spring of 1861, and had in his hands $330 of post-office money belonging to the United States. On the other hand, the United States were indebted to one Clemmens, a mail contractor in that region, for postal service in a sum exceeding $300; and the sum due to Clemmens by the United States had never been paid.

In August, 1861, the Congress of the so-called Confederate States passed an act appropriating the balances which were at the date of the breaking out of the rebellion in the hands of the several postmasters of the United States, who resided

Case submitted.

within the limits of the States then in rebellion, to the *pro rata* payment of claims against the United States for postal service; and in pursuance of the said act, and in obedience to a regular official order from the Post-Office Department of the so-called Confederate States, directing him to pay to Clemmens the whole sum of money in his, the said Keehler's, hands, received for the United States previous to the 1st of June, 1861, the said Keehler, on the 10th of April, 1862, paid to Clemmens the $330, and Clemmens gave him a receipt for it in form.

It was an admitted part of the case that the post-office at Salem was, in 1861, a collection office, and that Clemmens was the mail contractor, named in his special instructions, to whom the postmaster at Salem was required to pay over the net proceeds of his office quarterly, upon the production, by Clemmens, from time to time, *of the proper orders and receipts from the Post-Office Department of the United States;* and an admitted fact, moreover, that throughout the year 1862, the so-called Confederate government had force sufficient at its command to enforce its orders, and did enforce the orders of said government, in that part of North Carolina in which Salem is situated, and that no protection was afforded to the citizens of that part of the State by the government of the United States during that term.

The rebellion being suppressed the United States brought suit against Keehler and his sureties, on their official bond, already mentioned. The pleas were conditions performed, conditions not broken, and especially that the balance claimed by the United States, to wit, the $330, had been paid over and delivered by Keehler to the said Clemmens, on the 10th day of April, 1862, under the circumstances above stated. Upon this case, so agreed on, the judges of the Circuit Court were divided in opinion on the question, whether the law was for the plaintiff or for the defendant.

Mr. Hoar, Attorney-General, and Mr. Field, Assistant Attorney-General, for the United States, submitted the case. No opposing counsel.

Mr. Justice MILLER delivered the opinion of the court.

The defence, which the facts of the statement seek to set up to this action, will be noticed under three heads.

1. He paid the amount to one Clemmens, who was a mail carrier on the route which embraced the post-office of Keehler, and to whom Keehler had been directed to pay the money he might have as postmaster upon the production by said Clemmens of proper orders from the Post-Office Department. It was admitted that the government, at the commencement of the rebellion, owed Clemmens more than this sum, but it is not claimed that he had any orders for the money from the Post-Office Department of the United States.

Can this voluntary payment to a creditor of the United States be pleaded to a suit on the bond?

It is hardly necessary to say that such a payment is no compliance with the condition of the bond. It is, therefore, not good under a plea of covenants or conditions performed. Nor can it be used as an equitable set-off, because it would produce endless confusion in the accounts of the department, and lead to double payments and serious embarrassments in its business, if every postmaster who had government money could select a creditor of the United States and pay what he might suppose the government owed him.

2. It is stated that the Confederate Congress passed an act appropriating balances of this kind to the payment of claims against the United States for postal service, where the parties resided within the limits of the States in rebellion, and that under this act an order was drawn by the post-office department of the Confederate States on Keehler, directing him to pay this money to Clemmens, and that on this order it was paid.

It certainly cannot be admitted for a moment that a statute of the Confederate States, or the order of its postmaster-general, could have any legal effect in making the payment to Clemmens valid. The whole Confederate power must be regarded by us as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an act of its Congress or an order of one of

its departments, any right or property of the United States. Whatever weight may be given under some circumstances to its acts of force, on the ground of irresistible power, or whatever effect may be allowed in proper cases to the legislation of the States while in insurrection—questions which we propose to decide only when they arise—the acts of the Confederate Congress can have no force, as law, in divesting or transferring rights, or as authority for any act opposed to the just authority of the Federal government. This statute of the Confederate Congress and this draft of its post-office department are not, therefore, a sufficient authority for the payment to Clemmens.

3. But it is further stated (this payment being made on the 10th April, 1862), that throughout the year 1862 the so-called Confederate government had force sufficient to enforce its orders, and did enforce them in that part of North Carolina where defendant resided, and that no protection was afforded to the citizens of that part of the State by the United States government during that period.

It will be observed that this statement falls far short of showing the application of any physical force to compel the defendant to pay the money to Clemmens. Nor is it in the least inconsistent with the fact that he might have been desirous and willing to make the payment. It shows no effort or endeavor to secure the funds in his hands to the government, to which he owed both the money and his allegiance. Nor does it prove that he would have suffered any inconvenience, or been punished by the Confederate authorities, if he had refused to pay the draft of the insurrectionary post-office department on him. We cannot see that it makes out any such loss of the money, by inevitable overpowering force, as could even on the mere principle of bailment discharge a bailee. We cannot concede that a man, who, as a citizen, owes allegiance to the United States, and as an officer of the government holds its money or property, is at liberty to turn over the latter to an insurrectionary government, which only demands it by ordinances and drafts drawn on the bailee, but which exercises no force or threat of personal

violence to himself or property in the enforcement of its illegal orders.

But this court has decided more than once that in an action on the official bonds of such officers the right of the government does not rest on the implied contract of bailment, but on the express contract found in the bond, to pay over the funds. And on this principle it was held, in *United States* v. *Prescott*,* that a plea which averred positively that the money was stolen from the officer, without any fault or negligence on his part, was no defence. It would be difficult to find a stronger case for relief from a contract to keep safely and pay over the public money than this. But the court held that the contract was one which the defendant had voluntarily undertaken, and which he must at his own peril perform. This ruling was repeated in *United States* v. *Dashiel*,† also in *United States* v. *Morgan*.‡ Such was the law as declared by this court long before the rebellion broke out, and however hard it may be in some of its aspects, the court has no option but to act on it.

But Congress seems not to have been inattentive to the injustice which the rule might work in some cases, and has, by the act of April 29th, 1864,§ provided for the relief of postmasters situated like defendant, who have manfully done their duty. That act provides that in all cases where loyal postmasters have been robbed by Confederate forces or rebel guerillas, without fault or neglect of such postmaster, the Postmaster-General may credit them in settlement with the amount lost by the robbery, and if the officer had settled and paid the amount before the law was passed, it should be paid back to him. And by the act of March 3d, 1865, the relief is extended to losses by any armed force whatever, either by robbery or burning. These statutes recognize the rule laid down by this court, and provide for such exceptions as can be brought within their terms. For other cases, which present peculiar claims for relief, as this may do if it shall be shown that the claim of Clemmens

* 3 Howard, 578.
† 4 Wallace, 185.
‡ 11 Howard, 162.
§ 13 Stat. at Large, 62.

would be a just subsisting demand against the government but for this payment, the parties must resort to Congress. The court is not authorized to make other exceptions than those made by the statutes.

Our answer to the question certified to us by the Circuit Court is, that on the facts stated the

UNITED STATES IS ENTITLED TO A JUDGMENT.

RAILROAD COMPANY v. FREMONT COUNTY.

The proviso in the act of May 15th, 1856, to the State of Iowa, for aid in the construction of railroads, which excludes from the grant "all lands heretofore reserved by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any purpose whatever," excludes the lands granted to that State, among others, by the act of September 28th, 1850, known as "the swamp-land grant."

IN error to the Supreme Court of Iowa.

Fremont County, Iowa, filed a bill in one of the State courts of Iowa against the Burlington and Missouri River Railroad Company, to quiet the title to twelve thousand seven hundred and fifty-four acres of land, or thereabouts, situate in the said county, which the company claimed as belonging to it. Both parties set up title under grants by acts of Congress: Fremont County, under what is known as "the swamp-land grant" to the State of Iowa, September 28th, 1850;* the railroad company, under a grant to the State for aid in the construction of railroads, May 15th, 1856.†

The title of Fremont County, the complainant, was as follows:

By the 1st section of the act of September, 1850, it is provided "that to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and over-

* 9 Stat. at Large, 519.

† 11 Ib. 9.

flowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State."

Section 2d provides "that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State; and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to said land shall vest in the said State, subject to the disposal of the legislature thereof: provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Section 3d. That in making out a list and plats of the land aforesaid all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom.

"Section 4th. That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated."

Under this last section the State of Iowa became entitled to the benefit of this act. After its passage the only important steps to be taken to perfect the title in the State were the ascertainment and designation of the several subdivisions which fell within the description of swamp lands as defined in the third section. This duty was cast upon the Secretary of the Interior as the head of the land department.

On the 21st November, after the passage of the act, the commissioner of the land office issued instructions to the surveyor-general of the State to make a selection of these subdivisions, and report the same to the department;* and

* See also letters December 21st, 1853; January 22d, 1859, Lester's Land Laws, pp. 543, 551, 559.

also to transmit copies to the local land offices. This duty was performed in accordance with the instructions. The first list was returned and filed in the general land office September 20th, 1854, and in the local office October 23d, 1854. The second and remaining list was returned and filed in the general land office January 21st, 1857, and in the local office January 23d, 1857. These two lists contain the whole of the lands in controversy. On the filing of the lists in the local office the register was directed to make a note of the subdivisions in his tract-book, and to withdraw them from the market, which was done accordingly.

In this connection it may be proper to refer to the act of March 2d, 1855,* which is "An act for the relief of purchasers and locators of swamp and overflowed lands." It provides, in substance, that patents shall be issued to purchasers or locators who had made entries of the public lands claimed as swamp lands prior to the issue of patents to the States under the second section of the swamp-land grant of 1850, and providing for an indemnity to the States. Conflicts had arisen between these purchasers and locators, on the one side, and the States claiming the land under the swamp-land grants. As these lands were not withdrawn from sale till the filing of the lists in the local land office, they were supposed to be open to entry or location, and a portion of them had been thus appropriated. On the other hand, the States claimed that the grant to them by the act of Congress was a grant *in presenti* and vested the title immediately. Such had been the opinion expressed by the land commissioner, and also by the Attorney-General.

The embarrassments of the land department growing out of this controversy between the States and the settlers were removed by this act of 1855, which confirmed the title of the settlers, and compensated the States for the land of which they were deprived.

The second section of the act provided that compensation should be allowed to the States only in respect to subdivisions

* 10 Stat. at Large, 634.

taken up by the settlers, which were swamp lands within the true intent and meaning of the act of 1850; that is, where the greater part were "wet and unfit for cultivation." And the land department, therefore, allowed parties to contest the claim of the States, and to give evidence before the proper officers that the subdivision was not of the character contemplated by the law. As a consequence, under this construction of the act, controversies increased between the settlers and the States, and, as stated by one of the commissioners of the land office, the contesting applications pending before the department involved, by estimate, three millions of acres, and, on investigations being ordered, papers came into the office by bushels. Pending these proceedings Congress intervened and passed the act of March 3d, 1857.* This act is entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28th, 1850, and the act of March 2d, 1849."

The act contains but one section, and it provides "that the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September 28th, 1850, and the act of 2d March, 1849, heretofore made and reported to the commissioner of the general land office, *so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing laws of the United States*, be, and the same are hereby confirmed, and shall be approved and patented to the several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable," with a proviso saving the act of March 2d, 1855, which is continued in force and extended to all entries and locations, claimed as swamp lands, made since its passage. As we have already stated, the selection of the swamp and overflowed lands by the State of Iowa, under instructions from the land department, involved in this suit, was made, and lists returned and filed in the department September 20th, 1854, and January 21st, 1857, which was before the passage of this act. And these are the selections referred

* 11 Stat. at Large, 251.

to, confirmed, and approved, and for which patents were directed to be issued as soon as practicable, if the same were vacant and unappropriated, or not occupied by an actual settler under some law of Congress.

So far as respects the title of the complainant, Fremont County.

The title of the railroad company, which, as already stated, was under the act of May 15th, 1856, was thus. That act provides "that there be and is hereby granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River" (naming also several other lines of railroads), "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads," and then provides that when the lines of the roads shall be "definitely fixed," if it shall appear that any of the lands within these six sections shall have been "*sold or otherwise appropriated*," alternate sections may be selected of equal quantity within fifteen miles of the road.

To this grant is the following proviso:

"That any and all lands heretofore reserved to the United States by any act of Congress, or *in any manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever*, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The location of the railroad was not made on the ground and adopted by the company until March 24th, 1857.

The District Court rendered a decree declaring the right and title to be in the county, and the claim of the railroad company to be void. The railroad company appealed to the Supreme Court of the State, which, after hearing, affirmed the decree of the District Court. The railroad company now brought the case into this court for re-examination.

The case was submitted on the record, with briefs of Messrs. Rohrer and Strong for the plaintiff in error, and of Mr. Harvey, contra.

Mr. Justice NELSON, having stated the case in the way already given, delivered the opinion of the court.

It will be seen from an examination of the grant made to the railroad company by the act of May 15th, 1856, that the reservations annexed to it are very full and explicit. They are first found in the enacting clause itself, where provision is made for the selection of lands beyond the lines of the six sections on each side of the road, in case any of the sections have been previously "*sold or otherwise disposed of;*" and then again in the general proviso to the grant. These reservations clearly embrace the previous grant of the swamp and overflowed lands for the purpose of enabling the States to redeem them and fit them for cultivation by levees and drains. At the time of the passage of this act (May 15th, 1856), a moiety of the lands in controversy had been selected and reported to the land department; and the authorities of the State, under instructions from that department, were engaged in the selection of the remainder. The lands already selected and returned had been withdrawn from sale, and were not in the market at the time of the passage of the act; and as soon as the remaining lists were returned, which was January 21st, 1857, they were also withdrawn from the market. In the language of the railroad act, the whole of the lands in controversy were "otherwise appropriated," and were "reserved" for the purpose of aiding the States in their objects of internal improvements.

But there is still, if possible, a more decisive answer to the title set up by the defendants. Until the line of the railroad was definitely fixed upon the ground, there could be no certainty as to the particular sections of lands falling within the grant; nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float until this line was permanently fixed. Now, the proofs show that the location of the road was not

made on the ground and adopted by the company till the 24th March, 1857, which was after the confirmatory act of that year.

This, as we have seen, confirmed all the selections made at the time, and which included all in controversy in this suit, in the language of the section, "so far as the same shall remain vacant, and unappropriated, and not interfered with by actual settlement." As the railroad company at this time, for the reasons above stated, had not perfected their grant so as to have become invested with the title to any of the sections included in the lists or selections of the swamp lands on file in the land department, they can set up no appropriation of any of these lands under their grant, which leaves them subject to the confirming act of 1857, according to the very words of it.

DECREE AFFIRMED.

NOTE.

About a fortnight after the above reported case was adjudged, there was adjudged another from a different State, and which, as respected the position of parties, was a sort of converse to it; and in its nature somewhat supplementary. It is accordingly reported in immediate sequence. From its correlative character, as just described, the reader will readily understand that he must be possessed of the preceding case in order to understand this one. It was the case of

RAILROAD COMPANY *v.* SMITH.

1. The act of June 10th, 1852, concerning swamp and overflowed lands, confirmed a present vested right to such lands, though the subsequent identification of them was a duty imposed upon the Secretary of the Interior.
2. These lands were excepted from the subsequent railroad grants to Iowa and Missouri.

Statement of the case.

3. In a suit to recover lands which the plaintiff claims under one of the railroad grants, it is competent to prove by witnesses who know the lands sued for, that they were swamp and overflowed within the meaning of the swamp-land grant, and therefore excluded from the railroad grant.

ERROR to the Supreme Court of the State of Missouri.

The Hannibal and St. Joseph Railroad Company brought ejectment against Smith, in one of the county courts of Missouri, to recover possession of certain lands.

The title of the railroad company was deduced from an act of Congress, entitled, "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10th, 1852. This act granted to the State of Missouri, for the purpose of making the railroad, every alternate section of land designated by even numbers on each side of the road.

The legislature of Missouri, in September, 1852, accepted the grant, and by statute vested the land granted in the railroad company.

Such was the title of the plaintiff.

That of the defendant, Smith, was deduced from the same "swamp-land grant," the act of Congress, namely, which is set out in the statement of the last reported case, approved September 28th, 1850, by which Fremont County in that case held *its* lands. But in this case the railroad interest was the *actor;* not as in the last one a defending party merely, with a swamp-land grantee in the position of assailant.

On the trial below of the present cause the defendant introduced evidence against objection tending to prove that the lands in suit were wet and unfit for cultivation at the date of the swamp-land act of 1850; and this was his title. No evidence was introduced by him tending to show that the land in suit was ever certified as swamp land by the Secretary of the Interior, or that the same was ever patented as such to the State of Missouri. Nor was this pretended. In fact the correspondence of the land department of the United States showed that the secretary had no sufficient evidence to enable him to make such certificates.

The court in which the suit was brought gave judgment for Smith, the defendant, and the railroad company appealed to the Supreme Court of Missouri. That court affirmed the judgment

of the court below, and the railroad company now brought the case here.

Messrs. James Carr and W. P. Hall, for the plaintiff in error; Mr. Drake, contra.

Mr. Justice MILLER delivered the opinion of the court.

The grants of lands by Congress to the States in aid of railroads have generally been made with reference to the lands through which the roads were to pass, and, as the line of the road had to be located after the grant was made, it has been usual in the acts making the grant, to describe them as alternate sections of odd numbers within a certain limit on each side of the road, when it should be located.

This, of course, left it to be determined by the location of the road what precise lands were granted. So far as this uncertainty in the grant was concerned, it was one which might remain for a considerable time, but which was capable of being made certain, and *was* made certain, by the location of the road. But as Congress could not know on what lands these grants might ultimately fall, and as the roads passed through regions where some of the lands had been sold, some had been granted for other purposes, and some had been reserved for special uses, though the title remained in the United States, these statutes all contained large exceptions from the grant, as measured by the limits on each side of the road and as determined by the odd numbers of the sections granted.

We have had before us two cases growing out of the construction to be given to the language of these exceptions in the grant of May 15th, 1856, to the State of Iowa. The first of these was the case of *Wolcott* v. *The Des Moines Company*.* The other is the case of *The Railroad Company* v. *Fremont County*, decided at this term.†

The case before us arises under a similar grant to the State of Missouri, with like reservations in the act, but it raises a question somewhat different from that presented by the other two cases.

In the last of those cases it was determined that a proviso which excluded from the grant "all lands heretofore reserved by

* 5 Wallace, 681.

† The case immediately preceding.

any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever," excluded the lands granted to the States by the act of September 28th, 1850, known as the swamp-land grant. In that case the county of Fremont, claiming under the swamp-land grant, was plaintiff, and the railroad company, claiming under the grant to the State for railroads, was defendant, and the main point in it related to the evidence which might be necessary to establish the fact that the lands claimed by plaintiff were swamp and overflowed within the meaning of the act of 1850.

In the present case the position of the parties is reversed, the plaintiff claiming under the act of June 10th, 1852, granting lands to the State of Missouri for railroad purposes, and the defendant claiming under the swamp-land grant.

In the former case it was necessary for the plaintiff, who must succeed on the strength of her own title, to show satisfactory evidence that the title of the United States had, under the swamp-land grant, become vested in Fremont County. The opinion of the court shows how this was successfully done in that case.

In the present action it was incumbent on the railroad company to show that the title of the United States had become vested in the company under the grant for railroad purposes.

It is admitted that this has been done, unless the land is of that class reserved from the grant as swamp land; for the act under which plaintiff claims has an exception in precisely the same terms with the act for the benefit of the Iowa railroads.

In the former case the plaintiff, claiming under the swamp-land grant, was bound to establish his title by such evidence as Congress may have determined to be necessary to make the title complete in the State, or the grantee of the State, to which the lands were supposed to be granted, otherwise the plaintiff established no legal title. In the present case it is not necessary to defeat the title under the railroad grant to show that all the steps prescribed by Congress to vest a complete title in defendant, under the swamp-land grant, have been taken. It is sufficient to show that this land which is now claimed under the railroad grant, was reserved out of that grant, and this is done whenever it is proved by appropriate testimony to have been swamp and overflowed land, as described in the act of 1850.

In order to determine the character of the testimony which

will prove this, it may be useful to look at the statute which granted these swamp lands.

The first section of the act, after declaring the inducements to its passage, says that the whole of these swamp and overflowed lands, made thereby unfit for cultivation, and unsold, are hereby granted to the States.

The third section, for further description, says that all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included as swamp lands; but when the greater part is not of that character the whole of it shall be excluded.

Congress has here given a criterion, apparently not difficult of application, by which to determine what was granted, to wit, such legal subdivisions of the public lands, the greater part of which were so far swamp and overflowed as to be too wet for cultivation. Now, here is a present grant by Congress of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges, and sections, to identify them as coming within it. In this respect it is precisely like the railroad grants, which only became certain by the location of the road. In fact, in this regard the swamp-land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a float, to be determined by the choice of the line of the road in future. No act of Congress has ever attempted to take back this grant of the swamp lands, or to forfeit it, or to give it to any other grantee, or modified the description by which they were given to the States. It was protected by positive reservation in the grant under which plaintiff claims. Now, when a party claiming under that grant sues to recover a particular piece of land which is excepted out of the grant by appropriate language, is it not competent to show by parol proof that it was of the class covered by the first grant and excepted from the second, namely, so swampy, overflowed, and wet, as that the major part of the tract was unfit for cultivation?

By the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action,

but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the land department with the State officers, he must, if he had attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity?

The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.

Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant.

The decision of the case of the *Railroad Company* v. *Fremont County* disposes of all the errors alleged in this case but the admission of the verbal testimony, and as we are of opinion that the State court did not err in that, the JUDGMENT IS AFFIRMED.

Mr. Justice CLIFFORD, dissenting.

Unable to concur in the judgment of the court in this case, I think it proper to state the reasons of my dissent.

Congress made provision, by the first section of the act of the twenty-eighth of September, 1850, that swamp and overflowed lands, "*made unfit thereby for cultivation,*" and which remained unsold at the passage of the act, should be granted to the States in which the same were situated, to enable the States to con-

struct the necessary levees and drains to reclaim the lands so granted, and render them fit for cultivation.*

Such lands were a part of the public domain, and of course it was necessary, before the title could vest in the States, that the land should be surveyed and designated, as lands not made unfit thereby for cultivation were no more included in the first section of the act than lands sold prior to its passage.

Taken literally, the first section, it is conceded, purports to grant the whole of those swamp and overflowed lands, made unfit thereby for cultivation; but the second section makes it the duty of the Secretary of the Interior to make out an accurate list and plats of the lands described as aforesaid; and the third section provides that, in making out said list and plats, whenever the greater part of a subdivision is wet and unfit for cultivation, the whole of it shall be included in the list and plats, which is a matter to be ascertained and determined by the Secretary of the Interior, and which, under the act of Congress, cannot be ascertained and determined by any other tribunal. Lands fit for cultivation, under those circumstances, are to be included in the list and plats; but the corresponding provision in the same section is, that if the greater part of a subdivision is not of that character, that is, not swamp and overflowed lands, made unfit thereby for cultivation, then the whole of the subdivision shall be excluded from the list and plats.

Special power is conferred upon the Secretary of the Interior to make out an accurate list and plats of the lands, and it is quite clear that a jury is no more competent to ascertain and determine whether a particular subdivision should be included, or excluded, from the list and plats required to be made under that section, than they would be to make the list and plats during the trial of a case involving the question of title.

Courts and juries are not empowered to make the required list and plats, nor can they determine what particular lands shall be included in the list and plats before they are prepared by the officer designated by law to perform that duty.

Support to that conclusion is derived from the subsequent language of the same section, which makes it the duty of the secretary, when the list and plats are prepared, to transmit the same to the governor of the State, and to cause a patent to be

* 9 Stat. at Large, 519.

issued to the State for the lands. Unless the requirements were such as is supposed, it is difficult to see how the affairs of the land department can be administered, as the records and files of the office would not furnish any means of determining whether a given parcel of land belongs to the State in which it is situated or to the United States.

Evidently the title to the lands remains in the United States until these proceedings are completed, as the same section which makes it the duty of the secretary, when the list and plats are prepared, to transmit them to the governor and to cause a patent to be issued therefor, also provides that when the patent is issued "the fee simple to said lands shall vest in the said State, . . . subject to the disposal of the legislature therof."

Prior to the issuing of the patent therefor the fee simple to the lands does not vest in the State, and the lands, prior to the date of the patent, are not subject to the disposal of the legislature.

Strong confirmation that the construction of that act herein adopted is correct is also derived from the subsequent legislation of Congress upon the same subject. Selections of swamp and overflowed lands were made by the States, in certain cases under that act, before the required list and plats were made by the secretary, and Congress, on the third of March, 1857, passed an amendatory act to remedy the difficulty, in which it is provided to the effect that such selections, if reported to the general land office, should be confirmed, provided the lands selected were vacant and unappropriated, and the selections did not interfere with actual settlements under any existing laws of the United States.*

Such a law was certainly unnecessary if the construction of the original act adopted in the opinion just read is correct, as in that view the original act vested a fee simple title in the States without the necessity of waiting for any action on the part of the land department; and if so, then it follows that the States may select for themselves, and if their title is questioned by the United States or by individuals, they may claim of right that the matter shall be determined by jury.

Anticipating that the decision will occasion embarrassment to the land department, I have deemed it proper to state thus briefly the reasons of my dissent.

* 11 Stat. at Large, 251.

Statement of the case.

PELHAM *v.* ROSE.

1. The seizure of the property of which a forfeiture is sought by proceedings had under the act of Congress of July 17th, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," is the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture.
2. By the seizure of a thing is meant the taking of the thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery the term means caption; the physical taking into custody.
3. Where a writ of monition issued upon a libel of information, filed by the United States against a promissory note, commanded the marshal "*to attach the note, and to detain the same in his custody until the further order of the court respecting the same;*" and the marshal returned the writ with his indorsement thereon that he had "*arrested the property within mentioned;*" *Held*, in an action against the marshal for a false return, 1st, that due and legal service of the writ required the marshal to take the note into his actual custody and control; and 2d, that the return of the marshal signified that he had actually taken the note into his custody and under his control.
4. The court will decline to answer a question certified to it by the Circuit Court when it rests upon an hypothesis.

ON certificate of division of opinion between the judges of the Circuit Court for the District of Indiana, the case being thus:

An act of Congress, approved July 17th, 1862, entitled "An act to *seize* and confiscate the property of rebels," thus enacts:

"Sec. 6. All the estate and property, moneys, stocks, and credits, of such person, shall be liable to seizure as aforesaid; and it shall be the duty of the President to *seize* and use them as aforesaid, or the proceeds thereof."

"Sec. 7. That to secure the condemnation and sale of any such property, *after the same shall have been seized*, so that it may be made more available for the purposes aforesaid, proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, or in any Territorial court, or in the

United States District Court for the District of Columbia, *within which the property above described, or any part thereof, may be found, or into which the same may be brought*, which proceedings shall conform, as nearly as may be, to proceedings in 'admiralty and revenue cases;' and if said property shall be found to have belonged to a person in rebellion, the same shall be condemned as enemies' property."

Under this statute the attorney of the United States for the district of Indiana filed his libel of information against certain "credits and effects" of one Henry Pelham (the plaintiff), "that is to say, one promissory note for the sum of $7000, dated March 1st, 1862, and due four years after date, executed by Lewis Pelham to him the said Henry."

A writ of monition was issued, directed to a certain Rose, the then marshal of the district, which, after referring to the libel, ordered him to attach the note and detain the same *in his custody*, and to cite all persons claiming the same, or having anything to say why it should not be condemned and sold, to appear on a day designated and interpose their claims.

Rose made this return:

"In obedience to the within warrant, I have *arrested the property* within mentioned, and have cited all persons having or pretending to have any right, title, or interest therein, as by the said warrant I am commanded to do."

The District Court subsequently proceeded to try and determine the matters involved in the libel, and decreed,

1st. That for failing to appear, the default of all persons interested in the note should be entered.

2d. That the charges of the libel should be taken as confessed.

3d. That the note should be condemned as forfeited to the United States; and,

4th. That the clerk should issue a writ of *venditioni exponas* to the marshal to sell the note at public auction.

This latter writ was accordingly issued and delivered to the marshal, and was returned by him with a certificate that

Statement of the case.

he had sold the note at auction to Lewis Pelham, who was its maker, for $3000.

Henry Pelham now brought the action below against Rose and his sureties for a false return to the writ of monition.

The declaration, after stating such of the facts above-mentioned as were pertinent, set forth that the marshal did not, in obedience to the writ of monition, attach the note therein described, nor seize the same by himself or deputy; that the note was not even within sight of the marshal or of any of his deputies at any time between the delivery of the writ to him for execution and its return; nor was it, pending the proceedings by libel, within the State of Indiana; but that during this time, and for a period long after the entry of the decree of confiscation, was in the custody and possession of the plaintiff in the State of Kentucky. Wherefore (the declaration asserted) the return of the marshal was wholly false, and the decree of condemnation was founded upon a false return, and hence an action had accrued to the plaintiff on the bond of the marshal.

The defendants demurred, and upon the argument of the demurrer the following questions arose, upon which the judges of the court were opposed in opinion:

"1st. Whether, upon the facts stated in the declaration, it was material and necessary to the due and legal service of *the writ of monition*, therein set forth by the marshal, that he should have seized and taken into his custody and under his control, the promissory note mentioned.

"2d. Whether the return to the writ of monition, as set forth in the declaration, must be construed to mean that the marshal had actually taken into his custody and under his exclusive control, the promissory note; and,

"3d. Whether, on the hypothesis that all the matters, as set forth in the declaration, were true, the judgment and proceedings in the District Court, as therein stated, would estop the plaintiff to maintain an action on the promissory note against the maker."

Mr. Coburn, for the plaintiff in error, a brief of Messrs. Morrison, Dye & Harris being filed; Mr. Miles, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

The act of July 17th, 1862,* contemplates the seizure of the property, the forfeiture of which is sought by the proceedings taken under its provisions. It says so in express terms. In one section it makes it the duty of the President "to cause the seizure" of the estate and property, money, stocks, and credits of the persons designated therein. In another section it declares that the like property of persons engaged in armed rebellion against the United States, or in aiding or abetting the rebellion, "shall be liable to seizure," and imposes a similar duty upon the President to seize and use it. And in a third section it provides, that to secure the condemnation and sale of the property, "*after the same shall have been seized*," proceedings shall be instituted, in the name of the United States, in any District Court thereof, or in any Territorial court, or in the District Court for the District of Columbia, within which the property, or any part thereof, may be found, or, if movable, may first be brought; and that such proceedings shall conform, as nearly as possible, to proceedings in admiralty or revenue cases.

The seizure of the property, as thus seen, is made the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture. Now, by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody.

In the case at bar, a visible thing, capable of physical possession, is the subject of the libel. It is the promissory note of Pelham which constitutes the *res*, against which the proceeding is instituted, and not "a credit," or debt, which the note is supposed by the defendants' counsel to represent. Whether by any proceedings under the act of July, 1862, the indebtedness of a maker on a negotiable promissory

* 12 Stat. at Large, 590, §§ 5, 6, and 7.

note, before its maturity, could be reached without the possession of the note itself, is not a question presented for our consideration. It is sufficient that the object of the present libel is to reach the note itself. This appears at every stage of the proceedings; in the information; in the monition to the marshal; in his return; in the decree of the court; and in the sale made.

To effect its seizure, as required by the act, it was, therefore, necessary for the marshal to take the note into his actual custody and control. And such was the purport of the command of the writ of monition. The writ describes the note, and the command to the marshal is, "to attach the note, and to detain the same in your custody until the further order of the court respecting the same,"—language which is inconsistent with any service other than that made by physically taking the note into his possession and control. This form of command is usually adopted in warrants to the marshal in cases of municipal seizure. "On receiving it" (the warrant), says Conkling in his treatise, "it is the duty of the marshal to arrest the property seized by taking it into his custody."* The term arrest is the technical term used in admiralty process to indicate an actual seizure of property. And the return of the marshal to the writ, that he has "arrested the property within mentioned," signifies in apt and technical language that he has actually taken the property into his custody and under his control.

The first and second questions certified to us must, therefore, be answered IN THE AFFIRMATIVE.

The third question rests upon an hypothesis, and we must DECLINE TO ANSWER it until it has lost its hypothetical character and become involved in actual controversy.

* Fourth edition, p. 524.

Syllabus.

CHEEVER *v.* WILSON.

1. A married woman having rents from her separate real estate which had been settled upon her and was leased by her on long leases, subject to her mother's dower, pledged them to her tenant by proper instrument, to a certain amount for advances. Some time afterwards, her mother being yet alive, she was divorced by a decree which ordered her to direct payment of a third of the rents *as they should become due*, to her husband for the *education and support* of certain of their common children, which the court in decreeing the divorce assigned to him. The tenant refused to pay the husband anything in any way, but paid his own advances, and then kept rents on hand, paying some to the wife. After the divorce, and so after the husband's rights under the decree had attached, she made a further pledge of the rents to the tenant. It took some years before the sum for which the rents were pledged before the divorce was paid. On bill by the husband and account ordered—the mother being now dead, and the dower third having fallen in to the wife—the auditor held,
   i. That as soon as the advances for which the rents were first pledged were paid, the husband was entitled to be subrogated to the wife's full rights, against the tenant as existing at the time when the order in divorce was made (that is to say, exclusive of the dower third), till his third of the two thirds, with interest from the date of the decree, was paid;
   ii. That the tenant, for the payment of his demand under the pledge made after the divorce, was to stand postponed till this third of the husband's was fully paid, and,
   iii. That the wife (to whom, as already said, after the divorce there had fallen in, by her mother's death, the dower third, a part not subjected by the decree, to her husband), was to be confined to the enjoyment of that dower third till the husband was fully paid his third of the original two thirds, and the tenant was paid whatever he had advanced after the divorce. *Held*, that the report was right.
2. A married woman has the same power as a *feme sole* to pledge rents settled in trust for her to receive, take and enjoy them to her sole and exclusive use and benefit.
3. Where a decree in divorce gives a husband one-third part of his wife's rents, these being at the time of the decree subject to a paramount right of dower in her mother, the third does not become in any way augmented by the mother's death and consequent falling in of her dower's third.
4. Where a divorced husband brings a claim against a tenant of his wife for a portion of her rents allotted to him by the decree of divorce, the tenant, if he means to take advantage of an alleged nullity of the decree, must make his averment of the nullity in such form as that the

husband can take issue. He cannot set it up on argument, although his averment was that he had a mortgage of the rents, and "reserves to himself the right to impeach the decree if occasion should offer and require him to do so."

5. A decree in divorce, valid and effectual by the laws of the State in which it was obtained, is valid and effectual in all other States. Whether the finding by the court of domicil on which the decree is founded is conclusive or only *primâ facie* sufficient is not decided.
6. A wife may acquire a domicil different from her husband's whenever it is necessary or proper that she should have such a domicil, and on such a domicil, if the case otherwise allow it, may institute proceedings for divorce, though it be neither her husband's domicil nor have been the domicil of the parties at the time of the marriage or of the offence.

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

By a statute in force in Indiana in 1857* it was thus enacted:

"Divorces may be decreed by the Circuit Court of the State on petition, filed by any person at the time a *bonâ fide* resident of the county in which the same is filed; of which *bonâ fide* residence the affidavit of such petition shall be *primâ facie* evidence.

"The grounds of divorce are (among others):

"Abandonment for one year.

"Cruel treatment of either party by the other."

The statute further declares that, the court, in decreeing a divorce, shall make provision for the guardianship, custody, support, and education of the minor children of such marriage.

With this statute in force, one Mrs. Annie Jane Cheever, in June, 1857, she being then in Marion County, Indiana, filed a bill in the County Court of the State (the proper court, if the case were otherwise one for its cognizance), praying a divorce, *a vinculo*, from her husband, B. H. Cheever. Mrs. Cheever had come to Indiana from Washington in apparently the February preceding, and the city just named was the place where her parents had long lived, where it seemed that she was brought up, and where in 1842 she was married; a contemporary document describing both herself and

* Act of May 13th, 1852.

her then intended husband, as "of the city of Washington." At the time of the application for divorce, Mrs. Cheever was owner, as for more than seventeen years previously she had been, by devise from her father, of real estate in Washington; a store on Pennsylvania Avenue and two houses on Sixth Street; property which on her marriage in 1842 had been settled in trust, that she should "receive, take, and enjoy the rents and profits to her sole and exclusive use and benefit."

There was little in the record to show exactly what motive took Mrs. Cheever from Washington to Indiana; or how long *exactly* she remained in Indiana, or how or where, by dates, she was living after she left it. But it was certain that divorces *a vinculo* could not, when she went to Indiana, nor until long after she was divorced in that State, be obtained by law in the District of Columbia.

Her petition for divorce—which described her as a resident of Marion County, and, to which was annexed an affidavit that she was a *bonâ fide* resident of the county at the time the petition was filed (June 16th, 1857), and was so still—represented that she had been married to Cheever; that after conduct to her, harsh, cruel, and severe, he had in 1854 abandoned her without any purpose of returning to her; and it gave the names and dates of birth of four children, which it stated were the issue of the marriage.

The husband, by an answer of three lines, denied the allegations of the wife's bill, and required strict proof; and on his part filed a cross-bill, setting forth the fact of her separate property, the existence of the children, that in 1854 a disagreement arose between him and his wife which was wholly irreconcilable, that he had abandoned her with intent never to live with her again; that reconciliation was impossible: and he, too, on his part concluded his petition with a prayer for *a divorce a vinculo*, and to have custody of the older children, and the profits of the real estate to support them.

To this cross-bill of her husband Mrs. Cheever appeared *without process*, and the cause being called for trial, it *was by*

consent of parties submitted to the court without a jury, and "the court having heard the evidence," as the record stated, *found* the marriage, abandonment, and *residence of Mrs. Cheever*, the birth and names of the children all as alleged, and on the 26th of August, 1857, decreed the divorce prayed for by both parties alike.

How long Mrs. Cheever remained in Indiana after this date was not quite apparent. It rather *seemed* as if she had left it in the end of the following September. The record of the already described proceeding in divorce, contained under the date of February 24th, 1858, this entry:

"Now comes S. Yandes, Esq., attorney for B. H. Cheever, and L. Barton, Esq., attorney for Annie Jane Cheever, and on *their* motion *each of said parties has leave to withdraw their respective depositions filed in this court at the last term thereof, in the cause then pending for divorce between said Cheever and Cheever.*"

Some time before December of the same year (in June, as was said in one of the briefs, without contradiction by the other), Mrs. Cheever remarried, and went to Kentucky. Her second husband dying, she came back, apparently, to Washington. She was there it seemed in 1862 and 1863.

Prior to the divorce she had made to one Wilson, a grocer, two leases of five years each, of the store in Washington; one of the leases, made in 1855, ran from the 1st of October, in that year, till the 1st of October, 1860; and the other (made July 16th, 1857, forty days before the divorce), for a further term of five years, to commence when the first one should expire.

Besides these two leases made *before* the divorce, she made a third one in 1858, *after* it; this third one running for ten years from the expiration of the first one, that is to say, from the 1st October, 1860, till the same day in 1870; this last lease containing a stipulation, that if the premises should be destroyed by fire during the term, the rent should cease until the premises should be rebuilt by the lessors.

Wilson, the lessee, already named, appeared to have been on friendly terms with Mrs. Cheever and her mother, and

from time to time during her domestic troubles advanced to her money; collected the rents of her Sixth Street houses, paid certain claims against her, charging them against the rents of the property occupied or managed by him. To secure him for these advances made, and certain others to be made, Mrs. Cheever, nine months *before* the divorce, executed a deed of trust, in form, to two gentlemen of Washington, Messrs. Carlisle and Maury; and Wilson went on making advances on the one hand, and charging them against rents on the other, to the extent, as was alleged, of near $5000; the whole of this sort of business being done without much formality. A likelihood of confusion of accounts and of contest about them, if third parties became interested to intervene, was augmented by the fact that after the divorce, and after Cheever's rights, if any, under the Indiana order, had attached, Mrs. Cheever-Worcester received further advances from Wilson, not secured by the deed of trust, and which advances it was agreed by her that Wilson should still charge against rents; and finally, that in 1862, the storehouse was destroyed by fire, that the mother of Mrs. Cheever-Worcester received the insurance money, $4000, and that Wilson, under the covenant in the last lease, himself rebuilt it.

The decree of divorce in Indiana, which allotted the children in pursuance of the statute there, gave Cheever the three oldest, and Mrs. Cheever one, the youngest, and at the *same time* ordered that "*as the rents should become due and payable*," he should receive for the maintenance and education of the children which he took, the one third part of those which would be coming to Mrs. Cheever, in her own right, to obtain which Mrs. Cheever was ordered to give to him a proper authority to demand them of the tenant. Mrs. Cheever was to have the remaining two thirds. The mother was still alive, and her dower third was as yet paramount.

Mrs. Cheever, soon after the divorce, executed a power with an assignment to Cheever to receive the rents, interlining in it before execution, a declaration that the assignment was subject to a previous incumbrance of about $5000

to Wilson. Cheever, disregarding this part of the instrument, demanded his one third of Mrs. Cheever's two thirds, and Wilson setting up his prior right, and refusing to pay, Cheever now filed a bill in the court below, against him, Mrs. Cheever (now called Worcester), and her new husband, Worcester himself, setting out the divorce, order, &c., and praying for a specific performance of the Indiana order as to the portion of the rents allotted to him, and for general relief.

Mr. and Mrs. Worcester set up that the advances had not been yet paid by the rents; but, of course, did not set up that the divorce in Indiana was void.

Wilson set up the same allegation that the rents had not yet repaid him his advances made on the faith of them; and while he made no averment that the divorce was void, he yet stated that he "did not admit its validity or regularity, or that it was operative to affect his rights, but, on the contrary, reserved to himself the right to impeach it if occasion should offer and require him to do so." The matter, independently of the question of validity of the Indiana divorce, which, as Worcester died some time after filing his answer, it was possible might now be made, was obviously very much one of figures; and the court, in June, 1863, referred the matter to an auditor to state an account; the mother of Mrs. Cheever-Worcester having died in the April before, and her one third so falling in to her daughter.

The auditor, assuming the validity of the divorce, and bringing his account down as near to the date as practicable of his report, considered that the order of payment ought to be:

1. Wilson's advances to Mrs. Cheever, as secured by the trust deed of Carlisle and Maury.

2. Cheever's one third of the rents under the Indiana order from the time the advances were so satisfied.

3. So much of Cheever's one third of the rents as had been displaced by the interference of Wilson's prior claim, from the date of the Indiana order to the date of the payment of the advances under the trust deed, to payment

of which one third, the whole two thirds of Mrs. Cheever-Worcester's rents were to be devoted; and, as the reporter understood his view—this part of the case not having been argued here—he held* that Wilson was bound on the principle of subrogation to pay so much of Cheever's third as had been thus displaced; the effect of the auditor's whole view being to throw Wilson on later rents for reimbursement of advances not secured by the trust deed (the only ones as yet unpaid), and leaving to Mrs. Cheever-Worcester, for a considerable time, nothing but the dower one third which had fallen in by her mother's death.

Acting on these views of law, and subrogating Cheever to Wilson's rights against Mrs. Cheever-Worcester, the auditor, after much work of calculation, presented certain figures in result. Both Cheever and Wilson excepted to the report. Cheever excepted—

1. To the position assumed by the auditor, that the wife had power, under the marriage settlement, to anticipate and pledge her rents.

2. To the auditor's not bringing in, after the death of the mother, Mrs. Cheever-Worcester's new one third, to help to pay him a one third of the whole rents.

3. To the finding as to the state of the accounts between Wilson and Mrs. Cheever, as to the advances.

Wilson, on his part, objected to his being too much postponed for his later advances.

The court sustained the defendant's exceptions and dismissed the bill, upon the ground that the Indiana decree was wholly void as to each of the subjects of which it undertook to dispose; the divorce, the children, and the property. Cheever then brought the case here.

In this court, while some reference was made, on the side of Cheever, to the views of the auditor as to the wife's power of anticipation, to his view that the dower one third was not subject to the Indiana order; and to his figures; and by

* Printed transcript of record, December Term, 1869, No. 53, pp. 47, 53, 54.

Recapitulation of the case in the opinion.

Wilson to the principle of subrogation adopted, the argument was on the validity of the Indiana divorce and orders.

Mr. Boyce, for the appellant, contended that the Constitution ordaining that "full faith and credit should be given to the judicial proceedings of every other State," the judgment, if conclusive, as undoubtedly it was, in Indiana, was conclusive everywhere else in this country.* Jurisdiction having attached, the judgment was not open to inquiry upon the merits; that judgments of another State were not *primâ facie* but conclusive evidence of what they adjudged; that while parties not privies could show that the judgment had been obtained by fraud, or that the court rendering it had no jurisdiction, parties privy to the judgment could not do it.†

Mr. W. S. Cox, contra, commenting on the case as already stated, and upon the demoralizing character of the Indiana statute, contended that the courts of Indiana had no right to decree a divorce of any person but of *bonâ fide* domiciled citizens of that State; that the question of *bonâ fide* domicil was always one of fact; that here it was palpable that no case existed in fact, and that the divorce was a divorce by collusion and consent; the wife having set up a domicil in Indiana, because no divorce *a vinculo* could be got in Washington, her true domicil; that Mrs. Cheever could acquire no domicil except that of her husband, who it was not pretended was ever domiciled in Indiana; that even if there had been jurisdiction in Indiana to affect the person, there was none to affect the real estate in Washington; and, finally, that the decree was without parallel, for that it awarded the husband alimony for his own offence of desertion.

Mr. Justice SWAYNE delivered the opinion of the court.

The material facts of the case, as disclosed in the record, are as follows:

On the 6th of September, 1842, Cheever, and the defendant,

* Christmas *v.* Russell, 5 Wallace, 302. † Clay *v.* Clay, 13 Texas, 204.

Recapitulation of the case in the opinion.

Annie, then Annie J. Hughes, executed a deed of marriage settlement, whereby the title of the real estate therein described, situate in the city of Washington, was vested in Sarah T. Hughes, the mother of Annie, "in trust, to permit her daughter, the said Annie J. Hughes, to receive, take, and enjoy the rents and profits of the said lands and premises to her sole and exclusive use and benefit," &c. The property embraced in the settlement is designated in the proceedings as "the Avenue property," and "the Sixth Street property." On the 8th of September, 1842, the parties were married. On the 10th of September, 1855, Mrs. Cheever and Mrs. Hughes executed to the defendant, Wilson, a lease of the Avenue property for five years, from the 1st of October, 1855, at an annual rent of $1300, to be paid quarterly. On the 26th of November, 1856, they executed a deed of trust to Carlisle and Maury, to secure certain advances therein mentioned, made, and to be made, by the defendant Wilson, to Mrs. Cheever.

This deed refers to the lease, and authorizes Wilson, after the 1st of October, 1857, to retain and apply the rents to the indebtedness until it should be extinguished. On the 11th of February, 1857, Mrs. Cheever executed to Wilson a paper purporting to assign to him all the rents then due and thereafter accruing until he should have received the sums therein mentioned. A further lease was given by Mrs. Hughes and Mrs. Cheever to Wilson, on the 16th of July, 1857, of the Avenue property, for the term of five years, to commence on the 1st of October, 1860, at the same rent, to be paid in the same manner as was provided in the former lease. Mr. and Mrs. Cheever lived together in Washington until December, 1854, when they separated. On the 16th of June, 1857, Mrs. Cheever filed her petition for a divorce in the Circuit Court of Marion County, Indiana. She described herself therein as a *bonâ fide* resident of that county. The cause was removed by an order for a change of venue to the Circuit Court of Madison County, in that State. On the 19th of August, 1857, Cheever appeared and filed his answer and a cross-petition. On the 26th of that month the court decreed

Recapitulation of the case in the opinion.

a divorce *a vinculo matrimonii*, and thereafter, by the agreement of the parties, it was further decreed that Cheever should have the custody of the three elder children, and that Mrs. Cheever should have the custody of the younger one until the further order of the court, and that for the support and education of the children Cheever should receive one third of the rents and profits, to which Mrs. Cheever was entitled, accruing from the property described in the deed of settlement. The decree declared, "that the same is hereby decreed to the said Benjamin, as the same shall hereafter become due and payable, for the uses and purposes of the said infant children during the lifetime of the said Annie." . . . "And the said Annie shall execute to the said Benjamin a good and sufficient power to receive said rents and profits for the uses and purposes herein declared, which shall be sufficient for the purpose." On the 27th of August she executed such an instrument, pursuant to the decree; but before doing so she added this sentence to the draft which had been prepared: "This assignment of rents is subject to an incumbrance upon said rents to my agent, Jesse B. Wilson, of about $5000." Her interest in the rents at the date of the decree was two thirds in possession, and the remaining third expectant upon the death of her mother, who received that portion for her dower. Notice of the decree was given to Wilson within a very short time after it was rendered. He did not recognize the complainant's claim, and has never paid him anything.

Soon after the divorce was granted Mrs. Cheever married Louis Worcester. On the 11th of December, 1858, Worcester and wife gave to Wilson an instrument whereby they assigned to him all her rents until he should have received the sum of $3000. On the 30th of December, 1858, Worcester and wife and Mrs. Hughes gave to Wilson an extension of his lease of the Avenue property for the term of ten years, from the 1st of October, 1860, being an addition of five years to the term of the last preceding lease. At the same time Mr. and Mrs. Worcester executed to him a further assignment of the rents. The Avenue buildings were destroyed by fire

Recapitulation of the case in the opinion.

in April, 1862. Wilson erected the present store on the property at a cost to himself of upwards of $4000. He has continued to occupy it, and has paid no rent since the fire to any one.

Mrs. Hughes died on the 12th of April, 1863. Worcester died before that time. On the 22d of October, 1863, Wilson and Mrs. Worcester came to a settlement of their accounts. He had collected the rents of the Sixth Street property up to that time, but did so no longer. The accounts embraced the rent received from that property, as well as that from the Avenue property, and extended to the period of the fire. The result was that she was found to be indebted to him in the sum of $3290.

The complainant's bill was filed the 21st of June, 1858, and seeks a specific performance of the Indiana decree, against Wilson, as to the portion of the rents allotted to the complainant for the benefit of the children. On the 17th of June, 1863, it was ordered by the court that the auditor should report upon the state of the accounts between Mrs. Worcester and Wilson. There was no finding as to the rights of the parties, and no specific directions were given in the order.

The auditor made a very elaborate report. Assuming the Indiana decree to be valid, his conclusions were that the balance due to Wilson for his advances on the faith of the pledges of the rents, prior to the divorce or his having notice, and at the time of notice—which the auditor found to be the 11th of September, 1857—was $4627.78, including interest, and that this balance was extinguished on the 1st of January, 1863, leaving an overplus of $23.30; that there was due to the complainant the sum of $622.97, including interest, for rents, from the time of the payment of Wilson's advances to the 1st of January, 1865, the last quarter-day before the adjustment by the auditor, and the further sum of $2437.41 and interest for rents, from the date of the decree to the time the advances were paid; that the amount of the rents, accruing from the time of the payment of the advances, to the 1st of March, 1865, from the Avenue property,

as well as the Sixth Street houses, while the defendant collected the rents of the latter, excluding the third which fell in by the death of Mrs. Hughes, was $1831.84; that the amount due to the complainant was, therefore, $3060.38, and that the sum in the hands of the defendant, Wilson, applicable thereto in payment, $1831.84, was not sufficient to pay complainant's arrears by the sum of $1295.58.

According to the report the claimant is entitled to a decree against Wilson for the sum of $1831.84, with interest from the 1st of March, 1865, and for the further sum of $1295.58 against Mrs. Worcester, with interest from the same time. The sum proposed to be decreed against Wilson is made up of two elements: (1) the complainant's share of the rents received by Wilson after his advances were paid, with interest down to March 1st, 1865, being $622.97; and (2) the share belonging to Mrs. Worcester of the rents accruing after the same period (excluding her mother's share, which lapsed by her mother's death), with interest computed also to the 1st of March, 1865, being $1208.87, these sums making together the aggregate of $1831.84. The auditor held that Wilson was liable for the latter sum, because the complainant was entitled to it, on the principle of subrogation. All the parties excepted to the report. The court sustained the defendants' exceptions, and dismissed the bill upon the ground that the Indiana decree was void.

Upon the execution of the deed of settlement, the real estate therein described became the separate property of Mrs. Worcester, and she had the same power to anticipate and encumber the rents as if she had been a *feme sole.**

The proportion of the rents to which the complainant was entitled was one third of the two thirds to which Mrs. Worcester was entitled at the time of the rendition of the de-

* Colvin *v.* Currier, 22 Barbour, 387; Heatley *v.* Thomas, 15 Vesey, Jr. 596; Bullpin *v.* Clarke, 17 Id. 365; Jaques *v.* Methodist Church, 17 Johnson, 548; North American Coal Company *v.* Dyett, 7 Paige, 9; Insurance Company *v.* Bay, 4 Comstock, 9; Gardner *v.* Gardner, 22 Wendell, 526; Browning *v.* Coppage, 3 Bibb, 37, 1 Story's Eq. § 64.

cree in Indiana. The decree had reference to her rights as they existed at that time. It was not affected by the falling in of the other third, which her mother held as her dower to the time of her death.

The complainant was not bound by the lease of December, 1858. It was executed after the decree and notice to Wilson. He was bound by the preceding lease of July, 1857, which was executed before the decree. That lease contained a covenant on the part of Wilson to repair and pay rent. It did not expire until October 1st, 1865.

The buildings on the Avenue property destroyed by fire in April, 1862, were insured in the name of Mrs. Hughes for $4000, and she received that amount from the insurance company. The lease of 1857 fixed the amount of the rent, and the complainant is entitled to claim accordingly.

Under the lease of 1858, important questions may arise between Wilson, Mrs. Worcester, and the estate of Mrs. Hughes, but they do not affect the rights of the complainant in this litigation, and we need not therefore consider them.

It was proper, under the circumstances, to include in the accounts the rents received by Wilson from the Sixth Street property. That property was embraced in the deed of settlement and in the Indiana decree. The record of that case was filed with the bill as an exhibit, and became a part of it. The prayer of the bill is for general relief. The securities given by Mrs. Worcester embraced alike the rents accruing from that and the Avenue property. Wilson had applied and credited both. It would not be proper to withdraw and separate the former.

It appears by the complainant's exceptions, that he objected strenuously in the court below to the findings of the auditor, as to the state of the accounts between Wilson and Mrs. Worcester touching the advances. After a careful consideration of the evidence, we are satisfied with his conclusions, and see no reason to disturb them. We do not think anything would be gained to the interests of justice by modifying the report, or by setting it aside, and ordering a further examination of the subject.

We think the auditor was right in his conclusion upon the point of subrogation. A much larger amount of the complainant's share of the rents than this principle will give him of hers, was applied in payment of Wilson's advances. It is proper that an equal amount of her share, according to her rights, as they were when the decree was rendered, should replace what had been so applied for her benefit. This will leave, unaffected by this ruling, for her enjoyment, the full third which had belonged to her mother, and to which she became entitled at her mother's death. We are satisfied with the auditor's findings as to the amount for which the defendants respectively should be held liable. Their exceptions should have been overruled.

The decree rendered in Indiana, so far as it related to the real property in question, could have no extra-territorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the *situs rei*, by the proper proceedings conducted there for that purpose.* But no question arises upon that subject. The assignment executed by Mrs. Worcester to the complainant, of the 27th of August, 1857, in pursuance of the decree, was ample to vest in him the interest and authority which the court ordered her to convey. The reservation in behalf of Wilson was only what the law without it would have prescribed, and did not impair its efficacy, or limit what would otherwise have been the scope of its effect and operation.

The main pressure of the arguments here has been upon the question of the validity of the Indiana decree. Those at the bar were confined to that subject, and the printed briefs go but little beyond it.

The courts of the United States take judicial notice of the laws and judicial decisions of the several States.†

Upon looking into the laws of Indiana we find that the

* Sutphen *v.* Fowler, 9 Paige, 280; Massie *v.* Watts, 6 Cranch, 148, 158; Swann *v.* Fonnereau, 3 Vesey, Jr. 44; Portarlington *v.* Soulby, 3 Mylne & Keene, 104; Monroe *v.* Douglass, 4 Sanford's Chancery, 185; Shattuck *v.* Cassidy, 3 Edwards' Chancery, 152; 1 Story's Eq., §§ 743, 744.

† Pennington *v.* Gibson, 16 Howard, 80.

proceedings in the case there were governed by "an act regulating the granting of divorces, nullification of marriages, and decrees and orders of court incidental thereto," approved May 13th, 1852. The petition makes a case within the statute. It alleges that the petitioner was a *bonâ fide* resident of the county where it was filed, and sets forth as causes for a divorce abandonment from December, 1854, and cruel treatment, by the husband. His answer denied the allegations of the petition. His cross-petition prayed for a divorce, for the custody of the children, and for provision for their support out of the separate property of the wife described in the deed of settlement. The decree sets forth as follows: "The court find the marriage, abandonment, and residence of the said Annie J. Cheever, and the births, and names, and ages of the children, as alleged in the original petition, to be true, and the residue of said petition to be untrue." A divorce was thereupon adjudged in the usual form.

It would be a sufficient answer to the questions raised as to the validity of this decree, that no such issue is made in the pleadings. The answer of Mrs. Worcester is silent upon the subject. Wilson, in his answer, says he "does not admit the validity or regularity of said decree," or that "it is operative to affect his rights," but, on the contrary, . . "reserves to himself the right to impeach it if occasion should offer and require him to do so." This language is too vague and indefinite to have any effect. If he desired to assail the decree he should have stated clearly the grounds of objection upon which he proposed to rely. The averments should have been such that issue could be taken upon them.* He and his co-defendant are precluded by the settled rules of equity jurisprudence from entering upon such an inquiry. Their silence is an admission, and they are bound by the implication. As, however, the question has been fully argued upon both sides, and may arise hereafter in further litigation between the parties, we deem it proper to express our views upon the subject.

* White *v.* Hall, 12 Vesey, 324.

Opinion of the court.

The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of the authority which was invoked. It contained all the requisite averments. The court was the proper one before which to bring the case. It had jurisdiction of the parties and the subject-matter. The decree was valid and effectual, according to the law and adjudications in Indiana.*

The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana.† "If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere" in the courts of the United States.‡

It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicil.§ That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive, or only *primâ facie* sufficient, is a point on which the authorities are not in harmony.‖ We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the *animus manendi* may have been wanting.

It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter

* Statute of 1852, § 33; McQuigg *v.* McQuigg, 13 Indiana, 294; Noel *v.* Ewing, 9 Id. 52; Lewis *v.* Lewis, Ib. 105; Rourke *v.* Rourke, 8 Id. 430; Tolen *v.* Tolen, 2 Blackford, 407; Wilcox *v.* Wilcox, 10 Id. 436.

† Constitution, Art. 4, § 1; 1 Stat. at Large, 122; D'Arcy *v.* Ketchum, 11 Howard, 175.

‡ 2 Story on the Constitution, § 1313; Christmas *v.* Russell, 5 Wallace, 302.

§ Case *v.* Clarke, 5 Mason, 70; Cooper's Lessee *v.* Galbraith, 3 Washington Circuit Court, 550; McDonald *v.* Smalley, 1 Peters, 620.

‖ Noyes *v.* Butler, 6 Barbour, S. C. 613; Hall *v.* Williams, 6 Pick. 239; Mills *v.* Duryee, 2 Amer. Leading Cases, 791, note.

proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues.* The proceeding for a divorce may be instituted where the wife has her domicil. The place of the marriage, of the offence, and the domicil of the husband are of no consequence.†

The statute of Indiana enacted that "the court, in decreeing a divorce, shall make provision for the guardianship, custody, and support, and education of the minor children of such marriage."‡ That part of the decree which relates to this subject has been already sufficiently considered. *Barber* v. *Barber*,§ has an important bearing upon the case under consideration. There a wife had obtained a divorce *a mensâ et thoro*, and an allowance of alimony, in the State of New York. The husband afterwards removed to Wisconsin. To enforce the payment of the alimony she sued him in equity in the District Court of the United States for that district. The court was clothed with equity powers. The ground of Federal jurisdiction relied upon was the domicil of the husband and wife in different States. The court decreed for the complainant. This court, on appeal, recognized the validity of the original decree, sustained the jurisdiction, and affirmed the decree of the court below. This is conclusive upon several of the most important points involved in the case before us.

DECREE REVERSED, and the case remanded with directions to enter a decree

IN CONFORMITY TO THIS OPINION.

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* 2 Bishop on Marriage and Divorce, 475.

† Ditson *v.* Ditson, 4 Rhode Island, 87.

‡ Act 1852, § 21.

§ 21 Howard, 582.

Statement of the case.

NORRIS *v.* JACKSON.

1. The 4th section of the act of March 5th, 1865, establishes the mode in which parties may submit cases to the court without a jury, and the manner in which a review of the law of such cases may be had in this court.
2. The special finding of the facts mentioned in that statute is not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties.
3. If the finding of facts be general, only such rulings of the court, *in the progress of the trial*, can be reversed as are presented by a bill of exception.
4. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury.
5. Objections to the admission or rejection of evidence, or to such rulings or propositions of law as may be submitted to the court, must be shown by bill of exceptions.
6. If the parties desire a review of the law of the case, they must ask the court to make a special finding which raises the question, or get the court to rule on the legal propositions which they present.
7. In an action of ejectment, where the plaintiff's title is that of a voluntary purchaser under an execution void because the lien of the judgment had expired, and the title of the defendant is that of a *bonâ fide* purchaser from the debtor during the continuance of the lien, it is not competent for the plaintiff to prove that the defendant promised the creditor, under whose execution the land was sold, to pay the judgment, and that he did not do so; in consequence of which the lien was suffered to expire. The fact, if proved, would not extend the lien of the judgment.

IN error to the Circuit Court for the Northern District of Illinois, the case being this:

By section 4 of the act of March 3d, 1865,* it is provided that parties may submit the issues of fact in civil cases, to be tried and determined by the court, without the intervention of a jury; and it declares what the effect of such finding shall be, and how and under what circumstances there may be a review of such judgments.

The language of the section on this subject is thus:

"The finding of the court upon the facts, which finding shall be general or special, shall have the same effect as the verdict

* 13 Stat. at Large, 501.

of a jury. The rulings of the court in the cause, *in the progress of the trial*, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

With this statute in force, Norris brought ejectment in the court below against Jackson, submitting the case to the court without the intervention of a jury. Both parties derived title from one Woodruff; the plaintiff by judicial sale, the defendant as tenant of one Gitchell, to whom Woodruff had sold the lands *bonâ fide* some time before the judicial sale. This judicial sale, under which the plaintiff claimed, was made eleven days after the lien of the judgment on which the execution issued had expired, and this fact made it, under the statutes of Illinois, as the defendant contended, a nullity.

To counteract the effect of this too long delay, the plaintiff in the progress of the trial offered to prove that after the levy of the execution on the land in question, Gitchell, the landlord of the defendant Jackson, and the real party in interest, had agreed to pay the judgment, and had requested and obtained, from the attorney holding the same for collection, a delay of the sale of the land so levied on for fifteen or more days, when he refused to make payment as he had agreed to do, whereby the marshal's sale of said land was necessarily deferred till eleven days after the lien had expired.

The court rejected the evidence, and judgment having been given for the defendant, the plaintiff brought the case here. On its coming up, the transcript showed a long bill of exceptions, embracing all the evidence, which consisted of judgments, executions, deeds, depositions, admissions, and agreements of the parties, at the close of which it was said that "the foregoing was all the cause, and the court thereupon found the issues and rendered judgment for the defendant, to which decision and ruling of the court, the plaintiff then and there excepted."

Mr. A. F. Miller, for the plaintiff, both below and here, insisting particularly as error upon the rejection of the evidence which had been offered to show the cause of the delay, rested his case in part upon other matter embraced in the bill of exceptions.

Mr. S. W. Fuller, contra, argued that the attention of the court was confined to a single point.

Mr. Justice MILLER delivered the opinion of the court.

The first thing to be observed in the enactment made by the 4th section of the act of 3d March, 1865, allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is that it provides for two kinds of findings in regard to the facts, to wit, general and special. This is in perfect analogy to the findings by a jury, for which the court is in such cases substituted by the consent of the parties. In other words, the court finds a general verdict on all the issues for plaintiff or defendant, or it finds a special verdict.

This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest.*

The next thing to be observed is, that whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law.

In the case of a special verdict, the question is presented

* Burr *v.* Des Moines Co., 1 Wallace, 99; Graham *v.* Bayne, 18 Howard, 62.

as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant; and this being matter of law, the ruling of the court on it can be reviewed in this court on that record. If there were such special verdict here, we could examine its sufficiency to sustain the judgment. But there is none. The bill of exceptions, while professing to detail all the evidence, is no special finding of the facts.

The judgment of the court, then, must be affirmed, unless the bill of exceptions presents some erroneous ruling of the court *in the progress of the trial.*

The only ruling in the progress of the trial to which exception was taken by plaintiff, was to the refusal of the court to permit him to prove that Gitchell, the landlord of defendant, had promised to pay the judgment under which the land was sold to plaintiff.

We do not see that this was a matter of which plaintiff, a volunteer purchaser, had any right to complain. It could not extend the lien of the judgment beyond the time fixed by law, which seems to be the purpose for which it was offered.

We have taken some pains to comment on the mode in which cases tried by the court, which are properly triable by a jury, may be reviewed here. Attention was called to the statute of 1865, in the case of *Insurance Co.* v. *Tweed*,* and we condense here the results of an examination of that statute.

1. If the verdict be a general verdict, only such rulings of the court, *in the progress of the trial*, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

2. In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

3. That if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must

* 7 Wallace, 44.

present to the court their propositions of law, and require the court to rule on them.

4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.

As the only ruling of the court in this case that we can examine seems to have been correct, the judgment is

AFFIRMED.

THE GRAPESHOT.

1. When, during the late civil war, portions of the insurgent territory were occupied by the National forces, it was within the constitutional authority of the President, as commander-in-chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States, and the Provisional Court for the State of Louisiana, organized under the proclamation of October 20th, 1862, was, therefore, rightfully authorized to exercise such jurisdiction.
2. When, upon the close of the war, and the consequent dissolution of the court thus established, Congress, in the exercise of its general authority in relation to the National courts, directed that causes pending in the Provisional Court, and judgments, orders, and decrees rendered by it, which, under ordinary circumstances, would have been proper for the jurisdiction of the Circuit Court of the United States, should be transferred to that court and have effect as if originally brought, or rendered therein, a decree in admiralty rendered in the Provisional Court, as upon appeal from the District Court, became at once, upon transfer, the decree of the Circuit Court; and an appeal was properly taken from it to this court.
3. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed, upon due inquiry and credible representation, to be necessary in a foreign port.
4. Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit. The cases of *Pratt* v. *Reed* and *Thomas* v. *Osborn* explained.
5. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to

General statement.

order them, or to provide funds for the cost of them on the security of the ship.

6. The ordering by the master of supplies and repairs on the credit of the ship is sufficient proof of such necessity to support an implied hypothecation in favor of the material-man, or of the ordinary lender of money to meet the wants of the ship, who acts in good faith.

7. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required, and, if the fact of such necessity be left unproved, evidence is required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.

THIS case, which in its original form, was a libel in the District Court of Louisiana, on a bottomry bond, and, as such, involved nothing but the correct presentation of the principles of maritime law relating to that matter, and the examination of a good deal of contradictory evidence, to see how far the particular case came within them, presented subsequently, and in consequence of the rebellion and the occupation by our army of the mere city of New Orleans, while the region surrounding it generally was still held by the Confederate powers and troops, a great question of constitutional law, the question namely, how far, with that clause of the Constitution in force which declares that—

"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 President could establish a Provisional Court, and how far Congress, on the suppression of the rebellion, could, by *its* enactment, validate the doings of such a court, transfer its judgments, and make them judgments of the now re-established former and proper Federal courts, from one of which, the Circuit Court of the United States for the District of Louisiana, the cause purported to be brought here.

The case—which in this court consisted accordingly of three parts—to wit:

1. The matter of jurisdiction,

2. That of the principles of maritime law in regard to bottomry bonds,

Statement in the opinion of the first point.

3. The one of their application to the particular case, on the evidence, is all stated in the opinion of the court, not all consecutively in the opening of it, but all completely enough and with distinctness from the opinion itself, in three different parts, as the three respective topics arise to be treated of.

Mr. C. Cushing, for the owners of the ship, appellants; Mr. T. J. Durant, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The first question to be examined in this case is one of jurisdiction.

The suit, shown by the record, was originally instituted in the District Court of the United States for the District of Louisiana, where a decree was rendered for the libellant. From this decree an appeal was taken to the Circuit Court, where the case was pending, when, in 1861, the proceedings of the court were interrupted by the civil war. Louisiana had become involved in the rebellion, and the courts and officers of the United States were excluded from its limits. In 1862, however, the National authority had been partially re-established in the State, though still liable to be overthrown by the vicissitudes of war. The troops of the Union occupied New Orleans, and held military possession of the city and such other portions of the State as had submitted to the General government. The nature of this occupation and possession was fully explained in the case of *The Venice.**

Whilst it continued, on the 20th of October, 1862, President Lincoln, by proclamation, instituted a Provisional Court for the State of Louisiana, with authority, among other powers, to hear, try, and determine all causes in admiralty. Subsequently, by consent of parties, this cause was transferred into the Provisional Court thus constituted, and was heard, and a decree was again rendered in favor of the libellants. Upon the restoration of civil authority in the State,

* 2 Wallace, 259.

the Provisional Court, limited in duration, according to the terms of the proclamation, by that event, ceased to exist.

On the 28th of July, 1866, Congress enacted that all suits, causes, and proceedings in the Provisional Court, proper for the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana, should be transferred to that court, and heard and determined therein; and that all judgments, orders, and decrees of the Provisional Court in causes transferred to the Circuit Court should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly.*

It is questioned upon these facts whether the establishment by the President of a Provisional Court was warranted by the Constitution.

That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here that nothing further need be said on that point.

The object of the National government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

The duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.

* 15 Stat. at Large, 366.

Statement in the opinion of the second point.

What that duty is, when the territory occupied by the National forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitensdorfer* v. *Webb*,* the authority of the officer holding possession for the United States to establish a provisional government was sustained; and the reasons by which that judgment was supported, apply directly to the establishment of the Provisional Court in Louisiana. The cases of *Jecker* v. *Montgomery*,† and *Cross* v. *Harrison*,‡ may also be cited in illustration of the principles applicable to military occupation.

We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States.

The case then being regularly here, we will proceed to dispose of it.

The object of the original suit was the enforcement of a lien upon the bark Grapeshot, created by a bottomry bond, executed by her master, one Joseph S. Clark, in favor of Wallerstein, Massett & Co., at Rio Janeiro, upon the 15th of April, 1858.

The libel, filed by Wallerstein, Massett & Co., on the 3d of July, 1858, alleged that the bark Grapeshot, lying in the port of Rio, during the month of April, 1858, was in great need of reparation, provisions, and other necessaries to render her fit and capable of proceeding thence on her intended voyage to the port of New Orleans; and Joseph S. Clark, the master of the bark, not having any funds or credit there, and the owner of the said bark not residing in Rio, and having no funds or credit there, that the libellants, at

* 20 Howard, 176.

† 13 Id. 498, and 18 Id. 110.

‡ 16 Id. 164; see also United States *v.* Rice, 4 Wheaton, 246; and Texas *v.* White, 7 Wallace, 700.

Statement in the opinion of the second point.

the request of Clark, advanced and lent to him $9767.40, on the bottomry and hypothecation of the bark, at the rate of 19½ per cent. maritime interest; that Clark, as master, did really expend the sum borrowed for the repairing, victualling, and manning of the bark in order to enable her to proceed to New Orleans; that the bark could not possibly have proceeded with safety upon her voyage without such repairs, and other necessary expenses attending the refitting of her; that she sailed and arrived safe at New Orleans on or about the 7th of June, 1858; and, that the bond was, at the proper time, presented for payment to Clark, who refused to discharge it.

Upon this libel, process was issued, and the vessel and her freight were seized. Subsequently the vessel was sold under an order of the court, and the proceeds, together with the freight-money, amounting, in the whole, to $13,805.85, were deposited in the registry on the 2d of September, 1858.

On the 1st of November, 1858, George Law, the claimant of the vessel and freight, filed his answer, denying the necessity of the repairs and supplies, alleged to have been paid for by the money raised upon the bottomry bond, and alleging fraudulent collusion between the master and the lenders, to the prejudice of the claimant. The answer set out at large the history of the Grapeshot, from the time she left New York, on or about the 9th of February, 1857, to the date of her arrival in New Orleans, on or about the 7th of June, 1858. It represented that the bark, when she left New York, was stout and staunch, well fitted, and supplied for her then intended voyage to Constantinople, and for the return voyage to New York; that, instead of returning from Constantinople to New York, the master, Clark, embezzled the freight earned in the voyage out, and engaged the vessel in voyages for his own benefit, until he caused her to be stripped at Rio of her copper, which was replaced by second-hand and indifferent metal, owned by Clark, and put on her in fraud of the claimant; that the dishonest practices of Clark were well known at Rio, and that the libellants were fully cognizant of them. The answer further denied the charge

of the libel that the claimant had no funds or credit at Rio, and averred that he had credit to procure and obtain the necessary funds, and that the master was under no necessity to resort to the bottomry upon the vessel. The answer further alleged that there was no inspection or survey of the vessel with reference to the necessity for repairs; and that the alleged expenses for repairs and provisions far exceeded the sums actually expended, of all which the libellants had notice.

Before proceeding to examine the evidence, taken under these pleadings, it will be proper to consider the principles of maritime law applicable to the case.

A bottomry bond is an obligation, executed, generally, in a foreign port, by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed on; which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at the port of destination; but becomes absolutely void and of no effect in case of her loss before arrival.*

Such a bond carries usually a very high rate of interest, to cover the risk of loss of the ship as well as a liberal indemnity for other risks and for the use of the money, and will bind the ship only where the necessity for supplies and repairs, in order to the performance of a contemplated voyage, is a real necessity, and neither the master nor owners have funds or credit available to meet the wants of the vessel.

Sometimes bonds, bearing only the ordinary rate of interest, or executed under circumstances more or less different from those just stated, are called bottomry bonds, and are enforced as such;† but the general description just given embraces most instruments known under that name, and is sufficiently accurate for the case presented by the record.

* Carrington *v.* Pratt, 18 Howard, 67; The Atlas, 2 Haggard, 57–8.

† The Trident 1 W. Robinson, 29; Brig Draco, 2 Sumner, 157; 1 Parsons on Shipping, 116, 120.

Opinion of the court on the second point.

There is no question in this case as to the character of the bond; nor as to the safe arrival of the ship; nor as to the validity of the bond if the lien can be held valid. The controversy turns on the question of necessity for repairs and supplies, and for credit.

We are to consider, therefore, what degree of necessity for supplies or repairs, and what degree of necessity for credit in that form, will warrant a master in borrowing upon bottomry.

Where the claim of the material-man is against the owner only, and no privilege is given upon the vessel, no necessity need be shown affirmatively. The master, in the absence of known fraud, is fully authorized to represent the owners in all matters relating to the ship; and it will always be presumed that supplies and repairs, ordered by the master, were reasonably fit and proper, unless there is clear proof to the contrary, and also proof of collusion by the material-man.

But something more is required when the claim is against the ship itself. Such a claim can be asserted only as a lien or privilege upon the vessel. And the rule is that such a lien for supplies and materials, or for money advanced for the ship, since it is created and exists without record, or other public notice, can only be established upon circumstances of actual necessity.

Proof of absolute and indispensable necessity, however, is not required in order to the establishment of such a lien, where supplies and materials are furnished on the credit of the ship, or of the ship and owners, in a foreign port. In such cases, courts of admiralty do not scrutinize narrowly the account against the ship. They will reject, undoubtedly, all unwarranted* charges; but upon proof that the furnishing was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported;† unless

* The Cognac, 2 Haggard, 387.

† The General Smith, 4 Wheaton, 443; Peyroux *v.* Howard, 7 Peters, 324; Brig Nestor, 1 Sumner, 73.

Opinion of the court on the second point.

it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the material-man knew, or could, by proper inquiry, have readily informed himself of the facts.*

It has been supposed that a more stringent rule than that just stated was sanctioned by this court, at the December Term, 1856, in the case of *The Sultana*, reported under the title of *Pratt* v. *Reed*.†

In that case, coal for generating steam was supplied to the Sultana, of Buffalo, in New York, at Erie, in Pennsylvania. The master was sole owner, and known as such by the furnisher of the coal. The supplies were furnished from time to time during a period of nearly two years, and formed the subject of a running account of debit and credit extending through that time. The evidence warranted the impression, confirmed by the fact of sole ownership in the master, that the credit was given to the master and not to the ship. It was held that no lien attached to the steamer for the supplies thus furnished.

We have no doubt that the case was rightly decided. There are, however, expressions in the opinion which, separated from the case, appear to sanction the doctrine that, in order to the creation of a lien on the vessel, express proof is necessary of an unforeseen emergency creating a necessity for supplies, and also of the existence of a necessity for credit on the ship.

But that it was not intended by the court to establish any other rule than that previously recognized, sufficiently appears from an opinion pronounced in the case of *The Neversink*,‡ by the learned judge who delivered its judgment in the case of *The Sultana*. What was said in the former case sufficiently shows that the latter judgment was intended only

* The Fortitude, 3 Sumner, 246–7.
† 19 Howard, 359.
‡ Southern District of New York, November, 1867.

to affirm that there must be an apparent necessity for the credit as well as an actual necessity for the supplies, and that in the case before the court there was, in fact, no such necessity as was essential to the creation of a lien upon the steamer. It was not intended to deny that this apparent necessity might be presumed from the necessity for supplies, from the general authority of the master, and from general good faith in the particular transaction.

It has been supposed also that the judgment of this court in the case of *The Bark Laura*, reported as *Thomas* v. *Osborn*,* required affirmative proof of the necessity of credit to the ship, in order to the creation of a lien on the vessel. The court said, that "the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it that apparently such a case of necessity exists, are as ancient and well established as the authority itself." There is nothing in the language which necessarily denies that proved necessity for repairs may be received as presumptive evidence, sufficient, in the absence of other information, to establish a case of apparent necessity upon which the lender or furnisher may safely act. And the citations from the Digest and the Consolato del Mare, made to show the antiquity of the doctrine, seem to have reference only to the condition of the ship, and not to the condition of the credit of the owners or master.

We are satisfied that neither of the two cases just referred to, when properly considered in connection with the proofs before the court, can be regarded as in conflict with the rule we have stated, which, prior to these decisions, had been undoubtedly received upon the general consent of authorities as the true rule on the subject of implied hypothecation for repairs and supplies, or for advances having the same relation to the ship.

We have been induced to state this doctrine of implied hypothecation somewhat fully, not only because it seemed

* 19 Howard, 29.

Opinion of the court on the second point.

desirable to correct a common misunderstanding of these cases; but because of the close analogy in origin, effect, and incidents between implied hypothecation and express hypothecation by bottomry.

It is, indeed, difficult to trace, either in reason or in the authorities, any marked line of discrimination between them. In the case of *The Aurora*, decided in 1816, this court said: "To make a bottomry bond, executed by the master, a valid hypothecation, it must be shown by the creditor that the master acted within the scope of his authority, or, in other words, that the advances were made for repairs or supplies necessary for effecting the objects of the voyage, or the safety and security of the ship. And no presumption should arise in the case that such repairs or supplies could be procured on reasonable terms with the credit of the owner, independent of such hypothecation."*

And it was further said, in the same case, that "it is incumbent on the creditor who claims an hypothecation to prove the actual existence of those things which gave rise to his demand; and if it appear on his own showing, or otherwise, that he has funds of the owners in his possession which might have been applied to the demand, and he has neglected or refused to do so, he must fail in his claim."†

And this, undoubtedly, is the general rule also in respect to implied hypothecation. The principles on which it rests were fully explained and illustrated by Mr. Justice Story, in 1838, in the case of *The Fortitude*.‡

It has been thought that a distinction between the lien for repairs and supplies, or ordinary advances to pay for them, and the lien of bottomry, may be found in that "superadded necessity" of which the learned judge speaks, in the case last cited, as distinguishing the former from the latter. There must, he said in substance, not only be a necessity for the repairs, but a necessity for resorting to a bottomry loan.§ But this ruling must be taken with the qualification previously established by this court in the case of *The*

* 1 Wheaton, 96. † Ib. 105. ‡ 3 Sumner, 232.
§ The Fortitude, 3 Sumner, 234.

Virgin,* where it was held that "the necessity of the supplies and repairs being once made out, it is incumbent on the owners, who assert that they could have been obtained upon their personal credit without bottomry, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case." It is only when such competent proofs have been adduced, or the practicability of raising funds on credit has been made to appear from circumstances, that the lender is held responsible for failing to make due inquiry.

In the absence of such proofs or circumstances, an apparent necessity for credit by bottomry must be regarded as established when the necessity for repairs is proved.

A more substantial distinction between the implied and the express hypothecation may, perhaps, be found in the greater diligence required of the lender on bottomry than of the material-man in inquiry concerning the necessity for repairs. The authorities on this subject are not easily reconciled; but they may be best harmonized, perhaps, in the proposition that if no necessity for repairs is established a bottomry bond will not be supported in the absence of proof that the lender, after using reasonable diligence to ascertain the facts, had good reason to believe, and did believe, that the necessity really existed. And this is warranted by good reason. The maritime law seeks equally the general promotion of commercial intercourse and the most complete security in private transactions; and neither can well be reconciled with the support of hypothecations which partake largely of the nature of hazard, made where the owner cannot be consulted, at extraordinary rates of interest, agreed upon by the master and the lender, and under circumstances favorable to collusion and fraud, unless the lender be held to reasonable diligence in inquiring as to the existence of the facts of distress and necessity for repairs, which alone warrant such transactions.

The doctrine on the subject of maritime hypothecation, so far as it seems useful to consider it in this case, may be summed up, we think, in these propositions:

* 8 Peters, 554.

Statement in the opinion of the third point.

1. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed, upon due inquiry and credible representation, to be necessary.

2. Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit.

3. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship.

4. The ordering, by the master, of supplies or repairs upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the materialman, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith.

5. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required, and, if the fact of necessity be left unproved, evidence is also required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.

These principles are now to be applied to the case before us. The pleadings make distinct issues upon the necessity for repairs, the necessity for credit, and exercise of due diligence in inquiry by the lender.

On examining the proofs we find great contrariety in evidence, but we think it sufficiently established that Clark, the master of the Grapeshot, if not guilty of actual fraud, was very negligent of his duties as master.

It is alleged in the answer, and the allegation is supported by credible testimony, that the voyage for which she was originally destined was from New York to Constantinople, and back. The bark sailed from New York in February, 1857, and the voyage to Constantinople was accomplished

in due time; but, instead of obtaining a return freight for New York, the master engaged the bark in a new voyage. He purchased a cargo of salt, partly at Ivica and partly at the Isle de Sal, one of the Cape de Verde Islands, and carried it to Rio, where he lay for some time, then returned to the islands for another cargo of salt, with which he arrived at Rio early in January, 1858, and remained there until April, when he finally took a cargo for the United States; not then, however, for New York, but for New Orleans.

There is some evidence that the new voyages were for purposes of private speculation by the master, and this theory receives partial confirmation from a letter written by him to the owner from Constantinople, in which he admits that he could obtain a paying freight for New York, but states that he had determined to seek more profitable employment for the vessel, in a voyage to Rio with salt. On the other hand, it appears that nothing was kept secret from the owner, unless it be the fact of private speculation, for the letters of the master show that he was advised from time to time of all the movements of the vessel.

These transactions are adverted to only because, though having no direct bearing upon the case, they cast some light upon the subsequent conduct of the master.

The liabilities, except those charged under date of October 31st, 1857, which form the basis of the bottomry bond, were incurred, if incurred at all, while the ship remained at Rio, from January 2d to April 19th, 1858. They consist of charges for supplies and repairs.

As to the necessity for repairs, the libellants have put in the depositions of Clark, the master, and of the furnishers at Rio. The respondent, on his side, has put in the depositions of several seamen who made part of the crew of the Grapeshot.

The evidence of these witnesses cannot be reconciled. The witnesses for the libellants are positively contradicted by the witnesses for the respondent. Clark, for example, says that on the last voyage to the Cape de Verde Islands and back to Rio, the Grapeshot leaked badly, and that she lost

Opinion of the court on the third point.

nine hundred bushels of salt by the water from the leaking. And, as to the leaking, his testimony is, to some extent, corroborated by that of the repairer. But three of the crew, examined on this point, testify positively that there was no damage from leaking. As to injuries to the bottom of the vessel, and the necessity for recoppering, Clark says nothing in his deposition; he merely states that the accounts of the material-men are just and correct, and they testify that the repairs and supplies were necessary. On the other hand, some of the crew testify that the repairs were quite unnecessary, that the copper put upon her was inferior to the copper taken off, and that the vessel when nominally repaired was less staunch than before. There is more to the same effect.

It is said that the evidence of the seamen is unworthy of credit. It was certainly taken in a very loose and unsatisfactory way. But this was the fault of the commissioner, and not of the witnesses. On the main points at issue their testimony is clear and distinct enough, and we perceive no reason for discrediting it.

We have examined it with care, and, taken in connection with the whole evidence on both sides, it has satisfied us that we cannot hold the necessity for repairs as established.

And this view is confirmed by the absence of any survey or examination by public authority, or by competent and disinterested persons for the purpose of ascertaining the necessity for repairs. In the case of *The Cognac* the bottomry bond was authorized by the French Tribunal of Commerce at the port of repair, and also by the British vice-consul there, and yet the British Court of Admiralty disallowed some of the items covered by the bond.* And in the case of *The Fortitude* the bottomry bond was supported by evidence of a survey, called by the master and conducted by persons skilled in nautical affairs. This was, as the learned judge observed, "what every prudent master ought to do under the like circumstances."

* 2 Haggard, 377, 387.

We do not say that such a survey is indispensable. No doubt proof of the necessity and of the extent of the necessity may be otherwise made. But where the repairs alleged to be made are extensive, and the necessity otherwise left in doubt, the absence of such an examination will go far to warrant the conclusion that no real necessity existed.

The evidence in respect to the bills for supplies covered by the bottomry bond is not so strong as to the absence of necessity for them. But there are some items included in these bills, and particularly a very considerable item stated as a general balance found due on a former account of the consignee of the ship, which can hardly be regarded as subjects of bottomry.

Under these circumstances, if there were any proof affecting the lenders with actual knowledge of the facts, it would be our duty to pronounce the bottomry wholly invalid. For there is no evidence that they made any inquiry whatever, and the maritime law holds them to reasonable diligence in this respect.

But mere omission to make inquiry will not invalidate the bond altogether. It may be good in part and void in part. And where, as in this case, part of the repairs and supplies have been shown to be necessary, and there is no reason to impute fraud or collusion to the lenders, the bond, though void as to the items of which the necessity is disproved or not shown, may properly be held valid as to those items the necessity of which is shown.

Under the view which we have taken of this case it is not necessary to consider the evidence as to the necessity for credit. It may be of use, however, to observe that while there is evidence to show that the respondent, Law, was a man of large means, and known as such by some persons in Rio, the proof does not satisfy us that the sum named in the bond could have been raised on his credit at rates more advantageous than were actually obtained, much less that the lenders in this case could by any diligence of inquiry have learned that this might be done. It is matter of history, of which the court will take notice, that the year 1857 was

a year of financial revulsion and distress throughout the greater part, if not the whole, of the commercial world, the effects of which were still felt in the spring of 1858. In such a time proof of the practicability of obtaining funds, in a port so remote, upon the credit of the owner, should be clear indeed in order to affect a lender upon bottomry with the duty of inquiry.

On the whole the decree of the Circuit Court must be REVERSED, and the cause must be remanded to that court with directions to refer the accounts for repairs and supplies to one or more commissioners experienced in commerce and of known intelligence and probity, to ascertain, under the instructions of the court, what portion of the repairs and supplies, actually furnished to the ship, were really necessary, and for the amount thus ascertained and approved by the court to enter

DECREE FOR THE LIBELLANTS.

LATHAM'S AND DEMING'S APPEALS.

An appellant has a right to have his appeal dismissed notwithstanding the opposition of the other side.

THESE were two appeals from the Court of Claims, in suits against the United States. They had been passed at former terms, and early at this one. It being alleged by Mr. Hoar, Attorney-General, that they involved a question of public interest—to wit, the legal tender question—which he desired, for some reasons which he stated, to have passed on anew, he asked the court to fix a day at this term for argument upon them, it being stated by him that it was, in his opinion, most desirable that the matter should not be postponed to the next term. After opposition and some delays by *Messrs. Carlisle and Merryman, for the appellants respectively*, who denied that any question of legal tender was presented in the records, and asserted that the cases, whenever called, had been passed, on an understanding by themselves, the

counsel of the government, and the court, that if any such question were properly in them it should abide the decision to be made in *Hepburn* v. *Griswold*,* then under consideration by the court—a day was fixed for the hearing of the cases. When the day arrived the cases were postponed, owing to another case being before the court. Being finally called, *Mr. L. S. Chatfield, with whom was Mr. Merryman, for the appellants respectively*, offered a stipulation signed by them in behalf of their clients, and moved to dismiss the appeals. *The Attorney-General opposed the motion;* stating that it was a surprise to him; that he was now prepared to argue the cases, and desired to do so.

After some conference on the bench, where the judges did not seem to be entirely unanimous, the court withdrew for consultation. On their return, the CHIEF JUSTICE announced it as the unanimous judgment of the court that the appellants had a right to have their appeals dismissed, and they were both DISMISSED ACCORDINGLY.

THE JOHNSON.

Steamers navigating in crowded channels and in the vicinity of wharves, must be run and managed with great caution, and with a strict regard to the established rules of navigation, including that one which requires them, when approaching from opposite directions, to put their helms to port. If they are about to attempt any manœuvre not usual and clearly safe, such as running in under the bows of another vessel in motion, they must not only sound their whistle or give the other proper signal, but before attempting the manœuvre must be certain also that the signal was heard and understood by the approaching vessel.

APPEAL from the Circuit Court for the Southern District of New York, in a case of collision, the case being this:

All steamers navigating the crowded waters of the New York harbor, were bound in 1863 to obey the following RULES OF NAVIGATION, prescribed originally for the conduct of passenger steamers, but adopted by other vessels.

* The Legal Tender Case, 8 Wallace, 603.

Statement of the case.

"RULE 1. When steamers meet 'head and head,' it shall be the duty of each to pass to the right, or on the larboard side of the other, and either pilot, upon determining to pursue this course, shall give as a signal of his intention one short and distinct blast of his steam-whistle, which the other shall answer promptly by a similar blast of the whistle. But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting 'head and head,' or if the vessels are approaching in such a manner, that passing to the right (as above directed), is unsafe, or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give two short and distinct blasts of his steam-whistle, which the other pilot shall answer by two similar blasts of his whistle, and they shall pass to the left, or on the starboard side of each other.

"RULE 2. When steamers are approaching each other in an oblique direction, they will pass to the right, as if meeting 'head and head,' and the signal by whistle shall be given and answered promptly, as in that case specified.

"RULE 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given or answered erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

"RULE 4. The signals, by blowing of the steam-whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting 'head and head,' or nearly so, but at all times when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

"N. B. The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves; under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary, to guard against collisions or other accidents."

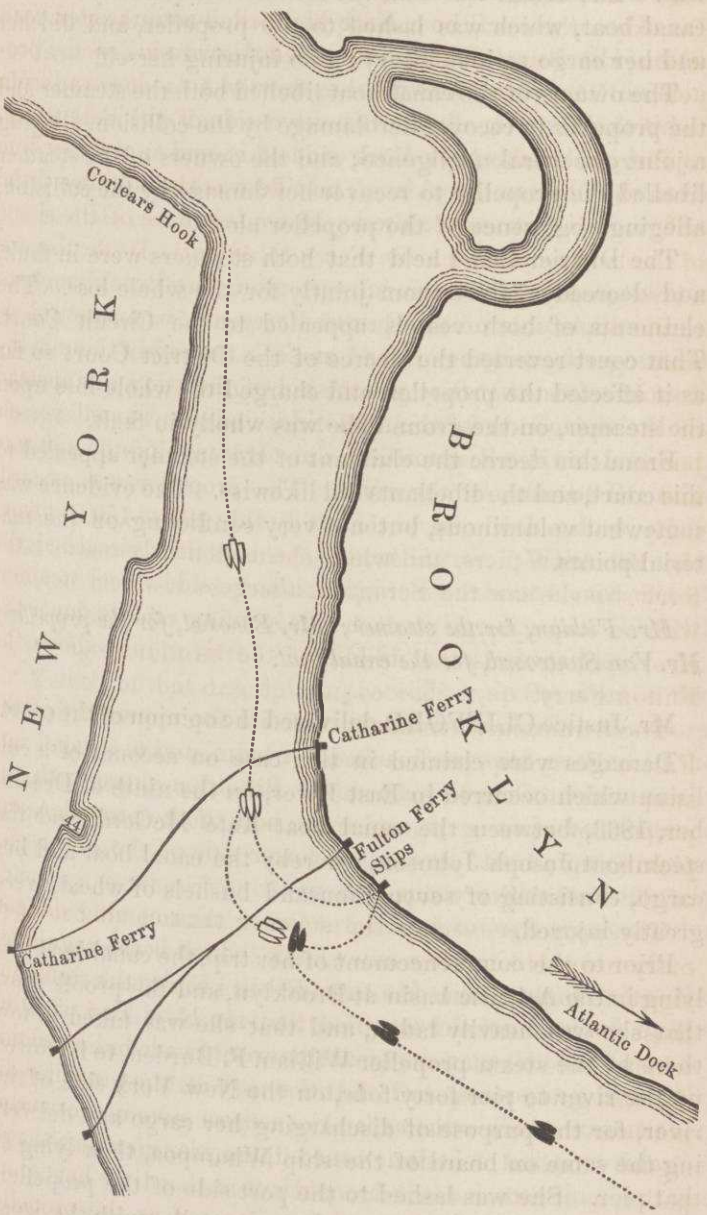
With these rules in force, the Burden, a small propeller

tug, was towing up the East River from Atlantic Dock, Brooklyn, the canal boat Kate McCord, heavily loaded with wheat, she being fastened to the larboard side of the propeller. The propeller with her tow was on her way from the Atlantic Dock, on the Brooklyn side of the East River, to Pier 44, on the New York side of it, and in a direct line from the dock to the pier. The tide was the middle of the ebb, running strongly down. In consequence of the shape of the land from Catharine Ferry to Atlantic Dock, there is a strong eddy tide which runs up along the Brooklyn shore to the upper side of the Fulton Ferry slip, when the tide is running ebb, and tugs bound up seek that eddy tide for the double reason that they get the aid of the eddy tide instead of the opposition of the ebb tide, and they avoid vessels bound down, leaving to them the advantage of the ebb tide and the breadth of the river. The propeller was, accordingly, going slowly up in that eddy tide 100 to 150 feet from the Brooklyn piers, and when she had nearly reached the ferry slip she saw the Scranton, a large side-wheel steamer, with an empty barge on each side, coming rapidly down the river, out towards the middle of the river just above the Fulton Ferry.

The Scranton, when about opposite the upper part of the Fulton Ferry slip, starboarded her helm, and at a rapid rate swept in, in a curve toward the Brooklyn shore, with the purpose of running in under the bow of the propeller, and picking up a boat lying on the lower side of the lower pier of the Fulton Ferry slip.

The propeller, seeing the steamer thus coming dangerously towards her, blew one whistle, which is the regulation signal to indicate that she intended to keep to the right, and those on the steamer testified that *she* blew two whistles, which is the regulation signal that would have indicated that she was going to the left; but the men on the propeller did not hear the two whistles, and of course gave no answering signal. Indeed, had they heard them, the men on the propeller, as it rather seemed, could not at that time have done anything to prevent the collision, situated as the propeller

Diagram of the East River.



Case restated in the opinion.

was. The result was that the steamer ran directly into the canal boat, which was lashed to the propeller, and did her and her cargo serious injury; also injuring herself.

The owners of the canal boat libelled both the steamer and the propeller to recover her damage by the collision, alleging a joint or several negligence; and the owners of the steamer libelled the propeller to recover her damage by the collision, alleging negligence of the propeller alone.

The District Court held that both steamers were in fault, and decreed against them jointly for the whole loss. The claimants of both vessels appealed to the Circuit Court. That court reversed the decree of the District Court so far as it affected the propeller, and charged the whole loss upon the steamer, on the ground she was wholly in fault.

From this decree the claimant of the steamer appealed to this court, and the libellants did likewise. The evidence was somewhat voluminous, but not very conflicting on the material points.

Mr. Fithian, for the steamer; Mr. Benedict, for the propeller; Mr. Van Santvoord, for the canal boat.

Mr. Justice CLIFFORD delivered the opinion of the court.

Damages were claimed in this case on account of a collision which occurred in East River, on the ninth of December, 1863, between the canal boat Kate McCord, and the steamboat Joseph Johnson, whereby the canal boat and her cargo, consisting of seven thousand bushels of wheat, were greatly injured.

Prior to the commencement of her trip, the canal boat was lying in the Atlantic basin at Brooklyn, and the proofs show that she was heavily laden, and that she was taken in tow there by the steam propeller William F. Burden, to be towed up the river to pier forty-four, on the New York side of the river, for the purpose of discharging her cargo and delivering the same on board of the ship Whampoa, then lying at that pier. She was lashed to the port side of the propeller, and when the collision occurred, the propeller with the canal

Case restated in the opinion.

boat in tow was proceeding up the river to the place where her cargo was to be transshipped.

Loss was sustained by the owner of the canal boat and by the owners of her cargo, and they joined in the same libel, claiming damages, as well of the propeller to which the canal boat was lashed as of the steamboat Joseph Johnson, which collided with the canal boat, and which was the immediate cause of the injury both to the canal boat and her cargo.

Lashed to the propeller as the canal boat was, she was as entirely under the control of the propeller as if she had been a part of that vessel. When they were proceeding on their course up the river, the Johnson, with two unladen canal barges in tow, one on each side, started from Corlear's Hook, on the New York side, on a trip down the river, inclining, however, towards the Fulton Ferry dock, on the Brooklyn side, to a point just below the lower slip of that dock, where she intended to take another boat in tow. When the boats started on their respective trips it was about eleven o'clock in the forenoon, and the tide at that time was half ebb, with a strong current in the channel of three miles an hour.

Vessels of that description proceeding up the river on that side, in that state of the tide, usually keep close to the shore, as they by that means avoid the downward current in the stream, and get the aid of the eddy or reflex tide near the shore, which facilitates their progress, and the evidence shows that the propeller, with the canal boat in tow, was proceeding up the river along that shore in the track usually pursued by steamtugs in performing towage service under those circumstances.

Boats descending the river at ebb tide usually select the middle of the channel, as their speed is much aided by the current, and the witnesses generally concur that the Johnson, until just prior to the collision, was proceeding down the river in a course much nearer the centre of the stream than the ascending boat with her tow lashed to her port side.

Aided by the current the speed of the descending boat was seven miles an hour; but the propeller with the canal boat

in tow was not able, in ascending the river, to make more than three or four miles an hour.

Whatever may have been the cause, it is admitted by the master of the Johnson that he did not see the propeller until she was opposite the slip next above the ferry slip, and he also states that the propeller, at that time, was about the same distance below the ferry that the Johnson was above that point, and of course they were not far distant from each other.

They were approaching at a combined speed of ten or eleven miles an hour, but not exactly from opposite directions nor on lines precisely parallel, as the Johnson was nearer to the centre of the stream than the propeller, and her course was inclining towards the Brooklyn shore. Strong doubts, however, are entertained whether the vessels would have collided if both had kept their course, but it is not necessary to decide that point, as it is conceded that the helms of both were changed before the collision occurred.

Appearance was regularly entered by the owners of the steamers, and the claimants of each steamer filed separate answers, denying that their vessel was liable for the injury, but the District Court held that both vessels were in fault, and entered a joint decree for the libellants in conformity with the allegations of the libel. Dissatisfied with the decree the claimants of the respective steamers appealed to the Circuit Court, where all the parties were again heard, and the Circuit Court affirmed the decree of the District Court as against the Johnson, but reversed it as against the propeller, holding that the Johnson was wholly in fault for the collision. Whereupon the claimants of the Johnson appealed to this court, and the libellants also appealed from so much of the decree as held that the propeller was not in fault.

All persons engaged in navigating vessels upon navigable waters, whether upon the seas or in rivers or harbors, are bound to observe the rules of navigation recognized and approved by the courts in the management of their vessels on approaching a point where there is danger of collision.

Such rules are ordained and administered to prevent collision and to afford security to life and property exposed to such dangers, and experience shows that if they are seasonably observed and strictly followed such disasters would seldom occur.*

Rules of navigation are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and they continue to be obligatory as the vessels advance, so long as the means and opportunity to avoid the danger remain. They are not strictly applied to a vessel which is otherwise without fault in cases where the proximity of the vessels is so close that the collision is inevitable, and they are wholly inapplicable when the vessels are so distant from each other that measures of precaution have not become necessary to prevent a collision. But precautions, in order to be effectual, must be seasonable; and if they are not so, and a collision ensues because they were not adopted earlier, it is no defence to show that they were adopted as soon as the necessity for the precaution was perceived, nor to prove that at the moment of the collision it was too late to render such a precaution of any service. Unless precautions are seasonable they are of little or no use, as it will seldom or never happen that a collision could be avoided at the time when it occurred.†

Steam vessels, independently of the sailing rules enacted by Congress, are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances.‡

Prior to the passage of the act of Congress prescribing sailing rules, as well as since that time, steam vessels approaching each other from opposite directions, so as to involve risk of collision, were required to put their helms to port so that each may pass on the port side of the other, and the court is of the opinion that that rule is applicable in this

* Steamship *v.* Rumball, 21 Howard, 383.

† The Governor, 1 Clifford, 97. ‡ St. John *v.* Paine, 10 Howard, 583.

case, although the collision occurred before that act of Congress went into operation.*

Suppose it to be true that these vessels were approaching each other on intersecting lines, so that they would have collided if they had not changed their course, then it is clear in view of the circumstances that each was bound to port their helm and pass to the right, as there was nothing to prevent them from complying with that well-known rule of navigation. They were navigating in the daytime and in good weather, and they had an unobstructed view of what was before them; but the Johnson, instead of complying with that rule of navigation, put her helm to starboard for the purpose of crossing to the Brooklyn side and taking another boat in tow, which was lying in the dock, just below the lower slip of the Fulton Ferry. Descending the river, as the Johnson was, at the rate of seven miles an hour, she obeyed her helm readily, and aided by the reflex tide as she left the stream she came round quickly so as to head towards the shore, and as she advanced on her new course she struck the canal boat on her port side and caused the injury described in the libel.

Complaint is made by the appellant that the propeller was in fault, but the court is of the opinion that what the propeller did was correct, and that she left nothing undone which, under the circumstances, was required of her by the rules of navigation. When the master of the propeller saw that the Johnson was heading directly towards the canal boat, he ported her helm, which was all he could do at that time, as the collision was inevitable. Some benefit, no doubt, resulted from the movement, as it doubtless diminished the force of the blow and lessened somewhat the injury to the canal boat and her cargo.

Unexplained, the appellant concedes that the attempt of the steamboat to cross the track of the propeller before she passed up, would not be warranted by the rules of navigation, but he alleges in argument that the Johnson, before

* The Sussex, 1 Robinson, 275; The Niagara, 3 Blachford, 37.

she starboarded her helm, gave notice to the propeller, by blowing her steam-whistle twice, that she intended to make that change in her course and go to the left, but the weight of the evidence is the other way, and the theory of the defence is expressly contradicted by the answer, which must be regarded as alleging the true state of the case.

Whether tested by the pleadings or the evidence, the case shows that the helm of the steamboat was put to starboard when, if changed at all, it should have been put to port, and that the steamboat was put upon a course heading towards the Brooklyn shore, across the track of the propeller, before the steamboat blew her whistle, as alleged by the appellant.

Even supposing it were otherwise, and that the theory of fact assumed by the appellant could be sustained, still the court is of the opinion that it would constitute no valid defence in this case, for several reasons, which will be briefly explained: (1.) Because the respective vessels, as they approached each other, were in such close proximity that the steamboat had no right to insist upon any departure from the ordinary rules of navigation. (2.) Because any such departure from the rules of navigation as that contemplated by the steamboat, necessarily involved danger of collision, as the propeller was nearer to the shore than the steamboat. (3.) Because the steamboat, even if she did blow her whistle before she starboarded her helm, still she had no right to change her course until it was certain that the signal was heard and understood by the approaching vessel. (4.) Because the signal, even if given before the order to starboard, was nevertheless too late to justify the steamboat in attempting to cross the bows of the propeller; but the court is satisfied that the signal, if given as alleged by the appellant, was not understood by those in charge of the propeller, and that it was culpable rashness, in view of the circumstances, for the steamboat to attempt to cross the bows of the propeller before receiving any signal that the propeller was willing to co-operate in the proposed change of course.

Those on board the steamboat received no answer to their signal, and it is reasonable to suppose that if they were at-

tentive to their duties they must have known that those in charge of the propeller did not understand their signal, and consequently if they made the proposed change in the course of their steamer, a collision would follow, and if they did not so understand the matter, it was their own fault.

Viewed in any light, the propeller was not at fault, and the responsibility must rest on the steamboat. Our conclusion is, that the Johnson is liable for the whole damage, and that the decree of the Circuit Court should be in all things affirmed.

Appeal was taken by the libellants from so much of the decree as exonerated the propeller, but their claim, in the view of this court, is against the colliding steamboat, and not against the propeller.

DECREE IN EACH CASE AFFIRMED.

BONNER *v.* UNITED STATES.

The United States cannot be sued in the Court of Claims upon equitable considerations merely. Hence the holder of a military bounty-land warrant can have no legal right through that court, against the United States, for compensation on the allegation that the government has wrongfully appropriated to other uses the lands ceded for his benefit.

APPEAL from the Court of Claims; the case being this:

The State of Virginia, during the Revolutionary war, promised bounty lands to her troops, on Continental establishment, and at an early day set apart for their benefit a tract of country within the limits of the present State of Kentucky, which it was supposed at the time would be sufficient for the purpose. Recognizing, however, that this reservation might prove insufficient to satisfy the claims of these troops, Virginia, in ceding, March 1st, 1784, to the United States the territory beyond the Ohio River, reserved all the lands lying between the Scioto and Little Miami Rivers, to supply any deficiency of lands in the Kentucky district. It was very

soon manifest that the apprehended deficiency existed, and the second reservation, therefore, became operative. In order to ascertain the limits of this reservation, it was necessary to find the sources of these two rivers and to run the line between them. The execution of this object was the occasion of much difficulty and the cause of frequent legislation by Congress. Two lines were run by different surveyors, one by Ludlow and the other by Roberts. It is unnecessary here to trace the history of these lines, or to show which is scientifically correct. It is enough to say that Congress, in 1818,* established Ludlow's line as the true boundary, and excluded entries upon the *west* side of it.

In this state of things, Wallace, being the owner and holder of unsatisfied military bounty-land warrants, issued by the State of Virginia for the services of her troops on the Continental establishment in the war of the Revolution, located them, in 1838 and 1839, on lands which he asserted to be within the district reserved by Virginia to satisfy warrants of this class, in her deed of cession to the United States of March 1st, 1784. The entries were, however, made on the *west* side of Ludlow's line. That line, therefore, excluded the land on which Wallace located his entries, though Roberts's line included them.

The lands on which the attempt was thus made to locate these warrants had long before that time been disposed of to other parties, and the government declined to recognize the validity of Wallace's proceedings, and refused to issue patents to him. Wallace accordingly filed a petition in the Court of Claims; a court which, by the act constituting it,† has power to hear and determine claims against the United States, *founded upon any law of Congress, or regulation of an executive department, or upon any contract with it, express or implied.* His claim was that as the government had wrongfully appropriated the lands on which the warrants were laid, and as he could not get the lands themselves, he should be paid the amount of money received into the treasury from their

* 3 Stat. at Large, p. 424.

† See 10 Stat. at Large, 612.

sale, with interest, or, in lieu thereof, have land scrip issued to him; the petitioner stating that he would be satisfied with this, "or with such other mode, if any there be, as will be *equitable and just.*"

Wallace dying soon after, his executor and devisee, one Bonner, took his place upon the record. He insisted in the Court of Claims that there was no power in Congress to establish Ludlow's line as the true boundary, since Virginia had not assented to this action on its part, and since it was demonstrable that this line did not include all the lands between the two rivers.

The Court of Claims, however, took a different view of the obligations of the government, and decided adversely to the claim on its merits.

The case being now here for review.

Mr. Hoar, Attorney-General, and Mr. Talbot, special counsel, for the United States, having argued the question of merits, in reply to *Mr. J. J. Coombs, for the appellant,* contended that there was a defect in the appellant's case on its face; that the allegation of the petition was of property held in trust by the United States for the satisfaction of these bounty warrants, and of a violation of this trust by the trustee; with a prayer not for judgment for a sum of money, but in fact for any equitable relief; that the Court of Claims being created by statute, its equitable jurisdiction was to be sought for in the acts of Congress defining its powers; and that there no such jurisdiction could be found. It was not authorized to give judgment except upon the basis of an act of Congress, a regulation of an executive department, or a contract, which terms did not include a case of trust arising out of a Virginia bounty-land warrant.

Mr. Justice DAVIS delivered the opinion of the court.

If the position of the counsel of the United States, that the Court of Claims has no authority to hear a case of this character, be well taken, we are relieved of the necessity of deciding the merits of the controversy.

The claimant insists that there was no power to establish Ludlow's line as the true boundary, and exclude entries on the west side of it, as Virginia did not assent to this action on the part of Congress, and as it is demonstrable that this line does not include all the lands between the two rivers.

If this position be correct, this claim is based on the theory that the United States has violated the trust contained in the deed of cession of the Northwestern Territory, and is bound in good conscience to furnish compensation to the Virginia beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity, and if it were a controversy between two private suitors, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them.

Immunity from suit is an incident of sovereignty, but the government of the United States, in a spirit of great liberality, waived that immunity in favor of those persons who had claims against it which were founded upon any law of Congress or regulation of an executive department, or upon any contract with it, express or implied, and gave the Court of Claims the power to hear and determine cases of this nature.

The inquiry then arises whether the present case, in view of this limited jurisdiction, is one that the Court of Claims had a right to consider. The answer to this question seems to us of easy solution. It is not pretended that there was any regulation of a department to justify the entries in dispute, and it is certain, instead of having a law of Congress to rest upon, they were made in violation of the whole course of legislation by Congress on the subject. Congress has not only, in fixing the boundary line of the reservation, excluded these entries, but has also limited the time in which the

holders of warrants of the class in question should have the right to locate them, and, in addition to this, has forbidden their location on tracts of land for which patents had been previously issued, or which had been previously surveyed.*

As the land in question had been previously patented to individuals, or granted for the use of schools, it follows that the attempt on the part of the claimant to locate his warrants on them was contrary to law, and that the claim which he now makes for compensation, because of the failure of this proceeding, cannot be said to be founded on a law of Congress. Nor can it be said to be based on a contract in the sense of the law conferring jurisdiction on the Court of Claims. That court was authorized to enforce legal rights and obligations, but it could not proceed further and judge of the equities between the citizen and his government. In the absence of legislation by Congress the holder of a Virginia military bounty-land warrant can have no legal right against the United States for compensation on the allegation that the government has wrongfully appropriated to other uses the lands ceded for his benefit.

It is only a contract authorized by law that the Court of Claims can consider, and as there is no law of Congress on this subject there is nothing on which that court could base a judgment against the United States if, in the opinion of that tribunal, it had not fulfilled its duties towards the beneficiaries under the Virginia deed of cession. The liability of the government, if at all, arises out of the breach of an accepted trust, and that liability cannot be enforced at law. The claimant is in no better position because the government is the trustee than he would be if a private person occupied that relation, and it is very clear, if such were the case, that a court of equity would alone have the power to deal with him.

As the government has not thought fit to allow itself to

* See the following acts of Congress: March 23, 1804, 2 Stat. at Large, 274; March 2, 1807, Ib. 425; April 2, 1818, 3 Id. 423; March 1, 1823, 3 Id. 772; July 7, 1838, 5 Id. 262.

be sued in the Court of Claims on equitable considerations, it follows that the remedy of the claimant, if any now exists, is with Congress.

The judgment of the court below is REVERSED, and the case is remanded to that court with directions to dismiss the petition for

WANT OF JURISDICTION.

THE HARRIMAN.

Performance of a contract of charter-party to proceed to a distant port specified, made during a war and for the obvious purpose of furnishing articles to one of the parties to it, held not dispensed with by the fact, learned in the course of the voyage, that the whole purpose of the voyage was defeated by the changed condition of military operations; the language of the charter-party having been absolute in its terms, and without provision for any contingency.

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

During the recent war between Spain and the Republics of Chili and Peru, the Spanish fleet being engaged in active hostilities in the South American waters against the ports of the enemy, required supplies of steam-coal, and vessels were taken up on charter, in San Francisco, to convey cargoes for delivery at sea to the vessels of the fleet in aid of the hostile operations of blockade and bombardment of the Chilian ports.

Among these vessels taken up by persons watching the operations of the Spanish fleet, was the ship B. L. Harriman, which was engaged in this service by a charter-party, under date of May 4th, 1866, entered into between one C. J. Jansen, her owner, a merchant of San Francisco, and a certain Emeric, as freighter, also a merchant of that city.

The ship engaged her whole capacity to the freighter, and to take no cargo except from him or his agent, he stipulat-

ing to furnish a cargo of 786 tons of steam-coal (already laden on board) and to pay "for the use of said vessel during the voyage aforesaid, $15 per ton, one-half to be paid here to C. J. Jansen, of San Francisco, two days after the sailing of the vessel, and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that the coal has been delivered."

The owner stipulated for the freighting and chartering of the vessel "for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific; *the port of discharge to be named before the vessel sails from San Francisco;* such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct by the instructions given to Valparaiso, *the commanding officer of the Spanish navy will have the right to receive only a part of the cargo, the whole, or none, and to send her, if he desires, to another port in Chili, Peru, or the Chincha Islands,* and in that case, the vessel will immediately proceed to the *port which will be named by said commanding officer,* and there complete her discharge."

The letter of instructions provided for in the charter-party was given by the freighter to the master of the ship, under date of May 14th, 1866, and says:

"I hereby name you the port of *Valparaiso,* Chili, as the first port you have to proceed to on leaving San Francisco, and when there, *to report yourself to the commanding officer of the Spanish navy,* who will have the right, &c." (pursuing the privilege contained in the charter-party).

The instructions proceed:

"I herewith hand you a letter for *the commanding officer of the Spanish navy,* at Valparaiso, *which contains the bill of lading of your entire cargo of coal, indorsed to his order, a duplicate of this charter-party, and of this letter.*"

On May 17th, 1866, before the ship sailed, the freighter addressed another letter of instructions to the master, con-

taining a copy of some instructions which he had himself received from Panama, and requesting the master to follow them so far as he could. They were thus:

"On receipt of this letter, if you have not attended to all our outstanding orders, you are requested to suspend operations until further ordered, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operations. In case, however, you should have taken up a vessel before the present reaches you, then you must instruct the ship *to seek after the fleet between the port of Valparaiso and the Chinchas.*"

On the 19th of May, the freighter gave to the master the liberty to call at the *Chincha Islands*, if wind and weather or other circumstances favored his making them *without prejudicing the freighter's rights under the charter-party and instructions. These islands are about* 1200 *miles north of Valparaiso*, to which place, it will be remembered, that by the principal letter of instructions the freighter had directed the master to go.

After the ship sailed, the owner wrote a letter to the freighter, in which he says:

"In your charter of the ship B. L. Harriman there is no provision made for the possibility of there being nobody to receive her (the ship's cargo) on arrival, nor do I know that the captain of the Harriman had your private instructions on this point. At the time of making the charter we could hardly contemplate anything of the kind, hence the omission, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Captain Swenson."

During the period of this transaction, war existed between Spain and Chili. The cargo was intended for the admiral of the Spanish fleet, then supposed to be operating against Valparaiso. The ship sailed from San Francisco, May 22d, and *on May 24th the fleet left the coast of Chili, and went to parts unknown, and did not return there.* The ship arrived at the Chin-

chas August 3d, 1866, and was there informed of the bombardment of Callao by the Spanish fleet, May 2d, that the fleet had been badly shattered and had sailed away; that a regular mail steamer from Valparaiso reported at the Chinchas that all was quiet at Valparaiso, and that nothing was known of the fleet. The master also proved that the coal would have been seized at the Chinchas if he had betrayed the objects of the voyage, as the feeling was very bitter, and that he believed the coal would have been instantly seized at Valparaiso.

The ship returned to San Francisco without having ever gone past the Chincha Islands. Being now in San Francisco, the owner offered to deliver the cargo there to the freighter, on payment of freight according to the charter-party. Payment of freight was refused by the freighter, and the cargo was demanded by him, which was refused except on payment of freight. The owner sold the cargo, and the freighter libelled the ship for the value of the cargo, and to recover back the amount paid under the charter-party, at the outset of the voyage, as so much freight paid in advance. The owner justified the sale under his lien for freight, claiming the unpaid charter-money, and a return freight at the same rate for the home voyage.

The District Court sustained the owner's right and lien for the unpaid charter-money, but rejected the claim for freight on the return voyage, and, as a result, gave a decree against the vessel for the balance of the proceeds in the owner's hands from the sale of the cargo, after satisfying the lien as allowed.

The Circuit Court rejected the right and lien of the owner to the charter-freight, and gave a decree for the proceeds of the cargo sold, and the charter-money paid at the outset of the voyage.

The claimant appealed to this court.

Mr. Evarts, for the appellant:

The real freighter, acting through the agency of the libellant, a San Francisco merchant, was obviously the admiral

of the Spanish fleet, and to him the cargo was consigned, the bill of lading indorsed, and to him the ship was required to report, and his instructions the master was required to obey. The whole object of the voyage and the whole motive of the affreightment, were the supply of coal to the Spanish fleet, for use therein, in aid and support of its hostile operations against the Chilian seaports. This service of the ship not only made the *cargo*, by its destination, contraband of war and lawful prize to the Spaniard's enemy, but exposed the *ship itself*, thus made a guilty tender of the Spanish maritime hostilities, to lawful capture and condemnation. These considerations determine the *destination* of the voyage as *the Spanish fleet off the coast of Chili*, and limit the purpose and the significance of any reference to Valparaiso, the Chinchas, or the other geographical or commercial points, to an ascertainment of the *situs* of the fleet, within the reciprocal engagements of the charter-party. The ports or commerce of the Spaniard's enemy were not only wholly foreign to the purpose and the terms of the projected voyage, but the nature of the enterprise and the interests of owner and freighter alike, excluded such ports and commerce as an alternative resort, or even a possible refuge, unless from otherwise inevitable shipwreck. By the very necessity of the reciprocal engagements, therefore, upon which the project of the voyage rested, the *situs* of the Spanish fleet, as the terminus of the voyage, and the presence of the consignee, the admiral, to receive the deposit of the cargo and liberate the ship from its transported burden, was within the obligations of the *freighter*, and clear of any responsibility or venture of the *owner*. The charter-party, the contemporaneous instructions, and the last advices from the Spanish fleet, communicated to the master by the freighter, admit of but one interpretation. The Spanish fleet was to receive the cargo at Valparaiso, and the admiral, within certain limits, was to direct its deposit or distribution. By the advices communicated by the letter of the freighter to the master, under date of May 17th, an *indulgence* rather than a right was suggested, that, contingently, the presence of the Spanish fleet between

Valparaiso and the Chincha Islands should be a sufficient compliance with its obligations in respect of the *geographical* terminus of the voyage.

The ship sailed upon and completed the voyage, bringing itself within the waters contemplated as the *situs* of the Spanish fleet for the reception of the cargo. She held the cargo merely for delivery, and nothing but the absence of the stipulated depositary and consignee prevented the delivery. Within two days after the ship sailed from San Francisco (May 24th), the Spanish fleet voluntarily withdrew from the South American waters, and never returned. Thus, by this voluntary act of the freighter's principal and stipulated consignee, the delivery of the cargo was prevented, its deposit rendered impossible, and the ship's master made the freighter's agent, by necessity, for the preservation of the cargo. The master of the ship, observing all the obligations of his new and compulsory duty, by prudent counsels and prompt action, extricated the cargo from the destruction to which the consignee had abandoned it, and the ship itself from the peril to which the consignee's desertion of his obligations had exposed it.

The decree of the Circuit Court should be, therefore, reversed, and the decree of the District Court either affirmed or modified, according as the judgment of this court shall be on the question of *the earning of freight on the return voyage.*

Mr. B. R. Curtis, contra, contended that whatever expectations the parties might have had, the contract was an absolute contract to proceed to Valparaiso, unless otherwise directed by the Spanish admiral while on the voyage to that port; that the meaning of the contract was not to be influenced by the result of the war in Chili; that the parties not having had an *ex post facto* experience, the contract was not to be interpreted by *ex post facto* discoveries; that the contract had not been performed, inasmuch as the ship proceeded but to the Chinchas, twelve hundred miles short of the proper port, and then, not having found the Spanish fleet, immediately broke up the voyage and began her return voyage

to San Francisco; that the charterer had in no manner waived performance, nor prevented it by any fault of omission or commission; that as a necessary deduction from the foregoing premises no freight had been earned, and that the owner, Jansen, must account for the full value of the cargo, and refund the half freight paid in advance.*

The learned counsel further argued, that it was a proposition too clear for denial, and one which had been lately strongly applied in this court,† that where a party undertakes positively to perform a certain act for a certain stipulated compensation, he cannot claim the compensation, however difficult or impossible performance may be, so long as the act remains unperformed, unless, indeed, the non-performance is owing to the fault or omission of the other contracting party; that when a ship was chartered for a port known to be blockaded, or for a port which was subsequently put under blockade, the risk or impossibility of entry could never be urged on behalf of the ship as entitling her to freight, as if the voyage had been performed, and that the same rule was applied against charterers.‡

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

This is an appeal in admiralty from the decree of the Circuit Court of the United States for the District of California.

The charter-party, which lies at the foundation of the controversy, bears date on the 4th of May, 1866. The parties to it were Jansen, the claimant, and owner of the ship, and Emerick, the freighter. Both parties were merchants of San Francisco. The entire capacity of the ship was engaged to the freighter. He stipulated to furnish her a cargo of

* Portland Bank *v.* Stubbs, 6 Massachusetts, 426; Benner *v.* Equitable Co., 6 Allen, 222; Chase *v.* Alliance Co., 9 Id. 311.

† Dermot *v.* Jones, 2 Wallace, 1.

‡ Scott *v.* Libby, 2 Johnson, 340; Burrill *v.* Cleeman, 17 Id. 72; Bright *v.* Page, 3 Bosanquet & Puller, 296, note; Barber *v.* Hodgson, 3 Maule & Selwyn, 267; Hadley *v.* Clarke, 8 Term, 265; Atkinson *v.* Ritchie, 10 East, 530; Vlierbloom *v.* Chapman, 13 Meeson & Welsby, 230.

786 tons of steam-coal, and to pay "for the use of said vessel during the voyage aforesaid, $15 per ton in United States gold coin, one-half to be paid here to C. J. Jansen, of San Francisco, two days after the sailing of the vessel, less two and one-half per cent. discount for cash, and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that the coal has been delivered." The owner stipulated "for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific; the port of discharge to be named before the vessel sails from San Francisco; such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct by the instructions given to Valparaiso, *the commanding officer of the Spanish navy will have the right to receive only a part of the cargo, the whole, or none, and to send her, if he desires, to another port in Chili, Peru, or the Chincha Islands*, and in that case, the vessel will immediately proceed to the *port which will be named by said commanding officer*, and there complete her discharge." In pursuance of the condition of the charter-party Emerick, on the 14th of May, 1866, addressed a letter to Swenson, the master, in which he said: "I hereby name you the port of Valparaiso, Chili, as the first port which you have to proceed to on leaving San Francisco, and when there to report yourself to the commanding officer of the Spanish navy, who will have the right to take only a part of your cargo of coal, the entire cargo, or none, and if he desires, to send you to another port in Chili, Peru, or the Chincha Islands, in which case you will have to proceed immediately to the port named by said commanding officer, and there complete your discharge, these conditions and privileges being part of the charter-party. I herewith hand you a letter for the commanding officer of the Spanish navy at Valparaiso, which contains the bill of lading of your entire cargo of coal, indorsed to his order." On the 17th of May, Emerick addressed another letter to the master, in which he gave a copy of the instructions he had received from Panama, which were as follows: "On receipt of this letter, if you have not attended to all our outstanding orders,

you are requested to suspend operations until further ordered, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operation. In case, however, you should have taken up a vessel before the present reaches you, then you must instruct the ship to seek after the fleet between the port of Valparaiso and the Chinchas." He added: "As far as it is in your power you are requested by me to follow the above instructions." On the 19th day of May, Emerick gave the master permission to make the Chincha Islands, if circumstances should be favorable, without, however, prejudicing his "rights under the charter-party, and instructions."

On the 22d of May, the vessel left San Francisco for the port of Valparaiso. She was freighted according to the charter-party. On the 16th of June following, Jansen said to Emerick, by letter of that date, "In your charter of the ship B. L. Harriman, there is no provision made for the possibility of there being nobody to receive her (the ship's cargo) on arrival, nor do I know that the captain of the Harriman had your private instructions on this point. At the time of making the charter we could hardly contemplate anything of the kind, hence the omission, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Captain Swenson."

Emerick made no reply. The ship proceeded to the Chincha Islands, and returned thence to San Francisco. Captain Swenson, in his protest, says that on the 4th of August he took a pilot on board and ran in near to the southernmost of those islands, and "lay in close to the land." He went ashore, and learned that the Spanish fleet had hauled off from the Chilian coast, and gone upon an unknown destination. After diligent inquiry, he became satisfied that any attempt to find the fleet would be "impracticable and fruitless." He became satisfied also that it was necessary to return at once to San Francisco, and took his departure the same day on his return voyage. He considered his original

voyage broken up by the withdrawal of the Spanish fleet, and the absence from Valparaiso of its commander, the consignee of his cargo. Upon the return of the vessel Emerick refused to pay the balance of the freight-money. Jansen thereupon landed and sold the cargo. Emerick filed this libel, seeking thereby to recover back the freight-money he had paid and the value of the cargo. The owner proved that at the time the charter-party was entered into war existed between Spain and Chili; that the cargo was intended for the admiral of the Spanish fleet, then supposed to be operating against Valparaiso; that on the 24th of May the Spanish fleet left the coast of Chili and went to parts unknown, and did not return there. He proved by the master the facts stated in his protest, and further, that he was informed at the Chincha Islands of the bombardment of Callao by the Spanish fleet; that the fleet had been badly shattered, and had sailed away. The master feared his coal would be seized at the Chincha Islands, if he betrayed the object of his voyage. The feeling there was very bitter. He believed the coal would have been instantly seized at Valparaiso.

Thus the case stood upon the proofs. The District Court decreed for the owner. The Circuit Court decreed against him, and he has brought the case to this court for review.

In settling the rights of the parties, the inquiries which demand our attention are: What was the contract between them? Was it fulfilled by the ship? and if not, was the nonfulfilment excused by fault or waiver on the part of the charterer, or by other facts, disclosed in the proofs, so as to entitle the owner to all, or any part of, the freight-money stipulated for in the charter-party?

According to that instrument, the destination of the vessel was to be fixed by letter before her departure upon her voyage. If it were Valparaiso, the commanding officer there of the Spanish fleet was to be the consignee, with the right to direct the ship to proceed further, and deliver all or a part of her cargo elsewhere. By the charterer's letter of the 14th

of May, Valparaiso was designated as the port to which she was first to proceed.

This destination was not subsequently changed, either in fact or according to the understanding of the parties. Emerick's letter to the master, of the 17th of June, requested him to search for the Spanish fleet between Valparaiso and the Chincha Islands, but it gave no intimation of a purpose or willingness that he should abandon the voyage to Valparaiso, as originally prescribed, and certainly no authority to that effect.

The charterer's letter of the 19th of May, authorizing the master to make the Chincha Islands, expressly reserved his rights "under the charter-party and instructions."

Jansen's letter of the 16th of June admits that the vessel had sailed for Valparaiso, and asks instructions as to the disposition of the cargo if the Spanish commander should have left there before her arrival. The master states in his protest that his destination, upon leaving San Francisco, was Valparaiso. He went no further than the Chincha Islands, which were short of that point about twelve hundred miles. He made no search for the fleet between the two points, and gave no reason for breaking up the voyage and not proceeding to the port of delivery, but the probable absence of the consignee and the peril there to ship and cargo.

The existence of the war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct, and unconditional, that the vessel should proceed to Valparaiso. The presence or absence of the consignee was immaterial. If absent it was the right and duty of the master to place the cargo in store.* The contract was not fulfilled. For this the shipper is in nowise responsible. Such are the relations of the parties.

The contract of affreightment is governed by the same principles as other special contracts. There are none to which these principles are more stringently applied. The

* Fisk *v.* Newton, 1 Denio, 45.

contract is an entirety; and where there has been no complete fulfilment on one side, and no fault or waiver on the other, no freight-money can be recovered. Mr. Justice Story says this is the result of all the cases.*

In *Paradine* v. *Jane*,† the court said: "When the party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have guarded against it by his contract." Such has always been the rule of the common law. If a lessee covenant to repair, and the house is burned down, he is bound to rebuild. If a party covenant to build a bridge and keep it in repair for a specified time, and it be swept away by an extraordinary flood before the time expires, he must replace it. A party agreed to secure in England for another the exclusive right to make, use, and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an act of the British Parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in *Paradine* v. *Jane*, and that the covenantor was liable for the breach of his agreement.‡ If a condition be to do a thing which is impossible, as to go from London to Rome in three hours, it is void; but if it be to do a thing which is only improbable or absurd, or that a thing shall happen which is beyond the reach of human power, as that it will rain to-morrow, the contract will be upheld and enforced.§

The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done.‖ Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance.¶ The answer to

* The Nathaniel Hooper, 3 Sumner, 555. † Alleyn, 26.

‡ Beebe *v.* Johnson, 19 Wendell, 500.

§ Comyn's Digest, 96; Rolle, 420, l. 20.

‖ Touteng et al. *v.* Hubbard, 3 Bosanquet & Puller, 300.

¶ 2 Parsons on Contracts, 672; Beebe *v.* Johnson, 19 Wendell, 500.

the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts—not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function.

A charterer agreed to load a ship at Liebeau with barley. The ship went there to receive the cargo. The factors of the shippers informed the master that the Russian government had forbidden the exportation of barley, and that no loading could be furnished. The ship returned in ballast. The charterer was sued for the breach of the contract. Lord Kenyon said: "I am decidedly against the defendant upon the point of law. It is said in Coke Littleton (1), that if a man be bound in an obligation to A., conditioned to enfeoff B., a stranger, and B. refuses, the obligation is forfeited, for the obligor has taken upon himself to make the feoffment. The reason of this is clear. If a man undertake what he cannot perform, he shall answer for it to the person with whom he undertakes. *I am always desirous to apply the settled principles of the law to the regulation of commercial dealings.*"*

A charterer covenanted to freight a ship at Gibraltar with a homeward cargo. A pestilent disease broke out there, and all public intercourse was forbidden by law. The cargo could not have been put on board without danger to all concerned of contracting and communicating the disorder. Lord Ellenborough said: "If in consequence of events which happen at a foreign port the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."†

An owner, by a charter-party, agreed that his ship should proceed from Liverpool to Terceira, and deliver her cargo. Terceira was under blockade, and both parties knew it. There was no intention to break the blockade. The ship

* Blight *v.* Page, 3 Bosanquet & Puller, 295.

† Barker *v.* Hodgson, 3 Maule & Selwyn, 271.

did not go. The owner was held liable. The rule laid down in *Paradine* v. *Jane* was cited and approved.*

A ship was chartered to proceed from Charleston to Rotterdam. She went to London, and the master learned that if she proceeded to Rotterdam she would be liable to seizure there and on the way, and to confiscation, under a decree of the Emperor Napoleon, for having touched at a British port. The master refused to proceed, and landed the cargo. Lord Ellenborough said: "Freight could only be earned by performing the terms of the charter-party." The goods "were brought here, instead of being conveyed to their port of destination."† This case, in its essential points, is strikingly like the one under consideration.

In *Lorillard* v. *Palmer*,‡ the vessel sailed on a voyage from Richmond to New York. Finding the Chesapeake Bay blockaded so that it was impossible to proceed without capture, she returned to Richmond. It was held that the shipper was entitled to receive back his goods without paying any freight.

A ship was chartered for a voyage from the city of New York to the city of St. Domingo. The latter was found to be blockaded. The ship was turned away by a blockading vessel, and returned to New York. It was held that the charter-party was dissolved, "and all claim to freight under it gone." The court said: "Nor is this a case for *pro rata* freight. Here was no acceptance of the cargo at an intermediate port." It was added that the owner of the ship may make himself liable for freight by accepting the goods short of the port of destination, upon the grounds of an implied contract, resulting from the partial transportation of the goods and the benefit received. "But when the cargo, as in the present case, is brought back to the port of lading, no such presumption can arise. No benefit has accrued to the owner, nor has he done any act from which an implied contract to pay any freight can be raised."§

* Mederos *v.* Hill, 8 Bingham, 235.

† Osgood *v.* Groning, 2 Campbell, 466.

‡ 15 Johnson, 14.

§ Scott *v.* Libby, 2 Johnson, 336; see also Abbot on Shipping, 596; Smith

Statement of the case.

There is nothing in the record to excuse the conduct of the vessel, or to entitle the owner to any part of the stipulated compensation.

It is unnecessary to pursue the subject further. We think the decree of the Circuit Court was in all things correct, and it is

AFFIRMED.

IN THE MATTERS OF HOWARD.

1. Where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in its provisions, but, having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition, previous to the distribution, his right to share in the fund, and in the prosecution of his suit, he is entitled, upon a proper showing, to all the remedies by injunction, or order, which a court of equity usually exercises to prevent the relief sought from being defeated.
2. The judgment, or decree of an inferior court, when affirmed by this court, is only conclusive as between the parties upon the matters involved. It does not conclude the rights of third parties not before the court, or in any respect affect their rights. It acquires no additional efficacy by its affirmance. As an adjudication upon the rights of the parties between themselves it has the same operation before as after its affirmance.
3. Accordingly where a decree of a Circuit Court of the United States, affirmed by this court, had determined that the complainants and certain intervening claimants, were entitled to a fund in the hands of the receiver of the court, and ordered the distribution of the fund among them, it was held that it did not preclude third parties from proceeding by bill to assert their claims to share in the fund, before its distribution; and to prevent such distribution, before their claims could be considered and determined, they were entitled, upon presenting a *primâ facie* case, to a restraining order or injunction from the court.

THESE were two motions which were heard together, as they involved a consideration of similar questions, and grew out of the same facts. The first motion was for a peremptory

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v. Wilson, Ib. 267, 469; Lidard *v.* Lopez, Ib. 453; Benner *v.* Equitable Ins. Co., 6 Allen, 222; Chase *v.* Alliance Ins. Co., 9 Id. 311; Atkinson *v.* Richey, 10 East, 531; Vliebroom *v.* Chapman, 13 Meeson & Welsby, 230.

mandamus to the judges of the Circuit Court of the United States for the District of Iowa (the alternative writ having been heretofore issued and returned), commanding them to execute a decree of that court rendered in the case of *Howard and others* v. *The City of Davenport and others*, by distributing certain funds in its custody. The second motion was to dismiss the appeal from the final decree, rendered in a subsequent suit, affecting the distribution of those funds.

The facts out of which these cases arose, were substantially as follows:

In 1854 the legislature of Iowa incorporated a company, styled the Mississippi and Missouri Railroad Company, to construct a railroad from Davenport to Council Bluffs, in that State, with a branch to Oskaloosa. To raise the necessary funds for the construction of the road the company executed, previous to 1861, several mortgages upon its property to secure its bonds, issued at different times, amounting to over six millions of dollars. The company also received, previous to 1861, in payment of subscriptions of stock, bonds to a large amount of certain cities and counties in the State, through which the road was located, the payment of which bonds was guaranteed by a special indorsement upon each. With the guaranty of this indorsement it disposed of the bonds to different parties.

In 1865 the company became embarrassed and insolvent, and in February, 1866, a suit was brought in the Circuit Court of the United States for the District of Iowa for the foreclosure of the mortgages upon its property. In May following the suit resulted in a decree for the sale of the property, and in July of the same year a sale was made under the decree, by a master in chancery, to the Chicago, Rock Island, and Pacific Railroad Company, a corporation created by the State of Iowa. The foreclosure and sale were made pursuant to an arrangement entered into between the stockholders and the greater number, but not all, of the bondholders, and other creditors of the company, by which it was agreed that the sum of $5,500,000 in bonds of the purchasing company should be given for the property, and applied

to the payment of the bonds secured by the different mortgages of the insolvent company, in conformity with a specified scale, with the exception of an amount equal to sixteen per cent. on the capital stock of that company, namely, $552,400, which should go to its stockholders.

Previous to this time Mark Howard and John Weber had severally recovered judgments against the city of Davenport, and also against the Mississippi and Missouri Railroad Company, upon certain bonds issued by that city to aid in the construction of the railroad, and guaranteed by that company. In the distribution of the proceeds to be received upon the sale of the property of the insolvent company no provision was made for the payment of these judgments, and on the 9th of July, 1866, the day on which the sale mentioned under the decree of foreclosure was made, Howard and Weber brought a suit in equity in the same court against the parties to the foreclosure suit to obtain payment of their demands out of the proceeds, which, by the arrangement mentioned, were to go to the stockholders. In their bill they set forth the judgments recovered by them against the Mississippi and Missouri Railroad Company; that the company was insolvent; that all its property had been sold under the decree of foreclosure; and that there was no other property out of which these judgments could be made than the $552,400 which was to be received by the stockholders out of the proceeds of the sale.

During the progress of the suit fourteen other persons appeared and presented claims of a similar character, to an amount exceeding seven hundred thousand dollars, against the same fund. These parties are designated in the proceedings as "intervening claimants joining in the bill." On application of the complainants and these intervening claimants a receiver was appointed by the court to collect and hold the fund which they were seeking to subject to the payment of their claims. This officer subsequently received from the Chicago, Rock Island, and Pacific Railroad Company, the purchasing company, in its first mortgage bonds, with interest coupons attached, the amount which was to go to the

stockholders of the insolvent company, and has ever since held the same in his custody, subject to the order of the court.

In May, 1868, a final decree was rendered in the suit, adjudging that the complainants and intervening claimants were entitled, as creditors of the Mississippi and Missouri Railroad Company, to so much of the purchase-money of its property as was agreed to be reserved for the stockholders; and directing the purchasing company to pay the same, less a small sum allowed for over-payment, in cash or its bonds, to the receiver; and directing the receiver, if paid in bonds, to convert the bonds into money, and, after satisfying certain costs, distribute the proceeds to the complainants and intervening claimants *pro rata*, in proportion to the amounts of their respective claims, which were stated. On appeal to this court this decree was affirmed, and the mandate to the Circuit Court, issued in pursuance of the judgment of affirmance, commanded "that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Whilst the appeal was pending Frederick A. Foster presented a petition to the Circuit Court, setting forth that he was a holder of certain bonds of the Mississippi and Missouri Railroad Company, secured by a mortgage on its property, which had never been paid; that he was not a party to the arrangement by which, upon a sale of the property, as already mentioned, a certain portion of the proceeds received were to be paid to the stockholders, and insisting that the fund thus realized was applicable to the payment of these bonds, and praying for an order restraining the distribution of the fund in the hands of the receiver, and directing that upon proper pleadings an issue be joined between the petitioner and other holders of bonds who never assented to the arrangement mentioned, and the complainants and intervenors, to settle the priorities of the parties in an application of the fund.

Subsequently three other parties, McCollum, Bardwell, and

McComb, presented similar petitions to the Circuit Court, setting forth that they were also holders of bonds of the insolvent railroad company, which had never been paid, and asking that the proceeds derived from a sale of its property, in the hands of the receiver, be applied to the payment of these bonds, in preference to the claims of any parties to the suit of Howard and others.

In May, 1869, the court denied the prayer of the petitioners, but allowed them to file their petitions, and required them to file a consolidated bill at the next term of the court against all the parties to the suit, setting up their respective claims with greater particularity than in the petitions.

In July following, the petitioners, Foster, McCollum, Bardwell, and McComb, filed their consolidated bill against Howard and all the other parties to the original suit, asserting their claims as mortgage bondholders to the fund in the hands of the receiver. The bonds amounted to about seventy-two thousand dollars, with large arrears of interest, for which they claimed a lien upon the fund in preference to the claims of Howard and others, and if that was not allowed, then they claimed the right, as general creditors, to share with them in the distribution of the fund.

All the defendants answered the bill, denying that the complainants had any lien on the fund as mortgagees, or any right to the fund as general creditors, and contending that if they were such creditors, the defendants were entitled, as a reward of their superior diligence, to be first paid out of the fund. No objection was made by them that after a final decree, affirmed by this court, directing a distribution of the fund, it was too late for the complainants to file their bill to reach the fund, or to share in its distribution.

In November, 1869, the Circuit Court heard the case and rendered a final decree, rejecting the claim of McCollum, and allowing the claims of the other three complainants, Foster, Bardwell, and McComb, to a limited amount as general creditors.

From this decree the complainants appealed: McCollum, because his claim was entirely rejected; Foster, Bardwell,

and McComb, because they were allowed to come in only as general creditors. The appeal was now pending in this court.

After this appeal was perfected, Howard and others, the complainants and intervening claimants in the original suit, applied to the Circuit Court for a rule on the receiver to proceed to execute the decree rendered therein by the distribution of the fund in his hands, as provided by the decree in that case, notwithstanding the appeal of Foster and his associates, or of any of them; or in case the court should be of opinion that the motion could not be granted in full, that then the receiver should be ordered to proceed to execute the decree, except as to such portion of the fund as to which execution was suspended by order of the court made at the May Term. This motion the Circuit Court denied.

The same parties then applied to this court for a writ of mandamus to the judges of that court, commanding them forthwith to execute the decree rendered at the May Term, 1868, and affirmed by this court, or to execute the decree by distributing all the fund, excepting sufficient to cover the claims of the appellants. This court, as is usual in applications for a mandamus, on a *primâ facie* showing, allowed the alternative writ, which being returned, the parties now asked for the peremptory writ. The parties at the same time moved to dismiss the appeal from the final decree in the above suit of Foster and his associates.

Messrs. Grant and Rogers, in support of the motions:

1. A judgment or decree affirmed by this court cannot be altered by new pleadings or evidence in the court below, but must be executed in the exact manner in which it is affirmed. Such is the rule in the State courts.*

The question has been conclusively settled in this court by a series of decisions.† In Sibbald's case this court said

* Ogden *v.* Bowen, 4 Scammon, 301; Abrams *v.* Lee, 14 Illinois, 167; Chickering *v.* Failes, 29 Illinois, 302; Biscoe *v.* Tucker, 14 Arkansas, 515, 523; Miner *v.* Medberry, 7 Wisconsin, 100, 102; Young *v.* Frost, 1 Md. Chan. 377.

† Cameron *v.* McRoberts, 3 Wheaton, 591; Brocket *v.* Brocket, 2 Howard, 238; McMicken *v.* Perrin, 18 Id. 507, 511.

that "no principle is better settled, or of more universal application, than that no court can reverse or annul its final decrees or judgments, for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake; from which it follows, that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review in cases of equity, and writs of error *coram nobis*, at law," they say, "are exceptions, which cannot affect the present motion." They add:

"When the Supreme Court have executed their power in a cause before them, and it requires further action, it sends a mandate to the court below. Whatever is before this court, and is disposed of, is considered finally settled. The inferior court is bound by the law of the case, and must carry it into execution according to the mandate. They cannot vary or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it further than to settle so much as has been remanded. After a mandate, no rehearing will be granted. It is never done in the House of Lords. And on a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate."*

2. If it be argued that Foster and others were not parties to the decree and not bound by it, we answer, that if all the necessary parties were not before the court when the case was originally heard, it was the duty of the court to require the plaintiffs to bring them in, and a failure to do so was ground of error in that cause.

But this court, in affirming the decree, decided that neither the bondholders nor stockholders were necessary parties, and they held, by implication at least, that no other parties were necessary, and the plaintiffs in Howard's suit had a right to

* Ex parte Sibbalds, 12 Peters, 488, 492; Washington Bridge Company *v.* Stewart, 3 Howard, 413; Chaires *v.* The United States, 3 Howard, 611–620; Bank United States *v.* Moss, 6 Howard, 31–41; Southard *v.* Russell, 16 Howard, 547, 571; McLaughlin *v.* O'Rourke, 12 Iowa, 459, 563.

file a bill as general creditors for themselves alone, and thus gain as at law a preference by the judgment in their favor over other creditors of the same degree who may not have used equal diligence.* No right to intervene in this cause.†

Messrs. F. Withrow and S. W. Fuller, contra, citing *Gillespie* v. *Alexander*,‡ *Williams* v. *Gibbs*,§ and other English and American cases.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

There is no ground for supposing any intention on the part of the circuit judges, or of either of them, to evade or disobey the mandate of this court. Their action has been dictated entirely from an opinion held by them that parties asserting a right to share in a common fund in the custody of the court, and presenting a *primâ facie* case in support of such asserted right, are entitled to be heard at any time before its actual distribution, although a decree ordering such distribution in a litigation between other parties may have been entered. Whether in this opinion they are sustained by the law, is the question presented for our consideration. We are not called upon to determine the character of the claims presented, whether they constitute liens upon the fund in the hands of the receiver, or stand as simple debts against an insolvent company, or whether the right, if any ever existed, of the holders to share in the fund has been lost by their laches. The question is not as to the merits of the claims, but whether the Circuit Court was forbidden by the force of its previous decree, when affirmed by this court, from considering the claims at all.

* Gordon *v.* Lowell, 21 Maine, 251; Lucas *v.* Atwood, 2 Stewart, 378; Corning *v.* White, 2 Paige, 567; Ogilvie *v.* Knox Insurance Company, 2 Black, 539.

† Brunson *v.* Railroad Company, 2 Black, 524; United States Bank *v.* Burke, 4 Blackford, 145; George *v.* Williamson, 26 Missouri, 190; Myers *v.* Zanesville Co., 11 Ohio, 273; Same *v.* Same, 13 Ohio, 197.

‡ 3 Russell, 130.

§ 17 Howard, 257.

Opinion of the court.

Undoubtedly it is the duty of all inferior courts to yield a prompt obedience to the mandate of this court, or, in other words, to treat as conclusive the judgment of this court upon the law and facts presented to it in appropriate form for consideration. Any other conduct would be subversive of the relation which the Constitution intends that inferior tribunals shall hold to this court. But the obedience thus due is not a blind obedience, acting upon the letter of the judgment affirmed, or mandate ordered, without any consideration of the rights of persons not parties to the litigation in which the judgment was entered. The judgment of an inferior court, when affirmed by this court, is only conclusive as between the parties upon the matters involved. Viewed simply as an adjudication between them, it is not open to question. It must be followed and obeyed. The inferior court cannot reopen the case and allow new proceedings to be taken, or further evidence to be given, or new defences to be offered, upon any ground whatever. It must execute the judgment or decree, and only for that purpose has it any authority over it. Such is the purport of the numerous cases cited by the counsel for the relators. But they go no further. None of them suggest even the proposition that the judgment or decree affirmed concludes the rights of third parties not before the court, or in any respect affects their rights. It would have been against all principle and all reason had they asserted anything of the kind. There is, indeed, a class of cases affecting the personal status of parties, in which a judgment necessarily binds the whole world, but it is not of these we are speaking. We refer to judgments at law or decrees in chancery, affecting rights of parties to property. They bind only the parties before the court and those who stand in privity with them.

The counsel of the relators seek to apply the conclusive character of such judgments and decrees between parties to persons not parties, under the supposition, it would seem from their argument, that they require some additional efficacy from their affirmance by this court. But they acquire no additional efficacy by such affirmance. As adjudications

upon the rights of the parties between themselves they have the same operation before as after their affirmance.

The decree in the case of *Howard and others* v. *The City of Davenport and others*, determined that the complainants and the intervening claimants were entitled to the fund in the hands of the receiver as against the defendants. It did not determine, and could not determine, that Foster and his associates had not equal or greater claims to the fund than either of those parties. They had, therefore, the same right to proceed by bill or other appropriate remedy, if there be one, to assert any claims or equity to the fund which they possessed, as they might have done if no such suit as that of *Howard and others* v. *The City of Davenport and others*, had ever been commenced or carried to final decree. And in the prosecution of their suit they were entitled, upon a proper showing, to all the remedies by injunction or order, which a court of equity usually exercises to prevent the relief sought from being defeated.

The general doctrine that where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in its provisions, but, having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition his right to share in the fund, is established by numerous authorities, both in England and the United States. Several of these are cited by counsel, to two of which we will refer. The first is that of *Gillespie* v. *Alexander*.* That was a suit for the administration of the estate of General Gillespie. After several debts against the estate had been proved before a master and been paid, the court, in January, 1825, decreed a distribution of the residue of the fund in court to the unsatisfied legatees. In November, subsequently, a party appeared claiming to be a creditor of Gillespie, and petitioned the court for liberty to prove his demand, and liberty was given. In July of the following year the master reported that there was due the petitioner over sixteen hun-

* 3 Russell, 130.

dred pounds. In the meantime the fund had been apportioned under the decree, and part of it had been paid in discharge of some of the legacies. The master of the rolls ordered that the debt to the petitioner should be apportioned among the funds of the different legatees, whose legacies still remained in court, observing that the legatees were not without remedy, as they could call on the other legatees to contribute. From this order an appeal was taken to the chancellor, and the principal objection urged to the order was similar to the objection urged in this case, that the creditor was concluded by the decree directing distribution, but Lord Eldon, in deciding the appeal, said:

"Although the language of the decree, where an account of debts is directed, is that those who do not come in shall be excluded from the benefit of that decree, yet the course is to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without a remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees and bring back the fund, he may do so, but he cannot affect the legatees except by suit, and he cannot affect the executor at all."

And the chancellor ordered that the debt should be apportioned to the shares of all the legatees, and that the petitioner should be paid the sums apportioned to the shares remaining in court, and be at liberty to apply against the legatees who had been paid, and against funds which might subsequently come in, for the balance due him.

The other case to which we will refer is that of *Williams* v. *Gibbes*, decided by this court and reported in the seventeenth of Howard. In that case, the County Court of the Sixth Judicial District of Maryland had, by its decree, rendered in December, 1846, awarded to the executors of one Oliver, the proceeds of a share of one Williams in an association known as the Baltimore Company. Upon appeal to the Court of Appeals of the State, the decree of the County

Court was, in this respect, affirmed. In 1852, six years after the entry of the decree, the administrator of Williams filed a bill, in the Supreme Court of Baltimore City, against the executors of Oliver, for the proceeds of Williams's share, averring that neither he nor Williams was present, or a party to, or bound by, any proceeding, or order, or decree of the County Court, or of the Court of Appeals, and that the settlement and adjustment of the amount of the partnership funds of the Baltimore Company, and of the charges, commissions, and costs to which they were liable in *solido*, and the distribution of the remainder of the funds by the decree of the court to the several shares, which the members of the company were entitled to, were not binding upon him or his intestate.

The case was transferred from the State court to the Circuit Court of the United States, where the bill was dismissed. On appeal to this court the decree of dismissal was reversed. Mr. Justice Nelson, speaking for the court, said:

"Now, the principle is well settled in respect to these proceedings in chancery, for the distribution of a common fund among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of wilful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or in case they have distributed the fund in pursuance of an order of the court, against the distributees."

And after referring to various cases from the English courts, and among others to that of *Gillespie* v. *Alexander*, already cited, said:

"The cases above referred to relate to the rights of creditors and next of kin; but the principle is equally applicable to all parties interested in a common fund brought into a court of equity for distribution among the several claimants."

These cases, and the general principles governing courts

of equity in the disposition of a common fund, of which there are several claimants, are sufficient to show that the judges of the Circuit Court were justified in authorizing Foster and his associates to file their consolidated bill, and thus present for consideration their claims to share in the fund in the hands of the receiver, and in withholding the distribution of the fund under the decree in the case of *Howard and others* v. *The City of Davenport and others*, until such claims could be considered and determined.

Whether in the determination of these claims the Circuit Court decided rightly or otherwise, can only be settled upon the hearing of the appeal from its decree.

It follows that the motion for a mandamus, and the motion to dismiss the appeal from the final decree, must both be

DENIED.

FRISBIE *v.* WHITNEY.

1. Occupation and improvement on the public lands with a view to pre-emption, do not confer a vested right in the land so occupied.
2. It does confer a preference over others in the purchase of such land by the *bonâ fide* settler, which will enable him to protect his possession against other individuals, and which the land officers are bound to respect.
3. This inchoate right may be protected by the courts against the claims of other persons who have not an equal or superior right, but it is not valid against the United States.
4. The power of Congress over the public lands, as conferred by the Constitution, can only be restrained by the courts, in cases where the land has ceased to be government property by reason of a right vested in some person or corporation.
5. Such a vested right, under the pre-emption laws, is only obtained when the purchase-money has been paid, and the receipt of the proper land officer given to the purchaser.
6. Until this is done, it is within the legal and constitutional competency of Congress to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

In March, 1862, and for many years before, there was a

large body of land in California known as the Soscol Ranch, and which was supposed by almost every one in that country to be private property. The tract covered eighteen square leagues, and included the city of Benicia, the town of Vallejo, the navy-yard of the United States, the depot of the Pacific Steamship Company, and hundreds of acres of land in cultivation and in possession of a large rural population. These parties all claimed under grants to a certain Vallejo by the Mexican government, made in 1843 and 1844, which had been presented to the Board of Land Commissioners and confirmed, and the decision of the board had been also affirmed on appeal to the District Court.

In March, 1862, the case coming before this tribunal, the court felt itself compelled to declare the grant void for want of authority in the Mexican government to make it, and on the 22d day of the month just named did so declare it; the decision not in any way impeaching the good faith of the numerous purchasers under Vallejo. However, as the act of Congress* which organized the Board of Commissioners to determine the land titles in California, declared that when any of the claims presented to it should finally be decided to be invalid the land should be considered as a part of the public domain, the effect of the decision was, that the United States became the absolute owner in fee of all the property, as above described; city, town, depot, ranch, the houses, the homes, the cultivated grounds and orchards, which the persons had bought and paid for, had built on and cultivated. The occupants had nothing left, of course, but an appeal to the equity and generosity of the government.

As soon as it became generally known in Benicia, and among the population on and about the Soscol Ranch, that this court had declared the Vallejo claim void, and that the whole eighteen leagues were public land, a rush was made to secure all of it that was valuable, and which it was supposed had become subject to the pre-emption laws. The report of the register and receiver of the Land Office, who were subsequently required to investigate the claims set up

* Act of 3d March, 1851, § 13.

to these lands, both by the Vallejo claimants and the settlers, presents the mode in which this was done. The parties desiring to make pre-emption claims generally went on the lands in the night, because they were resisted by those in possession; and in the morning a house, eight or ten feet square, with shed roof of redwood boards, set up edgewise, without window, fireplace, or floor, was discovered, the evidence of a *bonâ fide* settlement and occupation under the pre-emption laws of the United States.

Among the persons who sought to obtain a property by pre-emption right in this land was one Whitney, who, according to his own account, entered on a quarter-section one afternoon, with his family, consisting of his wife, two children, a man, and a carpenter, with his team, goods, and household furniture. He commenced building next day, and made a better house than those above described. It had three rooms. The quarter-section on which he entered had been already occupied by one Frisbie, a son-in-law of Vallejo, and one of the numerous persons in possession under Vallejo's title. It was inclosed by a fence, had a crop not yet gathered, and a house occupied by a tenant of Frisbie. Whitney's occupation was resisted by Frisbie, who on one occasion seized a double-barrelled shot-gun of Whitney's, cocked it at him, and stood in a menacing attitude, Whitney twisting it out of his hands.

On the 3d March, 1863, after the effect of the decision in *United States* v. *Vallejo* became known, and after Congress had had time to examine into the case, that body passed an act for the benefit of these occupants of the Vallejo claim.* This act authorized the lines of the public surveys to be extended over the Soscol Ranch, and enacted that *bonâ fide* purchasers from Vallejo or his assigns might enter the lands so purchased and reduced to possession at the time of the adjudication of the Supreme Court, at one dollar and twenty-five cents per acre. Under this act Frisbie paid his money, made his entry, and finally received his patent.

* 12 Stat. at Large, 808.

When, on the other hand, shortly after his settlement above described, Whitney applied to the land officers to make his declaration of intention to occupy and cultivate the land, they refused to receive it; first, because no surveys had been made by which the land could be identified, and afterwards because Congress had passed the act already cited for the benefit of the claimants under Vallejo. He never paid any money to the government, nor did he receive a certificate of entry or pre-emption, though he offered to prove his settlement.

In this state of things Whitney filed a bill in the court below, setting forth such of the preceding facts as bore favorably on his case, setting forth also that Vallejo's title had been declared void by this court on the 24th March, 1862, and that the land had so become part of the public domain, and subject to the right of pre-emption, and that he had settled upon it, erecting a dwelling-house, which he occupied with his family, cultivating, &c.; that the act of the 3d of March, 1863, had been passed at the solicitation of Vallejo, and purchasers under him. The bill proceeded:

"But your orator insists that after the decision of the Supreme Court of the United States in March, 1862, and before the passage of the special act of March 3d, 1863, above mentioned, the said lands were by law open to pre-emption; and your orator having within that period made a *bonâ fide* settlement, and having fully complied with all the conditions prescribed by law, is vested with the right to enter said lands."

It, therefore, prayed that as he, Whitney, had the superior equity, Frisbie should be compelled to convey the land to him.

Frisbie answered setting forth such of the already stated facts as affected favorably his case, denying the sufficiency of the settlement set up, admitting the decision of the Supreme Court, asserting that "the effect of that decision upon the rights of the purchasers under that grant, who had by themselves and their tenants settled and improved the land, was a question of law;" but maintaining "that it

did not subject the said land to settlement and pre-emption by strangers."

There was no great controversy apparently about the facts, and the court below, citing and relying on *United States* v. *Fitzgerald*,* *Smith* v. *United States*,† *Delassus* v. *United States*,‡ and *Lytle* v. *The State of Arkansas*,§ was of the opinion "that at the date of the complainant's entry on the land in controversy, in October, 1862, it was open to actual settlement and pre-emption; that he having made his actual settlement and improvement on the land, and complied with all the terms and conditions required by law to complete his title, or tendered performance thereof, was entitled to have a patent for the land, and obtained such an interest and vested title and property therein as could not be taken from him and transferred to another, against his consent, even by an act of Congress." It accordingly held Frisbie a trustee for Whitney, and decreed the conveyance prayed for.

The case was now brought here on appeal by Frisbie.

Messrs. Evarts, Blair, and Dick, for the appellant; Messrs. B. F. Butler and F. P. Stanton, contra.

Mr. Justice MILLER, after stating the case, delivered the opinion of the court.

Frisbie having become possessor of the legal title to the land in controversy, the complainant, Whitney, claims that he shall be compelled to convey it to him, because he has the superior equity; for this is a suit in a court of equity, founded on its special jurisdiction in matters of trust. It is, therefore, essential to inquire into the foundation of this supposed equity.

When, shortly after his settlement, Whitney applied to the land officers to make his declaration of intention to occupy and cultivate the land, they refused to receive it; first, because no surveys had been made by which the land could be identified, and afterwards because Congress had passed

* 15 Peters, 407. † 10 Id. 330. ‡ 9 Id. 133. § 10 Howard, 333.

the act already cited for the benefit of the claimants under Vallejo. He never paid any money to the government, never received a certificate of entry or pre-emption, though he offered to prove up his settlement; and he claims that his intrusion on Frisbie's inclosed grounds by violence, and his offer to prove his intention to become a *bonâ fide* occupant of the land, create an equity superior to Frisbie's, which demands of a court of chancery to divest Frisbie of his legal title and vest it in him.

If there be any principle of law which requires this, the court must be governed by it, but it is idle to pretend that such a decree would be founded in natural justice.

It is claimed on the part of the defendant in error that such a principle is found in the legislation of Congress granting the right of pre-emption to actual settlers on the public lands of the United States. The proposition is, that as soon as the decree of the Supreme Court was announced declaring the Vallejo claim invalid, the land covered by that claim became public land, subject to the operation of all the laws by which the actual settler could secure title to such lands; and that the steps taken by Whitney in this direction had so far effected this purpose, that the act of Congress for the benefit of the Vallejo claimants was ineffectual to enable Frisbie to avail himself of the benefits which it was intended to confer. We say the benefits it designed to confer, because we entertain no doubt of the *intention* of Congress to secure to persons situated as Frisbie was, the title to their lands, on compliance with the terms of the act, and if this has not been done it is solely because Congress had no power to enact the law in question.

The learned court whose decision we are reviewing place their judgment on the ground that, before the passage of that act, the complainant had acquired a vested right in the land, which could not be divested by any legislation of Congress. On the other hand it will hardly be contended that anything short of a vested right in this land could deprive Congress of the right which it has as owner and holder of the legal title, and, by the express language of the Constitution, to

dispose of and make all needful rules and regulations respecting the territory or other property of the United States. The essential inquiry in this case, therefore, is whether complainant had acquired such a vested right, before Congress by law withdrew these lands from the operation of the pre-emption acts.

It has been argued that no law existed at the time Whitney went upon the land, by which unsurveyed land could be legally entered upon with a view to pre-emption. But in the view which the court takes of the matter, it may be assumed that the lands were open to pre-emption. In this concession we also propose to waive the discussion of another question which presents serious difficulties to our minds, in regard to complainant's right to make a valid pre-emption by a forcible intrusion upon land cultivated, inclosed, and peaceably occupied by another man.

But resolving this difficulty in favor of complainant for the present, we are still of opinion that he had not acquired a vested right in the land when Congress acted upon the subject.

What had he done? He had gone upon the land, built a house and barn, and perhaps inclosed some of the ground. He had also applied to the register of the land office, and offered to make a declaration that he had done these things with the intention of making a permanent settlement, and claiming the land under the right of pre-emption. This is all. He had paid no money, nor had he then tendered any. The land officers refused to receive his declaration, and denied his right to pre-empt the land. He never has paid any money, has never received any certificate of pre-emption, and the register and receiver have never, in any manner, acknowledged or admitted his right to make pre-emption of that land. So far as anything done by him is to be considered, his claim rests solely upon his going upon the land and building and residing on it. There is nothing in the essential nature of these acts to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right.

The act of Congress on this subject, to which all the subsequent acts refer, and which prescribes the terms, and the manner of securing title in such cases, is the act of September 4th, 1841.* That was an act full of generosity, for it gave the proceeds of the sales of all the public lands to the States. The tenth section of the act provides that any person of the class therein described who shall make a settlement upon public lands, of a defined character, and who shall inhabit and improve the same, and who shall erect a dwelling thereon, shall be authorized to enter with the register of the proper land office, by legal subdivisions, one quarter-section of said land, to include the residence of the claimant, upon paying the minimum price of such land. Section eleven provides that conflicting claims for pre-emption shall be settled by the register and receiver; section twelve, that prior to such entry proof of the settlement and improvement required shall be made to the satisfaction of the register and receiver; and section thirteen requires an oath to be made by the claimant before entry; section fifteen requires a person settling on land with a view to pre-emption, to file within a limited time, a statement of this intention and a description of the land.

When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with the legal title to the land.

The construction of this act, and others passed since *in pari materiâ*, in regard to the nature of the rights conferred on occupants of the public lands, has, of course, received the consideration of that department of the government to which the administration of these land laws has been confided. The construction of that department and of the Attorneys-General to whom the Secretaries of the Interior have

* 5 Stat. at Large, 453.

applied for advice, cannot be better expressed than in the language of some of those opinions.

Attorney-General Cushing, in an opinion given in 1856,* says: "Persons who go upon the public land with a view to cultivate now, and to purchase hereafter, possess no rights against the United States, except such as the acts of Congress confer; and these acts do not confer on the pre-emptor, *in posse*, any right or claim to be treated as the present proprietor of the land, in relation to the government."

In the matter of the Hot Springs tract of Arkansas, Attorney-General Bates says:† "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our National land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase land in preference to others. . . . His settlement protects him from intrusion or purchase by others, but confers no right against the government."

In the matter of this same Soscol Ranch,‡ Attorney-General Speed asserts the same principle. He says: "It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. . . . The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase-money."

These opinions, written for the guidance of the Land Department, have been received and acquiesced in by the Secretaries of the Interior, and have come to be the recognized rule of action in that department.

This construction of the law has also been asserted by the courts of last resort in Missouri, Mississippi, Illinois, and California; States in which the population is largely interested in the liberal operation of the pre-emption laws.§

* 8 Opinions of the Attorneys-General, 72. † 10 Id. 57. ‡ 11 Id. 462.

§ Bower *v.* Higbee, 9 Missouri, 261; Phelps *v.* Kellogg, 15 Illinois, 135; Grand Gulf *v.* Bryan, 8 Smedes & Marshall, 268; People *v.* Shearer, 30 California, 650; and Hutton *v.* Frisbie, in the Supreme Court of California, July Term, 1869.

We are satisfied that this is a sound construction of the pre-emption laws on the question now under consideration.

A series of cases decided in this court, in which the equitable rights of persons claiming under those laws have been protected by the court against the legal title acquired by other parties, through the disregard of their rights by the officers of the Land Department, is supposed to assert principles inconsistent with the construction just stated. We cannot here examine these cases in detail, but we may state that in nearly all of them it will be found that the party whose equitable title was thus protected had, by the action of the officers of the Land Department, and the payment and acceptance of the price, acquired a vested right, which these officers afterwards disregarded, in violation of law. And if in any of these cases the party, asserting successfully his equitable interest, had not acquired a vested right in the just sense of that term, the cases are still widely different from the one under consideration. In all those cases the successful party had established his legal right of *preference of purchase* over the other, under the law as it stood when the land officers decided the case. And it was the action of those officers, and their disregard of the law in refusing to the party the benefit of this preference in purchase, which this court corrected, by compelling the conveyance of the legal title acquired by this violation of law. But in the case before us, and in those to which the opinions of the Attorneys-General refer, it was Congress, the law-making power, which intervened, and, by a new law, withdrew the land from the operation of the pre-emption laws, while the right of preference in purchase remained unexercised, and amounted to no more than this preference.

The courts may very properly correct the injustice done by the land officers, in refusing to accord rights, however inchoate, which are protected by laws still in existence; while they can only consider vested rights, when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they were founded.

The argument is urged with much zeal that because com-

plainant did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done.

To this we reply, as we did in the case of *Rector* v. *Ashly*,* that the rights of a claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient. That was a case also in which it became important to ascertain when a right to public land became vested, and though it arose under statutes somewhat different from the general preemption law, the principles asserted there, and in the previous cases of *Bagnell* v. *Broderick*,† and *Barry* v. *Gamble*,‡ strongly support our conclusion in the present case.

DECREE REVERSED, and the case remanded, with instructions to

DISMISS THE BILL.

HICKMAN *v.* JONES ET AL.

1. A prosecution in a so-called "court of the Confederate States of America," for treason, in aiding the troops of the United States in the prosecution of a miltary expedition against the said Confederate States, is a nullity, and the fact that the tribunal had clothed itself in the garb of the law gives no protection to persons who, assuming to be its officers, were the instruments by which it acted.
2. Where there is evidence before the jury—whether it be weak or strong—which does so much as *tend* to prove the issue on the part of either side, it is error if the court wrest it from the exercise of their judgment. It should be submitted to them under instructions from the court.
3. The fact that a man was himself a traitor against the United States, does not necessarily prevent his recovering damages against other traitors, for having maliciously arrested and imprisoned him before a so-called court of the Confederate States, for being a traitor to these; the alleged treason having consisted in his giving aid to the troops of the United States while engaged in suppressing the rebellion.

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* 6 Wallace, 142. † 13 Peters, 436. ‡ 3 Howard, 32.

Statement of the case in the opinion.

ERROR to the District Court for the Northern District of Alabama, in which court Hickman, the plaintiff in error, sued Jones, Moore, Regan, Coltart, Clay, and others, defendants in error, for maliciously causing him to be arrested, imprisoned, and prosecuted for a criminal offence, without probable cause.

Mr. R. Johnson, for the plaintiff in error; Messrs. Walker and Gordon, contra.

Mr. Justice SWAYNE, stated the case, and delivered the opinion of the court.

The facts disclosed in the record, so far as it is necessary to state them, are as follows:

During the late civil war the rebel government established a court known as the "District Court of the Confederate States of America for the Northern District of Alabama." In that court the plaintiff in error was indicted for treason against the Confederate States. The indictment alleged that troops of the United States were in the Northern District of Alabama engaged in a hostile enterprise against the Confederate States, and that Hickman "did traitorously then and there assemble and continue with the said troops of the said United States in the prosecution of their said expedition against the Confederate States; and then and there, with force and arms and with the traitorous intention of cooperating with the said troops of the United States in effecting the object of the said hostile expedition, did array and dispose himself with them in a hostile and warlike manner against the said Confederate States; and then and there, with force and arms, in pursuance of such his traitorous intentions, he, the said James Hickman, with the said persons, so as aforesaid assembled, armed, and arrayed in manner aforesaid, wickedly and traitorously did levy war against the said Confederate States." Upon this indictment a warrant was issued for the arrest of Hickman. He was arrested and imprisoned accordingly. He applied to the defendant, Jones, who assumed to act as judge of the court, to be allowed to

Statement of the case in the opinion.

give bail. Jones rejected the application and remanded him to prison. He was subsequently tried, acquitted, and discharged. He alleges that the proceeding was without probable cause and malicious. Moore was the clerk of the pretended court. The name of Regan is signed to the indictment as district attorney, and he conducted the trial. Robert W. Coltart was deputy marshal, and Clay was the editor and publisher of the "Huntsville Confederate," a newspaper through which it was alleged he incited the prosecution by means of malicious attacks upon Hickman designed to produce that result. The other defendants were members of the grand jury by which the indictment was found. Testimony was given tending to show that the plaintiff sympathized with the rebellion and participated in it while the rebel power predominated in North Alabama, both before and after its first invasion by the forces of the United States. The court instructed the jury, among other things, as follows:

"If, in the case at the bar, you believe that the acts and speeches of the plaintiff, upon which the defendants rely to prove his complicity with the rebellion, were the result of anything less than a fear that if he did not so speak and act, his life or his liberty or his property would be sacrificed to his silence or his omission, you will find a verdict for the defendants.

"If, on the other hand, you believe that these acts of apparent complicity with the rebellion were performed by the plaintiff under the influence of an honest and rational apprehension that to do otherwise would expose him to persecution or prosecution, or to loss of life, liberty, or property, and that notwithstanding these acts of affiliation with the rebel community in which he lived, he was always at heart honestly and truly loyal to the government of his country, he is entitled to your verdict."

The jury were further instructed that it was their duty to acquit the defendants, R. W. Coltart and Clay. Exceptions were duly taken by the plaintiff, and the case is brought here for review.

We have to complain in this case, as we do frequently,

of the manner in which the bill of exceptions has been prepared. It contains all the evidence adduced on both sides, and the entire charge of the court. This is a direct violation of the rule of this court upon the subject. We have looked into the evidence and the charge only so far as was necessary to enable us fully to comprehend the points presented for our consideration—thus in effect reducing the bill to the dimensions which the rule prescribes. No good result can follow in any case from exceeding this standard. Our labors are unnecessarily increased, and the case intended to be presented is not unfrequently obscured and confused by the excess.

The rebellion out of which the war grew was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the State to which it belonged. The proportions and duration of the struggle did not affect its character. Nor was there a rebel government *de facto* in such a sense as to give any legal efficacy to its acts. It was not recognized by the National, nor by any foreign government. It was not at any time in possession of the capital of the nation. It did not for a moment displace the rightful government. That government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary States. The union of the States, for all the purposes of the Constitution, is as perfect and indissoluble as the union of the integral parts of the States themselves; and nothing but revolutionary violence can, in either case, destroy the ties which hold the parts together. For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. But the recognition did not extend to the pretended government of the Confederacy. The intercourse was confined to its military authorities. In no instance was there intercourse otherwise than of this character. The rebellion was simply an armed resistance to the rightful authority of the sovereign.

Such was its character in its rise, progress, and downfall. The act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted. In the case before us, trespass would have been the appropriate remedy; but the authorities are clear that case also may be maintained. Each form of action is governed by its own principles. It is needless to consider them, as none of the exceptions taken relate to that subject. Our opinion will be confined to those which have been specifically mentioned.

1. The court instructed the jury to acquit the defendants, J. W. Clay and R. W. Coltart.

There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine.

These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken.*

2. The other instruction to be considered was, substantially, that if the plaintiff had himself been a traitor he could not recover against those who had been instrumental in his arrest, imprisonment, and trial for treason against the Confederacy—the treason alleged to consist in the aid which he had given to the troops of the United States while engaged in suppressing the rebellion.

As matter of law, we do not see any connection between the two elements of this proposition. Giving aid to the troops of the United States, by whomsoever given, and whatever the circumstances, was a lawful and meritorious act. If the plaintiff had before co-operated with the rebels there was a *locus penitentiæ*, which, whenever he chose to do so, he had a right to occupy. His past or subsequent complicity with those engaged in the rebellion might affect his character, but could not take away his legal rights. It certainly could not, as matter of law, give impunity to those by whose instrumentality he was seized, imprisoned, and tried upon a capital charge for serving his country. Such a justification would be a strange anomaly. Evidence of treasonable acts on his part against the United States was alien to the issue before the jury. To admit it, was to put the plaintiff on trial as well as the defendants. The proofs upon the question thus raised might be more voluminous than those upon the issue made by the pleadings. The trial might be indefinitely prolonged. The minds of the jury could hardly fail to be darkened and confused as to the real character of the case and the duty they were called upon to discharge. The guilt of

* Aylwin *v.* Ulmer, 12 Massachusetts, 22; New York Fire Insurance Company *v.* Walden, 12 Johnson, 513; Utica Insurance Company *v.* Badger, 3 Wendell, 102; Tufts *v.* Seabury, 11 Pickering, 140; Morton *v.* Fairbanks, Ib. 368; Fisher *v.* Duncan, 1 Hening and Munford, 562; Schuchardt *v.* Allens, 1 Wallace, 359.

the plaintiff, if established, could in no wise affect the legal liability of the defendants; nor could the fact be received in mitigation of damages. It is well settled, that proof of the bad character of the plaintiff is inadmissible for any purpose in actions for malicious prosecution.* All the evidence upon this subject disclosed in the bill of exceptions was incompetent, and should have been excluded from going to the jury. This instruction also was erroneous.

Judgment REVERSED, and the cause remanded to the court below, with an order to issue a *venire de novo*.

STAR OF HOPE.

1. To constitute a voluntary stranding of a vessel it is not necessary that there should have been a previous intention to destroy or injure the vessel, nor is such intention supposed to exist. It is sufficient that the vessel was selected to suffer the common peril in the place of the whole of the associated interests, in order that the remainder might be saved.
2. The stranding is voluntary whenever the will of man does in some degree contribute thereto, though the existence of the particular reef or bank on which the vessel grounds was not before known to the master, and though he did not intend to strand the vessel thereon; provided it sufficiently appear that in making the exposure of the vessel he was aware that stranding was the chief risk incurred by him, and that it was not wholly unexpected by him.
3. These principles applied to the facts of this case, and the stranding held to be voluntary, so as to render the damage to the ship thereby caused, and all costs and expenses consequent thereon, a subject of general average contribution.
4. As a general rule the contributory value of the ship, when she has received no extraordinary injuries during the voyage, and has not been repaired on that account, is her value at the time of her arrival at the termination of the voyage. But where, as in this case, the ship has sustained injuries during the voyage and undergone repairs, her contributory value is her worth before such repairs were made. In the absence of other proof on this point, her value in the policy of insurance at the port of departure is competent evidence. From this, however, should be made a just and reasonable deduction for deterioration.

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* 1 Greenleaf's Evidence, § 55.

Statement of the case.

5. The expenses of an *ex parte* adjustment made by the charterers of a ship at the port of delivery are not chargeable in admiralty on the ship or freight, unless the results were adopted and used in the court below by the commissioner who stated the adjustment made under order of the court.
6. Repairs cannot be made by the master unless he has means or credit; and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo or by the payment of marine interest.

APPEAL from the Circuit Court for California; the case arising upon an agreed statement of facts, in substance thus:

In November, 1855, the firm of Annan, Talmage & Embury, chartered at New York the ship Star of Hope, the master, officers, and crew being all employed by the owners. They received on board of her, at the port just named, a large quantity of merchandise on freight deliverable at San Francisco, and also merchandise their own property. They received also, on freight, payable to them for and on account of the owners, two hundred and forty-four tons of coal. Among the merchandise shipped by the charterers and the other shippers (not the owners), were five hundred casks and packages of brandy and other spirituous liquors, stowed next the coal, and one barrel and forty-eight kegs of gunpowder, prepared as "patent safety fusees."

With this cargo on board, the ship sailed from New York in February, 1856, for San Francisco, being in all respects during the voyage kept tight, staunch, well-fitted, tackled, and provided with every requisite, and with necessary men and provisions—all which the charter-party bound the owners that she should be—except as hereinafter set forth.

During the voyage, about the middle of April, 1856, the ship being then on the east side of the southern end of South America, and in about latitude 46° S., longitude 53° W., the weather squally and the sea rough, great quantities of smoke and vapor were observed issuing from the fore and after hatches. After as full an examination as was possible be-

Statement of the case.

tween decks and otherwise, all on board had *every reason* to believe the ship on fire below, originating as was supposed in the coal by spontaneous combustion. The hatches were immediately fastened down and everything made tight, in order to check as much as possible the progress of the fire, at least until a port of succor could be reached. It was known that among the cargo were large quantities of spirituous liquors, and of the prepared gunpowder already described, all which were believed by every one on board to be highly inflammable and explosive. Great alarm was felt in consequence, and the destruction of the ship, officers, and crew was apprehended by all.

The crew refused to continue the voyage, and the captain determined *properly* to make for the Bay of San Antonio, on the southeast coast of Patagonia, as the nearest anchorage. In about four days, during which the signs of fire continued to increase, she arrived off that bay, and *set the usual signal for a pilot.*

In making ready the anchors and getting up the chains from below, these were found quite hot, and there were other signs of fire which greatly heightened the general alarm.

Meantime the weather was such, the wind blowing the ship right on shore, with a heavy sea running, that she could not haul off. The shore being very rocky and precipitous, she could not have gone on there without certain and almost instant loss of vessel, cargo, and all on board. The captain being very unwilling to run into a *bay unknown to him without a pilot, waited about three hours for one, but none came.* The place, it was evident, was a *wild and desolate bay, without sign of human life.* All this time the indications of fire below, as well as the weather, continued to grow worse. At length he determined, as the best thing to be done for the general safety, and especially for the preservation of the cargo and lives of those on board, to make the attempt to run in without a pilot, preferring all risks to be thereby incurred rather than to remain outside in the momentary apprehension of destruction to all. Under all the circumstances, the captain was *fully justified* in this.

Statement of the case.

In attempting to enter the bay the *lead was kept going, showing successively* 8, 7, 6, 5, 4½, *and* 4 *fathoms, and immediately afterwards the ship grounded*, and after striking heavily remained fast. The reef or bank on which she grounded was *not visible* at the time, and the captain was *not aware* of its existence, *though her stranding was one of the chief risks he had assumed in undertaking to run in.* The result of the attempt was, that before the ship could be got to sea again she sprunk aleak, and sustained other very serious injuries in her bottom.

These were such as to fully justify the captain in turning back with her to Montevideo (as the nearest port) for examination and repairs, there being no inhabitants at San Antonio, and no sign of human life, and the water taken in by the ship having apparently extinguished the fire below.

He arrived at Montevideo in the end of April, 1856, and on removing the cargo found marks of fire on various portions. *The necessary expenses incurred by the ship at this port to enable her to resume her voyage*, including repairs, unloading, warehousing, and reloading of cargo, &c., were $100,000.

To defray these, the captain, being without credit or means, either of his own or his owners (and there being at Montevideo very little market for such goods and merchandise as the ship had aboard), necessarily sold a considerable portion of the cargo. This sale, both as to the mode and the cargo selected, was managed with all due care for the interest of all concerned. Of the cargo thus sold portions belonged to different parties shipping.

About the 11th September, 1856, the ship left Montevideo, no unnecessary delay having been made there, and arrived at San Francisco on December 7th, 1856.

The goods and merchandise of the several shippers remaining on board were in due time and in good order delivered to them.

Upon her arrival at San Francisco the said Annan and Embury, and one George Hazzard, who had become the assignees of Annan, Talmage & Embury, both as to the charter-party and as to their portion of the cargo, and in all respects

the successors in interest of Annan, Talmage & Embury, claimed and obtained the control of the ship and her cargo until the delivery of the latter was completed, and they alone collected and received of the several consignees the freight therefor. Messrs. Annan, Embury & Hazzard delivered to the several owners the goods and merchandise respectively, first obtaining from them the amount of their several contributions to the general average, and they also received so much of the cargo as was deliverable to themselves.

Of $36,000, the price and hire fixed in the charter-party, $9822.20 was paid either by the charterers or their assignees.

The expenses properly and necessarily incurred by the ship, from the day when her course was first changed for San Antonio, until the day she resumed her voyage; the freight due at San Francisco on the several portions of the cargo not delivered there to the several owners; the value at San Francisco of the ship and of the entire cargo, as well as of the portion delivered there, were matters which were all agreed upon by the parties; though the value of the ship at Montevideo was not known.

In this state of facts, Annan et al., the charterers, and fourteen other parties, shippers, and a sixteenth party, Embury et al., filed, in March and April, 1857, in the District Court, libels against the ship, then in the port of San Francisco. Annan & Co. for $44,700, and Embury & Co. for $10,115.

The libels, except the last, were in the same form, and were for the non-delivery at San Francisco, by the ship, of certain quantities of merchandise shipped upon her at New York, to be delivered, at the former port, to the several libellants respectively, but which were sold in the course of the voyage by the master at Montevideo, to pay for repairs at that port, made necessary by the stranding of the ship at the Bay of San Antonio.

The answers to all the libels, except to that of Embury & Co., set up substantially that the stranding at the Bay of San Antonio took place under circumstances which made the damage, and all expenses consequent thereon, a subject

of general average contribution by the ship, freight, and cargo.

The libel of Embury et al. was for the alleged amount paid by them as the consignees of the ship at San Francisco, as the expenses of an average adjustment, made or attempted to be made by them at that port after her arrival, and of an attempted collection of the same.

To this last libel the claimant of the vessel demurred, on the ground that the matters alleged did not constitute a cause of contract within the admiralty jurisdiction. He then proceeded to deny the principal allegations of the libel, and set up that the adjustment in question was made by the libellants, on their own account, as the assignees of the charterers of the ship (Annan & Co.), and not on account of the ship or her owners, and was defective, erroneous, and worthless; that at all events the cost of the adjustment should come into the general average, and the ship be liable only for her share in the contribution. That the libellants having, as charterers and consignees of the ship, delivered the cargo to the several consignees thereof without collecting the average thereon, should bear the loss. That the average actually collected by them, and the sum of $30,000 balance remaining unpaid on the charter of the ship, should be set-off.

The court referred the case to a commissioner to report an adjustment, upon the assumption that the loss and expenses caused by the stranding of the ship were general average. He did so report. But in his report—

1. He charged the ship or freight with the expenses of the adjustment made at San Francisco, by Annan, Embury & Hazzard.

2. He assumed as the basis of his estimate of the contributory value of the ship her valuation in the policy of insurance at Boston, deducting what the repairs at Montevideo cost.

3. He brought into particular average, or subject to a deduction of "one-third new for old," certain expenses at Montevideo, which, though incidental to the repairs of the ship, were either not themselves a permanent benefit to her, or were not incurred for that purpose. Such as expenses of

Statement of the case.

1. Surveys, orders, estimates, reports, &c.
2. Preparations for making the repairs; labor in heaving her down; wear and tear of materials used therein; anchors, cordage, blocks, &c.; boat hire, &c.
3. Building staging and use of materials therein, &c.
4. Expenses of raising funds (*i. e.*, loss on sale of cargo), &c.

Upon the coming in of the report, exceptions were filed by both parties. By the libellants, on the ground mainly that the loss and expenses were not general average; by the claimant, upon grounds affecting the details, just mentioned, of the report.

Upon these exceptions and the case stated, the matter was argued before the District Court, which decided that the damage caused by the stranding of the ship, and the loss and expenses consequent thereon (including the cost of the repairs at Montevideo), was a subject of particular average, and not of general average, as contended on behalf of the ship; and held her liable, as contended for by the libellants. Its view apparently was, that to make the case one for general average, the stranding should have been the result of an intention to effect that particular object. That court also held the ship liable under the last of the libels, namely, that of Embury et al., for the expenses of the adjustment made by the consignees; and decreed accordingly. The Circuit Court affirmed the decree of the District Court.

Subsequently, and before the appeal to this court, it was discovered that a serious error had been committed in the amount inserted in the decree upon the first libel, $26,469. It had been stipulated between the parties, that from any sum found due to the libellants, Annan et al., in their libel, should be deducted $26,177.80, the balance due by them as the charterers of the ship, and the decree entered for the difference. But a small portion of this balance was in fact deducted, so that the decree, instead of being for $26,469, should have been but for $4291.13.

On behalf of the ship a motion was made to correct this error of figures. The court, however, refused to correct the

decree, on the ground of the great lapse of time since the entry of the decree in the District Court, and because the alleged error, if it existed, might be corrected on appeal in this court.

It appeared also that another large sum, about $14,000, which should have been deducted from the same judgment for averages received by the same libellants, was never deducted.

Both these errors of figures were attributable to the adjuster who made up the adjustment for Embury et al., and to whom the casting up of the amounts awarded in the decree had been subsequently committed by the ship's agent at San Francisco.

The case was now brought to this court on these grounds:

1. That the damage to the ship, caused by her stranding at the Bay of San Antonio, and the loss and expense consequent thereon, were a subject of general average, and not of particular average, as decided by the court below.

2. That even if this were not so, and they were a subject of particular average, then the exceptions to the commissioner's report should have been sustained.

3. That the error of figures in entering the decree in favor of Annan et al. should be corrected, by reducing the same to $4291.13.

Mr. E. Casserly, for the appellant:

The conditions which must concur to stamp on a maritime loss the character of a general average may be stated as follows:

1. The danger must be imminent, and common to the ship, cargo, and the lives of those on board.

2. To avert this danger from the whole, the ship or cargo, either entirely or in part, must be purposely exposed to risk in lieu of the whole.

3. By the loss incurred, the safety of the other interests involved must, at least for the time, be accomplished.

The only controversy here is, whether or no the *second* essential condition is found in the case. In other words,

whether, to avert the danger impending over the whole, the ship was purposely put at risk in lieu of the whole, so as to make the damage afterwards incurred by her (and, of course, the consequent expenses) matter of general average contribution.

The facts are agreed on. The question is as to the legal effect of them.

The two following propositions contain, we suppose, a just statement of the law which governs this case:

1. Whenever, to avoid an imminent danger, common to the ship, cargo, and the lives of those on board, the ship is voluntarily or purposely exposed to a distinct and extraordinary peril, out of the usual course of navigation, and of the ship's duties as a carrier for the voyage, any loss or damage to the ship consequent thereon is a subject of general average contribution.

2. It is immaterial though this loss or damage to the ship is other or greater than was expected, or whether it was wrought directly and immediately by the act of exposure, or incidentally by reason of the ship being placed in a situation which made her liable to the injury.

The two propositions may be discussed together.

The whole law of general average is a series of analogous equities drawn out from an original principle. There being no decided case precisely the same with this in its facts, it will be necessary to deduce the law of this case by the same process, aided by the decisions in analogous cases.

The most obvious general analogy to sustain both propositions is that of goods put into a lighter to relieve the ship and cargo, and afterwards lost or damaged. This is a case of general average as ancient as the Digest, and so by all the authorities since, without exception.

So in the highly analogous case of goods lightered out of a ship compelled to take refuge in a port to which she was not destined, and which she cannot enter without being relieved of a part of her cargo.

This latter case presents pointedly the feature which converts a loss of lightered goods into a general average, namely,

that the lightering is out of the usual course of navigation for the voyage. Where it is not so, as when the lightering is in the common course of navigation or business, the loss is particular average. The exception is fully recognized,* and confirms the rule, and both clearly establish our two propositions.

In all such cases the decisive fact is, that there is a voluntary exposure of the goods to a distinct and extraordinary peril, out of the common course of navigation. The intention in putting the goods into the lighters is not to destroy them. Very generally the expectation is that they will be saved. The loss, howsoever it occurs, is incidental to the exposure, and is general average.

Following out the same principle of an extraordinary exposure, Magens† mentions the case of goods put out of a leaky ship on board of another, which was afterwards captured, where the goods were contributed for in general average.

Besides lightered goods, Emerigon‡ mentions the case of boats launched from a ship for the common safety and afterwards lost, coming into general average. As when a ship chased by hostile cruisers put out a boat with a lantern into the sea at night, by which the enemy was misled, and the ship escaped.

And see the cases of extraordinary exposure or loss, out of the common course, in 2 Phillips on Insurance: slipping the cable to run out to sea to escape going ashore;§ sails let go to right the ship when on her beam-ends;‖ applying a portion of the ship's tackle or equipment to an extraordinary use;¶ cutting a cable to keep with convoy or escape from an enemy;** expense of putting into a port out of the course of the voyage, to refit, &c., &c.††

Finally, in *Dupont* v. *Vance*,‡‡ this court has stated the distinctive features of a general average sacrifice in these words:

* Emerigon, 474; 2 Phillips on Insurance, § 1288, and note 3; Stevens and Benecke, 134; Lewis *v.* Williams, 1 Hall, 437, 438.

† 1 Magens, 160, case ix, quoted by Stevens and Beneke, 134, note *a*.

‡ Pp. 480, 481. § § 1295. ‖ § 1298. ¶ § 1299.

** §§ 1308, 1309. †† § 1320. ‡‡ 19 Howard, 162.

"If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionably by all the interests," &c.

The doctrine which prevailed below seems to have been that, to entitle a loss to come into general average, it must be not only the direct, but the immediate result of the act and will of man; so that, if the loss be by stranding, stranding must have been the very form of injury premeditated in making the exposure or sacrifice. But this doctrine is at war with the first principles of general average; with many of the oldest and most widely acknowledged cases of general average; and with several decisions of recognized authority in the Federal courts. The vital principle of general average is the motive of the act of sacrifice or exposure. That motive must be the common safety of the other interests concerned. It is that which gives its character to the act; not the fact that any particular damage was intended, or form of damage or injury "premeditated."

The doctrine is moreover in conflict with the principle and reason of the oldest and clearest cases of general average. Such are: goods put into lighters to relieve the ship; goods lightered to enable the ship to enter a port not her port of destination; goods put out of a leaky ship into another which is afterwards captured, &c. In all these cases the forms of injury are manifold, and beyond all human power beforehand to particularize. Thus, lightered goods may be damaged by water from the sea or the sky, by cold or heat, or by lightning; may be lost by stranding or foundering, or jettison, or by capture. It is, therefore, quite impossible to say how far the damage done the goods is "the direct and immediate result" of the exposure, or is merely a consequence or incident of their being placed in a position which made them peculiarly liable to injury. Or, that the particular form of damage done could have been (in the language of the District Court) "the result of an intention to effect that particular object." That would be to require of every

master of a ship, besides being a mariner, to be also a prophet.

The doctrine is equally opposed to all the most authoritative cases in the United States.

In *Caze* v. *Reilly*,* a case the reasoning of which has twice received "the unqualified assent" of the Supreme Court of the United States,† the master of a schooner, hard pressed by British cruisers, ran her upon the beach at Long Branch. The enemy, landing in boats, set fire to the vessel and burned her to the water's edge. The hulk floated ashore and was lost. About half of the cargo was saved, part before she was set on fire, and part after the fire was extinguished. Two questions were raised as to the liability of the goods saved to a general average. *First*, for the value of the vessel; and, *second*, for that of the freight and cargo lost. The first—which, in fact, involves the other—was the only one argued and decided. The court held in favor of the general average for the value of the vessel.

So in *Sims* v. *Gurney*,‡ a case which, like *Caze* v. *Reilly*, has twice received the approval of the Supreme Court of the United States.† From the violence of the storm in the Delaware Bay the ship, in this case, had to go ashore somewhere, and was in danger, if left to herself, of going upon certain flats, where her situation would have been extremely perilous. The subsequent facts are stated by the court: (p. 527.)

"To prevent that, the course was altered, and they stood for Cape May, the most desirable place to run on shore. The captain wished to get to Cape May, and the pilot said he would try for it, although he did not expect to effect it, but supposed they would stick on a ridge about four miles from the Cape. On this ridge the ship struck, according to the pilot's expectations. She lost her rudder and labored very hard on the ridge; the mizzen and mainmast were cut away to save her, and at length, con-

* 3 Washington's Circuit Court, 298.

† Columbian Insurance Company *v.* Ashby, 13 Peters, 343; Barnard *v.* Adams, 10 Howard, 302

‡ 4 Binney, 513.

trary to expectation, she beat over and got into deep water between the ridge and the Jersey shore. Being then quite ungovernable, she was at the mercy of the winds and currents, which, most fortunately and unaccountably, brought her on the shore near to Cape May, the object of their wishes. The damage was very considerable, both on the ridge and at the Cape, and in the course of the argument the damage at these two places has been the subject of separate consideration."

It was held a case of general average, both as to the damage from striking on the ridge and as to that from stranding on the beach at Cape May.

"'Because,' says the court, 'the damage at Cape May was the necessary result of running on the ridge. The ship lost her rudder and masts on the ridge, in consequence of which she was driven by the winds and waves on the shore near the cape. The same reasoning applies to the boats. For it was left to the jury to decide whether the damage done to them was in consequence of running on the ridge.'"

The first damage was by striking on the ridge four miles from Cape May, and was expected. The subsequent damage done by the loss of her boats and her stranding on Cape May was not only not expected, nor the result of an intention to effect that particular object, but was contrary to the expectations of the ship's officers. It was, however, a consequence of the original act of exposure, and partook of its character, because it was produced subsequently, by placing her in a situation which made her peculiarly liable to damage: namely, running her on the ridge, where she beat till she lost two of her masts and her rudder, and became unmanageable.*

The better doctrine is to treat all the facts connected with or consequent upon the original fact of exposure as one se-

* And see Sturgess *v.* Cary, 2 Curtis, 59, 66, 67; Reynolds *v.* Ocean Insurance Co., 22 Pickering, 191; Gray *v.* Waln, 2 Sergeant & Rawle, 229; Maggrath *v.* Church, 1 Caines, 196; Hennen *v.* Munro, 16 Martin's Louisiana, 449; also a case in the French Court of Aix Code de Commerce, Rogron's edition, note to Article 403.

ries: by reason of what a late writer calls the "oneness" of an act of general average.*

II. Was the stranding of the ship such as to make the loss occasioned thereby a subject of general average, within the rule laid down?

That this inquiry must be answered in the affirmative seems sufficiently clear.

How is it possible, on the case stated, to deny that there was an exposure, by the master, of his ship, to a distinct and extraordinary peril, purposely made by him, as the only escape from the instant destruction impending over ship, cargo, and crew?

The stranding is voluntary whenever the act of man in any degree concurs with the *vis major* to produce the result.†

The statement is, that "stranding was one of the chief risks he had assumed in attempting to run in." The other facts show conclusively that he realized this danger fully. They show that with his ship surrounded by the most pressing dangers, so thoroughly did he appreciate the perils of entering, and so reluctant was he to encounter them, that for three hours he held on outside, waiting for a pilot. A more pregnant fact it would be difficult to imagine. When, at last, he made up his mind to attempt to run in at all hazards, it was not because he overlooked or underrated the perils of the enterprise; but because it offered the only chance of escape from the far greater dangers that surrounded him, and which had become too pressing for further delay; and because, as the agreed statement says, "he preferred all the risks of running in to those of remaining outside." So stern was the necessity, that even though he knew the water was shoaling rapidly under him, the lead showing successively eight, seven, six, five, four and a half, and four fathoms, he dared not desist from the attempt to make his way in. The next moment, as must have been

* Hopkins's Average, 82, and cases cited.

† Emerigon (Meredith), 324, 475; Arnold on Insurance, 785–6 (Eng. ed. 1866), and note 1, p. 786; 4 Boulay Paty, 455, 457, 478.

expected, the ship grounded, and after striking heavily, remained fast.

In the face of these facts it seems little to the purpose to urge that the particular reef on which the ship struck was unknown to the master, that he endeavored to get a pilot, or even that he hoped or expected to take her safely in.

The theory of the court below was that to constitute a general average loss there must be an intent recklessly to destroy the thing selected for the exposure; a determination to sacrifice it at all events, without regard to the ordinary means of safety.

In truth, the intention to injure the *jactus*, as distinguished from the intention to put it in a situation of exposure out of the usual course, much less to injure it in any particular manner, or by any particular rock or shoal, *cannot* be an element of general average. Otherwise, goods lightered would never be entitled to contribution; because, as to them (as already remarked), so far from there being any intention to injure them, the expectation commonly is that they will be saved.*

So there is nothing in the fact that the captain tried to get a pilot. Having determined on the effort to take his ship in, it was his duty to do so, safely, if he could; and the law of general average neither requires nor allows any wanton exposure of property, or reckless disregard of the ordinary precautions. Neither does it object that the master obtains safety for the rest, at the least possible risk to the thing exposed.†

It is sufficient if there is a purpose to subject the *jactus* to a distinct and extraordinary exposure in lieu of the rest. That having been the master's purpose in this case, it is immaterial how far he hoped or endeavored to take his ship in without serious injury. His purpose and intention were to

* Caze *v.* Reilly, *supra*, 214.

† Barnard *v.* Adams, 10 Howard, 270; Sims *v.* Gurney, 4 Binney, 513, 514, 515, 519; Mutual Insurance Co. *v.* Cargo of Ship George, Olcott, 89, 91, 92; Columbia Insurance Company *v.* Ashby, 13 Peters, 342; Emerigon, 324 (ch. 12, § 13).

attempt to take her in at all hazards; and this purpose and intention embraced all the consequences of the attempt. He may have hoped they would not be serious, and may have taken every precaution to that end; and he may not have had beforehand a very definite idea of their precise character. But, whatever they might be, he deliberately exposed his ship to them. When one of them proved to be stranding, that result took its character from the act whence it flowed. That having been voluntary and with a purpose, the stranding was, in the eye of the law, voluntary also. The master's efforts, or even his hopes to take his ship in safely, as they could not control the event, do not affect its character.

The only remaining inquiry is—

III. Was the risk taken in this case out of the usual course of navigation and of the ship's duties as a carrier for the voyage, so as to entitle the loss consequent thereon to come into general average?

The place into which the master of the Star of Hope was obliged to venture with her, as his only chance of escape, was not his destined or any port, but a wild and desolate bay, far from the paths of commerce and forsaken by man, with a depth of water palpably dangerous and insufficient. The attempt to take her into such a place at all was not only beyond his duty, but could not be justified except by circumstances so desperate as to leave no alternative between that and destruction. The same circumstances inspired the motive which gives to the attempt, and to its consequences, the character which we claim for them.

The circumstances of the present case illustrate forcibly this important distinction between it and the cases put by the district judge.

If, after the deviation of the ship, while making for a port of refuge, she had encountered an ordinary peril of the seas, or one which, however extraordinary, was casual and wholly unanticipated, and without the choice or agency of man, in neither instance would the loss be general average. In the former instance the loss is one of the ordinary incidents of navigation; in the latter it lacks the essential element of an

exposure made or a risk run by man's agency with a purpose, and that purpose the common safety from a known danger.

But in the moment when the determination to take his ship into an unknown bay, at whatever risk, was acted on by the master, a new exposure of the ship was made, wholly different in its character; an exposure to distinct perils, made with a purpose of rescuing all the interests from a common danger; an exposure which was the voluntary sacrifice of the ship, so far as the mind and agency of man were concerned, or as respected any consequences that might ensue.*

IV. [The counsel then directed his argument to the exceptions to the commissioner's report.]

Mr. Donahue, contra:

To make a loss or damage by stranding a subject of general average, the stranding must be voluntarily or purposely done.

The question then presented, as applied to the circumstances of the case at bar, is this: Is the accidental stranding of a vessel to be deemed a voluntary or intentional stranding within the meaning of the law, when it appears that the stranding was either directly or incidentally occasioned by the intentional exposure of the vessel to extraordinary perils, out of the usual course of navigation and of the ship's duties as a common carrier?

The principles established by different cases cited on the other side, such as *Caze* v. *Reilly*,† *Columbian Insurance Company* v. *Ashby*,‡ *Sims* v. *Gurney*,§ *Gray* v. *Waln*,‖ seem to be

1. That the intention to consign to inevitable loss the objects (whether the goods or the ship) which are selected to bear the burden of the risk forms no element of the right to contribution. This principle is expressly declared by the

* Lee *v.* Grinnell, 5 Duer, 415, 416.

† 3 Washington's Circuit Court, 298.

‡ 13 Peters, 331.

§ 4 Binney, 513.

‖ 2 Sergeant & Rawle, 229.

Supreme Court in *Barnard* v. *Adams*,* and will not be denied in the present case.

2. It is also decided in these cases, that where a ship has been voluntarily stranded, the circumstance that she is thereby lost strengthens rather than destroys her claim for contribution against the cargo saved by the sacrifice.

3. That though the vessel may have been in the most imminent danger of being stranded by the force of the elements, yet, if the actual stranding is the immediate result of human agency, and is different from the one impending, and effected for the common safety, the case is one for general average.

But in all these cases the actual stranding as it occurred was intentional. The doubt arose from the fact that a stranding of some kind was imminent, if not inevitable, and that the volition of the master was exercised merely in the selection of a less dangerous part of the shore whereon to strand his ship.

But in the case at bar it was no part of the master's intention to strand the vessel. The stranding was not only involuntary but unexpected, except so far as he was aware that in attempting to run into an unknown harbor he incurred that risk, amongst others, and that it was the chief risk he encountered. That he voluntarily subjected the vessel and cargo to whatever risks such a course involved cannot be doubted, but it is equally clear that he did not voluntarily and intentionally strand his vessel, that is, that the stranding was not the immediate and direct result of an intention to effect that particular object.

It may be said that the whole deviation to a port of distress, and especially the entering this port, was a sacrifice for the common safety. But if an accidental damage of this kind is to be allowed in general average, because it occurred during a voluntary deviation, rendered necessary by a *vis major*, and therefore is the effect and consequence of a sacrifice for the common safety, the same principle would require

* 10 Howard, 304.

that every loss incurred during such a deviation should be contributed for.

Every peril encountered during a deviation is encountered out of the usual course of navigation for the voyage, and might, in a certain sense, be said to be the consequence and effect of a sacrifice made for the common safety. Thus, if the damage consequent upon the voluntary exposure to the dangers of entering an unknown harbor be general average, by parity of reasoning losses arising from directing the ship to parts of the seas where the chances of collision are greatly increased, or to high latitudes, where the risks of damage from icebergs are enhanced, or to stormy and inhospitable coasts, where the damages of shipwreck might be far greater than if the regular and usual course of the voyage had been pursued, might also be contributed; for the practical results of the principle contended for would be, that in all cases of deviation all the interests would be bound to contribute, or would become the insurers against any accidental damage sustained by any one of them.

If it be said that the risk incurred in entering an unknown and unfrequented harbor was extraordinary, we answer:

1. That in the cases supposed, and in many others, the risks incurred in consequence of a deviation may be quite as great and as much out of the usual course of navigation for the voyage as those incurred by the Star of Hope.

2. That it would be impracticable for courts to make the determination of the right to contribution depend upon nice discriminations between different degrees of peril, or to attempt to decide in each case whether the carrier was or was not bound, by his contract, to expose his vessel to the precise degree of risk he encountered; and,

3. That it is better to establish on such a subject a clear and well-defined rule, susceptible of general application, than to make the decision depend upon uncertain estimates of the degree of risk encountered, and thus give rise to many unfounded claims and to incessant litigation.

Independently of what precedes, which is in fact the argument of the court below, we submit that the ship should

bear the loss, because by an express contract,—that namely, of the charter-party,—the owner of the vessel expressly undertook to keep the vessel at his own expense in the condition in which she ought to be. The charter made no exception.

On the whole case the ship should bear the loss.

Reply: To the point, taken here for the first time, that the charter-party bound the owners to keep the ship staunch, well-fitted, &c., for the voyage, the answer is: That this covenant is no more than the law would imply without express words, and is subject to the understood exception of the perils of the seas.*

Mr. Justice CLIFFORD delivered the opinion of the court.

These are appeals in admiralty, brought here by the claimants of the ship Star of Hope, from a decree of the Circuit Court, rendered on appeal from a decree of the District Court, in four suits *in rem* instituted against the ship in the latter court, three being for the non-performance of a contract of affreightment, and the other for services rendered, and liabilities and expenses incurred, as consignees of the vessel. Twelve other suits were also instituted against the ship by other shippers for the non-delivery of their respective shipments, in which no appeals were taken, as the amount in controversy in the several cases was less than two thousand dollars.

1. Reference to one of the libels for the non-performance of the affreightment contract will be sufficient, as they all contain substantially the same allegations. Take the first one, for example, which was filed by the charterers. They describe the intended voyage as one from the port of New York to the port of San Francisco; they also allege that the goods were shipped on board the vessel; that she sailed on the tenth of February, 1856, from the port of shipment; that on the eighteenth of April following, in entering or attempting to enter the port of San Antonio, she accidentally

* The Casco, Davies, 185, 186, 187; Ames *v.* Belden, 17 Barbour, 513.

Case restated in the opinion.

grounded or stranded upon a bank or shoal there situated; that she thereby received such injuries that she was obliged, in order that she might be able to continue the voyage, to put back to Montevideo for repairs; that the master, after the vessel arrived there, being without money, credit, or other means to execute the repairs, sold a valuable portion of the goods shipped by and belonging to the libellants, of the value of forty-four thousand seven hundred dollars, and with the proceeds thereof paid for the said repairs; that the repairs having been thus made the ship resumed her voyage, and arrived safely at her port of destination; that by reason of the sale of their goods the libellants lost the whole amount sold, and that the master and owners of the ship neglect and refuse to make restitution.

2. Prior to the filing of the answer the fifteen affreightment suits were consolidated, and leave was given to the claimants of the ship to file one general answer to all those libels, and also to file one general stipulation therein for costs and expenses.

Pursuant to that leave the claimants filed their answer, in which they allege that the injury and damage to the ship at the Bay of San Antonio were incurred by the master voluntarily and deliberately for the general safety, and especially for the safety of the cargo and the lives of those on board, and that consequently all loss and damage sustained by the ship at that bay, and all costs and expenses of the subsequent repairs, and all other necessary costs and expenses incurred while at Montevideo and in getting to sea again, together with the costs and expenses incurred for the wages and provisions of the master, officers, and crew, to the time when the ship resumed her voyage, are, of right and according to law, a subject of general average contribution, to be borne by the ship, her freight, and her cargo, and also by the owners thereof in their just proportions. They also allege that the goods of the libellants having been sold by necessity to execute the repairs, are, of right, to be included in the general average, together with all loss and damage to the libellants in consequence of the sale at the port of distress.

Case restated in the opinion.

3. Brief reference must also be made to the libel filed by the consignees of the ship, as the fourth appeal under consideration is from that part of the decree relating to that suit. Annexed to the libel is a schedule setting forth the particular expenses and liabilities incurred for which the suit is brought, and the appellants, in response to that claim, allege, in the answer, that if any such disbursements were made, or any such expenses or liabilities were incurred, as is therein supposed, the same are a portion of the general average upon the ship, her freight, and cargo, to be borne by them all ratably, as alleged in the answer to the other libels.

Both parties consenting, the cause was referred to a commissioner to take and state an account and adjustment, upon the basis that the damage, loss, and expenses incurred by the ship are a subject of general average contribution, as contended by the claimants. Subsequent to that order, and before the hearing, the parties filed the agreed statement of facts set forth in the record. Although filed subsequent to the order of reference, still it is quite evident that it was drawn up and agreed to prior to the order, as one of the conditions of the order is that it shall not affect prejudicially the agreements of the parties as contained in the agreed statement.

Other evidence was introduced in addition to what is contained in the agreed statement, and the commissioner having heard the parties reported his conclusions in writing to the court, as directed in the order of reference. Exceptions to the report were duly taken by both parties, and they were again heard in support of the same; but the court being of the opinion that the damage, loss, and expenses incurred by the ship, as described in the answer and in the agreed statement, are not the proper subject of general average contribution, sustained the exceptions filed by the libellants, overruled those filed by the claimants, and entered the decree set forth in the transcript. Appeal was taken by the claimants from that decree to the Circuit Court, where the decree of the District Court was in all things affirmed. Dissatisfied

Case restated in the opinion.

with the decree as affirmed, the claimants appealed to this court, and still insist that the damage, loss, and expenses incurred by the ship are the proper subject of general average between the ship, her cargo, and freight, as alleged in the answer, which is the principal question presented for decision.

4. Much less difficulty will attend the solution of the question than is usual in cases of this description, as all the facts material to be considered in deciding the case are set forth in the agreed statement signed by the counsel of the respective parties.

Part of the cargo was furnished by the charterers, but large quantities of goods were also shipped by the libellants in the other libels, numbered from two to fifteen inclusive, and the owners of the ship also, by the consent of the charterers, shipped two hundred and forty-four and a half tons of coal on their own account. They were not interested in the other shipments, nor is it necessary to describe the goods composing the residue of the cargo, except to say that among the merchandise shipped were five hundred casks and packages of spirituous liquors, and forty or fifty kegs of gunpowder, prepared as "patent safety fuses," and the agreed statement shows that the spirituous liquors were stowed next to the coal shipped by the owners.

With a full cargo on board, the ship sailed for her port of destination on the day alleged in the pleadings, and during the voyage, to wit, on the fourteenth of April following, it was discovered that great quantities of smoke and vapor were issuing from the fore and after hatches of the ship. She was proceeding on her voyage, at the time the discovery was made, in latitude forty-six degrees south, longitude fifty-three degrees west, but the weather was squally and the sea was rough. Precautions, such as are usual on such occasions, were immediately adopted: the hatches were fastened down, and "everything made tight," in order to check as much as possible the progress of the fire, at least until a port of succor could be reached.

Great alarm was felt, and the fears of all were much in-

Case restated in the opinion.

creased by the fact, well known to all, that the cargo contained prepared gunpowder and large quantities of spirituous liquors. Under the circumstances the crew refused to continue the voyage, and the master determined, very properly, as the parties agree, to make for the Bay of San Antonio, on the southeast coast of Patagonia, as the nearest anchorage, and at the end of four days the ship arrived off that bay, and set the usual signal for a pilot.

Throughout that period the signs of fire continued to increase, and in getting up the chains, so as to be ready to cast anchor without delay, they were found to be quite hot, and there were other indications of fire, which greatly heightened the general alarm. Unwilling to run into a bay, unknown to him, without a pilot, the master set his signal as aforesaid and waited three hours for one, but no one came, and it became evident that none could be expected, as the coast was wild and desolate.

Something must be done, as the alarm increased as the impending peril became more imminent. Haul off the master could not, as the wind and waves were against any such movement. He could not resume the voyage for the same reason, and also because the crew utterly refused their cooperation; nor could he with safety any longer attempt to "lie to," as the ship was gradually approaching the shore, and because she was exposed both to the impending peril of fire on board, and to the danger, scarcely less imminent, of shipwreck from the wind and waves. Nothing, therefore, remained for the master to do, which it was within his power to accomplish, but to run the vessel ashore, which it is agreed by the parties would have resulted in the "certain and almost instant loss of vessel, cargo, and all on board," or to make the attempt to run into the bay without the assistance of a pilot. Evidently he would have been faithless to every interest committed to his charge if he had attempted to beach the vessel at that time and place, as the agreed statement shows that the weather was rough, that the wind was high and blowing towards the land with a heavy sea, and that the shore was rocky and precipitous.

Case restated in the opinion.

What the master did on the occasion is well described by the parties in the agreed statement, in which they say he at length determined, as the best thing to be done for the general safety, and especially for the preservation of the cargo and the lives of those on board, to make the attempt to run in without a pilot, preferring all risks to be thereby incurred rather than to remain outside in the momentary apprehension of destruction to all, and the parties agree that he was fully justified in his decision as tested by all the circumstances, although the ship in attempting to enter the bay grounded on a reef, and before she could be got to sea again sprung aleak and sustained very serious injuries in her bottom.

Great success, however, attended the movement, notwithstanding those injuries, as the water taken in by the ship extinguished the fire, and the ship remained fast and secure from shipwreck until the winds subsided and the sea became calm.

Repairs could not be made at that place, and the parties agree that the injuries to the ship were such as fully justified the master in returning to Montevideo for that purpose, as that was the nearest port where the repairs could be made. He arrived there on the twenty-seventh of the same month, and it appears by the agreed statement that the just and necessary expenses incurred by the ship at that port to enable her to resume the voyage were one hundred thousand dollars, including repairs, unloading, warehousing, and reloading of the cargo, and that the master, being without funds or credit, was obliged to sell a considerable portion of the cargo to defray those expenses.

Repaired and rendered seaworthy by those means the ship, on the eleventh of September, in the same year, resumed her voyage and arrived at her port of destination on the seventh of December following, and the master, without unnecessary delay, delivered the residue of the shipments in good order to the respective consignees, as required by the contract of affreightment.

5. General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are usually divided into two great classes: (1.) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2.) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.*

Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.†

Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, but in order to constitute a basis for such a claim it must appear that the expenses or sacrifices were occasioned by an apparently imminent peril; that they were of an extraordinary character; that they were voluntarily made with a view to the general safety; and that they accomplished or aided at least in the accomplishment of that purpose.‡

Authorities may be found which attempt to qualify this rule, and assert that where the situation of the ship was such that the whole adventure would certainly and unavoid-

* 2 Arnould on Insurance, 770; McAndrews *v.* Thatcher, 3 Wallace, 365.

† 2 Parsons on Insurance, 210; Ib. 277; 1 Parsons on Shipping, 346; McAndrews *v.* Thatcher, 3 Wallace, 366.

‡ 2 Phillips on Insurance, 61.

ably have been lost if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value, but the correctness of the position cannot be admitted unless it appears that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices, where there is no peril, present no claim for contribution, but the greater and more imminent the peril the more meritorious the claim for such contribution, if the sacrifice was voluntary and contributed to save the associated interests from the impending danger to which the same were exposed.*

Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master; but the authorities, everywhere, agree that three things must concur in order to constitute a valid claim for general average contribution: First, there must be a common danger to which the ship, cargo, and crew were all exposed, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interests to save the remainder. Secondly, there must be the voluntary sacrifice of a part for the benefit of the whole, as for example a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests. Thirdly, the attempt so made to avoid the common peril to which all those interests were exposed

* Maude & Pollock on Shipping, 320; MacLachlan on Shipping, 356; Barnard *v.* Adams, 10 Howard, 270.

must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case.*

Equity requires, says Emerigon, that in these cases those whose effects have been preserved by the loss of the merchandise of others shall contribute to this damage, and commercial policy as well as equity favors the principle of contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the associated interests and the lives of those on board from impending destruction; and if not present, the moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned.†

Masters are often compelled, in the performance of their duties, to choose between the probable consequences of imminent perils threatening the loss of the ship, cargo, and all on board, and a sacrifice of some portion of the associated interests in their custody and under their control, as the only means of averting the dangers of the impending peril in their power to employ. They must elect in such an emergency, and if they, in the exercise of their best skill and judgment, decide that it is their duty to lighten the ship, cut away the masts, or to strand the vessel, courts of justice are not inclined to overrule their determinations.

Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. From the necessity of the case the law imposes upon the master the duty, and clothes him with the power, to judge and determine, at the time, whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a

* Barnard *v.* Adams, 10 Howard, 303; Patten *v.* Darling, 1 Clifford, 262; 2 Parsons on Insurance, 278.

† Emerigon, 467.

portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted to his care, and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made.*

Controversies respecting the allowance or adjustment of general average more frequently arise in cases where the sacrifice made consisted of a jettison of a portion of the cargo than in respect to any other disaster in navigation.†

Explanations and illustrations upon the subject, therefore, whether found in treatises or in judicial decisions, are usually more particularly applicable to cases of that description than to a case where the vessel was stranded, but the leading principles of law by which the rights of parties are to be ascertained and determined in such cases are the same whether the sacrifice made consisted of a part of the cargo or of a part or the whole of the ship, as the controlling rule is, that what is given for the general benefit of all shall be made good by the contribution of all, which is the germ and substance of all the law upon the subject.

Doubts at one time were entertained whether a loss occasioned by a voluntary stranding of the vessel, even though it was made for the general safety, and to avoid the probable consequences of an imminent peril to the whole adventure, was the proper subject of general average contribution, but

* Lawrence *v.* Minturn, 17 Howard, 110; Dupont *v.* Vance, 19 Howard, 166; Patten *v.* Darling, 1 Clifford, 264.

† Birkley *v.* Presgrave, 1 East, 227.

those doubts have long since been dissipated in most jurisdictions, and they have no place whatever in the jurisprudence of the United States.

Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding, says Mr. Arnould, is to be made good by general average contribution, and the writer adds that there is no rule more clearly established than this by the uniform course of maritime law and usage.*

Sustained as that proposition is at the present day by universal consent, it does not seem to be necessary to refer to other authorities in its support, nor is it necessary to enlarge that rule in order to dispose of the present controversy, but to prevent any misconception as to the views of the court it is deemed proper to add that it is settled law in this court that the case is one for general average, although the ship was totally lost, if the stranding was voluntary and was designed for the common safety, and it appears that the act of stranding resulted in saving the cargo.†

Undoubtedly the sacrifice must be voluntary and must have been intended as a means of saving the remaining property of the adventure, and the lives of those on board, and unless such was the purpose of the act it gives no claim for contribution, but it is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary it is sufficient that the property was selected to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved.‡

6. Suggestion is made that the act of stranding of the vessel in this case was not a voluntary act, as the reef where

* 2 Arnould on Insurance, 784; Lewis *v.* Williams, 1 Hall, 440.

† Columbian Insurance Company *v.* Ashby, 13 Peters, 331; Caze *v.* Reilly, 3 Washington's Circuit Court, 298; Sims *v.* Gurney, 4 Binney, 513; Gray *v.* Waln, 2 S. & R. 229; 1 Parsons on Shipping, 372; Merithew *v.* Sampson, 4 Allen, 192.

‡ 1 Parsons on Shipping, 348.

she grounded was not visible at the time and was unknown to the master, but the agreed statement shows that in undertaking to run into the bay the master knew that the chief risk he had to encounter was the stranding of the ship, and the precautions which he took to guard against that danger show to the entire satisfaction of the court that the disaster was not altogether unexpected. As the ship advanced the lead was constantly employed, showing eight fathoms at first, then seven, then six only, and so on, the depth continuing to diminish at each throw of the lead until the ship grounded and remained fast.

Grant that the master did not intend that the ship should ground on that reef, still it is clear that he was aware that such a danger was the chief one he had to encounter in entering the bay, and the case shows that he deliberately elected and decided to take that hazard rather than to remain outside, where, in his judgment, the whole interests under his control, and the lives of all on board were exposed to imminent peril if not to certain destruction. Under these circumstances it is not possible to decide that the will of man did not in some degree contribute to the stranding of the ship, which is all that is required to constitute the stranding a voluntary act within the meaning of the commercial law.*

Suppose the storm outside the bay was irresistible and overpowering, still it does not follow that there was no exercise of judgment, for there may be a choice of perils when there is no possibility of perfect safety.†

Destruction of all the interests was apparently certain if the ship remained outside, but the master under the circumstances elected to enter the bay, without the assistance of a pilot, knowing that there was great danger that the ship might ground in the attempt, but his decision was, that it was better for all concerned to make the attempt than to remain where he was, even if she did ground, and the result shows that he decided wisely for all interests, as damage re-

* 2 Arnould on Insurance, 785; Emerigon, 324

† Sims *v.* Gurney, 4 Binney, 525; 2 Parsons on Contracts (5th ed.), 325, and note *y*.

sulted to none except to the ship, and she would doubtless have been destroyed if she had continued to remain outside of the bay.*

Guided by these considerations our conclusion is, that the loss and damage sustained by the ship at the place of the disaster, and the costs and expenses of the repairs, and all the other costs and expenses as charged in the adjustment, are the proper subject of general average contribution, as alleged by the claimants in their answer.

Details will be avoided, as the decree must be reversed and the cause remanded for further proceedings.

7. Apart from the error in the principle of the decree there is a manifest error in the amount allowed in the first case, but inasmuch as there must be a new hearing and a new decree, the correction of the error can best be made in the Circuit Court.

Brief consideration must also be given to the exceptions, taken by the claimants, to the report of the commissioner, which were overruled by the court. They are three in number, and they will be considered in the order in which they were made.

i. That the commissioner erred in charging the ship or freight with any part of the expenses incurred by the charterers in the *ex parte* adjustment procured by them prior to the order of reference to the commissioner.

Unusual difficulty attends the inquiry, on account of the indefinite character of the exception and the uncertain state of the evidence, but the conclusion of the court being that the case is one for general average, it seems to the court that those expenses constitute a matter to be adjusted between the charterers and the libellants irrespective of the controversy presented in this record, unless the results of that adjustment were adopted and used by the commissioner. Influenced by these suggestions the exception is sustained, but the matter is left open for further inquiry when the mandate is sent down.

* Rea *v.* Cutler, 1 Sprague, 136.

ii. That the commissioner erred in assuming that the valuation of the ship as given in the policy of insurance is the proper basis of her contributory value in the statement of the amount for general average.

As a general rule, the value of the ship for contribution, where she has received no extraordinary injuries during the voyage, and has not been repaired on that account, is her value at the time of her arrival at the termination of the voyage, but if she met with damage before she arrived, by perils of the sea, and had been repaired, then the value to be assumed in the adjustment is her worth before such repairs were made. Neither party gave any evidence as to the value of the ship prior to the disaster except what appears in the policy of insurance, and under the circumstances it is difficult to see what better rule can be prescribed than that adopted by the commissioner.*

Strictly speaking the rule is the value of the ship antecedent to the injuries received, but as that requirement can seldom be met the usual resort is her value at the port of departure, making such deduction for deterioration as appears to be just and reasonable.†

No proofs on that subject, except the policy of insurance, was offered by either party, and inasmuch as ships are seldom insured beyond their actual value the exception is overruled.

iii. That the commissioner erred in carrying into particular average certain expenses incurred by the master at the port where the repairs were made, which should have been regarded as the proper subject of general average.

Considerable difficulty also attends this inquiry for the want of a more definite statement of the grounds of the complaint. We think it plain, however, that the exception must be sustained, as some of the matters charged as particular average, in whole or in part, ought clearly to have been in-

* Hopkins on Average (3d ed.), 104; 2 Arnould on Insurance, 812; Patapsco Insurance Co. *v.* Southgate, 5 Peters, 604; Clark *v.* United States Insurance Co., 7 Massachusetts, 370; Dodge *v.* Union Insurance Co., 17 Id. 471.

† 1 Parsons on Shipping, 448; Mutual Safety Insurance Co. *v.* The Ship George, Olcott, Rep. 157.

cluded at their full value among the incidental expenses necessarily incurred in making the repairs, but in view of the circumstances we shall not attempt to do more than to state the general principles which should regulate the adjustment in the particulars involved in the exception, and leave their application to be made in the case by the court below, where the parties, if need be, may again be heard.

8. Whatever the nature of the injury to the ship may be, and whether it arose from the act of the master in voluntarily sacrificing a part of it or in voluntarily stranding the vessel, the wages and provisions of the master, officers, and crew from the time of putting away for the port of succor, and every expense necessarily incurred during the detention for the benefit of all concerned, are general average.*

Repairs necessary to remove the inability of the ship to proceed on her voyage are now regarded everywhere as the proper subject of general average. Expenses for repairs beyond what is reasonably necessary for that purpose are not so regarded, but it is not necessary to examine the exceptions to the rule with any particularity in this case, as the parties agree that all the expenses incurred were necessary to enable the ship to resume her voyage.

The wages and provisions of the master, officers, and crew are general average from the time the disaster occurs until the ship resumes her voyage, if proper diligence is employed in making the repairs.†

Towing the ship into port, and extra expenses necessarily incurred in pumping to keep her afloat until the leaks can be stopped, are to be included in the adjustment.‡

Surveys, port charges, the hire of anchors, cables, boats, and other necessary apparatus, for temporary purposes in making the repairs, are all to be taken into the account as

* Abbott on Shipping, 601; Plummer *v.* Wildman, 3 Maule & Selwyn, 482; Walden *v.* Le Roy, 2 Caines, 262; Henshaw *v.* Insurance Co., Ib 274; Nelson *v.* Belmont, 21 New York, 38; The Brig Mary, 1 Sprague, 18.

† Padelford *v.* Boardman, 4 Massachusetts, 548; Potter *v.* Ocean Insurance Co., 3 Sumner, 27.

‡ 2 Phillips on Insurance (3d ed.), § 1326; Orrok *v.* Commonwealth Insurance Co., 21 Pickering, 469.

well as the expenses of unloading, warehousing, and reloading the cargo after the repairs are completed.*

Repairs in such a case cannot be made by the master unless he has means or credit, and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo or by the payment of marine interest.†

Governed by these rules it is believed the rights of the parties may be adjusted without serious difficulty or danger of mistake.

DECREE REVERSED in respect to each of the four cases before the court.

STEAMBOAT BURNS.

1. A writ of error or appeal to this court cannot be sustained in the name of a steamboat, or any other than a human being, or some corporate or associated aggregation of persons.
2. The acts of the State legislatures authorizing suits to be sustained by or against steamboats by name, confer no right so to sustain them in the Federal courts.
3. Any person, however, who in the State courts has substantially made himself a party to the case, by asserting on the record his interest in the vessel, and conducting the defence in the highest court of the State, may prosecute a writ of error in his own name in this court under the 25th section of the Judiciary Act.

THESE were two cases brought before the court by what purported to be writs of error to the Supreme Court of Missouri. The writ in the first case referred to a judgment in

* Potter *v.* Ocean Insurance Co., 3 Sumner, 42; The Brig Mary, 1 Sprague, 18; Stevens & Benecke, 76.

† Orrok *v.* Commonwealth Insurance Co., 21 Pickering, 469; 1 Parsons on Shipping, 400.

that court in a suit "between the *steamboat Burns, her tackle, &c., appellant*, and James Reynolds and James Aiken, respondents and appellees," in which "a manifest error hath happened, to the great damage of the said *steamboat, her tackle, &c.*, as by *her* complaint appears." The citation made the same recital. The writ and citation in the second case varied from this only in the names of the defendants in error.

This form of the writ was endeavored to be justified by a statute of Missouri known in that State as the Boat Law, a statute which it was said sought to establish in the State court the plan and procedure of the admiralty. By this act proceeding was authorized against the *res*, and the vessel was a good deal treated of by the language of the act as the defendant in the case. However, one section of the act (section 12th), provided that the *owner, captain, agent, consignee, or any creditor of the boat*, might appear to the action, on behalf of the boat or vessel, and plead thereto and defend the same; and another section, the 38th, that the *captain, agent, owner, consignee, or other person* interested in the boat or vessel, might *appeal or prosecute a writ of error to reverse any judgment rendered against the boat or vessel.* And, indeed, in this very case the record showed that one Adolph Keinecke had made claim in the inferior court as owner, and as such had defended the suit in the name of the steamboat. He had likewise made affidavit that he was the owner, and gave bond to enable him to appeal to the Supreme Court of the State. But instead of taking the appeal in his own name he took it in the name of the steamboat.

The question now was whether these writs could be sustained.

Mr. Wills, with a brief of Mr. Rankin, for the plaintiff in error; Mr. G. P. Strong, contra.

Mr. Justice MILLER delivered the opinion of the court.

It is believed to be the first time that anything but a human being, or an aggregation of human beings, called a corporation or association, has attempted to bring a writ of error or appeal in this court.

It is said in support of the writ that the proceeding below was *in rem* against the steamboat by name, and that as it was so conducted through all the State courts it should be so here.

There is nothing in the essential nature of proceedings *in rem* which justifies or requires this. Whenever the *res* is seized in admiralty proceedings proper, or in revenue or other proceedings partaking of that character, the property is condemned and sold, and with the distribution of the proceeds the case ends, unless some one appears in court as claimant either of the *res* or its proceeds. When a claimant appears he becomes a party to the proceedings, and may defend, take an appeal, or writ of error, or adopt any other proceeding that a party properly before the court may be entitled to.

It is true that in placing such cases on the dockets of our courts, and in the reports of our decisions, the name of the vessel or thing seized is often retained; but in all cases where any defensive action is taken, some person must appear and claim an interest or a right to be heard on account of his relation to the property.

It is said that the statute of Missouri allows the steamboat to be sued by name, and allows a defence to be made by the owner in the name of the vessel.

But the States cannot in this manner confer on an inanimate object, without sense, or reason, or legal capacity, the right to prosecute legal proceedings in the Federal courts. Nor does the statute under which these proceedings were had in the State court present any difficulty to a party interested in the boat, in asserting his rights. Section 12 of the Steamboat Law,* provides that the owner, captain, agent, consignee, or any creditor of the boat, may appear to the action, on behalf of the boat or vessel, and plead thereto and defend the same; and though it has been the practice to do this in the name of the vessel, it has never been held, nor do we suppose it ever will be by the State courts, that an

* 1 Revised Statutes of Missouri, 306.

owner cannot appear in his own name and assert his rights in the vessel.

Section 38, however, relieves the matter of all embarrassment, and shows that the framers of the statute seemed to think as we do, that when an appeal or writ of error was to take the case to a higher court, it should be by some person who asserted an interest in the vessel. With the liberal provision which that section makes for review of the judgment, there can be no necessity that we shall so far violate reason and law as to permit a steamboat to bring a suit here by writ of error.

If any person or corporation whom this court can recognize as a legal entity, capable of sustaining a suit in this court, has an interest in such a controversy, that party must connect himself with the case in such a manner as to enable himself to assert his rights here. It cannot be done in the name of a steamboat.

An examination of the records in these cases shows that Adolph Heinecke did in the inferior court claim to be the owner, and defended the suit in the name of the steamboat. He likewise made affidavit that he was the owner, and gave bond to enable him to appeal to the Supreme Court of the State. But instead of taking the appeal in his own name he took it in the name of the steamboat. We are of opinion that by a liberal construction of the record he may be so far regarded as claimant and party to the record as to enable him to bring a writ of error to this court in his own name if he shall be so advised. The present writs are

DISMISSED.

LINTHICUM *v.* RAY.

1. The possession of a wharf by the defendant under color and with claim of title is sufficient to put the plaintiff, in an action on the case for obstructing him in its use, upon proof of a better title to the wharf, or, of an equal right with the defendant to its use.
2. A right not connected with the enjoyment or use of a parcel of land cannot be annexed as an incident to that land so as to become appurtenant to it.

ERROR to the Supreme Court of the District of Columbia.

This was an action on the case for obstructing the plaintiff in the use of a wharf in the city of Georgetown, in the District of Columbia. The wharf was situated on the south side of Water Street, between Market and Frederick Streets, in that city, and extended one hundred and one feet on the Potomac River. The plaintiff asserted a right to its use under various mesne conveyances from Francis and Charles Lowndes. It appeared from the evidence that, in the year 1800, these parties were the joint owners of a wharf occupying the site of the present wharf, and of similar dimensions. At the same time, Francis Lowndes owned in his own right two lots on the north side of Water Street, opposite the wharf, which he had improved by the erection thereon of two warehouses. These buildings were separated from each other by about twenty feet. In 1804 the two Lowndes united in a deed conveying to Richard and Leonard H. Johns the intervening lot between the two buildings, with its appurtenances, and also to them, "their heirs and assigns, the privileges and rights of using the wharf built" by the Lowndes, "free of all expense, for the purpose, from time to time, of mooring their ships or vessels, and for loading and unloading the same," and for all goods imported or exported by them. The several mesne conveyances which bring the property to the plaintiff cover the same lot and the same "privileges and rights of using the wharf," describing both in similar language.

On the other hand, the defendant asserted a right to the

wharf itself, as it now existed, and not merely a right to its use, and traced his title to the same original source,—Francis and Charles Lowndes.

It appeared from the deeds produced, that in April, 1800, these parties conveyed to one Templeman, in trust to indemnify him for his past indorsements, and any future indorsements he might make for them, and one John Suter, of notes in the Bank of Columbia, the two improved lots on the north side of Water Street, and the wharf mentioned. The trust-deed was accompanied with a power to the grantee to sell this property, and apply the proceeds to the payment of the notes indorsed by him, which were not taken up at maturity by their makers. In 1807, Templeman conveyed the property to Walter Smith upon trust to sell the same, whenever requested by the Bank of Columbia, to pay certain notes. In this conveyance Francis Lowndes joined. By sundry mesne conveyances from Walter Smith, the property, as contended by the defendant, became vested in him in 1858. At this time the wharf, which existed in 1804, had perished, and a new wharf, the one now in existence, was constructed in its place by the defendant, and has ever since remained in his exclusive possession.

The court below instructed the jury, that upon the evidence produced in the case the plaintiff was not entitled to recover, and the jury accordingly found for the defendant. The plaintiff excepted to the instruction, and brought the case here.

Messrs. Bradley and Wills, for the plaintiff in error.

Messrs. Cox and Davidge, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

We do not deem it important to consider whether the conveyance to Smith from Templeman, the trustee, was authorized by the power contained in the deed to the latter, or whether the subsequent conveyances under Smith oper-

ated to vest a good title to the land upon which the present wharf is situated, or such a right of wharfage as to authorize the construction and exclusive use of the present wharf. The possession of the defendant under color and with claim of title is sufficient to put the plaintiff upon proof of a better title to the wharf, or, at least, of an equal right with the defendant to its use. And such proof he has not produced. The deed of the two Lowndes to the Johns in 1804, under which he derives all the claim he possesses, only conferred a right to the use of the wharf then in existence, and not any general right of wharfage, or any right to the land covered by the wharf. Its language is that it grants the right "of using the wharf *built*" by the Lowndes, referring clearly to the structure then erected. And the right to use the wharf is limited to that of mooring to it the ships and vessels of the grantees, for loading and unloading, and of passing over it goods imported or exported by them. The deed contains no provision for keeping the wharf in repair, or for building a new one in case of its destruction, or any clause indicating an intention to confer any right or privilege of greater duration than that of the structure then existing.

Nor was the right to use the wharf made appurtenant to the twenty-feet lot, situated on the north side of Water Street, by being conveyed to the Johns in the same instrument. It was in no way connected with the enjoyment or use of the lot, and a right not thus connected cannot be annexed as an incident to land so as to become appurtenant to it.*

The right was not attached as an incident to any estate; it passed by a grant in gross, and was necessarily limited in its duration by the existence of the structure with which it was connected.

JUDGMENT AFFIRMED.

* Ackroyd *v.* Smith, 10 Com. Bench, 164.

EX PARTE ZELLNER.

Where an act of Congress gives, as part of the general system of organization of a court, an appeal from *any* final judgment or decree which may *hereafter* be rendered by it, an appeal lies from a judgment rendered under an act which gives the court jurisdiction to pass, in the usual way, and not by any special proceedings, upon a class of cases additional to those of which it already had jurisdiction, even though nothing be said in such act about an appeal.

ZELLNER filed his petition in this court, and moved for a mandamus to the Court of Claims to compel them to allow an appeal from a decree which that court had made against him. The case was this. The relator was the owner of a quantity of cotton, stored at Macon, Georgia. In February, 1866, a special agent of the Treasury Department seized and carried away the same, and it was afterwards shipped by another agent of that department to the city of New York, and there sold by an agent of the government for $3076, after deducting all charges and expenses. On this state of facts the relator applied to the Court of Claims for a judgment against the government, in his favor, to this amount.

The court, on full consideration, denied the claim and dismissed the petition: whereupon he prayed an appeal from the decree of dismissal, which was refused. The single question presented was, whether or not the relator was entitled to an appeal. And this depended upon the construction to be given to certain statutes, as follows: An act of 24th February, 1855,* conferred jurisdiction upon the Court of Claims "to hear and determine all claims founded upon any regulation of an executive department, or upon any contract, express or implied, with the government," "and also all claims which may be referred to said court by either house of Congress." An act, of 3d March, 1863,† amending the former act, conferred jurisdiction, in addition to the above cases, "of all set-offs, counter-claims, claims for dam-

* 10 Stat. at Large, 612.

† 12 Id. 765.

ages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government, against any person making claim against the government in said court."

The 5th section of this act of 1863 provided "that either party may appeal to the Supreme Court of the United States from *any* final judgment or decree which may *hereafter* be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said Supreme Court may direct."

There was yet, however, another act in the case, the act providing for the collection of abandoned property in insurrectionary districts, passed March 12th, 1863, under which the property in question was seized. This statute provided, in the 3d section, that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and, *on proof to the satisfaction of the said court*, of the ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, receive the residue of proceeds, after deducting expenses," &c. *The act contained no provision for an appeal from the judgments or decrees of the court.* It was passed by Congress on the same day that the act of 1863, above referred to, was passed, reorganizing the Court of Claims, and authorizing it to render judgments against the government, with the right of either party to appeal to the Supreme Court, as already stated, though it was not approved by the President till nine days afterwards.

It was supposed below, as the act concerning abandoned and captured property conferred upon the Court of Claims a new subject of jurisdiction in addition to those previously provided for, and at the same time made no provision for appeals to the Supreme Court from their judgments or decrees, that no right of appeal existed in respect to either party, and that the general provision in the 5th section of the act reorganizing the court, and conferring what may be called its general jurisdiction, could not be invoked.

Opinion of the court.

Mr. Durant, in support of the motion, argued that the Abandoned Property Act left the practice, remedy, and all jurisdictional conditions, to previous legislation about the Court of Claims; and that so an appeal existed under the act of March 3d, 1863, reorganizing that court.

Mr. Hale, special counsel of the United States, contra, citing and relying on *United States* v. *Nourse*,* and the 1st section of the act of 25th June, 1868, providing for the allowance of an appeal by the government from all final judgments of the Court of Claims adverse to it, whether such judgment shall have been rendered by virtue of the general or any special power of the court—contended that no appeal being specially given by the Abandoned Property Act, and the whole matter in proceedings under that act being referred to the satisfaction of the Court of Claims, the case was not embraced by the general right of appeal given by the previous act of March 3d, 1863, reorganizing the Court of Claims.

Mr. Justice NELSON delivered the opinion of the court.

We cannot agree to the view that the general provision in the 5th section of the act of March 3d, 1863, reorganizing the Court of Claims, and conferring what may be called its general jurisdiction, cannot be invoked in this case. The language of that section is general: "Either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court." This court was organized as a special judicial tribunal to hear and render judgment in cases between the citizen and the government; the subjects of its jurisdiction were defined in the act, and, generally, the mode of conducting its proceedings, subject, of course, to such alterations and changes as Congress from time to time might see fit to make. The subjects of its jurisdiction could be enlarged or diminished, but this would not disturb or in any way affect the general plan or system of its organization.

* 6 Peters, 470, 494.

If new or additional subjects of jurisdiction were conferred the effect would be, simply, to increase the labors of the court, the cases to be heard and determined under the existing organization.

In the regulation of the jurisdiction of the United States Circuit and District Courts, by the Judiciary Act of 1789, the 22d section of that act, together with the 2d section of the act of 3d March, 1803, provided for writs of error and appeals from all final judgments or decrees of the District to Circuit Courts, and from all final judgments and decrees of the Circuit to the Supreme Court. The jurisdiction of both these courts has been enlarged, from time to time, since this organization; and it has never been doubted but that the judgments or decrees founded upon these new subjects of jurisdiction were liable to the operation of these general provisions in respect to writs of error and appeals. The case of *United States* v. *Ferreira*,* illustrates the principle.

The power to hear and adjudicate upon certain claims under the treaty of 1819, between this government and Spain, was conferred upon the District Judge of the United States for the Northern District of Florida. In a case before him he rendered a decision against the government, from which the United States District Attorney appealed to the Supreme Court, which, it was admitted, would have been regular if the adjudication had been rendered by the judge as a court, and the decree, *that* of the District Court. But, it was held, that the power was not conferred upon the judge in his judicial capacity, sitting as a court, but upon him as a commissioner; and hence, an appeal under the 22d section of the Judiciary Act would not lie. The same principle is stated in *United States* v. *Circuit Judges.*†

The case of *United States* v. *Nourse*, relied upon against this motion, was a case of special and summary jurisdiction, under the act of 15th May, 1820, in which the mode of proceeding is particularly pointed out, and in which a special mode of taking an appeal is prescribed, and in respect to the

* 13 Howard, 40.

† 3 Wallace, 675.

proceedings before the district judge they could be taken at chambers as well as in court.

As it respects the act of Congress in question, no special proceedings are prescribed to the Court of Claims or to the claimant. Any person claiming to be the owner of abandoned or captured property within the meaning of the act may, at any time within two years after the suppression of the rebellion, present his claim for the proceeds to the Court of Claims, and they are to proceed, in the usual way, to hear and adjudicate upon the question of ownership and right to the proceeds, according to the proofs and law of the case.

We are referred to the 1st section of the act 25th June, 1868,* as bearing upon this motion, which provides for the allowance of an appeal by the government from all final judgments of the Court of Claims adverse to it, whether such judgment shall have been rendered by virtue of the general or any special power of said court. We can only say that in the view the court have taken of this case this section has no application to it. The judgment has not been rendered by the court under any special power conferred; and it is not pretended that the effect of it is to take away the right of the claimant to appeal from a judgment under the general jurisdiction of the court.

MOTION GRANTED.

BARNEY *v.* SCHMEIDER.

1. It is not sufficient to sustain a verdict for the plaintiff, that the testimony on which it was founded was known to the court by whom the jury was charged to find such a verdict. The evidence must be submitted to the jury, or the charge is erroneous.
2. The question, whether certain imported goods were similar to certain other goods described in the revenue law, for the purposes of customs duties, is a mixed question of law and fact, and cannot, by the mere charge of the court, be wholly withdrawn from the jury.

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* 15 Stat. at Large, 75.

3. The proper mode of proving papers on file, in any of the departments or public offices of the government, is by procuring certified copies from those persons who have them in custody. The counsel for the government cannot be compelled to produce either such copies or the originals for the benefit of parties who may be litigating with the government.
4. Notice, therefore, to the party or counsel representing the government to produce such papers, does not authorize the party giving the notice to use other copies than those properly certified as above stated.

ERROR to the Circuit Court for the Southern District of New York, the case being thus:

Schmeider sued Barney, collector for the port of New York, in the court below, in an action of assumpsit with the common counts only, to which Barney pleaded the general issue. The plaintiff's claim was for duties on certain woven goods alleged to have been unlawfully collected of him by the defendant as collector of the port of New York, and which had been paid under protest. The act under which the goods were rated for duties, provided that on all delaines, cashmere delaines, muslin delaines, barege delaines, comprised wholly or in part of worsted, wool, mohair, or goat's hair, and *on all goods of similar description*, not exceeding fifty cents in value per square yard, two cents per square yard shall be paid. And the point in dispute was whether the goods of plaintiffs, on which the two cents per yard had been assessed, were goods of a similar description to those above mentioned, within the meaning of the act. A jury was called and sworn, and directed by the court to find a verdict for the plaintiffs, which was done, and judgment rendered for the amount claimed.

A paper was found in the record under the caption of "Case and Exceptions," signed and sealed by the judge who presided at the trial. This paper set forth some things which were said to be *shown* by the evidence, some things which *appeared* in evidence, and a large part of it was the evidence itself. There was also the full charge of the court, the prayer for instructions on the part of the defendant, which were refused, and the exceptions of the defendant.

Counsel for and against.

Among other matters found in the bill of exceptions was this statement in the charge of the court to the jury:

"The testimony taken on a former trial has, with the consent of both sides, and with the approbation of the court, been put in. It is very voluminous. It has not been read before this jury, nor was it necessary that it should be, for it was delivered in the hearing of the court only a few days since, and is fresh in its recollection. There is very little discrepancy in the testimony."

The court then proceeded to tell the jury what this evidence showed that was material to the issue, and to make a very able argument on the law of the case, and directed the jury to find for the plaintiff, or rather said, "the verdict ought to be for plaintiffs." To this part of the charge the defendant excepted specially.

In the course of the trial the plaintiff, having given the defendant due notice to produce at the trial the original appeals made by him to the Secretary of the Treasury, was permitted to use copies proved by witnesses who mailed the originals, because defendant did not produce the originals. This was also excepted to. The questions now here were these:

1. Whether it was error in the court below, under the circumstances described, to tell the jury that their verdict ought to be for the plaintiff.

2. Whether it was error to allow the plaintiff to use the copies proved by the witnesses who mailed the originals.

3. Whether, on a right construction of the tariff act already quoted, the expression, "goods of a similar description," was confined to one ascertained species of goods, or was applicable to others in addition; this last question, however, not being necessary to be passed on, if either of the others were decided in the affirmative.

Mr. Hoar, Attorney-General, and Mr. Field, Assistant Attorney-General, for the United States. Mr. Evarts, contra.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

The seventh amendment of the Constitution declares, that in suits at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

This right may be waived by the party. The act of March 3d, 1865,* provides a mode by which the parties to a suit may submit the matter proper for a jury to the court; and the case of *Norris* v. *Jackson*, decided a few days ago,† gives the mode of proceeding under that statute, and explains what may be received in such cases, and how the matter proper for review may be brought before this court.

If, then, the parties in the present case had been willing to waive a jury and permit the court to find both the law and the facts, there was no difficulty in doing this, and in presenting the law to this court for review. For it is never to be forgotten that, in common law cases, it is the ruling of the inferior court on *the law alone* which *this* court is authorized to review. The common law admitted of no re-examination of the facts found by a jury, except by granting a new trial in the same court in which the verdict was rendered, and the constitutional amendment just referred to, forbids any other mode of re-examination than that which accords with the rules of common law.

As the defendant in this case did not waive his right to have the facts tried by a jury, it was the duty of the court to submit such facts to the jury that was sworn to try them.

It is needless to say that this was not done. The statement is clear that the case was decided upon the testimony taken on a former trial, and not read before this jury, because the court had heard it in the first case, and did not deem it necessary to be heard by the jury in this case.

It is possible to have a jury trial in which the plaintiff, having failed to offer any evidence at all, or any competent evidence, the jury finds for the defendant for that very reason. And in such case it is strictly correct, if the plaintiff does not take a non-suit, for the court to instruct the jury to

* 13 Stat. at Large, 501.

† *Supra*, 125.

find for the defendant. But we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court. It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility.

It is insisted with much ingenuity that in this case there was no disputed fact for the jury to pass upon, and that the only issue in the case being one of law, it was proper for the court to dispose of it. If this were so, the instruction of the court might be sustained, provided the undisputed facts necessary to sustain the verdict had been submitted to the jury. But let us see if this assumption is supported by the record. The form of the pleadings shows nothing and admits nothing. The plaintiff then must make a case by evidence to the jury. Looking into the case stated and as though it *had* been read to the jury, we find that plaintiff's claim is for duties on certain goods unlawfully collected of him by defendant as collector of the port of New York. The act under which the goods were rated for duties provides that on all delaines, cashmere delaines, muslin delaines, barege delaines, comprised wholly or in part of worsted, wool, mohair, or goat's hair, and *on all goods of similar description*, not exceeding fifty cents in value per square yard, two cents per square yard shall be paid. And the point in dispute was whether the goods of plaintiffs, on which the two cents per yard had been assessed, were goods of a similar description to those above mentioned, within the meaning of the act. Now it is clear that this question alone is one of mixed law and fact, because until we are informed by testimony as to the nature and character of plaintiff's goods, no construction or view of the law can be applied to them. The court can only know by evidence what kind of goods

were assessed by the collector, and this at once dispels the idea that the case could in any sense present an abstract question of law. But before the court or the jury could get to these questions there were several others, purely matters of fact, to be decided. The rate at which the goods were actually assessed, the payment of the duties as thus assessed, the protest at the time of payment, and the appeal to the Secretary of the Treasury, were all essential to the plaintiff's recovery and necessary to be found to the satisfaction of the jury. The judge also tells us that "there is very little discrepancy in the testimony." But where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony and not the court's. The proposition is not, therefore, sustained, that nothing but a question of law was to be decided.

There is another error, however, which, although unimportant in this case, may arise very often in the numerous suits to recover back taxes paid under protest in the customs and in the internal revenue departments.

The plaintiffs having given the defendant due notice to produce at the trial the original appeals made by them to the Secretary of the Treasury, were permitted to use copies proved by witnesses who mailed the originals, because defendant did not produce the originals. This was excepted to and was error, and it would be equally error if the United States had been the nominal, as it was the real, defendant in the suit. The papers showing this appeal, when filed with the secretary, became part of the records and archives of his office, and the law is well settled that in such case the originals need not be produced in any trial, but that copies of them, certified by the officer in whose charge they properly are, may be used with the same effect as the originals. If the government needs these copies she produces them when she proposes to use them. If any one else wants to use them the law provides the means by which such copies can be produced. They are the best attainable evidence, and must be produced, unless some sufficient reason is shown for not doing

so. The government is not bound to furnish either the originals or certified copies to suitors with whom it is contending, unless upon demand at the proper office, and tender of the lawful fees.

For this and for the other errors mentioned the judgment must be

REVERSED, AND A VENIRE FACIAS DE NOVO IS ORDERED.

SWAIN *v.* SEAMENS.

1. A contract to build, on a lot sold upon mortgage, a mill fifty feet wide by one hundred and fifty long, is not, as a proposition of law, substantially complied with by building one that is seventy-eight feet wide by a hundred long, even though the purpose of the contract was to give the vendor security for the purchase-money of the lot, and though the mill of the latter dimensions have cost more and be better adapted to the purposes intended than such a one as was contracted for.
2. But if the vendor, having made an agreement that upon a mill of the former dimensions being built on the lot sold, he will accept policies of insurance on it for the amount of another mortgage collateral to one given on the property sold, and he does accept such policies, he cannot decline to enter satisfaction on such other mortgage because the mill was not of the dimensions contracted for. He waives by such acceptance of the policies all right to object to the variation in the construction.
3. Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.
4. The statute of frauds cannot be set up as a defence to the performance of one formal item of an agreement, where the contract has been fully performed by the party asking such performance, and, except as to such remaining formal item, by the other party also.

APPEAL from the Circuit Court for Wisconsin, in which court Seamens and others filed a bill against Swain, praying that a mortgage executed to him, Swain, by Medbery and wife, on certain lots, of which he, Seamens, and the others were now owners, in Wisconsin, might be cancelled.

It appeared that in 1855, Swain sold to Medbery and

one Aldrich real estate in Michigan for $52,400, of which $10,000 was paid in cash, and the balance, $42,400, secured by a mortgage on the lands, payable in instalments at different times; and that on this Michigan land, foundations had been made in the previous autumn, by driving piles for the erection of a saw-mill *fifty by one hundred and fifty feet in size;* that Medbery was then the owner of certain lots in Wisconsin; and that on the same day and in pursuance of articles of agreement preceding the sale, to give additional security to the extent of $6666.66, he and his wife executed to Swain a mortgage on *these* lots as additional security.

On the Wisconsin mortgage, Swain, on the same day that it was given, indorsed the following stipulation, which gave rise to this suit:

"It is hereby agreed, that if within two years from this date the large saw-mill, *fifty by one hundred and fifty feet in size*, shall be *properly built and completed, upon the foundation commenced last fall*, by driving piles, to accept in place of the within mortgage, *security* in proper fire insurance policy, or policies, on said large saw-mill, and thereupon to discharge the within mortgage."

The stipulation above made was in pursuance of a contract made by the purchasers in the previous articles of agreement, to keep the buildings erected, and the large saw-mill to be erected, upon the premises, insured in some safely reputed fire insurance company or companies against fire, and that they should assign the policy or policies to Swain, and that in default thereof it should be lawful for him, Swain, to effect the insurance himself, and that the premiums and the costs and charges of his doing so, should be a lien on the mortgaged premises.

THE BILL alleged that subsequently to the execution of the agreement indorsed by Swain on the mortgage, and within the two years, there was built and completed upon the Michigan lands, and upon the foundation referred to in the said agreement, a large saw-mill, not of 50 by 150 feet, but of 78 by 100; this mill, however, *being larger and of greater value and better adapted to the purposes intended than one of the*

dimensions originally contemplated; and that the said mill, as built and completed, was *assented to and accepted by Swain as a compliance with the said written agreement* indorsed on the Wisconsin mortgage; that in May, 1856, Medbery and Aldrich caused the new saw-mill to be insured in different companies named, to the extent of $6000; and that these policies of insurance were duly transferred and delivered to Swain, *and accepted and assented to by him as a compliance with the agreement*, and that he had them in possession; that in October, 1857, Swain caused the new mill to be further insured for one year in the name of Medbery & Aldrich, for his own use and benefit; that in September, 1858, he again caused the new saw-mill and other buildings on the premises to be again insured for one year in the name of Medbery & Aldrich, but for his own security, and paid out for premium $210; that all these insurances mentioned were obtained at the request of Swain, with the consent of Medbery & Aldrich, and upon the understanding *that they should reimburse him the premiums;* that in November, 1858, Swain and Medbery & Aldrich accounted respecting the amount due upon the mortgage, and that Medbery & Aldrich then paid him $15,236.06, in which sum was included, as paid by Swain during 1857 and 1858 for premiums on the new saw-mill and other property mentioned in the mortgage, the sum of $446.50, and interest.

That "during the building and erection of the said large saw-mill upon the premises referred to in the written agreement aforesaid by said Medbery & Aldrich, the said defendant, Swain, was present at different times, and was informed by said Medbery & Aldrich, or one of them, of the intended or the then variation in the dimensions of said saw-mill from 50 by 150 feet, as specified in said written agreement, and that the said mill, as was then being built or was then completed, would be of greater value and better adapted for the uses and purposes intended than it would be if built of said dimensions as specified in said written agreement, and that the said defendant was then and there asked by said Medbery & Aldrich, or one of them, to consent to

such alteration, and accept the mill as then being built, and since completed, in lieu of the one mentioned in said written agreement, and that the said defendant *did then and there agree to accept, and did accept the said mill so being built*, and afterwards completed, in lieu of the one mentioned in said written agreement, and as a compliance on the part of said Medbery & Aldrich with the said written agreement on his or their part."

The mortgage on the Michigan property not being paid, Swain foreclosed it, and on a decree, finding $22,464 due, sold and purchased the premises for $19,600.

THE ANSWER denied that Medbery & Aldrich completed the mill substantially according to the agreement; denied that Swain consented to or acquiesced in the departure from the plan for constructing the mill; and, admitting that Swain did accept policies of insurance upon the mill which was built, denied that he did so in pursuance of the agreement, or that he accepted the policies as a compliance on the part of Medbery & Aldrich.

The statute of frauds of Wisconsin, it may be necessary here to state, enacts,* that "no estate, or interest in lands, . . . nor any power over or concerning lands, or in any manner relating thereto, shall be *created* or *surrendered*, . . . unless by deed or conveyance in writing, &c.;" and that "the term lands," shall be construed as coextensive in meaning with "lands, tenements, and hereditaments;" and the terms "estate and interest in lands," to embrace *every* estate and *interest*, freehold and chattel, legal and equitable, present and future, vested and contingent in lands as above defined.

The right to have the cancellation prayed for, depended therefore upon the following questions:

1. Was the mill constructed in substantial conformity with the agreement?

2. If constructed differently, did Swain consent to or acquiesce in the departure from the original plan; or

* Code of 1858, pp. 613, 615.

3. Did Swain, after its construction, accept policies on the mill in pursuance of the agreement?

If any one of these questions were answered in the affirmative, then, obviously the mortgage was to be cancelled.

4. Unless, indeed, there was something in the statute of frauds, as above quoted, which interfered with such a conclusion.

The second and third questions were obviously questions of pure fact, and the court below, which decreed the cancellation, considered, as this court (on appeal from that decree) also considered, that the evidence made it clear, on direct proofs, that Swain had in fact acquiesced in the departure in the building of the mill, and moreover that after its construction he had accepted policies, by this means also waiving any objection to such variation.

On the two points of law it was contended by *Mr. J. M. Howard, for the appellant:*

1. That the contract was clear and specific to *properly* build and complete a mill of a fixed, intelligible, and practicable size; and that this being so the court was bound to hold the parties to it; and so bound whether the mill really built was of greater value or of less than the one contracted to be built, the creditor having a right to stipulate for just such a mill as he pleased.

2. That the agreement to modify the stipulation as to the dimensions of the mill was an agreement which did, in truth, provide for the "surrender" of one "estate or interest in lands" and for the "creation" of another, and was therefore void within the Wisconsin statute of frauds.

Mr. M. H. Carpenter, contra:

1. What was the spirit of the agreement? Swain was not contracting for a mill which he was to use. He had sold the land. What he had in view was security, and security alone. Precise dimensions were of no consequence to him, value was everything; because upon value depended his security, which was the subject of the agreement. The literal re-

quirements of the agreement would have been satisfied by the construction of a mill of any value, or of no value, provided it were 50 by 150 feet, for this is the only specification in the agreement in regard to the mill. This, however, would not have satisfied the spirit of the agreement. But if a worthless mill, 50 by 150 feet, would not have done this, then a mill of any dimensions, but of value sufficient to support an insurance equal to $6666.66, does do it; does satisfy this spirit. In other words, the true spirit of the contract, so far as regards Swain, was value, not form; and, if the mill actually constructed was of greater value than one constructed 50 by 150 feet would have been, and it could be insured to the amount of $6666.66, then such mill satisfied the agreement in its true spirit and according to the intention of the parties. But the point is not important. We do not urge it. The evidence, which the court will see absolutely demands affirmative answers to the second and third questions, renders any discussion of this first one useless. If Swain accepted the mill either by words, or by silence as expressive as words, or by receiving policies upon it, there is an end of the case.

As to the statute of frauds, no question arises under it. The point seems to be faintly urged. A variation in an agreement as to the size of a saw-mill, is not a surrender of or a creation of an interest in land. If it were, then without insisting on what cases assert, that a written or sealed instrument, even when within the statute, may be varied as to the time or manner of its performance, or may be waived altogether by a subsequent parol agreement, the conclusive answer here is, that the contract was fully executed on the side of both parties; and that Swain, after standing by and witnessing the completion of the mill with its actual dimensions, and agreeing to it, is equitably estopped from objecting to cancel the mortgage upon the ground of change in the plan. The doctrine that where a person encourages an act to be done, or in any way accepts it when done, he cannot afterwards exercise his legal right in opposition to such consent, is perfectly settled, and is applied in all cases where a party has

Case restated in the opinion.

by word or act given others reason to believe that if he had a right, he intended to waive it, and where such others would be prejudiced by his asserting his right. Authorities need not be cited for this horn-book law.

Mr. Justice CLIFFORD delivered the opinion of the court.

Subsequent to the removal of the case from the State court to the Circuit Court a new bill of complaint was filed by the consent of the respondent, so that it is not necessary to refer to the proceedings in the suit before the petition for the removal was granted.

Swain, the appellant and respondent, owned certain real estate situated in the State of Michigan, and on the fourteenth of April, 1855, he sold the same to John W. Medbery and James F. Aldrich for the consideration of fifty-two thousand dollars, as appears by the pleadings.

Pursuant to the terms of the sale the purchasers paid ten thousand dollars in cash when the deed was executed, and gave back a mortgage on the same real estate to secure the balance of the purchase-money, which was payable in instalments at different times. Medbery at that time was the owner of an undivided third part of certain lots situated in Milwaukee, in the State of Wisconsin, together with a flouring-mill erected thereon, called the Empire Mill, and he and his wife, on the same day and as a part of the same transaction, gave a mortgage of the same lots and mill to the appellant as additional security for the balance remaining unpaid of the purchase-money of the first-mentioned real estate.

Prior to the purchase and sale of the Michigan real estate the foundation for a saw-mill, fifty feet by one hundred and fifty feet, to be erected on the premises, had been commenced, and the mortgagee, at the time the second mortgage was executed as additional security, stipulated and agreed with the mortgagors therein that if the mortgagors in the first mortgage built and completed the saw-mill there described in a proper manner upon the foundation so commenced, within two years from that date, he would accept as security in the place of that mortgage proper fire insurance policies on said

Case restated in the opinion.

saw-mill, and would thereupon cancel and discharge the said second mortgage. Reference is made to the stipulation for its exact phraseology, as more fully set forth in the record, and it will be seen that it was duly executed under the hand and seal of the appellant, and was indorsed at large on the second mortgage which was given as additional security.

Substantial compliance on the part of the mortgagors in the first mortgage with all the conditions of that agreement, and within the time therein specified, is set up by the appellees and complainants; and they also allege that the mortgagors in the second mortgage subsequently sold and conveyed, by deed of warranty, all their interest in and to the said lots and mill, and that they, the complainants, afterwards became the purchasers of the same lots and mill; and they allege that at the time the suit was commenced they were the owners of the same in fee, as alleged in the bill of complaint. They do not claim that the mill built and completed, as aforesaid, was of the precise dimensions mentioned in the agreement, but they allege that it was of larger dimensions and of greater value, and that it was better adapted to the purposes to be accomplished; and they aver that the mill as built and completed was recognized and accepted by the appellant as a compliance with that agreement.

Based on these and other allegations the prayer of the bill of complaint is that the mortgage of the lots and mill, called the second mortgage for the purpose of identification, may be ordered and decreed to be cancelled and discharged, and that the complainants may have such other and further relief as the nature of the case shall require.

I. Special reference to the evidences of title exhibited by the complainants is unnecessary, as the parties before the hearing in the Circuit Court entered into a written stipulation that the complainants at the time the bill of complaint was filed were the owners in fee of the lots in question and of the flouring-mill located on the premises. Possessed of the title to the lots and mill as previously held by the mortgagors, the claim of the complainants is that the mortgage thereon held by the appellant should be cancelled and dis-

Case restated in the opinion.

charged, because, as they insist, the conditions of the stipulation and agreement indorsed on the same, providing for that result, have all been fulfilled.

Such is the claim of the complainants, but the respondent denies that proposition and every element of it, and he contends that the complainants have no claim to any relief, because he insists that the mortgagors in the first mortgage never fulfilled any of the conditions specified in that stipulation and agreement; that they never built and completed the saw-mill therein described; and he expressly denies that they ever procured the policies of insurance, as alleged, or that he ever accepted the mill which they did build on the premises as a compliance with that stipulation and agreement.

Both parties were fully heard in the Circuit Court, and a decree was entered for the complainants cancelling and discharging the mortgage, and the respondents appealed to this court.

II. Relief cannot be decreed to the complainants on the ground that the mortgagors in the principal mortgage built and completed a saw-mill on the premises embraced in that mortgage, of the dimensions specified in the written stipulation and agreement which is indorsed on the second mortgage, as the bill of complaint concedes that they did not, in terms, comply with that condition, and the complainants do not claim in argument that the saw-mill which those parties built thereon was of that form or of those dimensions. Strict compliance, therefore, with the conditions of the stipulation cannot be maintained, as the proposition finds no support either in the pleadings or proofs, but is contradicted by both in every part of the record.

Proof of strict performance failing, the next proposition of the complainants is that the saw-mill which those mortgagors did build constitutes a substantial compliance with the conditions of that stipulation, but it is not possible to decide as a conclusion of law that a saw-mill seventy-eight feet in width by one hundred feet in length is a substantial compliance with an agreement which required that the saw-mill to

Case restated in the opinion.

be constructed should be of the dimensions described in that instrument, even though it be shown that it cost more and was of greater value and better adapted to the purposes to be accomplished, as the appellant having stipulated that the saw-mill to be built should be fifty feet in width by one hundred and fifty feet in length, had a right to stand upon the contract and to insist that it should be fulfilled according to its terms.

Substantial performance, it is true, is all that is required to satisfy any such agreement, and it may also be conceded that in the adjudication of controversies growing out of building contracts slight differences in the dimensions between the building constructed and the terms of the contract may, under many circumstances, be overcome by a reasonable application of that rule, but the differences in the case before the court are far too great to fall within that principle, as the effect would be to make a new contract and substitute it in the place of the stipulation executed by the parties.

III. Suppose neither of those propositions can be sustained, still the complainants contend that the decree of the Circuit Court should be affirmed, because they insist that the appellant acquiesced in the departure from the plan and dimensions as specified in the written instrument, and that he expressly accepted the said mill which those parties built and completed as a compliance with that stipulation.

Considerable conflict exists in the proofs upon that subject, and in view of that fact it becomes necessary to examine with some care the circumstances attending the transaction as bearing upon the probabilities of the case. Duplicate agreements were executed between the parties to the beforementioned deed of conveyance for the purchase and sale of the lands therein described six months before the deed of the same and the mortgage back, as aforesaid, were signed and delivered, by which the appellant agreed to sell, and the grantees in the deed and the mortgagors in the mortgage back agreed to purchase, those tracts of land, with certain exceptions, which are unimportant in this investigation, and

Case restated in the opinion.

also with certain reservations, of which two only need be noticed:

1. He reserved the house where he resided and the premises connected therewith for his benefit for one year from the date of the agreement.

2. Also the use and occupancy of the shop and fixtures connected with the same then in the possession of his brother, a deaf-mute, together with the use of the water "as now used, or in a similar way," so long as the said brother chooses to occupy the same, "to be free of rent, let, or unnecessary hindrance, otherwise than if in the way of other important improvements it may be removed" sufficiently to be out of the way, "and where he can have the same use and privileges as before."

By the terms of the agreement as amended the purchasers were to pay ten thousand dollars in cash, and they were to give their bond for forty-two thousand dollars for the balance of the purchase-money, together with a mortgage back of the whole real estate purchased to secure the payments, and they also covenanted to give "good and satisfactory security upon other property" for the sum of six thousand six hundred and sixty-six and two-thirds dollars. They also agreed to keep an insurance in some safe insurance company upon the insurable property on the premises, to the amount of one-third of its value, for the benefit and security of the mortgagee. No provision was made for any insurance upon the "other property" to be conveyed to the appellant as additional security, but when the mortgage back was executed, six months later, it was therein stipulated that the mortgagors should "well and truly keep the buildings erected, and the large saw-mill to be erected, upon the premises," insured in some safely reputed fire insurance company or companies against loss by fire, and that they should assign the said policy or policies to the appellant or his assigns; and it contained the further stipulation that in default thereof it should be lawful for the appellant or his assigns to effect the said insurance, and that the premiums paid for effecting the same and the costs and charges should be a lien on the said mortgaged premises.

Evidently the deed of conveyance and the two mortgages, together with the stipulation indorsed on the second mortgage, must be construed together, as they constitute parts of the same transaction; and reference may also be made to the written agreement for the purchase and sale of the real estate embraced in the deed, as that agreement remained in force when the other instruments were drafted and until the transaction was finally closed.

Security it is stipulated shall be accepted "in proper fire insurance policy or policies on said large saw-mill in place of the within mortgage," but the amount of the insurance to be procured as the substitute for the mortgage security is not specified, and without reference to the instrument which provided for the sale and purchase of the real estate included in the deed of conveyance it would be difficult if not impossible to define that amount, but when the several instruments relating to the transaction are considered together all ambiguity at once disappears.

Viewed in the light of those suggestions the intention of the parties appears to be plain, as it is quite evident that the second mortgage constitutes the "security upon other property" for the amount which the purchasers of the real estate agreed to give to the appellant as the seller thereof in addition to the mortgage back of the premises included in the deed of conveyance.

IV. Two conditions precedent are annexed to the supposed right of the mortgagors in the second mortgage to demand that the mortgage should be cancelled and discharged, and unless it is shown that they were waived or modified by mutual consent they must both be fulfilled or the appellant must prevail: (1.) That the large saw-mill, "fifty by one hundred and fifty feet in size," was *properly* built and completed upon the foundation previously commenced, within two years from the date of the stipulation indorsed on the second mortgage; (2.) That proper fire insurance policies on said saw-mill to the amount of six thousand six hundred and sixty-six and two-thirds dollars were procured for the benefit of the appellant, in one or the

other of the two modes provided in the instrument of mortgage.

Undoubtedly the obligation to procure the policies rested on the mortgagors, but authority to procure them in case of the default of the mortgagors was vested in the appellant, and if he exercised that authority and actually procured the policies to that amount as security for their indebtedness he cannot set up the non-performance of that condition as an answer to this suit. They might procure the policies, or if they did not he might procure them, and in that event the premiums paid and the costs and charges incurred were made a lien on the mortgaged lands, and if he exercised the privilege conferred and procured the policies he is bound by his own act.

1. Compliance with the first condition is not shown, as the mill actually built is seventy-eight feet in width by one hundred feet in length, and not one hundred and fifty feet in length as described in the written stipulation, and the decree therefore must be reversed unless it satisfactorily appears that the appellant acquiesced in the change made in the plan and dimensions of the mill or accepted it after it was completed, as contended by the complainants.

Constructed as the mill was of different dimensions from the plan specified in the stipulation, it could not be erected throughout upon the foundation previously commenced, but it appears that it was erected on the same site, and that it is connected with the same water-power, and that no greater alterations were made in the foundation previously commenced than the change in the plan and dimensions of the mill required; and the proofs show to the entire satisfaction of the court that the mill as constructed cost nearly twice as much as it would if the plan indicated in the stipulation had been followed, and that it is of greater value, and that in view of the site and surrounding circumstances, it is much better adapted to the purposes to be accomplished.

Intended for three gangs of saws with other machinery incident to such a saw-mill of modern construction, it seems reasonable to suppose that the increase in the width of the

mill, as compared with the dimensions given in the stipulation, would much more than compensate for the diminution in the length of the structure, as the length is still sufficient, and the effect of the alteration is to give more space where it is most needed.

Even the answer alleges that the second mortgage was given as a performance of the agreement to furnish additional security, and the appellant admits that he agreed to accept the policies of insurance on the saw-mill in the place of the mortgage, provided the mill was built of the size specified in the stipulation and on the foundation commenced before the agreement for the sale and purchase of the real estate was executed, but he utterly denies that he acquiesced in the change made in the plan and dimensions of the mill, or that he ever accepted or agreed to accept the mill as built and completed. Three witnesses, however, testify to the contrary, and a fourth testifies that the appellant was two or three times at that place and once in the mill "during the building of the mill," and that he never made any objections to him or in his presence as to the change in the dimensions of the mill. Two of these witnesses are the mortgagors in the first mortgage, who built and completed the saw-mill; the third was a partner with them in the lumber business, and the fourth is the millwright who superintended the construction of the saw-mill and put in the machinery, and in the judgment of the court they are entitled to credit. They speak of his presence at the mill during the progress of the work and after the mill was completed, and the first three give the details of the conversation they had with him, showing to a demonstration that, if they are to be believed, the appellant not only acquiesced in the change in the plan as proposed, but that he in terms accepted the saw-mill erected on the premises as built and completed.

Opposed to the statements of those witnesses is the negative averment of the answer and the positive denial of the appellant that any such interviews ever took place, or that he ever gave utterance to any such sentiments, but it is a

sufficient response to those denials of the appellant to say that his testimony is not of a character to discredit the proofs introduced by the complainants. Attempt is also made to contradict the complainants' witnesses as to the time when they say they saw the appellant at the saw-mill or in that vicinity, but the error, if it be one, is not sufficient to discredit the witnesses, as it is quite immaterial whether the interview was at the time stated or a week or two or even a month earlier. Other considerations, such as the necessity for the removal of the shop of the deaf-mute brother, are also invoked as tending to show the improbability that the appellant should have assented to the alteration in the plan of the mill, but it is unnecessary to enter into the details, as the court is of the opinion that the allegations of the bill of complaint in that behalf are fully proved by the direct proofs.

Next objection of the appellant is that the agreement to accept the mill as built and completed, even if made as supposed, was void as within the statute of frauds of that State, because it was not in writing; but it becomes necessary before considering that question to determine whether the second condition specified in the stipulation was fulfilled so that the mortgagors in the second mortgage, or those claiming under them, have the right, if the agreement to accept the saw-mill as built and completed is operative, to demand that the second mortgage shall be cancelled and discharged.

2. Whether the mortgagors in the principal mortgage kept the insurable property included in that mortgage insured or not is not a question in this case, nor is it a question at this time whether they kept the saw-mill insured as agreed in that instrument, but the question to be decided is whether the mortgagors, within two years from the date of the stipulation, procured for the benefit of the mortgagee proper fire insurance policies thereon to the requisite amount, or whether the mortgagee within that period procured the same for his own benefit, as required or permitted in the second condition of that stipulation, when construed in connection with the provision upon the subject contained in the

principal mortgage. Proper fire insurance policies might be procured for the purpose, as before explained, by the mortgagors or by the mortgagee, and inasmuch as the premiums paid and the costs and charges incurred were, in the latter event, to be added to and considered a part of the debt secured by mortgage, it cannot make any difference whether they were actually obtained by the one or the other of those parties. Such being the rule to be applied, the question presented for decision is purely one of fact depending upon the proofs in the case, the results of which, as they appear to the court, will be briefly stated.

Three policies of insurance on the saw-mill were procured, in the year 1856, by the mortgagors for the benefit of the mortgagee, to wit: two thousand dollars in the Ætna Insurance Company, two thousand dollars in the Washington Union Insurance Company, and two thousand dollars in the Jackson Mutual Insurance Company; and the proofs show that the policies were delivered to the appellant, and that he accepted them without objection. Added together, the sum is a fraction less than the required amount, but the policies were accepted without objection, and none is now made on that account.

Policies on the saw-mill were obtained, the succeeding year, by the appellant, for the same amount, to wit: fifteen hundred dollars in the Phœnix Insurance Company, three thousand dollars in the Washington Union Insurance Company, and fifteen hundred dollars in the Ætna Insurance Company; and the proofs show that the premiums which he paid for the same were added to the mortgage debt, and were ultimately adjusted by the mortgagors.

Insurance on the saw-mill for the year 1858 was also obtained by the appellant for the same amount, and the exhibits in the record show that the money he paid for the premiums was repaid to him by the mortgagors. They also paid him at the same time fourteen thousand six hundred and seventy-three dollars and forty-three cents, which was indorsed on the bond given for the balance of the purchase-money, and which was secured by the mortgage of the same real estate.

V. All of these policies, however, were for the term of one year, and the next objection is that they cannot be regarded as fulfilling the second condition of the stipulation on that account, as they would expire before some of the instalments of the bond fell due; but the objection is not entitled to weight for several reasons: (1.) Fire policies are usually issued for one year, and there is nothing in the stipulation to justify the conclusion that the policies were to be in any other than the usual form. (2.) When the first three were obtained they were accepted by the appellant without objection. (3.) He asked and obtained leave of the mortgagors to procure the future policies, and when he came to exercise that privilege he obtained them in the same form. (4.) Because, having been intrusted, at his own request, with the business of procuring the requisite insurance, it was his own fault if the business was neglected or was not properly transacted. (5.) He cannot impute fault to the mortgagors, as they paid on the mortgage a sum nearly equal to the anticipated cost of the saw-mill, especially as they had consented to leave the business of insurance to him, and as he was expressly authorized to add the premiums to the mortgage debt, and as all sums paid for that purpose were declared to be a lien on the mortgaged lands. (6.) If he desired that the insurance should be continued, and did not wish to transact the business, he should have given notice to the mortgagors; but the probability is that he felt less interest in the subject on account of the large payment which had been made on the mortgage debt.

VI. 1. Although the fee of the mortgaged premises remains in the mortgagor, under the laws of that State, till after foreclosure and sale, still no doubt is entertained that the stipulation to accept proper fire insurance policies on the saw-mill in the place of the mortgage was an agreement providing for the surrender of an "estate or interest in lands," and, therefore, was an agreement within the statute of frauds of that State.*

* Revised Stat., chap. 108, § 6, p. 615; Wood v. Trask, 7 Wisconsin, 572; Russell v. Ely, 2 Black, 578.

Nothing is left for construction, as the subsequent act provides that the term "lands" shall be construed as co-extensive in meaning with lands, tenements, and hereditaments, and that the terms "estate and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent.*

But the stipulation in this case to accept the policies of insurance on the saw-mill as security in the place of the second mortgage, and thereupon to cancel and discharge that instrument, is in writing, and having been executed as a part of the bargain of purchase and sale of the real estate, it rests upon a sufficient consideration, and is valid and binding. Argument upon that topic is unnecessary, as it is too plain for contention; but the suggestion which the appellant intends to make is that the agreement subsequently made to modify the stipulation as to the dimensions of the mill is within the statute of frauds of that State, and null and void. Views of the complainants are that an agreement, though in writing and under seal, may in all cases be varied as to time or manner of its performance, or may be waived altogether by a subsequent oral agreement; but the court is of a different opinion, if the agreement to be modified is within the statute of frauds.

2. Numerous authorities sanction the principle advanced by the complainants in cases not within the statute of frauds, and which fall within the general rules of the common law, and in such cases it is held that the parties to an agreement, though it is in writing, may, at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve, or annul the former agreement, if no part of it was within the statute of frauds.†

Reported cases may also be found where that rule is pro-

* Revised Stat., chap. 108, § 6, p. 615; Stevens *v.* Cooper, 1 Johnson's Chancery, 425; Hunt *v.* Maynard, 6 Pickering, 489; Browne on Frauds (2d ed.), § 430.

† Goss *v.* Nugent, 5 Barnewall & Adolphus, 64; Harvey *v.* Grabham, 5 Adolphus & Ellis, 73; Emerson *v.* Slater, 22 Howard, 42; Brown on Frauds (2d ed.), § 409.

mulgated without any qualification; but the better opinion is, that a written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of *Marshall* v. *Lynn*,* is that the terms of a contract for the sale of goods falling within the operation of the statute of frauds cannot be varied or altered by parol; that where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing.†

Suggestion may be made that all the cases were cases at law; but the same rule prevails in equity, as appears by the highest authority.‡

Regarded, therefore, as a mere executory agreement to accept the mill when built and completed, it is clear that the statute of frauds would be a good defence to a suit for the breach of it; but it cannot be viewed in that light, as it was fully executed on the part of the mortgagors, and was in fact fully executed on the part of the appellant.

3. He is not sued for a breach of the agreement to accept the mill as built and completed; but the suit is to compel him to cancel and discharge the mortgage as agreed in the written stipulation. Called upon to plead to the bill of complaint, he sets up the defence that the dimensions of the mill vary from those specified in the stipulation, to which the complainants reply that he acquiesced in the change at the time the work was done, and that he accepted the mill as built and completed, and they prove the allegations to the

* 6 Meeson & Welsby, 109.

† Clarke *v.* Russel, 3 Dallas, 415; Emerson *v.* Slater, 22 Howard, 42; Goss *v.* Nugent, 5 Barnewall & Adolphus, 58; Harvey *v.* Grabham, 5 Adolphus & Ellis, 73; Stowell *v.* Robinson, 3 Bingham's New Cases, 928; Stead *v.* Dawber, 10 Adolphus & Ellis, 57; Falmouth *v* Thomas, 1 Crompton & Meeson, 109; Hasbrouck *v.* Tappen, 15 Johnson, 200; Blood *v.* Goodrich, 9 Wendell, 68.

‡ Emmet *v.* Dewhirst, 8 English Law and Equity, 83; same case, 3 McNaughten & G., 587; Stevens *v.* Cooper, 1 Johnson's Chancery, 429; Browne on Frauds (2d ed.), § 422.

entire satisfaction of the court. They built and completed the mill seventy-eight feet in width by one hundred feet in length, at an expense exceeding thirty thousand dollars, and the appellant not only accepted it when completed as a compliance with the stipulation, but he also accepted the policies of insurance procured on it as security in the place of the second mortgage, and he cannot now be permitted to avoid the true issue, nor to divest the transaction of its real character in order that he may set up the statute of frauds.

VII. 1. Even part performance is often admitted in equity as an answer to the statute; but it is not necessary to invoke that principle in this case, as it is clear that the appellant acquiesced in the changes made in the plan, and that the mill, as built and completed, was accepted by him as a compliance with the stipulation.*

2. Estoppel is also set up by the complainants as an answer to the defence of the statute of frauds, and, in view of the facts, the court is of the opinion that it is a complete answer to that defence. He sold the real estate for fifty-two thousand four hundred dollars, received in cash ten thousand dollars, and the purchasers gave a mortgage on the same real estate for the balance of the purchase price. They paid towards the mortgage seventeen thousand six hundred and seventy-three dollars, exclusive of five hundred and seventy-six dollars and seventy-three cents for insurance premiums and for taxes, and erected the saw-mill at the cost of thirty-two thousand dollars, and the record shows that the appellant foreclosed the mortgage, and, with two other persons, became the purchaser of the entire property and improvements, subject to the mortgage, for the sum of nineteen thousand six hundred dollars, and has a decree for the deficiency of two thousand eight hundred and sixty-four dollars and eleven cents, for which he proposes to foreclose the second mortgage now under consideration.

3. Beyond doubt the mortgagors in the first mortgage, one of whom was the principal mortgagor in the second mort-

* 1 Story Eq. Jur. (9th ed.), §§ 759, 761; Browne on Frauds (2d ed.), § 463.

gage, built and completed the saw-mill in the full belief, induced by the conduct and declarations of the appellant, that it would be accepted as a compliance with the stipulation indorsed on the second mortgage. Taken as a whole, the proofs satisfy the court that his conduct and declarations led them to believe that he was content with the change made, and that he would readily acquiesce in their doings when the mill was completed, and, if so, he cannot be heard to allege or prove the contrary to the prejudice of their rights.*

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

DECREE AFFIRMED.

THE JUSTICES *v.* MURRAY.

1. The provision in the seventh amendment of the Constitution of the United States, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, applies to the facts tried by a jury in a cause in a State court.
2. So much of the 5th section of the act of Congress of March 3d, 1863, entitled "An act relating to habeas corpus and regulating proceedings in certain cases," as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury, to the Circuit Court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

Patrie brought a suit for an assault and battery and false

* Pickard *v.* Sears, 6 Adolphus & Ellis, 474; Freeman *v.* Cooke, 2 Exchequer, 654; Foster *v.* Dawber, 6 Id. 854; Edwards *v.* Chapman, 1 Meeson & Welsby, 231; Morris Canal Company *v.* Lewis, 1 Beasley, 323; Cary *v.* Wheeler, 14 Wisconsin, 285.

imprisonment against Murray and Buckley in the Supreme Court of the Third District of New York; to which the defendants pleaded the general issue, and pleaded further as a special defence that the said Murray was marshal of the Southern District of New York, and the said Buckley his deputy; and that, as such marshal, he, Murray, was, by order of the President, on or about the 28th August, 1862, directed to take the plaintiff into custody; that the said Buckley, as such deputy, was directed by him, the marshal, to execute the said order; and that, acting as such deputy, and in pursuance of his directions, he, Buckley, did, in a lawful manner, and without force or violence, take the said Patrie into custody; that during all the time he was in custody he was kept and detained in pursuance of said order of the President, and not otherwise.

Issue being thus joined, the cause was tried at the Circuit Court in Greene County, within the third judicial district, before a jury. The defendants appeared by counsel. No evidence was given on the trial, on the part of the defendants, in support of the special defence set up as being under the order of the President. A verdict was rendered for the plaintiff and judgment was regularly entered upon the verdict on the 8th June, 1864.

In December following a writ of error was issued to the Supreme Court of the Third District, to remove the cause to the Circuit Court of the United States for the Southern District of New York. The writ was issued under the 5th section of an act of Congress, passed March 3d, 1863, entitled "An act relating to *Habeas Corpus*, and regulating proceedings in certain cases." The 5th section of this act provides as follows:

"If 'any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any officer, civil or military,' . . . or 'for any arrest or imprisonment made' . . . 'at any time during the present rebellion, by virtue or under color of any authority by or under the President of the United States,' . . . 'it shall' . . . 'be competent for either party, within six months after the rendition of a judgment in any such cause,

Statement of the case.

by writ of error or other process, to remove the same to the Circuit Court of the United States for that district in which such judgment shall have been rendered; and the said Circuit Court shall thereupon proceed to try and determine the facts and law in such action in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding.'"

The State court refused to make a return to the writ of error. Thereupon an alternative mandamus was issued by the Circuit Court of the United States, to which a return was made setting forth the suit, trial, and judgment already referred to. To this there was a demurrer and joinder; and, after due consideration, the demurrer was sustained, and a judgment for a peremptory mandamus rendered. From this judgment a writ of error was taken to this court.*

The case was argued on two occasions, and each time with ability and care. On the first by *Mr. A. J. Parker, for the plaintiffs in error, and by Mr. Evarts, then Attorney-General, contra;* and at this term, by *Mr. Parker again, on one side as before, and by Mr. Hoar, now Attorney-General, with Mr. Field, Assistant Attorney-General, on the other.* On the second occasion the argument was confined to two questions submitted by the court:

1. Whether or not the act of Congress of March 3d, 1863, providing for the removal of a cause, after judgment by a State court, to the Circuit Court of the United States, for a new trial, is an act in pursuance of the Constitution of the United States?

2. Whether or not the provision in the seventh amendment of the Constitution of the United States, which declares that no fact tried by a jury shall be otherwise re-examined

* The alternative and peremptory mandamus against the Supreme Court of New York was allowed by consent of the counsel for the defendants, with a view to present the question raised and decided in the case. The Circuit Court had refused to issue it against the court, and issued it only against the clerk. This is stated to prevent the case from being cited as an authority for the power, and without intending to express any opinion on this subject. S. N.

in any court of the United States than according to the rules of the common law, applies to the facts tried by a jury in a cause in a State court?

Mr. Justice NELSON delivered the opinion of the court.

This case has received the most deliberate consideration of the court. As we have arrived at the conclusion that the seventh amendment, upon its true construction, applies to a cause tried by a jury in a State court, this opinion will be confined to considerations involved in the second question submitted to us for argument at the bar. The decision of that in the affirmative disposes of the case.

The seventh amendment is as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the common law."

It must be admitted that, according to the construction uniformly given to the first clause of this amendment, the suits there mentioned are confined to those in the Federal courts; and the argument is, perhaps, more than plausible, which is that the words, "and no fact tried by a jury," mentioned in the second, relate to the trial by jury as provided for in the previous clause. We have felt the full force of this argument, and if the two clauses were necessarily to be construed together, and to be regarded as inseparable, we think the argument would be conclusive. But this is not the view that has been taken of it by this court. In *Parsons* v. *Bedford et al.*,* Mr. Justice Story, in delivering the opinion of the court, referring to this part of the amendment, observed, "that it should be read as a substantial and independent clause;" and that it was "a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner." The history of the amendment confirms this view.† He further observed that "the only modes

* 3 Peters, 447, 448.

† Debates in Congress, by Gales & Seaton, vol. 1, pp. 452, 458, 784.

known to the common law to re-examine such facts was the granting of a new trial by the court where the issue was tried, or the award of a venire facias de novo, by the appellate court, for some error of law that had intervened in the proceedings."

Another argument mainly relied upon against this construction is that the ten amendments proposed by Congress, and adopted by the States, are limitations upon the powers of the Federal government, and not upon the States; and we are referred to the cases of *Barron* v. *The Mayor and City Council of Baltimore*;* *Lessee of Livingston* v. *Moore and others*;† *Twitchell* v. *The Commonwealth*,‡ as authorities for the position. This is admitted, and it follows that the seventh amendment could not be invoked in a State court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in the court below. But this would seem to be the only consequence deducible from these cases or from the principles they assert. They have no pertinent, much less authoritative, application to the question in hand. That question is not whether the limitation in the amendment has any effect as to the powers of an appellate State court, but what is its effect upon the powers of the Federal appellate court? Is the limitation confined to cases of writs of error to the inferior Federal courts, or does it not also apply to writs of error to State courts in cases involving Federal questions? The latter is the precise question for our determination. Now, it will be admitted that the amendment, in terms, makes no such discrimination. They are: "and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common law cases coming up from an inferior Federal court, and also to the Circuit Court in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of Federal cog-

* 7 Peters, 243. † Ib. 551. ‡ 7 Wallace, 321.

nizance coming up from a State court? The terms of the amendment are general, and contain no qualification in respect to the restriction upon the appellate jurisdiction of the courts, except as to the class of cases, namely, suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation, we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court.

It seems to us also that cases of Federal cognizance, coming up from State courts, are not only within the words, but are also within the reason and policy of the amendment. They are cases involving questions arising under the Constitution, the laws of the United States, and treaties, or under some other Federal authority; and, therefore, are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior Federal court. No other cases tried in the State courts can be brought under the appellate jurisdiction of this court or any inferior Federal court on which appellate jurisdiction may have been conferred. The case must be one involving some Federal question, and it is difficult to perceive any sensible reason for the distinction that is attempted to be made between the re-examination by the appellate court of a case coming up from an inferior Federal, and one of the class above mentioned coming up from a State court. In both instances the cases are to be disposed of by the same system of laws and by the same judicial tribunal.

Mr. Hamilton, in the 82d number of the Federalist, speaking of the relation that would subsist between the National and State courts in the instances of concurrent jurisdiction, observes that the Constitution, in direct terms, gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of Federal cognizance in which it is not to have an original one, without a single expression to confine its operations to the inferior Federal courts. The objects of

appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, he observes, and from the reason of the thing, it ought to be construed to extend to the State tribunals. "The courts of the latter will, of course, be National auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of National justice and the rules of National decisions."

This idea of calling to the aid of the Federal judiciary the State tribunals, by leaving to them concurrent jurisdiction in which Federal questions might be involved, with the right of appeal to the Supreme Court, will be found to be extensively acted upon in the distribution of the judicial powers of the United States in the act of 1789, known as the Judiciary Act. Besides the general concurrent jurisdiction in the Judiciary Act, a striking instance of this is found in the 33d section of the act, which provides "that for any crime or offence against the United States the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence." And a series of acts were also passed in the earlier sessions of Congress, conferring upon the State and county courts cognizance to hear and determine upon offences, penalties, and forfeitures, and for the collection of taxes and duties arising and payable under the revenue laws, or under a direct tax or internal duties, and which were continued down till the State courts refused to entertain jurisdiction of the same.* The State courts of New York continued to exercise jurisdiction under these acts till as late as 1819.†

The reasons, therefore, for the application of this clause

* 1 Brightly's Digest, 281, and note *g*, p. 282.

† United States *v.* Lathrop, 17 Johnson, 4.

of the seventh amendment to cases coming up for review from the State courts were as strong as in cases from the inferior Federal courts, and the history of the amendment will show that it was the apprehension and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury in the State courts that led mainly to its adoption.

The appellate jurisdiction of this court, after defining its original jurisdiction, is as follows:

"In all 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 Congress shall make."

Mr. Hamilton, in the 81st number of the Federalist, after quoting the provision observes: "The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law, but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury in favor of the civil law mode of trial." And he then enters into an argument to show that there is no real ground for alarm or apprehension on the subject, and suggests some regulations by Congress by which the objections would be removed. He observes, also, that it would have been impracticable for the Convention to have made an express exception of cases which had been originally tried by a jury, because in the courts of some of the States all causes were tried in this mode, and such exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. He then suggests that Congress has full power to provide that in appeals to the Supreme Court there should be no re-examination of the facts where the causes had been tried by a jury according to the common law mode of proceeding. Now, it is quite clear that the restrictions upon this appellate power by Congress, pointed out by Mr. Hamilton for the purpose of quieting the public mind, had a direct reference to the revision of the

judgments of the State courts as well as the inferior Federal, and what is significant on the subject is, that the amendment submitted in the first session of Congress by Mr. Madison adopts the restriction suggested by Hamilton, and almost in the same words. We will simply add, there is nothing in the history of the amendment indicating that it was intended to be confined to cases coming up for revision from the inferior Federal courts, but much is there found to the contrary.*

Our conclusion is, that so much of the 5th section of the act of Congress, March 3d, 1863, entitled "An act relating to habeas corpus, and regulating proceedings in certain cases," as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury, to the Circuit Court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void.

The judgment of the court below must, therefore, be REVERSED, the cause remanded with direction to dismiss the writ of error and all proceedings under it.

PUBLIC SCHOOLS *v.* WALKER

1. The act of Congress of July 27th, 1831, *relinquishes* to the State of Missouri the lots, commons, &c., *reserved* for the use of schools by the act of June 12th, 1812, and nothing else.
2. The act of 1812 excluded from the reservation which it made, all lots rightfully claimed by private persons, and the report of the Board of Commissioners under the act of July 9th, 1832, in favor of such a claim and its confirmation by Congress, is evidence that it was rightful.
3. The fact that such a claim was barred by the limitation of the act of 1824 did not prove that it was not a rightful claim, nor prevent Congress from removing that bar, and allowing the claim to be proved and confirmed.
4. Such subsequent confirmation shows that the claim was a rightful one, when the act of 1812 was passed, and that the lot claimed was not included in the reservation for schools.

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* Wetherbee *v.* Johnson, 14 Massachusetts, 412; Patrie *v.* Murray, 43 Barbour, 331.

Statement of the case.

ERROR to the Supreme Court of Missouri; the controversy being one of those, quite numerous in this court, growing out of the various acts of Congress intended to settle the land titles originating in the lands of Louisiana prior to its purchase by our government from France. The case was thus:

The President and Directors of the St. Louis Public Schools brought suit, in the St. Louis Land Court of Missouri, against Walker and another, to recover certain lands situate in the city of St. Louis.

The title of the plaintiffs, who represented the common schools of St. Louis, rested on two acts of Congress. The first of these was the act of June 13th, 1812,* the first section of which, after confirming the common field lots and commons to certain towns and villages, of which St. Louis is one, directs the deputy surveyor of the Territory to survey and mark the out-boundary lines of said several towns so as to include the out-lots, common field lots, and commons thereto respectively belonging.

The second section, under which the plaintiffs' claim arose, enacted that:

"All town or village lots, out-lots, or common field lots, included in such surveys, *which are not rightfully owned or claimed by any private individuals*, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby, reserved for the support of schools in the respective towns or villages aforesaid; provided, that the whole quantity of land contained in the lots reserved for the support of schools in any one town or village shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village."

The other act was that of July 27th, 1831.† The second section of this act, referring to the section just cited from the act of 1812, declares:

"That the United States do hereby relinquish all their right,

* 2 Stat. at Large, 748.

† 4 Id. 435.

title, and interest in and to the town and village lots, out-lots, and common field lots, in the State of Missouri, reserved for the support of schools in the respective towns and villages aforesaid, by the second section of the above-recited act of Congress, and that the same shall be sold or disposed of, or regulated for the said purposes, in such manner as may be directed by the legislature of the State."

It was conceded that, by the survey made under the first section of the act of 1812, the lot in controversy was found to be within the out-boundary of the town of St. Louis and its common field lots, commons, &c. It was also admitted that by appropriate legislation of the State the plaintiffs have become invested with such right as the State could give by virtue of the last-recited act of Congress.

The surveyor-general at St. Louis, on demand of the plaintiffs, on the 3d June, 1861, had *caused this lot to be surveyed and certified to them, as a lot embraced within and covered by the reservation for school purposes*, and on this survey and certificate and the acts aforesaid they rested their title.

Such was the plaintiffs' case.

The defendant, who had been in possession by himself and those under whom he claimed from 1844 till the beginning of this suit in 1864, now asserted that this land was, at the time the act of 1812 was passed, rightfully claimed by Joseph Brazeau, a "private individual," and was, therefore, not relinquished to the State by the act of 1831.

In support of this assertion he showed that, long before the act of 1812, Brazeau had filed with a board of commissioners, organized under the act of 1805 to report on such cases, his claim and the evidences of it furnished him by the colonial authorities. Though this first board of commissioners reported against the claim because he had not proved the inhabitancy and cultivation prior to 1803, which the act of 1805 required, yet Congress, which had never made the reports of these commissioners final, but in all the numerous acts regulating the various commissions appointed for this purpose, had reserved to itself the power to confirm

or reject their reports, did by the third section of the act of 1812 provide for a further hearing on this question of inhabitancy and cultivation. It also in every act on the subject reserved from sale the lands for which claims had been filed with the recorder of land titles, whether confirmed or not.*

Several changes were made in the tribunals authorized to act on these claims, and for a time there was none with such authority.

An act of 1824† directed that individual claims should be presented before a court of the United States within two years, and that unless so presented they should be barred. The time was extended, by subsequent act, to May 26th, 1829. Brazeau did not present his claim under these directions.

Finally, however, by an act of 1832,‡ another commission was organized. The recorder of land titles, in whose office all the old undetermined cases like Brazeau's still remained on file, and two other commissioners, were directed by this act of 1832, to examine all those unconfirmed claims in his office, and classify and report them to Congress. They were to report what claims would have been confirmed under Spanish laws and usages, and what were, in their opinion, destitute of merit under that rule. And while no new claim was to be admitted, they might raise new testimony in addition to that already on file in such cases. This commission passed favorably on Brazeau's claim, the necessary proof of occupancy and cultivation having been made, and reported it to Congress, and that body confirmed the claim by act of July 4th, 1836.§

The St. Louis Land Court gave judgment for the defendant, and the Supreme Court having affirmed, the case was now here for review.

The case was elaborately argued by *Messrs. Blair and Dick, for the plaintiff in error.* They relied largely:

1st. On the fact that Brazeau had not presented his claim

* See act of 1805, § 5, 2 Stat. at Large, 327; act of 1806, § 5, Ib. 39[illegible]; act of 1807, § 8, Ib. 442; act of 1811, §§ 6 and 10, Ib. 664-5.

† May 26th, 4 Stat. at Large, 52.

‡ July 9th, Ib. 565.

§ 5 Id. 127.

as directed to do by the act of 1824, and its supplement; that not having done so his power to establish a right was barred, and ended in 1829; that being then without any rightful claim, the act of 1831 vested the title in the State for the use of the schools.

2d. On the survey made by the surveyor-general and mentioned, *supra*, p. 284, as part of the plaintiffs' title, and upon this declaration made by this court in *Kessell* v. *Public Schools*,* as to the legal effect of such a document:

"We are furthermore of opinion, that the certificate of the surveyor-general above set forth, and which was accepted by the grantees, is *record evidence of title*, by the recitals in which the government and the board of school directors are mutually bound and concluded. And this instrument, declaring that the land described *was reserved* for the support of schools, and the courts of justice having no power to revise the acts of the surveyor-general, under these statutes, it is not open to them to inquire whether the lands set apart were, or were not, lots of the description referred to in the statutes. The parties interested have agreed that this was a school lot, and here the matter must rest, unless some third person can show a better title."

Messrs. Todd, Glover, and Shepley, contra.

Mr. Justice MILLER delivered the opinion of the court.

It is not to be denied that if the lot in question was one of the class which, by the act of 1812, was reserved for the support of schools, that the title was vested in the State by the act of 1831, and by the State in the plaintiffs.

On the other hand, if the lot in question was not of the class reserved for support of schools by the act of 1812, then nothing in the act of 1831 has any effect upon it, and whoever may be the true owner, neither the State or school directors acquired any interest by the act of 1831.

Nothing can be plainer than that the act of 1831 was intended to relinquish the title which remained in the United States to the same lots and lands which had been reserved

* 18 Howard, 25.

for the support of schools by the act of 1812, and it relinquished title to nothing else. The one act is the exact complement of the other. The one *reserved* a class of lots, fields, and commons for the support of schools; the other *relinquished to the State* the title of the lands and lots so reserved for the same purpose. We are compelled, then, to look to the act of 1812 to ascertain precisely what was reserved.

This presents no *patent* ambiguity, for "all town or village lots, out-lots, or common field lots," included in such surveys, are so reserved, with the exception of three classes. These are:

1st. Such as are rightfully owned or claimed by any private individuals.

2d. Or held as commons belonging to such towns or villages.

3d. Or that the President may think proper to reserve for military purposes.

If the lot in question was covered by either of these exceptions, then it was not reserved by the act of 1812, and was not relinquished to the State by the act of 1831.

The inquiry is still further narrowed in the present case by the fact that it is only claimed to be excluded from the class reserved, because it was rightfully claimed by a private individual.

It will be seen by reference to the statement of the defendants' title, that at the time the act of 1812 made an exception of lots rightfully claimed by private individuals, Joseph Brazeau was asserting a claim before the proper tribunal for this land; that his claim was never abandoned; and that, finally, a competent tribunal, authorized by Congress, decided his claim to be a rightful one, and that Congress, by statute, confirmed this decision.

Unless it is shown in some other way that Brazeau's claim was not a rightful one, we think the plaintiffs have no title; for it is too clear for argument that no land was relinquished to the State by the act of 1831 which was not reserved for schools by the act of 1812, and is equally clear that no land rightfully claimed by a private individual was so reserved.

Two propositions are urged with zeal and ability, as counteracting the effect of Brazeau's claim, on the rights of plaintiffs.

1. It is said that, by virtue of the act of Congress of 1824,* and other amendatory acts, his claim was barred.

The act of 1824 directed that all such individual claims should be presented before a court of the United States, and that unless presented to the court within two years they should be barred; and though the time was subsequently extended, Brazeau did not present his claim within it.

It may be conceded that between this time and the passage of the act of 1832 organizing another board, Brazeau had no claim which he could lawfully assert to this land; and it is said that while his claim was in this condition, the act of 1831 vested the title in the State for the use of schools.

But as the act of 1831 only relinquished the title to lots reserved by that of 1812, and as that reserved none rightfully claimed by private individuals, we must inquire whether the fact that Brazeau had failed to assert his claim within the time limited by Congress, proved that his claim was not rightful. For as a board of commissioners has said that it was rightful, and as Congress has also said it was, this proposition can only be refuted by holding that his failure to assert it for a time, and the declaration of Congress that he could not be heard to assert it afterwards, proved that it was not rightful.

We do not think it had this effect. If it be treated as a statute of limitation, it is not the doctrine on which such statutes are founded, that lapse of time proves the wrongfulness of the claim. They are made for the repose of society and the protection of those who may, in that time, have lost their means of defence. It is a mere declaration of the law-making power to the plaintiff, that having voluntarily slept so long upon his rights, he shall not now be permitted to assert them, to the injury of individuals and the disturbance of society.

* 4 Stat. at Large, 52.

In the class of cases before us, the act was nothing more than the declaration of the sovereign power, who at the same time held the fee of the land, that if you establish your equitable claim to the land within a certain time, I will confer the title; if you do not, I will not afterwards hear you assert it. But it was competent for the sovereign, after this forfeiture had occurred by laches, to release it, to consent to hear the claimant, and to give him another chance to prove the rightfulness of his claim. And this is what Congress did by the act of 1832.

It is a little remarkable that Congress did not require in this act that these parties who had been barred by the former acts, should now appear and renew their claim, but it directed the recorder of land titles, in whose office all the old cases like Brazeau's still remained on file, and two other commissioners, to examine all those unconfirmed claims and classify and report them to Congress. They were to report what claims would have been confirmed under Spanish laws and usages, and what were, in their opinion, destitute of merit under that rule. And while no new claim was to be admitted, they might receive new testimony, in addition to that already on file in such cases.

It is very clear that Congress, by this act, intended to remove the restriction on the right to assert these claims imposed by the act of 1824, so far as it concerned those that had been filed in due time with the recorder. We can entertain no doubt of their right to do this, and we do not see that they lost this right by a gratuitous relinquishment of the interest of the United States in lots *not* rightfully claimed by any private individual. They still had, as we think, the right to ascertain whether these old claims, long known and on the public files, were rightful claims or not.

2. It is said that the survey made for plaintiffs of this lot by the surveyor-general, and his certificate that the lot was of those reserved for public schools by the act of 1812, is conclusive, and cannot be disputed.

We do not know of any statute or of any rule of law which should give it this effect. The survey is made *ex parte* by

an officer who has no control of the evidences of claims filed with the recorder of land titles.

Being an officer of the government, it is possible that this certificate of a survey, which he is authorized to make, may bind the United States, but we cannot see how it can determine, conclusively, the rights of private persons, which are not considered by him, and still less the rightfulness of a claim submitted by Congress to other tribunals for investigation, and reserved to itself for final approval or rejection.

The case of *Kissell* v. *Public Schools*, is very much relied on to establish the conclusiveness of this certificate. That was a contest between the public schools and a person claiming under the pre-emption laws. The court, in discussing the effect of a certificate of survey in favor of the schools, precisely like the one in the present case, said that, as to the public schools, they were bound by it, and so was the government. "The parties interested," says the court, "have agreed that this land was a school lot, and here the matter must rest, unless some third person can show a better title." The court held, in that case, that Kissell did not show a better title, by a common entry and purchase as pre-emptor, because the land, being within the limits of the town of St. Louis, was reserved from sale. The clear implication here is, that when there is a better title, the certificate of survey is not conclusive against that title.

JUDGMENT AFFIRMED.

BURNETT v. CALDWELL.

1. Where a purchaser of real estate fails to comply with the terms of the contract under which he obtained possession, the vendor is at liberty to treat the contract as rescinded, and to regain the possession by ejectment. In such case, in the State of Georgia, and in this country generally, it is not necessary to give notice to quit before bringing the action.

Statement of the case.

2. In ejectment brought under such circumstances an inquiry of the defendant, when examined as a witness, what he gave for the property, how much he had paid, in what manner he had paid, and whether he had paid a valuable consideration, is irrelative.

ERROR to the District Court for the Northern District of Georgia, the case being this:

In 1850, one Rogers being in possession of certain premises for some years, sold them to persons from whom they passed to the Rome Female College. And this college executed a somewhat peculiar deed conveying them to Caldwell. Caldwell being thus in possession and claiming title, sold them in January, 1864, to a certain Vliet. Vliet paid him $4000, and gave him two promissory notes, each for $7000, payable in the course of the year at dates fixed. Caldwell at the same time executed to Vliet a title bond in the penal sum of $26,000, reciting the payment of the $4000 and the delivery of the notes, and conditioned that if Vliet should pay the notes at maturity and Caldwell should thereupon make to him "a good warranty title in fee simple" for the premises, the bond should be void. The bond was silent as to the right of Vliet to occupy the premises, but Caldwell put him in possession. Vliet transferred the bond and delivered possession to Burnett. Nothing having been paid on the notes, and more than three years having expired since the maturity of the one last payable, Caldwell brought ejectment against Burnett to recover possession of the property. He had given him no notice to quit.

On the trial, Burnett the defendant being on the stand, his counsel proposed to ask him what he had given for the property, how much he had paid and in what manner, and whether he had paid a valuable consideration. The court, on objection, overruled the interrogatory.

In addition to this, various questions were made before the court as to whether Rogers had or had not a valid title by virtue of the statute of limitations, whether Caldwell had or had not a perfect paper title, and whether the deed executed by the trustees of the Rome Female College was valid or not.

The court (Erskine, J.) gave instructions on all those points, but in addition instructed the jury that "if a purchaser failed to comply with the terms of a contract under which he obtained possession, the vendor was at liberty to treat the contract as rescinded, and regain the possession by an action of ejectment; that in such case neither a demand of possession nor a notice to quit was necessary; that the ejectment here was not brought to enforce the contract of sale, but to regain possession of the land acquired under it."

Verdict and judgment went for the plaintiff, Caldwell; and the defendant, Burnett, brought the case here.

Mr. Thompson, for the plaintiff in error, went into argument to show that the instructions as to the statute of limitations —as to Caldwell's paper title, and the deed executed by the trustees of the Rome Female College—were erroneous; and particularly to show that the instructions above quoted, as to the right to bring ejectment and this without notice, were so.

Mr. J. E. Brown submitted an able brief contra, along with a MS. report of a late case, *McHan* v. *Stansel*, in the Supreme Court of Georgia, deciding that, in a case like the present, ejectment might be brought without any notice to quit.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the District Court of the United States for the Northern District of Georgia. The suit was an action of ejectment, prosecuted by the defendant in error to recover possession of the premises described in his declaration. The view which we take of the case renders it unnecessary to consider several of the exceptions which are found in the record. The facts as they appear, and which are undisputed, are as follows:

Caldwell was in possession, claiming title. On the 26th of January, 1864, he sold to Vliet, who paid him $4000, and executed to him two promissory notes, each for $7000, payable, respectively, on the 1st of April and the 1st of July following, with interest from date. Caldwell at the same time executed to Vliet a title bond in the penal sum of

$36,000. It recited the payment of the $4000 and the execution of the notes, and was conditioned that if Vliet should pay the notes at maturity, and Caldwell should thereupon make to him "a good warranty title in fee simple" for the premises, the bond should be void. The bond was silent as to the right of Vliet to occupy the premises, but Caldwell put him in possession. Vliet transferred the bond and delivered possession to Burnett. Nothing having been paid on the notes, and more than three years having expired since the maturity of the one last payable, Caldwell instituted this suit to oust Burnett and recover back possession of the property.

The legal principles which must govern the determination of the case are all well settled. If the contract in such cases be silent as to possession by the vendee, he is not entitled to it.* If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. The relation of landlord and tenant does not subsist between the parties. The characteristic feature of that relation is wanting. The vendee pays nothing for the enjoyment of the property. The case comes within the category of a license.† In such cases the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor.‡ The assignee of the vendee is as much bound by the estoppel as the vendee himself.§ Upon default in payment of any instalment of the purchase-money, the possession becomes tortious, and the vendor may at once bring ejectment.‖ Ejectment may sometimes be maintained when covenant for the purchase-money could not.¶

* Suffern *v.* Townsend, 9 Johnson, 35; Erwin *v.* Olmsted, 7 Cowen, 229.

† Co. Litt. 52, b; Mumford *v.* Whitney, 15 Wendell, 380; Dolittle *v.* Eddy, 7 Barbour, S. C. 78; Watkins *v.* Holman, 16 Peters, 54; Blight's Lessee *v.* Rochester, 7 Wheaton, 535.

‡ Whiteside *v.* Jackson, 1 Wendell, 418; Jackson *v.* Moncrief, 5 Id. 26; Jackson *v.* Stewart, 6 Johnson, 34; Hamilton *v.* Taylor, Little's Select Cases, 444.

§ Jackson *v* Walker, 7 Cowen, 637.

‖ 1 Wendell, 418; 5 Id. 26; 7 Cowen, 637, cited *supra.*

¶ Wright *v.* Moore, 21 Wendell, 230.

In England it is necessary to give notice to quit before bringing ejectment.* In this country, generally, the rule is otherwise.† In the case before us, the question must be decided according to the local law of Georgia. The authorities upon the subject, cited in the brief for the defendant in error, and especially the manuscript case of *McHan* v. *Stansel*, decided by the Supreme Court of that State, at the June Term, 1869, and not yet reported, establish the proposition that such notice in this case was not necessary.

The plaintiff's lessor was clearly entitled to recover upon these grounds. This renders it immaterial whether Rogers had or had not a valid title by virtue of the statute of limitations, whether Caldwell had or had not a valid title under the same statute, or a perfect paper title, and whether the deed executed by the trustees of the Rome Female College was valid or not. Resolving all these questions in the negative, the right of the plaintiff's lessor to recover was not affected. The instructions relating to these subjects may, therefore, be laid out of view. In any just view of the subject they could have worked no injury to the plaintiff in error.

The testimony offered as to the amount paid by Burnett to Vliet for the property was irrelevant, and was properly excluded.

In *Marlin* v. *Willink*,‡ where the leading facts were substantially identical with those upon which the questions before us have arisen, Judge Duncan said: "This is the plainest case in the world." Ejectment was held to have been properly brought by the vendor, and a judgment in his favor was sustained. Whatever relief the plaintiff in error may be entitled to must be sought in equity. He can have none at law.

JUDGMENT AFFIRMED.

* Right *v.* Beard, 13 East, 210; Doe *v.* Jackson, 1 Barnewall & Cresswell, 448.

† 7 Cowen, 63; 7 Barbour, S. C. 74, cited *supra*.

‡ 7 Sergeant & Rawle, 297.

LOBRANO *v.* NELLIGAN.

Although by the general law of Louisiana a father's guardianship of his minor children imports a mortgage on his immovable property in their favor, yet this mortgage does not make such a contract between the guardian to the minor as that the legislature may not, by special statute, authorize the father to sell his property divested of the tacit mortgage, especially where the proceeds are still preserved to the minors by an investment which the statute prescribes.

IN error to the Supreme Court of Louisiana; the case being thus:

By the civil code of Louisiana the father is the administrator of the estate of his minor children, and does not, as in communities where the common law prevails, give personal security for the fidelity of his administration, but his immovable property is tacitly mortgaged in favor of the minor from the day of his appointment, as security for his administration, and for the responsibility resulting from it.

In this condition of the general law on the subject, the legislature empowered James Robb, of New Orleans, to sell his real estate under certain conditions, and directed so much of the proceeds of the sale as should be coming to his children to be invested for their benefit, subject to the approval of the Probate Court, in certain species of securities, which could not be assigned or transferred until the termination of the administration. Power was given to the court to discharge the mortgage to the children, on compliance with the conditions imposed in the act. And the court having so discharged the mortgage to the children, Robb sold the property to one Nelligan. Nelligan in turn sold it to one Lobrano. Lobrano, however, refused to complete the purchase, assigning as a cause that the property was subject to a legal mortgage in favor of the minor children, and that the act of the legislature by virtue of which it was pretended that the mortgage was raised and cancelled, impaired the obligation of a contract, and was, therefore, unconstitutional and void. Suit being brought by Nelligan against Lobrano

for the purchase-money, and the plea of unconstitutionality being set up, the Supreme Court of Louisiana held that the statute impaired no contract and was valid. Lobrano then brought the case here.

Mr. Durant, for the plaintiff in error:

By the law of Louisiana guardianship imports a mortgage on the property of the guardian in favor of the minor. The guardian and the minor stand then in relation to one another as parties to a contract. And the contract is not the less a contract because the obligation is incurred by the obligor (the guardian) without any express agreement on the part of the obligee (the minor). The act of the legislature of Louisiana impaired this obligation by relieving the property of Robb from the mortgage, and leaving the minors without security.

Mr. J. P. Horner, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is contended that the statute authorizing Robb to sell is invalid, because it impaired the obligation of a contract; but we think this a mistaken view of the subject. It is certain there was no contract to violate, which the parties themselves had any hand in making, and the inquiry arises whether the law has made one for them which has been impaired by this statute. It will not be questioned that the legislature possesses the power to determine by law the manner in which the estates of infants shall be preserved, and to say what kind of security shall be given by those who are intrusted with their management, and, if so, as a necessary consequence, it has the power of altering the law on the subject, whenever in its judgment the interest of the minors or the public good requires that it should be done.

In most of the States of the Union the guardian of the property of a minor gives bond, with personal securities, for his faithful conduct; but in Louisiana, in case the father occupies that relation, a different security has been provided,

for his entire real estate is bound for the proper discharge of his trust. The security is called a tacit mortgage, which is nothing more than a regulation by law, to assure the property of the minor in the custody of the parent against loss. The legislature thought proper to adopt this measure of protection as a general policy on the subject to which it relates, and as there is no constitutional restraint on its action in this regard, it can change or modify this policy whenever it thinks proper to do so. And it has so far modified it, that the natural tutor of his minor child can at any time remove the general lien on his real estate, by executing a mortgage on a specific part of it, which he is at liberty to change to other property. This course of proceeding, authorized as early as 1830, must have been generally adopted, and although the security for the minor is actually lessened by it, as a part is taken in pledge where the whole was previously bound, it does not appear that the constitutionality of the statute has ever been questioned. The wisdom of the measure is apparent, for the public good requires that the power to alienate real estate should be restricted as little as possible, and this consideration doubtless induced the legislature to depart from its original policy, which made the transfer of real estate, when owned by a parent whose minor children had property, very difficult.

The principle which allows a change of security at all, necessarily leaves the legislative power over the whole subject unabridged, and there is no right of complaint, if the legislature, in varying the nature and extent of the security, takes care that the property is preserved.

A contrary doctrine, if carried to its legitimate conclusion, would seriously interfere with the ability of the legislature to perform one of its most important duties. Charged as it is with the duty of preserving the estate of the minor, it could not change the character of the security, which it had at one period accepted as sufficient for the purpose, although it should turn out to be wholly inadequate to accomplish the object. It is not to be presumed the legislature will lessen the security, except for good cause, nor jeopard by its course

of action the estate of the minor, but, should such be the case, the corrective cannot be applied by this court.

By the statute in question, which was intended to benefit the minor children of Robb, and was an indirect mode of investing their means, under legislative direction, a change of security has been effected, and nothing more, and we cannot see how these minors, in the proper sense of the term, have been divested of any right in consequence of this change. Be this as it may, the legislature never contracted with them, or with any one in their behalf, not to use its power in this regard, and there being no contract to violate, there is no question in this case which this court can review.

JUDGMENT AFFIRMED.

THE SECRETARY *v.* MCGARRAHAN.

1. The Commissioner of the Land Office cannot properly grant a patent under the 7th section of the act of July, 1866, "to quiet land titles in California," unless the purchaser bring himself by affirmative proofs within the terms of the section.
2. The granting of a patent for lands in cases where proofs, hearing, and decision are required, and where the exercise of judgment and discretion is thus necessary, is not a matter wherein the action of the Department of the Interior is subject to re-examination by the Supreme Court of the District.
3. A judgment in mandamus ordering the performance of an official duty against an officer, as if yet in office, when in fact he had gone out after service of the writ, and before the judgment is void. Such a judgment cannot be executed against his successor.
4. Mandamus to compel either the Commissioner of the General Land Office, or the Secretary of the Interior, to issue a patent, cannot be sustained under statutes as now existing.

ERROR to the Supreme Court of the District of Columbia.

On the 3d of December, 1868, one McGarrahan, the alleged purchaser of the claim of a certain Gomez, to a tract of land in California, known as the *Panoche Grande*, filed a petition in the Supreme Court of the District of Columbia

praying that a writ of mandamus might be issued, commanding the Hon. O. H. Browning, Secretary of the Interior, to issue, or cause to be issued, to him, McGarrahan, a patent for the land alleged to be embraced by that claim.

The claim of Gomez to this land had been decided in this court to be signally fraudulent and void.* The right of McGarrahan to demand and receive such a patent as he asked the Supreme Court of the District to order, was placed in his petition upon the provisions of the act of July 23d, 1866, entitled "An act to quiet land titles in California."†

"Section 7. That where persons, *in good faith and for a valuable consideration*, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have *used, improved, and continued in the actual possession of the same*, according to the lines of their original purchase, *and where no adverse right or title* (except of the United States) exists, such purchaser may purchase the same, after having such land surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts required in this section, *under regulations to be provided by the Commissioner of the General Land Office*, &c.: *Provided, that the right to purchase herein given shall not extend to lands containing mines of gold, silver, copper, or cinnabar.*"

A subsequent act disposes, in a different way, of lands containing mines of gold, silver, copper, or cinnabar.

The petition of McGarrahan, not averring that proof of the facts had been made under the regulations of the Commissioner of the General Land Office, and without averring that the lands in question were *not* mineral lands, containing mines, &c., alleged simply that the facts stated in his application were proved, by the relator, to Mr. Browning, the Secretary of the Interior, and that he had found, from the proofs, that the relator, in good faith and for a valuable consideration, purchased the lands from Gomez. Upon the

* 23 Howard, 326; 1 Wallace, 698; 3 Id. 752. † 14 Stat. at Large, 220.

showing made in this petition, the Supreme Court of this District, without notice to Mr. Browning, the Secretary of the Interior, ordered, on the 7th of December, a rule to issue, commanding him to show cause, on the 3d Monday of January, 1869, before the court sitting in general term, why the writ of mandamus prayed for should not issue. On the 26th of January, Mr. Browning filed a return, in the nature of a plea to the jurisdiction of the court, submitting that the court had not jurisdiction of the subject-matter of the case, and could not grant the writ prayed for:

1st. Because the subject-matter was of purely executive cognizance, resting in the judgment and discretion of executive officers, in the ordinary discharge of their official duties.

2d. Because the subject-matter was one in which judgment and discretion were to be exercised; and

3d. Because the issuing of patents for lands was, by statute, the duty of the President of the United States.

On the 8th of July a writ of mandamus was issued, directed to Mr. Browning, *or to his successor in office*, commanding him to convey to McGarrahan the land in question. Four months before, Mr. Browning had retired from the office of Secretary of the Interior, and had been succeeded by the now present incumbent, the Hon. J. D. Cox. And on the same day, the 8th of July, this writ was served upon Mr. Cox, as one of the parties named in the *alternative* judgment. No proceedings of any kind were taken upon the retirement of Mr. Browning, to revive the suit against his successor, Mr. Cox, or to make him a party, and no notice of the pendency of the case was given to him by the relator or by the court, or any requirement made of him to answer the application on its merits.

Mr. Hoar, Attorney-General, and Mr. Ashton, special counsel, for the Secretary:

The case presented by the record, is:

1st. A peremptory mandamus issued against the head of a department, in a suit instituted against his predecessor,

to which the incumbent had never been made, or become, a party.

2d. A peremptory mandamus awarded against the head of a department, in a case arising under laws which it is *his* duty to administer and execute, upon an *ex parte* statement of a claimant before his department, without any exhibition, on the part of the government he represents, of the truth of the matter in controversy, and without any opportunity being afforded by the court for such exhibition of the matter thus sought to be subjected to judicial determination; and

3d. A judicial order to the head of a department to issue a patent for lands, which the facts officially known to him might show to be lands that Congress had expressly excepted from the grant made in the 4th section of the act of July 23d, 1866, under which the relator claimed.

No instance of judicial usurpation of authority, so palpable, has been brought to the attention of this court.

In *Gaines* v. *Thompson*,* Miller, J., in delivering the opinion of the court, took occasion to review the previous adjudications upon this subject, and to expound, in terms even clearer than had been before employed, the doctrine they all enunciate, that "an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions."

The reports of the decisions of this court contain *eight* cases in all, in which heads of departments and other executive officers were sought to be controlled by this prerogative writ of mandamus; but in only one† was the attempted control sanctioned by this court. These cases came up from the district.‡ In two of them only, the court below issued writs of mandamus. In the first, this court affirmed the judgment; and in the others it reversed the decision of the court below. Of these eight cases, one was against the Postmaster-General;§ two were against the Secretary of

* 7 Wallace, 352. † Kendall *v.* United States, 12 Peters, 618.
‡ Ib., *supra*; Commissioner of Patents *v.* Whiteley, 4 Wallace, 522.
§ Kendall's Case, *supra*.

the Treasury;* two against the Secretary of the Navy;† one against the Public Printer;‡ one against the Commissioner of Patents;§ and one against the Commissioner of the Land Office.‖

In all of these cases the doctrine is enforced, as a fundamental principle of our political system, that the Judiciary is forbidden to interfere with the exercise of executive discretion; or, as the court expresses it,¶ the writ of mandamus lies only where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.

2. It is indisputable that the duty imposed upon the executive officers who may be charged with the execution of the statute, under which the relator claims, is not ministerial in its character, within the meaning of these authorities, but is in the highest degree *executive*, as that term is defined in *Mississippi* v. *Johnson*.**

In the case of *United States* v. *The Commissioner of the Land Office*,†† where the application was for a mandamus to compel the issuing of a patent, Nelson, J., said, the case "calls for the exercise of the *judicial functions* of the officer, and these of no ordinary character. The duty is not merely ministerial, but involves judgment and discretion, which cannot be controlled by this court."

The right of pre-emption given to the assignees of rejected Mexican grants plainly depends upon a variety of facts and conditions, which must be established to the satisfaction of and according to the rules provided by the Commissioner of the Land Office; whether they purchased in good faith, and for valuable consideration; whether they have used, improved, and continued in the possession of the land in the

* Reeside *v.* Walker, 11 Howard, 272; United States *v.* Guthrie, 17 Id. 284.

† Decatur *v.* Paulding, 14 Peters, 497; Brashear *v.* Mason, 6 Howard, 92.

‡ United States *v.* Seaman, 17 Howard, 230.

§ Commissioner *v.* Whiteley, 4 Wallace, 522.

‖ United States *v.* Commissioner, 5 Id. 563.

¶ Commissioner of Patents *v.* Whiteley, 4 Id. 522. ** 4 Id. 498.

†† 5 Wallace, 563; and see United States *v.* Seaman, 17 Howard, 230; Gaines *v.* Thompson, 7 Wallace, 353.

manner prescribed by the statute; whether any valid adverse title or right exists; whether the land has been properly surveyed; whether the facts have been proved "under the regulations of the Commissioner of the General Land Office;" whether the lands are within the excepted locality; and, finally, whether the lands contain mines of gold, silver, copper, or cinnabar.

3. Mr. Browning's return was intended to raise a simple question of jurisdiction upon the face of the act of July 23d, 1866. The facts of the case of the relator were not disclosed. Upon that return the court awarded a peremptory mandamus—*a final judgment upon a plea in abatement.* The court, without being informed, or requiring or desiring information, as to the actual situation of the land, assumed not only that the facts were as the statute required, in order to give a right under it, but that upon those facts nothing was left to the judgment of the Land Department, and a mere ministerial duty devolved upon it to issue a patent to the relator. It is plain that such a judgment is without warrant of law, and void.

4. Great as was the error of the court below in rendering a final judgment in this proceeding as against the defendant, Mr. Browning, its error in rendering such a judgment against his successor, Mr. Cox, was still more flagrant.

The imperative rule of the law of mandamus is that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct *demand* or request to perform it must have been made by the prosecutor to the *defendant*, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied.*

In addition, the doctrine of this court has limited the power of the courts to issue this writ, to cases of acts required by law of the individual rather than of the officer—a doctrine explained by the court in *United States* v. *Guthrie*, and in *Kendall's Case.*

* Tapping on Mandamus, 283.

It might well be in any case, that while a particular incumbent had refused to perform an act required by law, his successor would not refuse, upon proper demand being made. The law, therefore, entitles the *successor* to the same opportunity to comply or refuse, as was given to the incumbent against whom the suit is brought.

5. This court has, in effect, determined that the duty and power of issuing patents does not devolve upon the Land Department, or upon the Secretary of the Interior, who is vested with supervisory and appellate authority over that department, in such a sense as to render the Commissioner of the Land Office, or the Secretary of the Interior, liable in any case to be proceeded against in this form of action. In *United States* v. *Commissioner of Land Office*,* Nelson, J., in delivering the opinion of the court, took occasion to say, that "patents are to be signed by the *President* in person, or in his name by a secretary under his direction, and countersigned by the Recorder of the General Land Office."†

Mr. Merriman, contra:

The petition sets forth the facts entitling the relator to a patent for the land claimed, and that these facts had been proven to the satisfaction of the Secretary of the Interior; that those facts had been determined by him, but that the secretary refused to issue the patent without any just cause. This was not denied by the secretary, but he simply interposed a denial of the jurisdiction of the court in the matter.

Was the denial well founded? The General Land Office is a part and parcel of the Department of the Interior, and its officers are subject to the directions of the secretary of that department. It is his duty to see that they perform their duties. It is their duty to issue patents for lands to persons by law entitled to them. To one officer is delegated the duty of engrossing, recording, certifying, and affixing

* Act March 2d, 1833, 4 Stat. at Large, 663; Act March 3d, 1841, 5 Id. 417.

† 5 Wallace, 563.

the seal of the Land Office, and issuing such patents; to another the duty of signing the name of the President.

The entire duties of issuing patents are performed by certain specified officers. The President is required to perform no personal act in the matter, and indeed the same language of the statute is used in reference to the commissioner as to the secretary for signing patents, each to act under the direction of the President of the United States. The rule being held that the commissioner is subject to the supervision of the head of the department, the same reason will apply to the application of the rule to the subordinate and strictly ministerial officer who affixes the signature to the patent.

In this case the secretary, instead of directing his subordinates to perform the duty of issuing the patents to which the relator is entitled by law, refuses entirely to do so.

Mr. Justice CLIFFORD delivered the opinion of the court.

Land grants purchased of Mexican grantees or their assigns, in good faith and for a valuable consideration, where such grants have subsequently been rejected or where the lands so purchased have been excluded from the final survey of the grant, may be purchased of the United States by such prior purchasers, after the same are surveyed under existing laws, at the minimum price established by law, in cases where there is no valid adverse private right or title; and where such prior purchasers have used, improved, and continued in the actual possession of the premises according to the tenor of their original purchase, they first making proof of those facts as required in the seventh section of the act to quiet the title to such grants, under regulations to be prescribed by the Commissioner of the General Land Office, as provided in the same section of that act.*

Annexed to that right, however, are three other conditions, one of which it becomes important to notice. They are in the form of provisos, and the one to be noticed is that the right to purchase, as given in the body of the section,

* 14 Stat. at Large, 220.

"shall not extend to lands containing mines of gold, silver, copper, or cinnabar."

By the record it appears that the relator, on the fifth of October, 1858, addressed a communication to O. H. Browning, Secretary of the Interior, in which he represented that he, the relator, on the twenty-second of December, 1857, purchased of Vincente P. Gomez the rancho situated in California and known as Panoche Grande, and that the claim to the same had since been rejected by the decree of the Supreme Court reversing the decree of the District Court confirming the claim, and prayed that he, by virtue of the provision contained in the seventh section of that act, might be allowed to purchase the same of the United States, supporting his alleged right to do so by the following representations:

That the land embraced in the claim was a Mexican grant; that he purchased it of the original donee in good faith and for a valuable consideration; that the land, since the claim was rejected, has been regularly surveyed under existing laws; that there is no valid adverse private right or title to the same, and that he has continued in the actual possession of the tract since the claim was rejected, as required by law; but he did not allege that the land did not contain mines of gold, silver, copper, or cinnabar, nor did he offer any other proof of the facts set forth than what is contained in the exhibits annexed to the communication.

Prior to the date of that paper, to wit, on the fourteenth of August preceding, the Secretary of the Interior addressed an official letter upon the subject to the Commissioner of the General Land Office, in which he adverted to the fact that a bill was pending in the Senate relating to the claim, and stated that in his judgment it would be highly improper for the department to do anything to affect the title to the land until Congress should dispose of the claim. Pursuant to that view he, at the same time, directed the commissioner to instruct the local officers to suspend action in all such cases until they should receive further orders. Correspondence ensued between the secretary and the counsel of the relator,

but the secretary, on the twenty-eighth of November following, informed the counsel that he adhered to the views expressed in the directions which he gave to the Commissioner of the General Land Office.

Dissatisfied with the decision of the secretary, the relator, on the third of December, of the same year, presented a petition to the Supreme Court of this district, in which he prayed that a mandamus might issue directing "O. H. Browning, Secretary of the Interior," to issue or cause to be issued a patent for the land described in the petition, and for such other or further relief as may seem meet and proper. Service was duly made, and on the eighth of the same month a rule was issued commanding the secretary to show cause, on the third Monday of January following, why the writ of mandamus should not be issued as prayed in the petition. He appeared, as commanded, and pleaded that the court had no jurisdiction to grant the writ, for the following reasons: (1.) Because the subject-matter of the petition is purely of executive cognizance, resting in the judgment and discretion of executive officers in the ordinary discharge of their official duties. (2.) Because the subject-matter is one in which judgment and discretion are to be exercised. (3.) Because the issuing of patents for lands is, by the act of Congress, the duty of the President.

On the fifth of February following the parties filed a stipulation in the case, agreeing that the cause "be submitted to the court upon briefs and arguments, and that the said court may render its judgment in vacation as of the present term and of the day of such submission." Submitted, as aforesaid, the case was held under advisement until the eighth of July following, when the court, two justices signing the decree, determined that the prayer of the petition be granted, and that a writ of mandamus issue, directed to the said O. H. Browning, Secretary of the Interior, or to his successor in office, commanding him, upon payment of the sum therein specified, to issue or cause to be issued to the relator a patent from the United States of the tract of land described in his petition.

Four months before that judgment was rendered, the Secretary of the Interior, who was the party respondent in the litigation, resigned his office, and J. D. Cox, the present Secretary of the Interior, had not only been appointed his successor, but was in the regular discharge of all its duties.

Although none of these facts are disputed, still the record shows that the writ of mandamus was addressed to the predecessor of the present incumbent, or his successor in office, and that the writ, on the eighth of July in the same year, was served on the present secretary, who was not named in the writ, was never a party to the suit, and never had any notice of the proceedings. Judgment having been rendered without notice to the present secretary, and without a hearing on his part, or any opportunity to be heard, he sued out a writ of error and removed the cause into this court.

Founded, as the proceeding in this case is, upon a claim to land which has been three times under examination in this court before the present writ of error was sued out, it is deemed necessary and proper to advert to the views expressed by the court on those occasions in respect to the validity of the claim and the means adopted to procure its confirmation. Reference to the docket entries will show that the case was first presented here at the December Term, 1858, by the claimant, as an appeal not prosecuted; and it also appears that a copy of the record having been produced by him, and the certificate of the clerk that the appeal had been duly prayed and allowed, the case on his motion was docketed and dismissed, in conformity to the ninth rule of the court, for want of prosecution. Such a proceeding when *bonâ fide* has the effect to vacate the appeal and leave the decree of the subordinate court in full force, and the docket entries also show that the mandate was issued in pursuance of that order, and that it was subsequently delivered to the assignee of the claimant.

Nothing further was done in the cause during that term, but at the succeeding term the Attorney-General filed a motion to rescind the decree of the preceding term dismissing the case, and to revoke the mandate, alleging for cause that

the decree and mandate had both been procured by misrepresentations and fraud. Affidavits were filed by the Attorney-General showing that the cause was still pending in the District Court, that no appeal had been granted, that the cause, when the claimant made his motion to docket and dismiss it, was not legally before this court. Pending that motion three motions for mandamus were filed by the claimant: First, to compel the District Court to file the mandate and to execute their decree. Second, to compel the District Court to dismiss the application of the United States to open the decree and grant a new trial. Third, to compel the Surveyor-General to survey the land confirmed to the claimant by the decree of the District Court.

Both parties were heard, and the court overruled the several motions filed by the claimant, but granted the motion of the Attorney-General, upon the ground that the allegations of the motion were fully proved.*

Attempts were subsequently made by the claimant to enjoin the clerk and district attorney from furnishing a certified copy of the record to enable the United States to appeal, but the injunction was refused, and the appeal was perfected and duly entered here; and the next step of the claimant was to file a motion to dismiss the appeal, alleging that the court had no jurisdiction of the case, but the court unanimously overruled the motion for the reasons expressed in the opinion.†

Subsequently the cause was heard upon the merits, and the court held that the claim was invalid and fraudulent, and reversed the decree of the District Court, and remanded the cause, with directions to dismiss the petition.‡

Unless, therefore, the claim of the petitioner is brought within the terms of the act of Congress referred to in his petition he has no right whatever to a patent for the land in controversy.

Suppose everything which he alleges in his petition is

* United States *v.* Gomez, 23 Howard, 330.

† Same *v.* Same, 1 Wallace, 690. ‡ Same *v.* Gomez, 3 Id. 766.

true, still it does not bring his case within the act of Congress, as the petition does not allege that the land does not contain mines of gold, silver, copper, or cinnabar; and the record furnishes evidence tending strongly to the conclusion that such an averment, if made, could not be supported, as the statement of the land commissioner is that the land embraced in the claim does contain "valuable quicksilver mines."

Mere allegation, however, is not sufficient, but the condition is that the claimant shall make proof of the facts required under regulations to be provided by the Commissioner of the General Land Office. His application to be allowed to purchase the land was made to the Secretary of the Interior, and he was as much bound to prove that the land did not contain mines of the description mentioned as he was to show that his purchase of the donee of the tract was made in good faith and for a valuable consideration, as he was not entitled to a patent if the lands contained mines of gold, silver, copper, or cinnabar, any more than if he had made the purchase in bad faith and without consideration.

Argument to show that he did not bring his case within that condition is unnecessary, as the point is clear to a demonstration. He did allege that he purchased the lands in question of the donee in good faith and for a valuable consideration, but he offered no proof of the alleged fact, except what may be inferred from the deed annexed to the petition, bearing date December 22d, 1857, and which purports to have been executed by the original claimant.

Special reference is made in the petition to the deed of release given by the occupants of the land to the relator as supporting the allegation of good faith, but it is entitled to very little weight, if any, as it bears date six years subsequent to the alleged purchase of the grant.

Evidence was exhibited in the case tending to show that the lands were surveyed subsequent to the decree of the court rejecting the claim, but it is not proved that the present claimant thereafter continued in the actual possession of the land, nor that it was free from any adverse private right or title.

Such allegations are set forth in the petition, but the record contains no proof to support the first allegation, and nothing to support the second, except what is derived from the statement of the Commissioner of the General Land Office, that no report of any individual adverse interests was found on the files of his office. Tested solely by the merits, therefore, it is quite clear that the application of the relator could not have been properly granted, as the proofs before the department were not sufficient to warrant a decision in his favor.

Adjudged invalid and fraudulent, as the claim had been by the unanimous decision of this court, it was quite proper that the secretary should require satisfactory proof that the case as presented came within the terms of the act of Congress relied on before consenting to give the claimant the benefit of its provision; and when it appeared that the petition addressed to him was deficient in allegation, and that the proofs were insufficient in all particulars, except, perhaps, one, he was entirely justified in rejecting the application.

Evidently the case, if examined upon the merits, was not made out by the claimant, but the more decisive objection to the judgment of the court below is that the case, from its very nature, is one which was exclusively within the jurisdiction of the executive officers of the government, because it was one requiring proofs, hearing, and decision, and involved the exercise of judicial judgment and discretion, and consequently was not one where the action of the Department of the Interior is subject to re-examination by the Supreme Court of this district.

Since the decision of this court in the case of *McIntire* v. *Wood*,* it has been regarded as the settled law of the court that the Circuit Courts of the United States in the several States do not possess the power to issue writs of mandamus, except in cases in which it may be necessary to the exercise of their jurisdiction.†

Authority to that effect might doubtless be given to those courts by an act of Congress; but the insuperable difficulty

* 7 Cranch, 504.

† Riggs *v.* Johnson Co., 6 Wallace, 198.

at present is, that neither the Judiciary Act nor any other act of Congress has conferred upon them any such power. Antecedent to the decision of this court in the case of *Kendall* v. *The United States*,* grave doubts were entertained whether any court established by an act of Congress possessed any such jurisdiction; but the majority of this court came to the conclusion in that case, that the Circuit Court of this district might issue the writ of mandamus to an executive officer residing here, commanding him to perform a ministerial act required of him by law, and it is not denied that the court below possesses all the power in that behalf which the Circuit Court of the district possessed at that time. Subsequent decisions of this court have affirmed the same principle; but in all of the subsequent cases the principle is strictly limited to the enforcement of mere ministerial acts not involving the necessity of taking proofs, and it has never been extended to cases where controverted matters were to be judicially heard and decided by the officer to whom the writ is required to be addressed.†

Though mandamus may sometimes lie against an executive officer to compel him to perform a mere ministerial act required of him by law, yet such an officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions.‡

Discussion of the principle, however, seems to be unnecessary, as all of the cases appear to affirm the same rule, that the writ cannot issue where discretion and judgment are to be exercised by the officer, and only in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy.§

Even if it could be shown that the court below possessed

* 12 Peters, 608.

† Decatur *v.* Paulding, 14 Peters, 497; Brashear *v.* Mason, 6 Howard, 99.

‡ Gaines *v.* Thompson, 7 Wallace, 353; Reeside *v.* Walker, 11 Howard, 289.

§ United States *v.* Seaman, 17 Howard, 230; United States *v.* Guthrie, Ib. 304; Commissioner of Patents *v.* Whiteley, 4 Wallace, 522; United States *v.* Commissioner, 5 Id. 563.

the power to issue the writ in such a case, still it is clear that the judgment in this case would be erroneous, as the case upon the merits was not submitted to the court under the stipulation. Undoubtedly the appearance of the respondent was general, but he pleaded only to the jurisdiction of the court, and it appears that the question of jurisdiction was the only point argued and submitted for decision. But the court decided the whole case without proofs, and without any further hearing. Taking the record as it is exhibited, such certainly is the clear inference from it, and it is not suggested that it does not correctly represent what occurred. Assuming the record to be correct, comment upon the proceeding is unnecessary, as, in the view of this court, it is clearly erroneous.

Several other objections are also taken to the proceedings by the Attorney-General, which are equally decisive that the judgment of the court below must be reversed, one or two of which will be briefly noticed.

Service was made upon O. H. Browning, Secretary of the Interior; but the fact is conceded, or not denied, that he had resigned and gone out of office four months before the decision of the court was announced. When he resigned, of course the suit abated, but the court gave judgment against him as if he were still in office, and decreed that the writ of mandamus should be directed to him and to his successor in the office. Complaint may well be made by that party that he no longer possesses the power to execute the commands of the writ, and the present secretary may well complain that he is adjudged to be in default though he never refused to allow the relator to purchase the land, and that the judgment was rendered against him without notice and without any opportunity to be heard.

Notice to the defendant, actual or constructive, is essential to the jurisdiction of all courts, and the better opinion is, that a judgment rendered without notice may be shown to be void, when brought collaterally before the court as evidence.*

* Nations v. Johnson, 24 Howard, 203.

Patents for land are required to be signed by the President in person, or in his name by a secretary under his direction, and they are to be countersigned by the Recorder of the General Land Office.*

Such patents cannot be issued and delivered to any party without the signature of the President, and no proceeding to compel either the Commissioner of the General Land Office or the Secretary of the Interior to issue such a patent can be sustained while that provision of law remains unrepealed.†

Congress may so provide, and in that event it would be the duty of the secretary to carry the provision into effect; but the act of Congress referred to in the petition as the source of power in this case gives the Secretary of the Interior no authority upon the subject. On the contrary, the express provision is, that the regulations for executing the law shall be provided by the Commissioner of the General Land Office, and the better opinion is, that the application to be allowed to purchase the land embraced in such rejected claim should be made to the Commissioner, and not to the Secretary of the Interior, as the right to purchase of the United States will never vest until the land is surveyed under existing laws.

It appears by the record in this case that a survey of some kind was presented to the secretary, but whether it was one made under existing laws or not is not sufficiently shown.

Viewed in any light, the Secretary of the Interior has no original cognizance of applications of this description. He may, perhaps, as the head of the department, exercise an appellate and supervisory power over the doings of the Commissioner, but the original application should have been made to the Commissioner of the General Land Office.‡

Mr. Justice MILLER: I agree to the judgment of the court on the ground set forth by this court in the case of

* 4 Stat. at Large, 663; 5 Id. 417.

† United States v. Land Commissioner, 5 Wallace, 563.

‡ 9 Stat. at Large, 395.

Gaines v. *Thompson*,* that the courts have no jurisdiction to control the actions of the departments in such cases.

I do not think that the merits of the present claim were before the court, and I decline to express any opinion upon it.

JUDGMENT REVERSED, and the cause remanded with directions to DISMISS THE PETITION.

LYNCH ET AL. *v.* BERNAL ET AL.

1. The Board of Commissioners created under the act of Congress, entitled "An act to ascertain and settle private land claims in the State of California," passed March 3d, 1851, had jurisdiction of a claim made under a grant of a lot by a Mexican governor within the limits of the pueblo of San Francisco; and such claim was not required to be presented in the name of the corporate authorities of the city.
2. The eighth section of that act requires every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, to present his claims to the Board of Commissioners for examination. The fourteenth section qualifies this general language, and declares that the provisions of the act shall not extend to lots held under grants from any corporation or town to which lands have been granted for the establishment of a town by the Spanish or Mexican government; nor "to any city, or town, or village lot, which city, town, or village existed on the 7th of July, 1846;" and provides that the claims for such lots shall be presented by the corporate authorities of the town; or if the land, upon which the town, city, or village is situated, was originally granted to an individual, shall be presented in the name of such individual: *Held*, 1st, that the second clause of this section does not apply to *all lots situated within the limits* of a city, town, or village, which existed on the 7th of July, 1846, but only to the lots owned or claimed by such city, town, or village; 2d, that the object of the section was to give to lotholders deriving title from a common source—from the authorities of a pueblo or town, or from an individual who was originally the grantee of the land upon which the pueblo or town is situated—the benefit of the examination by the board of the general title under which they hold, and relieve the commissioners from the necessity of considering a multitude of separate claims for

* 7 Wallace, 347.

small tracts depending upon the validity of the same original title. It intended that the corporate authorities should present under one general claim not only the interest of the city, town, or village which they represent, but also the separate interests of individuals holding under conveyances from them.

3. The fourteenth section of the act has no application to lots held adversely to the corporation or town by independent titles. The confirmation of a claim, whether made to corporations or individuals, cannot enure to the benefit of parties holding adversely to them.
4. When the Board of Commissioners had jurisdiction of a claim, its validity and title to recognition and confirmation were subjects for that tribunal's determination; and its adjudication, however erroneous, cannot be collaterally assailed on the ground that it was made upon insufficient evidence.
5. The rule is as applicable to inferior and special tribunals as it is to those of superior or general authority, that where they have once acquired jurisdiction their subsequent proceedings cannot be collaterally questioned for mere error or irregularity; and the provision of the fifteenth section of the act of March 3d, 1851, declaring that the final decrees of the commissioners, or of the District Court, and patents following them, in California land cases, shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons, does not change the operation of this general rule.
6. The decree of the District Court upon the claim involved an adjudication that the grant under which it was made was valid; and the decree approving the survey settled the location and boundaries of the land. Neither of these determinations can be collaterally assailed for any matter which might have been corrected on appeal, had it been brought to the attention of the appellate court.
7. Whoever received deeds from the city of San Francisco, or asserted title to parcels of land under the Van Ness ordinance, whilst the claim of the city to the land was pending for confirmation before the tribunals of the United States, necessarily held whatever they took subject to the final determination of the claim. Their title stood or fell with the claim.
8. The exception made in the final decree of confirmation to the city of San Francisco from the tract confirmed of "such parcels of land as have been, by grants from lawful authority, vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings pending therein for that purpose," is not limited to parcels of land claimed under perfect grants, but includes all parcels claimed by private parties under grants from the authorities of the former government, the claims to which had been subjected, or might, in proceedings then pending, be subjected to the examination of the tribunals of the United States, and had been, or might be, confirmed by them.

Statement of the case.

9. The doctrine of relation is applied only to subserve the ends of justice, and to protect parties deriving their interests from the claimant pending the proceedings for the confirmation of his title. It gives effect to the confirmation of the title as of the day when the proceedings to secure such confirmation were instituted; and for that purpose only can the decree be treated as made at that time. No different interpretation is to be given to the language of the decree than would be given if the doctrine of relation had no application.

ERROR to the Supreme Court of the State of California.

The case was ejectment to recover the possession of certain real property situated within the corporate limits of the city of San Francisco, as defined by its charter of 1851, the plaintiffs asserting title to the premises under a grant of the Mexican government confirmed by the tribunals of the United States. The case was commenced in a District Court of the State, and was tried by the court without the intervention of a jury by stipulation of the parties.

The court found as facts, that the plaintiffs (who are the widow and son of José Cornelio Bernal, deceased), in March, 1853, presented a petition to the Board of Land Commissioners, created under the act of March 3d, 1851, to ascertain and settle private land claims in California,* for the confirmation of a claim asserted by them to the premises in controversy; in which petition they averred that the premises were granted in 1834 by Figueroa, then Mexican governor of the Department of California, to said José Cornelio Bernal; and that such proceedings were had that in 1854 the said claim was adjudged valid and confirmed by the board; and in 1856, on appeal, by the District Court of the United States. The court set forth in its findings the proceedings had before the board, and the District Court on appeal; and what it declared to be the evidence remaining of record with the clerk of the District Court with respect to the grant. That evidence stated that a grant was made by Governor Figueroa to Bernal, as alleged above, but the court found that according to that evidence no such grant was ever issued, differing in its finding in that respect from both

* 9 Stat. at Large, 631.

the Board of Land Commissioners and the District Court of the United States.

From the decree confirming the claim of the District Court, the United States declined to prosecute an appeal to this court, and the decree thus became final.

In 1861 the tract confirmed was surveyed under the directions of the Surveyor-General of the United States, and the survey was subjected to the revision and correction of the District Court, under the act of Congress of June 14th, 1860.* When made to conform to the directions of the court, the survey and the plat of it were approved, and its decree of approval was, on appeal, affirmed by this court.† The approved survey and plat embraced the premises in controversy.

The defendants were in possession of the premises at the commencement of the action; and asserted that they possessed an older and superior title to the premises under the ordinance of the city of San Francisco, adopted in June, 1855, and the subsequent legislation of the State and of the United States respecting the same. Their claim arose in this wise. At the cession of California to the United States, and for many years previous thereto, San Francisco was a Mexican pueblo, asserting a claim to lands embracing its site and adjoining lands to the extent of four square leagues. The city of San Francisco, as successor of the Mexican pueblo, claimed these municipal lands, and presented her claim to the Board of Land Commissioners for confirmation. In December, 1854, the board confirmed the claim to a portion of the land, embracing the premises in controversy. The case was then appealed by the city to the District Court of the United States, and was afterwards transferred to the Circuit Court of the United States, under the act of Congress of July 1st, 1864.‡ In May, 1865, the Circuit Court confirmed the claim to four square leagues, subject to the following deductions, namely: "Such parcels of land as have been heretofore reserved or dedicated to public uses by the

* 12 Stat. at Large, 33.

† Dehon v. Bernal, 3 Wallace, 774.

‡ 13 Stat. at Large, 333.

United States; *and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings pending therein for that purpose, all of which said excepted parcels of land are included within the area of four square leagues, above mentioned (those described as confirmed), but are excluded from the confirmation to the city.*"* The claim thus confirmed by the decree of the Circuit Court, was also confirmed, with some modifications, by the act of Congress of March 8th, 1866.†

Whilst this claim was pending before the District Court on appeal from the board for confirmation, viz., on the 20th of June, 1855, the common council of the city of San Francisco passed "an ordinance for the settlement and quieting of the land titles in the city of San Francisco," which is known in that city as the "Van Ness ordinance," after the name of its supposed author. By its second section the city relinquished and granted all the title and claim which she held to the lands within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855, provided said possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal proceedings.‡

In March, 1858, the legislature of the State ratified and confirmed the ordinance, and in July, 1864, Congress passed an act by which all the right and title of the United States to the lands were granted to the city of San Francisco, for the uses specified in the ordinance.§ The party through whom the defendants claim was in the actual possession of the premises in controversy at the time designated in the ordi-

* 3 Wallace, 686. † 14 Stat. at Large, 4. ‡ 15 California, 627.
§ 13 Stat. at Large, 333. Act to expedite the settlement of titles to lands in the State of California, § 5.

nance, and also on the passage of the confirmatory act of the legislature, and therefore acquired whatever right or title the city then possessed.

The District Court found as conclusions of law that the defendants were estopped by the final decree of confirmation, and the approved survey, from questioning the plaintiffs' title to the premises, and gave judgment for the plaintiffs for the possession of the premises and $500 damages for their use and occupation. On appeal the judgment was affirmed by the Supreme Court of the State; and the case was brought here under the 25th section of the Judiciary Act.

Messrs. Ashton and G. H. Williams, for the plaintiffs in error; Mr. E. L. Goold, contra.

Mr. Justice FIELD delivered the opinion of the court.

The act of June 14th, 1860, gives to a survey and plat of land claimed under a confirmed Mexican grant, when approved by the District Court, the effect and validity of a patent of the United States. It so declares in express terms.* It is therefore upon the decree of confirmation, and the approved survey and plat, that the Bernals rely to recover in the present action.

To meet the case thus presented the defendants contend, 1st. That the Board of Land Commissioners had no jurisdiction to consider the claim of the plaintiffs under the grant of Figueroa, and as a consequence, that the action of the District Court, in hearing the appeal from the board, and in revising and approving the survey of the claim, was without authority and void; and 2d. That if the board had such jurisdiction, the defendants possess an older and superior title to the premises under the ordinance of the city of San Francisco, adopted in June, 1855, and the subsequent legislation of the State and of the United States respecting the same.

The objection to the jurisdiction of the board arises from

* 12 Stat. at Large, 34, § 5.

the fact that the premises granted consist of a lot within the limits of the pueblo or town of San Francisco as it existed at the cession of California to the United States. At that date San Francisco, as such pueblo, possessed an equitable claim to lands within the limits of four square leagues, to be assigned and measured off from the northern portion of the peninsula upon which the town is situated. The city of San Francisco succeeded to such interest, and her authorities presented the claim to the Board of Land Commissioners for confirmation; and the defendants insist that the claim of the Bernals under the grant of Figueroa should have been presented in the name of those authorities, and could in no other way have been brought under the jurisdiction of the board.

This position is founded upon the language of the 14th section of the act of Congress, but is not, in our opinion, supported by its meaning. A previous section of the act requires every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, to present his claim to the commissioners for examination. The 14th section qualifies this general language, and declares that the provisions of the act shall not extend to lots held under grants from any corporation or town, to which lands have been granted for the establishment of a town by the Spanish or Mexican government; nor "to any city or town, or village lot, which city, town, or village existed on the 7th of July, 1846;" and provides that the claims for such lots shall be presented by the corporate authorities of the town, or if the land upon which the town, city, or village is situated, was originally granted to an individual, shall be presented in the name of such individual.

The second clause of this section does not apply to all lots situated within the limits of a city, town, or village, which existed on the 7th of July, 1846, but only to the lots owned or claimed by such city, town, or village.

The object of the section was to give to lotholders deriving title from a common source—from the authorities of a pueblo or town, or from an individual who was originally the grantee of the land upon which the pueblo or town is

situated—the benefit of the examination by the board of the general title under which they hold, and relieve the commissioners from the necessity of considering a multitude of separate claims for small tracts depending upon the validity of the same original title. It intended that the corporate authorities should present under one general claim not only the interest of the city, town, or village which they represent, but also the separate interests of individuals holding under conveyances from them. The confirmation of the common title to these authorities would of course enure to the benefit of parties holding under them.

The section has no application to lots held adversely to the corporation or town by independent titles. The confirmation of a claim, whether made to corporations or individuals, could not enure to the benefit of parties holding adversely to them.

The claim of the Bernals, not being derived from the pueblo of San Francisco, or by any action of its authorities, but directly by grant from the political chief of the department, was adverse to the claim of the city. It was, therefore, properly presented to the Board of Commissioners for examination, and jurisdiction over it was rightfully taken by that tribunal.

The board having jurisdiction of the claim, its validity and title to recognition and confirmation were subjects for that tribunal's determination; and its adjudication, however erroneous, cannot be collaterally assailed on the ground that it was made upon insufficient evidence. The rule is as applicable to inferior and special tribunals as it is to those of superior or general authority, that where they have once acquired jurisdiction their subsequent proceedings cannot be collaterally questioned for mere error or irregularity. The provision of the fifteenth section of the act of March 3d, 1851, declaring that the final decrees of the commissioners, or of the District Court, and patents following them, in these California land cases, shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons, does not change the operation

of this general rule. Final decrees in other judicial proceedings affecting the title to property, are not conclusive except between the parties; they bind only them and their privies; they do not conclude the rights of third persons not before the court, or in any manner affect their rights. Third parties, with respect to the adjudications of the Board of Commissioners, and of the District Court, on appeal from the board, stand upon the same footing as they do with respect to other adjudications in the ordinary proceedings of courts of law.

The decree of the District Court upon the claim necessarily involved an adjudication that the grant under which it was made was valid; and the decree approving the survey settled the location and boundaries of the land. As neither of these determinations can be collaterally assailed for any matter which might have been corrected on appeal, had it been brought to the attention of the appellate court, the plaintiffs must recover unless the defendants have a superior title to the premises.

Such title they claim to possess, as we have already mentioned, under the ordinance of the city of San Francisco, passed in June, 1855, and the subsequent legislation of the State and of the United States.

Whilst the claim of the city of San Francisco to her municipal lands was pending before the District Court of the United States, on appeal from the Board of Commissioners, the ordinance of June 20th, 1855, commonly known, from the name of its reputed author, as the Van Ness ordinance, was passed. By its second section the city relinquished and granted all the title and claim which she held to the lands within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal proceedings.

In March, 1858, the legislature of the State ratified and confirmed the ordinance; and in July, 1864, Congress passed an act by which all the right and title of the United States to the lands were granted to the city of San Francisco, for the uses specified in the ordinance.* The party through whom the defendants claim was in the actual possession of the premises in controversy at the time designated in the ordinance, and also on the passage of the confirmatory act of the legislature, and therefore acquired whatever right or title the city then possessed.

The claim of the city was confirmed in May, 1865, by the decree of the Circuit Court of the United States, to which court the hearing of the claim had been transferred; and subsequently, with some modifications, by the act of Congress of March 8th, 1866.†

The position of the defendants is that by the possession of the party through whom they claim, and the operation of the Van Ness ordinance, they acquired an older and superior title to that ceded to Bernal by the grant of Figueroa. This position assumes that the city possessed a title to the premises in controversy at the time the ordinance was passed, whereas, though the city was then asserting, in the courts of the United States, her claim to four square leagues, the boundaries of the tract were not defined, nor was it known what exceptions and reservations might be made from the claim when it should be considered and finally determined. Whoever received deeds from the city, or asserted title to parcels of land under the Van Ness ordinance, whilst the claim of the city to the land was thus pending, necessarily held whatever they took subject to the final determination of the claim. Their title stood or fell with the claim.

Now, when the final decree upon the claim was made there were excepted from the tract confirmed such parcels of land as had been, by grants from lawful authority, vested in pri-

* 15 California, 627; Act to expedite the settlement of titles to lands in the State of California, § 5; 13 Stat. at Large, 333.

† 14 Stat. at Large, 4; 13 Id. 333, § 4; Grisar v. McDowell, 6 Wallace, 377.

vate proprietorship, and had been finally confirmed to parties claiming under said grants by the tribunals of the United States, or should thereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings then pending therein for that purpose. This exception is not limited to parcels of land claimed under perfect grants, as contended by counsel, but includes all parcels claimed by private parties under grants from the authorities of the former government, the claims to which had been subjected, or might, in proceedings then pending, be subjected to the examination of the tribunals of the United States, and had been, or might be, confirmed by them. The object of the exception was to prevent any possible controversy between parties claiming under the city, and parties holding under grants adjudged valid by the tribunals of the United States, and to protect the latter from being harassed by further litigation respecting their titles. By the language, "such parcels of land as have been by lawful authority vested in private proprietorship," no more is meant than parcels of land which have been granted by lawful authority to private parties.

The exception excludes, therefore, from confirmation to the city the land granted to Bernal, and the Van Ness ordinance did not operate to pass any right or interest in the demanded premises to the party through whom the defendants claim.

As, by the doctrine of relation, the decree confirming the title of the city took effect as of the day when her petition was presented to the board in July, 1852, it is contended that the exception is to be construed as referring only to grants, which had been confirmed previous to that date, or which might subsequently be confirmed in proceedings then pending. But the position is not tenable. Such a construction is not required from any application of the doctrine of relation. That doctrine is applied only to subserve the ends of justice, and to protect parties deriving their interests from the claimant pending the proceedings for the confirmation of his title. It gives effect to the confirmation of the title

as of the day when the proceedings to secure such confirmation were instituted; and for that purpose only can the decree be treated as made at that time. No different interpretation is to be given to the language of the decree than would be given if the doctrine of relation had no application.*

JUDGMENT AFFIRMED.

BENNETT *v.* HUNTER.

1. The act of 5th August, 1861, "To provide increased revenue from imports, to pay interest on the public debt, and for other purposes;" and the act of June 7th, 1862, "for the collection of direct taxes, in insurrectionary districts, within the United States, and for other purposes," are to be construed together; and so construed, their primary object is to be regarded as having been the raising of revenue.
2. Thus construed, the first clause of the 4th section of the act of 1862—which clause enacts "that the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States,"—does not operate *proprio vigore*, to vest the title of the land in the United States upon non-payment of the tax; that clause being followed immediately by another which says, "and upon *the sale hereinafter provided for* shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever." The first clause merely declares the ground of the forfeiture of title, namely, non-payment of taxes, while the second clause was intended to work the actual investment of the title in the United States or in the purchaser at the tax sale, through a public act of the government.
3. Under the act of 1862, the right to pay the tax and relieve the land from sale, is not limited to sixty days after the fixing of the amount of it by the proper authorities. Payment prior to sale is sufficient.
4. Payment of the tax, which the act requires to be made by the owner, need not necessarily be made by the owner in person. It is enough that it be made by him acting through some friend or agent, compensated or uncompensated; any person, in short, willing to act in his behalf, and whose act is not disavowed by him.

ERROR to the Supreme Court of Appeals of Virginia; the case being thus:

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* Jackson *v.* Bard, 4 Johnson, 230; Heath *v.* Ross, 12 Ib. 140.

Statement of the case.

By an act of August 5th, 1861,* passed in quite the early part of the late rebellion, Congress having laid a duty on incomes, imposed a direct tax of $20,000,000 per annum upon the whole of the United States, of which a certain sum was apportioned to Virginia. The act provided that the tax should be assessed and laid on all lands according to their money value on the 1st of April, 1862; and it provided for the assessment and collection of the tax, and authorized the sale of so much of the lands of delinquent payers as might be necessary to satisfy the taxes due thereon; and furthermore provided that at any time after the advertisement for sale and before actual sale, the delinquent taxpayer might pay the amount assessed with ten per cent. penalty, and thus relieve his lands; and yet further that, in the event of a sale of property for non-payment of the tax assessed thereon, the owners, their heirs, executors, administrators, *or any person in their behalf*, might redeem the same within a certain period thereafter. The act also provided that if, at the time it went into operation, any of the people of any State should be in actual rebellion, so that the laws of the United States could not be executed therein, it should be the duty of the President to collect both land tax and income tax, with six per cent. *interest*, according to the provisions of the act, as soon as the authority of the government should be re-established.

Afterwards, however, the rebellion having now become widespread, and assumed far greater magnitude, an act of June 7th, 1862,† declared that when in any State the civil authority of the government of the United States should be obstructed by insurrection or rebellion, so that the provisions of the former statute could not be peaceably executed, the direct taxes apportioned by that statute should be apportioned and charged in each State wherein the civil authority was thus obstructed, upon all the lands situate therein, respectively, &c., as the same were enumerated and valued under the last assessment and valuation thereof made under

* 12 Stat. at Large, 294.

† Ib. 422.

the authority of said State or territory previous to January 1st, 1861; and every parcel of the said lands, according to the said valuation, was declared to be charged, by virtue of the act itself, with the payment of so much of the whole tax laid and apportioned by said act upon the State wherein the same was situate, as should bear the same direct proportion to the whole amount of the direct tax apportioned to said State as the value of said parcels of land should, respectively, bear to the whole valuation of the real estate in the said State, according to the said assessment and valuation made under the authority of the same, and in addition thereto with a penalty of fifty per centum of said tax.

The 3d section allowed the *owner or owners* of the lands, *within sixty days* after the amount of the tax charged thereon, respectively, should have been fixed by a board of tax commissioners (the appointment of which was provided for by the act), to pay the same to the commissioners, and take a certificate thereof, by virtue of which the lands should be discharged from the tax.

The 4th section (which, if we divide the enactment into two clauses, reads thus) enacted as follows:

1*st clause.* "That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall *thereupon* become forfeited to the United States.

2*d clause.* "And upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

The 7th section, as amended by the act of February 6th, 1863,* required the board of tax commissioners in case the taxes charged on the lands should *not be paid agreeably to the provisions of the 3d section*, to advertise the property for sale, and to sell the same to the highest bidder, for a sum not less than the taxes, penalty, and costs, and ten per cent. per annum interest on the tax. And it also authorized the com-

* 12 Stat. at Large, 640.

missioners, in all cases where the owner of the property should not, on or before the day of sale, appear *in person* before them and pay the amount of the tax, with ten per cent. interest thereon and cost of advertising, or request the property to be struck off to a purchaser for a less sum than two-thirds of the assessed value thereof, to bid off the same for the United States, at a sum not exceeding two-thirds of its assessed value, unless some person should bid a larger sum, and in that case it declared that the property should be struck off to the highest bidder, who, upon payment of the purchase-money, should be entitled to receive from the commissioners their certificate of sale, which was thereby required to be received as *primâ facie* evidence of the regularity and validity of the sale, and of the title of the purchaser under the same, in all courts and places; with a proviso that the *certificate should only be affected as evidence of the regularity and validity of the sale*, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid *previous to sale*, or that the property had been redeemed according to the provisions of the act. Also, by a proviso to this section, the owner of the property, or any loyal person having any valid lien upon or interest in the same, might, within sixty days after the sale, *appear in person* before the board of tax commissioners, and, if a citizen, upon taking an oath to support the Constitution, and paying the amount of the tax and penalty, with interest thereon, from the date when the State went into rebellion, at the rate of fifteen per cent., together with the expenses of the sale and subsequent proceedings, &c., redeem the same; and, if the owner were a minor, a non-resident alien, a loyal citizen beyond seas, a person of unsound mind, or under legal disability, the period of two years after the sale was allowed for redemption.

Under this act of the 7th of June, 1862—the second of the acts above mentioned—a tax was assessed upon a tract of land situate in Alexandria County, Virginia, of which one B. W. Hunter was then owner for life, the property in remainder being in his son, and default having been made in payment, the land was advertised for sale. After advertise-

ment, but before sale, the amount of the tax, expenses, penalties, and costs (the whole being within $100), was tendered *by a tenant, in occupation of about half of the premises*, to the commissioners appointed for the collection of taxes under the act, who refused to receive the money, upon the ground that the tender was not made by the owner of the land in person. The land was then, January 11th, 1864, sold, and one Chittenden became the purchaser, and received a certificate from the commissioners, reciting the sale and his purchase for $8000. He thereupon leased the property to one Bennett, who went into possession. After the close of the war, Hunter, the son, who had served as an officer in the rebel army, but against whose property no proceedings for confiscation had been instituted, and whose estate in remainder had now become absolute, brought suit in one of the State courts of Virginia to recover possession of the land. No question was made of his right to recover if his title was not divested by the sale for taxes. The court in which the suit was brought gave judgment in his favor, and the judgment being affirmed by the Supreme Court of Appeals of the commonwealth, the other side brought the case here for review.

The case, as this court considered it, required the consideration and determination of one point only, namely, whether the commissioners under the act could make a valid sale for taxes, notwithstanding the previous tender *by the tenant of half the premises*, of the amount due? Other important and interesting questions were argued at the bar, but under the view taken of the case by this court they need not be stated.

Messrs. Chittenden and Willoughby (*Mr. Hoar, Attorney-General, and Mr. Field, Assistant Attorney-General, filing a brief by leave of the court, for the United States*), *for the plaintiff in error:*

1. Congress, having power to "lay and collect" taxes, and "to make all laws which shall be necessary and proper for carrying into execution" that power, may, for the purpose of enforcing their collection, declare a forfeiture of land for the non-payment of taxes laid thereon, or authorize a

sale, by summary proceedings on the part of the executive branch of the government, of the whole of such land. Such summary measure is not in conflict with that clause of the Constitution which declares that no person shall be deprived of property without "due process of law."*

That clause refers solely to the exercise by the State of the right of eminent domain.†

2. The 4th section of the act of 1862 created a forfeiture to the United States of land upon which the direct tax had not been paid as provided in the 3d section of that act, which took effect at the time of default and prior to the sale or disposition of the property as provided for in the 7th and other following sections of the act.

This appears from the plain import of the language employed in declaring the forfeiture. The latter clause of the section does not qualify the preceding clause respecting the time when the forfeiture becomes absolute. The section has two branches—the first making the forfeiture of title, and the second the ultimate vesting of that title. To declare *the title*, in the particular event, to be forfeited to the United States, clearly means that *the title* is divested out of the defaulting owner, and devolved upon the United States. The section does not say that the delinquent lands shall be forfeited; but that *the title* of the owner of them shall be lost to him, and forfeited to the United States. But how, and for what purpose forfeited? The law itself gives the reply: not to be held by the United States for its own use, but to be sold for payment of taxes, penalty, and costs; and that sale, under the scheme of the law, becomes the appointed mode in which *the title* ultimately *vests*. Now, the condition of this sale is to the highest bidder; but in case no one bids to the amount of the penalty and costs, then it may be struck off to the United States at that sum. By the act of 1862, as subsequently amended by the act of 1863, the privilege of bidding by the commissioners, for and on behalf of the

* High *v.* Shoemaker, 22 California, 363; Nichols *v.* Bridgeport, 23 Connecticut, 205; Allen *v.* Armstrong, 16 Iowa, 512.

† Gilman *v.* Sheboygan, 2 Black, 513.

United States, was enlarged to the extent of two-thirds of the assessed value. In this way, the law appointed and designated two classes of purchasers at the sale—first, the highest bidders, and, secondly, the United States, acting through the commissioners, and subject to the restrictions of these acts. The United States, as well as the highest bidders, might be purchasers at these tax sales. When, therefore, the latter clause of this 4th section declares, that "the title, upon the sale hereinafter provided for, shall vest in the United States or the purchasers at such sale," it has exclusive reference to the United States as *a purchaser*, and not as *the sovereign*, to whom the forfeiture had been declared in the preceding clause.

After default, therefore, there was nothing left in the owner but *a mere privilege of redemption*, capable of being exercised only in such mode and upon such terms as the law prescribed.

3. It does not appear that the tax was paid within the sixty days. The case shows, that after the advertisement of the sale of said premises referred to in said certificate, and before sale, a tender by some one was made. But unless made within the sixty days, it was no tender even if it had been made by the owner in person. But

4. The *owner* did not make the tender, as the law required. The case shows that the tender was made by *a tenant in occupation of about one-half of said premises.* We concede that a *lawful* tender of the tax to the officer authorized to receive it would have been tantamount to payment, but deny that the tender in this case was lawful.

Messrs. J. A. Garfield and S. F. Beach, contra, citing, on the point of the tenant's tender, the case of *Dubois* v. *Hepburn** in this court, in which, on a case of redemption after sale, and, as they argued, a stronger case, therefore, than this, since interests had vested by the sale, the court say:

"Any person who has any interest in the land . . . is the

* 10 Peters, 1.

owner thereof for the purpose of redemption. Any right of entry upon it, to its possession or enjoyment or any part of it, which can be deemed an estate in it, makes the person the owner for purpose of redemption."

The CHIEF JUSTICE delivered the opinion of the court.

The case requires the consideration and determination of one point only, namely, whether the commissioners under the act could make a sale for taxes, notwithstanding a previous tender of the amount due?

In order to a right understanding of the real point in controversy, however, it will be useful to notice briefly the occasion and the objects of the enactments which have given rise to it.

The necessities of the war, arising from the rebellion, demanded immediate provision of adequate funds. For this purpose Congress increased the duties on customs, imposed a duty on incomes, and laid a direct tax of twenty millions of dollars upon lands. This latter tax was apportioned, agreeably to the direction of the Constitution, among the several States in proportion to their respective numbers; and it was provided that, if the act could not be carried into execution in any State in consequence of rebellion, it should be the duty of the President to proceed, as soon as the authority of the United States should be re-established therein, to collect both the land tax and the income tax, with six per cent. interest.

The income tax thus imposed has never been collected; but provision was made by the act of June 7th, 1862, for the collection of the land tax in the insurgent States. This act, or some similar provision, was necessary to enable the President to perform the duty devolved upon him by the act of 1861. The acts of 1861 and 1862 are, therefore, to be construed together. The general object of both was the same, namely, the raising of revenue by a tax on land. The first prescribed a mode of collection where the authority of the General Government was acknowledged, and no serious obstacle existed to the execution of the law; the second di-

rected the mode of collection where this authority had been overthrown by insurrection, but had been sufficiently re-established to make collection, to some extent at least, practicable.

The provisions of the latter act were necessarily adapted to the peculiar circumstances in which it was to be executed, and were in most respects more stringent than those of the former. The first act, for example, directed the assessment of lands by assessors to be appointed under it; the second adopted the valuation made under the authority of the several States prior to the rebellion, and charged directly upon each parcel of land its proportion of the tax apportioned to the State. Under the first act, delinquent tax-payers were permitted, at any time after advertisement for sale, and before actual sale, to pay the amount assessed with ten per cent. penalty, and thus relieve their lands. The second act imposed on each tract, without respect to delinquency on the part of the owner, a penalty of fifty per cent. in addition to its proportion of the tax upon the State, and, it is contended, allowed payment only within sixty days after assessment. In the earlier act indulgent provision was made for redemption after sale; in the latter, onerous conditions were imposed on such redemption.

Without adverting further to particular points of difference between the two acts, it may be observed that their most striking contrast was in their practical application.

The several adhering States, under the act of 1861, assumed and paid their respective quotas, and collected the amount of the tax from their own citizens under their own laws, so that in those States the machinery of the law was never really put in action; while in the insurgent States the act of 1862, so far as it was executed at all, was carried into effect according to its terms by the officials of the National government. In this way, the citizens of the adhering States were relieved from the processes of collection and from penalties and forfeitures for non-payment, while the citizens of the insurgent States who could not be thus relieved were exposed to their unmitigated operation.

Keeping these circumstances in view, we are to consider the effect of the sale for taxes made, as we have already stated, to the lessor of the plaintiff. And this must depend mainly on the construction to be given to the fourth section of the act of 1862.

This section provides "that the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States; and upon the sale hereinafter provided for shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

And we are first to consider whether the first clause of this section, *proprio vigore*, worked a transfer to the United States of the land declared to be forfeited.

The counsel for the plaintiff in error have insisted earnestly that such was its effect. But it must be remembered that the primary object of the act was, undoubtedly, revenue, to be raised by collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale, and to the disposition of the lands purchased by the government; a policy which had reference to the suppression of rebellion rather than to revenue. But this purpose did not affect the operation of the act before sale, for until sale actually made there could be, properly, no redemption. The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt. And it seems unreasonable to give to the act, considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed and relieve his lands from the lien. The first clause of the act, therefore, is not to be considered as working an actual transfer of the land to the United States, if a more liberal construction can be given to it consistently with its terms.

Now the general principles of the law of forfeiture seem to be inconsistent with such a transfer. Without pausing to

inquire whether, in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction.* In the case of lands forfeited by alienage the king could not acquire an interest in the lands except by inquest of office.† And so of other instances where the title of the sovereign was derived from forfeiture. And in the case of *United States* v. *Repentigny*,‡ where the forfeiture to the government of lands arose from omission to perform the conditions of the grant, this court held that before the forfeiture could be consummated by reunion of the land with the public domain, "a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent," should take place. The court said further that "a legislative act directing the possession and appropriation of the land is equivalent to office found."

Applying these principles to the case in hand, it seems quite clear that the first clause of the fourth section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely, non-payment of taxes, while the second clause was intended to work the actual investment of the title through a public act of the government in the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary, and, independently of the sale, worked no divestiture of title. The title, indeed, was forfeited by non-payment of the tax; in other words, it became subject to be vested in the United States, and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public

* Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 625.

† 3 Blackstone's Commentaries, 258.

‡ 5 Wallace, 265.

sale. It follows that in the case before us the title remained in the tenant for life with remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States.

But it has been insisted that the right to pay the tax and relieve the land from sale expired at the end of sixty days after the amount was fixed by the proper authority.

It does not appear when the amount was fixed, or when the sixty days ended. It may be inferred, perhaps, from the fact of sale, that default for payment had continued at least through that time, for otherwise there could have been no power to sell.

If this inference be admitted, however, it by no means follows that the right to pay the tax and have the land discharged from it expired with the sixty days. It is more reasonable to suppose that this right remained as long as the title of the land remained in the owner—that is, until after sale. And this view is confirmed by reference to another part of the act. The seventh section gives direction as to sales, the issue of certificates of sale to purchasers, and proceedings for redemption after sale, and then provides that "the certificate of sale shall only be affected, as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property had been redeemed according to the provisions of this act." This provision makes it clear that proof of payment of taxes prior to the sale invalidates the certificate, and this could not be unless the right to pay the tax continued until the sale. This seems to leave no doubt on the point that the right to make such payment was not strictly limited to sixty days after the fixing of the amount of the tax.

But to whom did the right to make this payment belong? The obvious answer is, to the owner, either acting in person or through some friend or agent, compensated or uncompensated. The terms of the act are, that the owner or owners may pay; and it is familiar law that acts done by

one in behalf of another are valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice.

But it is insisted that the right of payment is limited by the act to the actual owner in his proper person. But we perceive no such limitation in its terms. On the contrary, the fact that the privilege of redemption after sale is limited to the owner or the loyal person having a lien or other interest, appearing in proper person and taking a prescribed oath, appears to us to afford an irresistible inference that the right of payment before sale is not so limited. It is a right which, under the act, belongs to the owner, and no oath is required in order to its exercise. It is a right to be exercised under the act as a law for raising revenue. It is expressly distinguished from the privilege of redemption after sale and complete divestiture of title, which is accorded upon very different principles, and in pursuance of a very different policy. We cannot doubt that it might be properly exercised by the owner in person, or through any other person willing to act in his behalf and not disavowed by him.

The application of these principles decides the case before us. The title and possession of the land, at the time of assessment, was in B. W. Hunter for life, with remainder in fee to his son, the defendant in error. The life estate terminated, and the fee became vested in 1864. The sum due the United States for taxes, penalty, and costs, was tendered to the commissioners before sale, and it was their duty to accept it. The tender was not objected to as insufficient, but was refused solely because not made by the owner in person. This refusal not being warranted by the act, the tender must be held good. The certificate of sale under which the plaintiff in error claims title cannot, therefore, be sustained. The sale must be regarded in law as having been made after the payment of the tax, and as insufficient to vest the title to the land in the purchaser.

It follows that the judgment of the Court of Appeals of Virginia must be

AFFIRMED.

BIGELOW *v.* FORREST.

1. The act of March 23d, 1863, "relating to *Habeas Corpus*, and regulating judicial proceedings in certain cases," applies only to suits for acts done or omitted to be done during the rebellion.
2. It does not apply to actions of ejectment.
3. The act of July 17th, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," and the joint resolution of the same date explanatory of it, are to be construed together.
4. Under the two thus construed all that could be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized, terminating with the life of the person for whose offence it had been seized.
5. The fact that such person owned the estate in fee simple, and that the libel was against *all* the right, title, interest, and estate of such person, and that the sale and marshal's deed professed to convey as much, does not change the result.

ERROR to the Supreme Court of Appeals of Virginia, the case being this:

Congress, by an act commonly called the Confiscation Act, passed July 17th, 1862,* during the late rebellion, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," after enacting that treason should be punished with death, provides:

"*Section* 5. 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 . . . of the persons hereinafter named, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States."

This 5th section proceeded to name six classes of persons whose property should be liable to seizure, and first among them:

"Any person hereafter acting as an officer of the army or

* 12 Stat. at Large, 589.

navy of the rebels in arms against the government of the United States."

And the last clause of it enacts that

"It shall be a sufficient bar to any suit brought by such person for the possession or use of such property, . . . to allege and prove that he is one of the persons described in this section."

The act proceeds:

"*Section* 7. That to secure the condemnation and sale of any such property, after the same shall have been seized, so that it shall be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, or any Territorial court, within which the . . . property above described may be found; . . . which proceedings shall conform, as nearly as may be, to proceedings in admiralty or revenue cases; and if said property . . . shall be found to have belonged to a person engaged in rebellion, . . . the same shall be condemned as enemies' property, and become the property of the United States, and may be disposed of as the court shall decree, and the proceeds thereof paid into the treasury of the United States for the purposes aforesaid.

"*Section* 8. That the several courts aforesaid shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof, where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto.

"*Section* 14. That the courts of the United States shall have full power to institute proceedings, make orders, and do all other things necessary to carry this act into effect."

By the latter clause of a "joint resolution explanatory"* of this act, passed on the same day with it, it was resolved by Congress that no punishment or proceedings under the act should be "so construed as to work a forfeiture of the real estate of the offender *beyond his natural life.*"

It was a part of the history of this legislation of July 17th,

* 12 Stat. at Large, 627.

1862, that the then President, Mr. Lincoln, immediately after the passage of the *act* by both houses of Congress, had prepared the draft of a message objecting to provisions that might result "in the divesting of title forever," and suggesting or showing that the bill, as Congress had passed it, was in conflict with that clause of the Constitution, which ordains that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted;"* that before his message was presented to Congress, the joint resolution, above quoted, was passed to remove his objections; and that the President, in a message of July 17th, 1862, mentioned, that before he was informed of the resolution, he had prepared the draft of a message, stating objections to the bill becoming a law; a copy of which draft he submitted; and also mentioned that, considering the act of Congress, and the joint resolution explanatory thereof, as substantially one, he approved and signed both.

Under this act, above quoted, as appeared by a case agreed on and stated, in the nature of a special verdict, the District Attorney of the United States for the Eastern District of Virginia, in September, 1863, caused a tract of land in the eastern part of Virginia, of which a certain French Forrest (a person acting as an officer of the navy of the so-called Confederate States, from July 1st, 1862, to April, 1865, and thus one of the persons described in the 5th section of the above quoted act), was *seized and possessed in fee*, to be seized. A libel was afterwards, on the 9th November in the same year, filed on behalf of the United States, in accordance with the act, in the District Court of the district just named, "against *all the right, title, and interest, and estate of the said French Forrest, in and to the said tract of land.*" The said libel proceeded to judgment in accordance with the act, and on the 9th of November, 1863, an order of condemnation was made by the court, by which it was decreed that the clerk should issue a *venditioni exponas* to the

* Art. 3, § 3, clause 2.

marshal, and that the property described in the libel be sold by the marshal of the district, for cash, to the highest bidder, and that he execute a deed to the purchaser for the same.

In pursuance of the decree the land was publicly sold, and knocked off on the 10th July, 1864, to one Buntley, to whom the marshal made a deed reciting the *venditioni.* Buntley's rights under the sale became afterwards vested in a certain Bigelow. Forrest died intestate November 24th, 1866, and his only child and heir-at-law, Douglass Forrest—whom the cases agreed on stated was "one of the persons described in said section 5th, that is to say, who acted as an officer of the army and navy of the so-called Confederate States, from and after the passage of the said act till April, 1865,"—brought an action of *ejectment*, on the 1st of April following, in the Circuit Court of Fairfax County, one of the State courts of Virginia, against Bigelow, to recover the land, averring seizure in himself on the 1st of January, 1867.

The defendant having pleaded to issue, on the 8th day of November, 1867, filed his petition for the removal of the cause into the Circuit Court of the United States, under the provisions of the 5th section of the act of Congress of March 3d, 1863,* entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases."

This act thus provides:

"*Section* 4. That any order of the President or under his authority, made at any time *during the existence of the present rebellion,* shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any *search, seizure, arrest* or *imprisonment* made, done, or committed, or acts omitted to be done under and by virtue of such order or under color of any law of Congress.

"*Section* 5. That if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer, civil or military, or against any other person for any *arrest or imprisonment made, or other trespasses or wrongs done or*

* 12 Stat. at Large, 755.

committed, or any act omitted to be done at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress; and the defendant shall . . . . . in the court in which such suit or prosecution is pending file a petition, stating the fact verified by affidavit, for the removal of the cause for trial at the next Circuit Court of the United States, to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, &c., ... it shall then be the duty of the State court to accept the surety and proceed no further in the cause or prosecution. . . . . And copies being filed, as aforesaid, in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process."

Bigelow's petition for removal complied with the requisitions of this statute, respecting the form of procedure for removal.

The prayer of the petition was, however, denied, and, by agreement of the parties, the case already set forth, was stated in the nature of a special verdict, upon which the court gave judgment for the plaintiff. A petition was then presented to the District Court of Appeals praying for a writ of supersedeas to the judgment, and assigning as errors that the Circuit Court denied the motion to remove the cause into the Circuit Court of the United States upon the petition which had been filed for such removal, and also that the judgment was not warranted by the facts found in the agreement made in lieu of a special verdict, and that it was against the law and the evidence. The District Court of Appeals, however, being of opinion that no error had been committed in the cause by the Circuit Court of Fairfax County, refused the supersedeas. A petition was then presented by the defendant to the Supreme Court of Appeals of the State, complaining of the action of the District Court of Appeals, and praying for a writ of supersedeas to the judgment, assigning the same errors which he had assigned in his petition to the

Argument in favor of the sale.

District Court. The application to the Supreme Court was unsuccessful. The supersedeas was denied, and thereupon the present writ of error was sued out. There were two questions, therefore, presented by the record:

1st. The question whether there was error in the refusal of the State Circuit Court to allow a removal of the cause into the Federal court; for if there was not, then obviously there was no ground for complaint that the Court of Appeals had refused a supersedeas to the judgment because such removal had not been allowed.

2d. The question whether there was error in the judgment of the court upon the merits of the case.

Messrs. Poland and Willoughby, for Bigelow, the plaintiff in error:

1. The court erred in denying the motion to remove the cause, for the action asserted a trespass or *wrong to have been committed*, and so fell within the act of March 3d, 1863.

The act on which the ejectment was founded was at least committed under color of an act of Congress, and also under color of an order given by authority of the President of the United States.

2. The decree of the District Court of the United States condemning and confiscating *all the right, title, and interest* of the original owner, under the act of July 17th, 1862, or Confiscation Act, is binding upon all but appellate courts. Such decree cannot be collaterally assailed, especially by a State court, except by showing that such District Court did not have *jurisdiction.*

It is agreed that the land was seized *under the act.* Proceedings were had "in accordance *with said act.*" The act prescribes that the "proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." Regularity in all that was done is of course to be inferred.

By the act *all* the property is to be seized. No other seizure would have been proper under the act. A life-estate could not have been seized, for the act did not direct it, nor did the owner have a life-estate. The officer could not

make a seizure of separate interests. He is to take *the property belonging to the person.*

3. Douglass Forrest, plaintiff below, is admitted to have been, like his father was, one of the persons described in the fifth section of the Confiscation Act. The latter part of that section declares that "it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." No amount of argument could show more clearly that Douglass Forrest cannot maintain this action, than this statement in the law itself. It is decisive of this whole case.

4. The decree of the District Court, confiscating *all the right, title, and interest* of the original owner, was authorized by the law. This is not a proceeding in the nature of a bill of attainder. The clause of the Constitution concerning this subject had reference to bills of attainder which were common to the English Parliament, and had often been resorted to by several of the colonial legislatures during the revolution, by which it often happened that the estates of persons were confiscated *after their death*, and without conviction or trial, and often when such estates had passed into the hands of innocent holders. The true construction of this clause is that no attainder of treason should work a forfeiture *except during* the life of the person attainted; that is, that it should be done during his life. But this limitation upon *bills of attainder* does not apply to proceedings in courts, in individual cases, where there are regular trials and formal proceedings in which the individual has full opportunity to defend.

The last clause of the joint resolution, explanatory of the Confiscation Act, was passed out of superfluous caution to keep the act within the limits of the Constitution. It employs the very language of the Constitution, except in one word, which must have been inserted inadvertently in the hurry attending the passing of many resolutions with this, upon the last day of a long session. It was inserted because of the suggestion of the President, and because of his great desire to keep within the bounds of the Constitution. But

neither the President nor Congress had fully considered the effect of the clause of the Constitution.

Any other construction of the real intention of Congress than that which we give it, would defeat the object of the bill, which was to raise money for the support of the army. The life of a traitor, liable to be executed for his crime, especially if the government could get him into custody, might be supposed to be very short. In any event the tenure of a mere life-estate would be so uncertain, that but very little money could be raised upon it. Such estates would not be improved, and instead of building up the country with loyal men upon these estates, as was contemplated, the tendency would be to destroy and impoverish it. Such a construction should not be given to an act of Congress if it is possible to give any other reasonable view of its intention.

Again, the act has at least equal force with the joint resolution. Both were approved by the President on the same day, and became a law at the same time. But the act says that *all* the property shall be seized, and the *same* shall be condemned. If the construction contended for by the defendant in error be allowed, then one exactly contradicts the other. If this be so we must give effect to that part of the bill which will be most consistent with its whole object. The word *forfeiture* is always spoken of as referring to *all* the interest a man has in property. It is one of the modes of *absolute conveyance* of real estate, and the word is never used in any other legal sense.*

If any other construction is given to the word forfeiture than that for which we contend, both in the Constitution and the act, and which is the universal legal construction of the word, we shall be led into difficulties which cannot be solved by any known rules of law. Can it be said to affect only the life-estate? But the interest of the owner is not that of a life-estate. He holds in fee. Can the legislature determine that an estate in fee shall be a life-estate, or that

* 2 Blackstone's Commentaries, 267.

it can be divided into one estate for life and some other interest? If it does make this separation there must be a remainder. Who is the holder of this? not his heirs, for there can be no heirs of the living. Besides a remainder must pass from the grantor at the same time with the creation of the particular estate, and must be supported by such particular estate, and if this fails the remainder falls with it. Can there be any inheritance from the estate which is left in the original owner? What kind of an estate is it that he has left which can *descend* to heirs? What is there left upon which an inheritance can be built, and what would be the name of such estate? The first rule of inheritance is, that the inheritance must be from a person who dies *seized* of the estate.

Mr. Conway Robinson, contra.

Mr. Justice STRONG delivered the opinion of the court.

The first question presented by the record for our consideration is whether there was error in the refusal of the State Circuit Court to allow a removal of the cause into the Circuit Court of the United States; for if there was not, there is no ground for complaint that the Supreme Court of Appeals had denied a supersedeas to the judgment because the removal prayed for had not been allowed.

The act of Congress of March 3d, 1863, under which the right to remove the cause was claimed, and under which the right existed, if it existed at all, enacted, in its fifth section, that if any suit or prosecution, civil or criminal, had been or should be commenced in any State court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the then existing rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, the defendant might effect the removal of the cause into the Circuit Court of the United States holden in the district where

the suit might be pending. The act prescribed the course to be pursued in order to stay the proceedings in the State court and transfer the cause into the Federal tribunal. It must be conceded that the plaintiff in error complied with the requisitions of the statute and its supplements respecting the form of procedure for a removal of his cause. It remains, therefore, only to inquire whether the action was one which, under the act of Congress, could be removed. It was an action of ejectment, commenced on the 1st of April, 1867, in which the plaintiff averred seizin in himself on the 1st day of January, 1867, and an entry by the defendant upon the land on the same day, and a withholding of the possession. It might, perhaps, be sufficient to say that the act complained of, for which the suit was brought, was not, as described by the statute, "an arrest or imprisonment made," or "other trespass or wrong done or committed," or "an act omitted to be done *during the rebellion.*" It is to suits for acts done or omitted to be done *during the rebellion* exclusively that the statute is applicable, and prior to January 1st, 1867, the rebellion had ceased to exist.

But we do not rest our judgment upon so narrow ground. In our opinion, the statute was not intended to apply to actions of ejectment. It is manifest to us that Congress had in view only personal actions for wrongs done under authority or color of authority of the President of the United States, or of some act of Congress. The fourth section made any order of the President, or under his authority, a defence in all courts to any action, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress. The description of the causes of action mentioned in the fifth section is slightly different, not quite so detailed and specific, but it is evident that they were intended to be the same in both sections, as well as in the seventh, which prescribed a statutory limitation to suits and prosecutions. The specification, which all of these sections contain, of arrests and imprisonments, or, as in the fourth section, of searches,

seizures, arrests, and imprisonments, followed by more general words, justifies the inference that the other trespasses and wrongs mentioned are trespasses and wrongs *ejusdem generis*, or of the same nature as those which had been previously specified. This construction is fortified by the consideration that the mischief against which the statute was intended to guard was manifestly the excitement and prejudice so likely, in times of intense popular feeling, to attend suits in local courts for personal wrongs; excitement and prejudice which might render a fair trial difficult, and which might, indeed, greatly embarrass the government. The same mischiefs, in the same degree, could hardly have been expected to attend the trial of possessory actions for real estate. The action of ejectment is not a personal action, and it appears to us not to be embraced in any of the classes mentioned in the fourth, fifth, and seventh sections of the act.

It follows that there was no error in disallowing the removal of this case into the Circuit Court of the United States.

We proceed next to inquire whether there was error in the judgment of the court upon the merits of the case. The plaintiff below claimed the land as the sole heir of his father, French Forrest, who had been the owner down to September 1st, 1863, and who died intestate on the 24th day of November, 1866. The defendant claimed as a purchaser under a decree of confiscation made by the District Court of the United States for the Eastern District of Virginia, on the 9th day of November, 1863. French Forrest, the father of the plaintiff, was an officer in the navy of the Confederate States from July 1st, 1862, until April, 1865. In September, 1863, under the act of Congress of July 17th, 1862, known as the Confiscation Act, the land in controversy was seized as his property, libelled in the District Court of the United States, and, on the 9th of November next following, a decree of condemnation was entered, and the land was ordered to be sold by the marshal. Whether there was a *venditioni exponas* issued, as was ordered by the court, does not appear from the case stated (to which alone we can look for the

facts), except that the marshal's deed recites its issue. We may assume that there was. The property was sold at the marshal's sale and a deed was made to the purchasers. Subsequently, and before the institution of this suit, the entire interest acquired by the purchase became vested in Bigelow, the defendant. But what was that interest?

The fifth section of the Confiscation Act of July 17th, 1862, enacted that it should be the duty of the President of the United States to cause the seizure of all the estate and property, moneys, stocks, credit, and effects, of certain persons described in six classes, and to apply and use the same and the proceeds thereof for the support of the army. To one or more of these classes French Forrest belonged. That it was not intended the mere act of seizure should vest the property seized in the United States is plain from the provisions of the seventh section, which enacted that to secure the condemnation and sale of any such property, after the same shall have been seized, proceedings *in rem* should be instituted in a District Court, and that if it should be found to have belonged to a person engaged in rebellion, or who had given aid or comfort thereto, it should be condemned as enemy's property, and become the property of the United States, and that it might be disposed of as the court might decree. Concurrently with the passage of this act, Congress also adopted a joint resolution explanatory of it, whereby it was resolved that no punishment or proceedings under the act should be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. It is a well-known fact in our political history that this resolution was adopted in consequence of doubts which the President entertained respecting the power of Congress to prescribe a forfeiture of longer duration than the life of the offender. Be this as it may, the act and the resolution are to be construed together, and they admit of no doubt that all which could, under the law, become the property of the United States, or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized. It fol-

lows, then, that the estate acquired by the purchaser at the marshal's sale expired on the 24th day of November, 1866, when French Forrest died.

It is argued, however, on behalf of the plaintiff in error, that the decree of confiscation in the District Court of the United States is conclusive that the entire right, title, interest, and estate of French Forrest was condemned and ordered to be sold, and that as his interest was a fee simple, that entire fee was confiscated and sold. Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction. And it attempted no such thing. The decree made has not that meaning. It is true, the cause in the District Court was entitled, "United States against all the right, title, interest, and estate of French Forrest in and to all that certain piece, parcel, or lot of land" (describing it); but all this is descriptive, not of quantity of estate, but of the subject of seizure, and that was land. The proceeding was required by the act of Congress to be *in rem*, and the decree condemned, not the estate of French Forrest, but, using its own words, "the real property mentioned and described in the libel." The marshal was ordered to sell the said property, the boundaries of which were given in the title to the decree. Had the purchasers looked at that decree (and knowledge of it must be attributed to them), they would have seen that it was a decree of confiscation of the land, and they were bound to know its legal effect. It is, therefore, a mistake to argue that the plaintiff below was permitted to impeach collaterally the decree under which the marshal's sale was made, or that the judgment of the court in this case impeaches it. The argument assumes what cannot be admitted, that the decree of the District Court established a confiscation reaching beyond the life of French Forrest, for whose offence the land was condemned and sold.

It has been further argued on behalf of the plaintiff in error, that the plaintiff below was barred against maintaining his suit by the latter clause of the fifth section of the act of 1862, which enacted that 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 the section. The agreed statement of facts, in lieu of a special verdict, finds that the plaintiff is one of the persons described in said section fifth; but it immediately explains this by adding, "that is to say, he acted as an officer of the army and navy of the so-called Confederate States from and after the passage of said act until April, 1865." Was he, therefore, barred from maintaining the ejectment? The land was not seized or condemned for any act of his. He had no interest in it when it was declared forfeited. He could not have been heard in opposition to the decree of forfeiture. That proceeding was wholly *inter alias partes*. If, therefore, he is not at liberty to assert his claim, he is denied the right to his property without trial, without any procedure in due course of law, and the practical effect of the bar is to assure to the purchaser at the marshal's sale the enjoyment of the property after his right has expired, and to give him by estoppel a greater estate than he purchased. No construction of the act of Congress that works such results can be accepted. It is plainly against the true meaning of the act. We have already remarked that the act and the contemporaneous resolution must be construed together. The latter declares that the act shall not be construed to work a forfeiture of the real estate of the offender beyond his natural life. It can do this neither directly nor indirectly. The punishment inflicted upon him is not to descend to his children. His heritable blood is not corrupted. It is, of course, necessary to give such an interpretation to the words of the statute that they shall not contravene the declared intent of Congress. And this may be done and effect given to every part, by holding that the persons described in the fifth section, who are barred from bringing a suit for the possession or use of

such property, are those, and those only, whose property the President has caused to be seized. Such we think is the meaning of the clause barring suits.

This is all that need be said of the case. It is enough to show that, in our opinion, none of the errors assigned have any real existence. We do not care to speculate upon the anomalies presented by the forfeiture of lands of which the offender was seized in fee, during his life and no longer, without any corruption of his heritable blood; or to inquire how, in such a case, descent can be cast upon his heir, notwithstanding he had no seizin at his death. Such speculations may be curious, but they are not practical, and they can give no aid in ascertaining the meaning of the statute.

JUDGMENT AFFIRMED.

NATIONAL BANK *v.* COMMONWEALTH.

1. The right of the States to tax the shares of the National banks reaffirmed.
2. The statute of Kentucky (set forth in the statement of the case), taxing bank stock, levies a tax on the shares of the stockholders, as distinguished from the capital of the bank invested in Federal securities.
3. This is true, although the tax is collected of the bank instead of the individual stockholders.
4. The doctrine which exempts the instrumentalities of the Federal government from the influence of State legislation, is not founded on any express provision of the Constitution, but in the implied necessity for the use of such instruments by the Federal government.
5. It is, therefore, limited by the principle that State legislation, which does not impair the usefulness or capability of such instruments to serve that government, is not within the rule of prohibition.
6. A State law requiring the National banks to pay the tax which is rightfully laid on the shares of its stock is valid under this limitation of the doctrine.
7. On a writ of error to a State court no question will be considered here which was not called to the attention of the State court.

ERROR to the Court of Appeals of Kentucky; the case being this:

The act of Congress establishing the National banks,* enacts:

"*Section* 40. That the president and cashier of every such association shall cause to be kept a correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, and such list shall be open to the inspection of the officers authorized to collect taxes under State authority.

"*Section* 41. *Provided*, that nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person, from being included in the valuation of the personalty of such person, in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. *Provided further*, that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located."

Under the act of Congress which makes these provisions, the First National Bank of Louisville was established.

A statute of Kentucky,† relating to revenue and taxation, lays a tax as follows:

"On bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies."

And the same statute goes on to enact:

"The cashier of a bank, whose stock is taxed, shall, on the first day in July of each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent. upon the

* 13 Stat. at Large, 111.

† Revised Statutes of Kentucky, vol. ii, pp. 239, 266.

amount; and the said bank or corporation shall thereby forfeit the privileges of its charter."

Acting in professed pursuance of the State statute, the Commonwealth of Kentucky demanded payment from the said bank of $4000, with interest, the sum which a tax of fifty cents per share on the shares of the bank gave. Payment being declined the State sued.

The suit was brought in one of the State courts, and according to the practice of the courts of Kentucky by a petition, setting forth the amount of the tax and claiming a judgment for the same. The answer by the same mode of practice, set up four distinct defences to the action. These were:

1. That the bank was not organized under the law of the State, but under the bank act of the United States, and was, therefore, not subject to State taxation.

2. That it had been selected and was acting as a depositary and financial agent of the government of the United States, and, therefore, was not liable to any tax whatever, either on the bank, its capital, or its shares.

3. That its entire capital was invested in securities of the government of the United States, and that its shares of stock represented but an interest in the said securities, and were therefore not subject to State taxation.

4. That the shares of the stock were the property of the individual shareholders, and that the bank could not be made responsible for a tax levied on those shares, and could not be compelled to collect and pay such tax to the State.

The commonwealth demurred; and the case resulting in a judgment in its favor in the Court of Appeals, this writ of error was prosecuted by the bank.

Mr. Wills, with a brief of Messrs. Pirtle and Caruth, for the plaintiff in error:

I. We admit that under recent decisions of this court *shares* in National banks may be taxed in the hands of the

stockholders.* But this tax is laid, not on shares in the hands of stockholders, but on the capital of the bank itself.

Under the statute of Kentucky the amount of the tax is calculated by charging fifty cents on each one hundred dollars of stock, exacted *in solido* from the bank itself, under penalty of twenty per cent. damages in addition against the cashier and forfeiture of the charter. This is not a tax upon the shares but on the bank. The shareholder is neither named nor known in the transaction. It is a matter between the State and the bank. The shares of one hundred dollars are used simply as a means of computing the amount of tax on the capital stock. Without this, or some similar contrivance for estimating, a tax could not be levied on capital stock. There is not a word said about requiring the bank to pay for the shareholder as a convenience, but it directly, in terms, applies to stock of the banks. What stock does the bank own except the capital stock, which is identical with itself? The law requires the cashier of a bank whose stock is taxed, on the first day in July in each year, to pay *the amount due.* The amount due upon what? Clearly upon the capital stock. The capital of State banks in Kentucky is not always divided into shares of one hundred dollars each; on the contrary, some of the State banks now in operation, as *ex. gr.*, The Merchants' Bank of Kentucky, are divided into shares of only twenty-five dollars each, and one, The Western Financial Corporation, into shares of five hundred dollars each.

Now, these two banks are taxed annually under the statute, because in Kentucky there are no other laws upon the subject. The language is "fifty cents on each share thereof equal to one hundred dollars of stock." If that means a tax upon the share, as the Court of Appeals holds, the shares in the said banks being respectively twenty-five and five hundred dollars, and the law providing only for a tax on shares equal to one hundred dollars, nothing can be clearer than that no tax at all is levied on their shares.

* Van Allen *v.* The Assessors, 3 Wallace, 573; Bradley *v.* The People, 4 Id. 459.

II. *A tax on the capital stock of the bank cannot be collected.*

1. Because of its investment in government bonds.*

2. Because of its character as an agency and instrument of the powers of the Federal government.† If there be any one principle of constitutional law now universally acquiesced in, it is that the powers, agents, and means employed by Congress to carry into effect the powers vested by the Constitution in the Federal government must be free from State taxation and control. Taxation would impede, burden, and perhaps destroy the constitutional laws of Congress, and hostile legislation revolutionize our National economy. Such protection is necessary to uphold the nation's credit and preserve the nation's life. The tax imposed in this case upon the plaintiff in error is, in substance and in fact, a tax upon the operations of the bank itself.

III. *Can the law be enforced as a tax on shares?*

The shares in the hands of the shareholders are, under the act of Congress, to be included in the assessment of their personal estate; and, in order that the State officers may have every facility to arrive at the exact number of shares held by each person, the bank is required to keep, at all times, a list of names of stockholders, number of shares held by each, &c. If the means of collecting the tax be nothing, why is Congress careful to insert the foregoing provision? If the States can coerce the bank itself to pay the tax *in solido* for its stockholders, whence the necessity of the list of stockholders to be open for the inspection of the taxing officers of the State? It was with a view to prevent proceedings such as this one that Congress particularly prescribed the *mode* of collection as well as the extent of it. It was to prevent these organizations from being made the servants and agents of the States in the collection of taxes; to

* Weston *v.* City of Charleston, 2 Peters, 449; Bank of Commerce *v.* Commissioners, 2 Black, 620; The People *v.* Commissioners, 4 Wallace, 244.

† McCulloch *v.* State of Maryland, 4 Wheaton, 316; Osborn *v.* Bank of the United States, 9 Wheaton, 738; Dobbins *v.* Commissioners, 16 Peters, 435.

do which would be to clothe the State with an authority not justified by the constitution, and denied by this court. Without remuneration, and without right, the commonwealth of Kentucky is undertaking to force the plaintiff in error, in its corporate capacity, to collect this tax from its shareholders, and pay the same into the State treasury. Not only so, but penalties of a grave and serious character are imposed upon the bank and its officers in the event of neglect or refusal. Can this burden be imposed? Is it in accordance with the provisions of the act of Congress and the decisions of this court? With great propriety the bank may say to the State: "You have your assessing officers; send them to the bank; they will there find a list of all stockholders, let them assess for themselves the shares of stock for taxation; but you shall not transform our National agency into a State servant, and compel it to perform a burdensome duty, not enjoined by its charter."

IV. *A concession of the right as claimed carries with it means for its enforcement.*

This right, if conceded, may, and actually does, involve the destruction of these National agencies.

"If such tax be not paid," says the statute, "the cashier and his securities shall be liable for the same, and twenty per cent. upon the amount; and the *said bank or corporation shall thereby forfeit the privileges of its charter.*" Such is the law upon which this proceeding is based.

V. *The rate of taxation is higher than allowed by Congress.*

[The learned counsel then went into an exhibition of facts and figures to show this.]

Mr. Albert Pike, contra.

Mr. Justice MILLER delivered the opinion of the court.

In the several recent decisions concerning the taxation of the shares of the National banks, as regulated by sections forty and forty-one of the act of Congress of June 3d, 1864,

it has been established as the law governing this court that the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in their aggregate totality being called sometimes the capital stock of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the States, or in bonds and mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities.

On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the States on stock or shares so held by them, although all the capital of the bank be invested in Federal securities, provided the taxation does not violate the rule prescribed by the act of 1864.

It is not intended here to enter again into the argument by which this distinction is maintained, but to give a clear statement of the propositions that we have decided, that we may apply them to the case before us.

If, then, the tax for which the State of Kentucky recovered judgment in this case is a tax upon the shares of the stock of the bank, and is not a tax upon the capital of the bank owned by the corporation, the first, second, and third grounds of defence must fail.

There are, then, but two questions to be considered in the case before us:

1. Does the law of Kentucky, under which this tax is claimed, impose a tax upon the shares of the bank, or upon the capital of the bank, which is all invested in government bonds?

2. If it is found to be a tax on the shares, can the bank

be compelled to pay the tax thus levied on the shares by the State?

The revenue law of Kentucky imposes a tax "on bank stock, or stock in any moneyed corporation of loan and discount, of fifty cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations, or societies."

We entertain no doubt that this provision was intended to tax the shares of the stockholders, and that if no other provision had been made, the amount of the tax would have been primarily collectible of the individual or corporation owning such shares, in the same manner as other taxes are collected from individuals. It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may, in the market, be worth a great deal more or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, but the tax is the same in each case. This shows that it is the *share* which is intended to be taxed, and not the cash or other actual capital of the bank.

It is said that there may be, or that there really are, banks in Kentucky whose stock is not divided into shares of one hundred dollars each, but into shares of fifty dollars or other amounts, and that this shows that the legislature did not intend a tax of fifty cents on the share, but a tax on the capital. But the argument is of little weight. What the legislature intended to say was, that we impose a tax on the shares held by individuals or other corporations in banks in this State. The tax shall be at the rate of fifty cents per share of stock equal to one hundred dollars. If the shares are only equal to fifty dollars it will be twenty-five cents on each of such shares. If they are equal to five hundred dollars it will be two dollars and fifty cents per share. The rate is regulated so as to be equal to fifty cents on each share of one hundred dollars.

But it is strongly urged that it is to be deemed a tax on

the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the States for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. If the State cannot require of the bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some act of Congress, forbids it. There is certainly no express provision of the Constitution on the subject.

But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *McCulloch* v. *The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he

ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorizes the tax.

If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no

greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government.

A very nice criticism of the proviso to the 41st section of the National Bank Act, which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy.

It is said here in argument that the tax is void because it is greater than the tax laid by the State of Kentucky on other moneyed capital in that State. This proposition is not raised among the very distinct and separate grounds of defence set up by the bank in the pleading. Nor is there any reason to suppose that it was ever called to the attention of the Court of Appeals, whose judgment we are reviewing. We have so often of late decided, that when a case is brought before us by writ of error to a State court, we can only consider such alleged errors as are involved in the record, and actually received the consideration of the State court, that

it is only necessary to state the proposition now. As the question thus sought to be raised here was not raised in the Court of Appeals of Kentucky, we cannot consider it.

JUDGMENT AFFIRMED.

JONES *v.* BOLLES.

1. Equity has always jurisdiction of fraud, misrepresentation, and concealment, and this does not depend on discovery.
2. Where an agreement against which a complainant in equity asks to have relief, is perpetual in its nature, and the keeping of it on foot is a fraud against the party complaining, so that the only effectual relief against it is to have it annulled, the case is one for equity, not for law.
3. Where a bill is filed by stockholders to enjoin the setting up of a claim for purchase-money, against the lands of a company whose capital stock is divided into shares, the ground of the bill being that the party now setting up the claim, induced the complainants to buy their shares by fraudulently representing that the property sold to the company was unincumbered, and that he had no interest in it—the agents of the company also joining in such misrepresentations—the company may be properly made a defendant, though no relief is prayed for against *it*, but rather relief in its favor.
4. A sufficient interest in the stock of a company will in such case be inferred, where the bill expressly states that the complainant purchased on *his own account* and in trust for other parties a large number of shares, and paid therefor upwards of $25,000; and then afterwards states that the defendant threatened to bring an action against the company to enforce the pretended claim, whereby the stock of the company, which the complainant alleges he purchased in good faith, and which he still held, was liable to become greatly depreciated in value; this statement being nowhere denied in the answer—the defendant averring only his ignorance on the subject—and the allegation being fully corroborated by the proof, at least so far forth as relates to the purchase of stock by the complainant; and no question having been made on the examination as to the complainants' still holding the stock.

APPEAL from the Circuit Court for the District of Wisconsin; the case being thus:

Bolles, a citizen of Massachusetts, on behalf of himself and all other stockholders of the Mineral Point Mining Company, filed his bill of complaint in the court below against

Statement of the case.

one Jones, and the said company, the former a citizen, and the latter a corporation, of Wisconsin, for an injunction to restrain Jones from suing for, claiming or demanding against the said company the purchase-money of a certain tract of mining land in Wisconsin, or any mineral rents for mineral raised on the same. The matter set forth in the bill as a ground for this relief was a charge of misrepresentation and fraud on the part of Jones, perpetrated at Boston in Massachusetts, in November, 1865, whereby he induced him, the complainant, Bolles, who was a broker, to purchase for himself and other persons a large amount of the capital stock of the said mining company. The substance of the specific charges was that Jones and others, agents of the company, represented to him, the complainant, Bolles, that the company was seized in fee of the said tract of land; that it had been conveyed to the company by him, Jones, for the consideration of $30,000, which had been fully paid and satisfied, and that the title of the company was perfect and unincumbered; and, to beget further assurance in him, the complainant, that they exhibited a warranty deed from Jones to the company, and an abstract of title, showing an unincumbered title to the lands; that they further represented that the land was of great value for mining purposes, and that Jones had no interest in the property; that the complainant being entirely ignorant of the facts except as represented to him by Jones, and relying on those representations, purchased on his own account and in trust for others a large amount of the capital stock of the company, and paid upwards of $25,000 for it, and afterwards sold still larger amounts to parties who paid for the same on the faith of the said assurance that the property was unincumbered. The bill then alleged that at the time of the giving of the deed referred to, an agreement was made between Jones and the company (a copy of which was set out), the existence of which was carefully concealed by Jones when he made the representations complained of (but which he now asserted to be valid and subsisting), by which he claimed a large balance to be due to him for mineral rents and purchase-money of the said lands, and threatened to

bring an action against the company therefor, which, if successful, would greatly depreciate the stock of the company, and seriously embarrass it.

Jones in his answer to the bill, denied the principal charge in the aggregate as made (a mode of answer which this court observed, in passing, was altogether too narrow a mode of denial), admitted that he, with the president and secretary of the company, were in Boston at the time alleged and attended a meeting at Bolles's house, on the subject, and that he understood that the secretary had made representations to the effect complained of, but that the room was large and pretty well filled, and that he did not hear it. That he afterwards expostulated with the secretary for having made such a statement, and took some pains to inform *some* persons that it was not true. But he did not allege that he ever so informed *the complainant.* He denied that he made any such representations himself. He admitted the agreement complained of and insisted upon its validity. He did not deny Bolles's interest as alleged in the stock of the company, though he averred ignorance on the subject of it. Other points were made in the answer, but what has been stated is sufficient to show the principal issue made in the suit.

The Circuit Court, after full proofs, which showed among other things alleged, the purchase of the stock, decreed in favor of the complainant, enjoined the defendant from bringing any action against the company, directed him to execute a release, and declared the agreement entered into between the company and the defendant void. Whereupon Jones, the defendant below, appealed. No question was made on the examination below, as to Bolles still holding his stock.

Mr. M. H. Carpenter, for the appellant:

I. The whole of the complainant's case rests, as regards merits, upon loose verbal alleged admissions, made under circumstances of all others most likely to be misunderstood or misconstrued. They are susceptible of precisely the explanation given by the defendant; his explanation carries upon its face evidence of its truth. The attempt is to hold

a party responsible for general conversation held at a kind of social party; that conversation relating to real estate, the title of which might have been fully understood by the examination of an abstract which was publicly exhibited. Can this be done?

II. But there are difficulties as to jurisdiction and pleading.

The basis of the prayer for relief is, that Jones threatens to bring a suit against his co-defendant, the mining company, upon a false and fraudulent claim, and that thereby the complainant is liable to suffer injury and sustain damage, and one of the defendants, the company, is liable to be greatly embarrassed in conducting its affairs. Assume all this to be true. Then,

1st. If Jones made *false* representations whereby the complainant was induced to purchase stock and was injured, the courts of common law afford an ample remedy. If he made true representations and afterwards attempted to do that which, if consummated, would operate as a fraud upon the complainant, the courts of law still afford a remedy. If his representations operated as an estoppel against his setting up a claim against the company, it would be as operative a defence at law as it would in equity. If the threatened action had been, or were to be brought by Jones, against the company, the answer would be that the claim is false, fraudulent, and brought for the purpose of extortion. This affords a perfect defence in law. If the claim were true and not false, but Jones had estopped himself from enforcing it by making false representations, that is, by representing to the purchasers that he had no claim against the company, and the contrary of those representations if acted upon, would injure and embarrass the company, the defence is still perfect in the action at law. A court of law has thus full and adequate jurisdiction of the subject-matter of the action, whatever may be the alleged particular phase of it.

Yet further. The case stated does not constitute an equitable cause of action. It does not show wherein or how much damage the plaintiff is liable to sustain, and does not pretend that any has been sustained. Courts of equity will

indeed protect against great threatened injury where the mischief will be irreparable. But there is no allegation here of irreparable injury; no averment that Jones is irresponsible; no statement of facts from which injury can be inferred. The only allegation upon that subject is that the stock which plaintiff now holds is *liable* to become greatly depreciated in value.

The bill is not one for discovery. All of the facts are known, and susceptible of proof without any testimony to be furnished by the answer.

2d. But how does a court of equity, on such a case as the one assumed, acquire jurisdiction? The mining company is not charged with fault or collusion. It is not alleged that if sued by Jones, it will not defeat the action; nor that it is incapable of transacting its own business, and protecting its stockholders; nor is it shown how stockholders so large as the complainant and his associates, have not a sufficient control of the affairs of the company; nor that the company could not have brought an action in its own State court to remove a cloud upon its title, if it was likely to be embarrassed by Jones setting up a false and fraudulent claim. If then there is no collusion, or concert of action charged between the defendants, and relief be demanded against both or all in regard to the same thing, and no cause of action be stated against one, there is a misjoinder of parties as to both or all, and, of course, either may demur.

3d. The proof does not show that the complainant, Bolles, is the owner of any stock in the Mineral Point Mining Company. He avoids saying specifically that he owns any stock, or that he owned any at the time of filing the bill. No stockholder has united with him in prosecuting this action. If it be true that he owns one share, worth perhaps $5, he occupies the position of obtaining an injunction to restrain the company from paying an honest debt, of which his distributive share, if it were paid by an assessment, might be less than five cents.

No opposing counsel.

Opinion of the court.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court, as follows:

We have examined the proofs in the cause and find them to be very full and convincing against the appellant, and are satisfied with the decree of the Circuit Court, unless the same be invalid for some jurisdictional or technical reason.

It is objected that a court of equity has no jurisdiction of the case because the law affords a complete remedy in damages. This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery. But in this case a court of law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effectual relief against it, where the keeping of it on foot is a fraud against parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity.

It is next objected that there is a misjoinder of defendants by reason of making the mining company a party. But the company is directly interested, and though no relief is prayed against it, but rather in its favor, it is eminently proper that it should be made a party, complainant or defendant. It could not be made complainant against its will, and, besides, its own agents joined in the fraudulent representations that were made. As a separate and independent personality, therefore, distinct from the stockholder interest, there was propriety in making it a party defendant.

It is also objected that the appellee, Bolles, does not distinctly state or prove the amount of his interest in the company. The bill expressly states that the appellee purchased on his own account and in trust for other parties a large number of shares, and paid therefor upwards of $25,000; and then afterwards states that the appellant threatened to bring an action against the company to enforce his pretended claim for rents and purchase-money, whereby the stock of the company, which the appellee alleges he purchased in good faith, and which he still held, was liable to become greatly depreciated in value. This is surely an allegation of a large interest, and the statement is nowhere denied in the answer.

Statement of the case.

The appellant avers only his ignorance on the subject. But the allegation is fully corroborated by the proof, at least so far forth as relates to the purchase of stock by the appellee. No question was made on the examination as to his still holding the stock.

We do not perceive any legal grounds of objection to the decree, and it is therefore

AFFIRMED.

MEPHAMS *v.* BIESSEL.

1. Compensation to a person who had acted for four months (from 16th March to 26th July), both as captain and as one of two pilots on a Missouri steamer, left at $900 per month, at which sum the Circuit Court had fixed it; the evidence, which though not so full as it ought to have been, showing that pilots' wages were at the time very high, that the person had performed his duty in both capacities well, and that the owners had charged his services against the government (which had impressed the vessel during twenty-six days of the time) at the rate of $1000 per month.
2. A master not held liable for injury to flour, apparently arising from a bad stowage; the same having occurred from a necessity to unload, and reload, in order to get across a bar in the river; the testimony showing that the captain was not blamable, and there having been some reason to believe that the injury arose from causes inherent in the flour itself.

THIS was an appeal in admiralty from the decree of the Circuit Court for the District of Missouri, in which one Biessel, on the one side, had filed a libel *in personam* against M. & W. Mepham, owners of the steamer Iron City, for wages as master and pilot; and in which they, on the other, sought to set off against the claim for services, at whatever sum these might be estimated, a demand that they made against Biessel for injury to certain flour, which on crossing a bar in the river (in order to lighten the vessel, and so get over the bar), it had been necessary to put ashore, and afterwards when the vessel had got over, with the rest of the cargo (that being unloaded and put ashore below the bar), to come back

for and reload; and which was ultimately found to be sour;—injured, as the Mephams asserted, by Biessel's carelessness in stowing it, when it was taken on board the second time.

The court below sustained the claim of the libellant, fixing his wages at $900 a month, and refused to allow the set-off raised by the other side.

Mr. Dick, for the appellant; Mr. Leighton, for whom Mr. Drake had leave to file a brief, contra.

Mr. Justice SWAYNE stated the case more particularly, and delivered the opinion of the court.

The only questions presented for our consideration are, the value of the services of the appellee as master and pilot of the steamer Iron City during the period of his employment upon her in those capacities, and whether he can be held liable upon the principle of recoupment for the damage sustained by a part of the cargo of the vessel upon her first voyage after he took charge of her as captain, which was a voyage from St. Louis to Fort Benton, upon the Missouri River. The services commenced on the 16th of March, 1866, and terminated on the 26th of July following—making a period of four months and ten days. Four witnesses were examined. They were Biessel, the appellee; W. G. Mepham, one of the appellants; Bush, the mate, and Stone, the pilot. The leading facts, as developed in the proofs bearing upon the subject of compensation, are as follows:

Biessel had been in the employment of the Mephams as mate upon a steamer at $150 per month. He talked of seeking employment elsewhere, expecting to receive $300 per month. Captain Hunter, also in the employment of the Mephams, to whom he made the communication, requested him to remain until the captain could consult the owners. An interview took place. Biessel told them he had never served as captain, and doubted whether he would suit them in that capacity. They employed him as captain. It was usual to employ two pilots. Biessel found two who asked jointly $1600 per month. Pilots were much in demand at

that time. He proposed to the owners to employ Stone as a pilot at $800 a month, and to serve himself as the other pilot, besides performing his duties as master. They assented, and assisted him to procure a pilot's license. The arrangement was carried out. Biessel testifies that he told them it would cost less than to employ two pilots, in addition to the captain. Mepham testifies that he said it should cost them nothing for pilotage but the wages of Stone. Here the parties are at issue, and there is no other testimony upon the subject.

The wages of pilots varied, according to the testimony, from $200 to $1000 per month. Biessel says the usual compensation of captains was $400 per month. Mepham testifies that they paid their three other captains $200 per month. The proof is satisfactory that Biessel performed his duty as captain well and faithfully, and that, in addition, he did full as much service as Stone in discharging the duties of pilot. The boat was impressed into the service of the United States, and was thus employed during a period of twenty-six days. For that time we are satisfied from the evidence that the services of Biessel were charged against the government, and paid for to the appellants, at the rate of a thousand dollars per month. Both parties agree that there was no special contract as to the compensation Biessel should receive. It is to be regretted that the proof is not fuller as to the wages at that time of both captains and pilots. It could have been easily made so, and would have relieved us from some embarrassment which we have felt in coming to a conclusion as to this branch of the case. The entire testimony of Biessel is characterized by a fairness and candor which have impressed us favorably in his behalf. The Circuit Court fixed his compensation as master and pilot at $900 per month.

After a careful examination of all the testimony in the record, we have found no sufficient reason to dissent from this allowance.

The claim for recoupment cannot be sustained. The flour to which it relates was in sacks, which were inclosed in other sacks. According to the shipping phrase it was "double-

sacked." The shipper directed it to be carried upon deck. A part of it was originally placed in the hold. Upon discovering this, Biessel caused it to be removed to the deck, and directed that no more should be put in the hold. During the voyage, Bush, the mate, says it became necessary for the boat to "double trip it," in order to pass a bar. A part of the cargo was landed below the bar and a part above it. This flour was landed above. All the passengers, some fifty in number, assisted in unloading and reloading. Some of them in reloading put a part of the flour in the hold without the knowledge of the captain or mate. The mate subsequently saw it there, but allowed it to remain, and did not advise the captain. The captain knew nothing of it until the vessel reached Fort Benton. That part of the flour was then found to be soured. Mepham says the loss to the appellants was $10 a sack upon a hundred sacks, amounting to $1000. It was the duty of the mate to see to the loading. According to the testimony, the captain was not blamable. There was other flour in the hold during the entire voyage, which arrived at Fort Benton uninjured. There is some reason to believe that the spoiling of the flour in question arose from inherent causes, and not from its being kept under the deck.

There is nothing in the record which would warrant us in holding Biessel responsible.

The decree of the Circuit Court is

AFFIRMED.

BANK OF WASHINGTON *v.* NOCK.

1. An agreement made by a contractor about to furnish certain manufactured articles to the government that advances to be made by a bank to enable him to fulfil his contract shall be a lien on the *drafts* to be drawn by him on the government for the proceeds of the articles manufactured, does not give a lien on a *judgment* against the government for damages for violation of the contract; certain drafts having been drawn, and their proceeds received by the bank.

Statement of the case.

2. A subsequent agreement that the debt due to the bank for such advances, and also for any future ones to be made for the purpose of suing the government for non-fulfilment of its contract, shall be paid out of *any receipts* from the government, gives no right where a suit, though prosecuted, has resulted in an adverse judgment, even though a second suit have resulted successfully; this latter suit having been prosecuted under a new and special resolution of Congress, and by the aid of advances received from other parties; the bank, on the adverse judgment in the first suit, having refused to advance anything to prosecute the second.

3. A paper "renewing and reviving" the debt now, at the date of the paper, barred by the statute of limitations, for the balance of all the advances made in such a matter, whether to fulfil the contract or to prosecute the claim, does nothing more than keep alive the personal obligation. It gives no lien.

NOTE.—In this case the contractor, soon after the original agreement to advance, and when only a part of the advances were made, assigned a patent-right (for the delivery of products under which to the government his contract with the government was made) to the bank, with power to sell it if the advances were not paid when due. And the present case was a proceeding in equity to enforce a lien on a judgment which the contractor had obtained against the government for its breach of contract with him, the bank having kept the patent-right twenty-seven years, and not offering by its bill to return it.

ERROR to the Supreme Court of the District of Columbia; where the case was thus:

The trustees of the Bank of Washington filed in May, 1867, a bill against Nock, complaining that in 1840, he having received a patent for a mail lock, made a contract with the Postmaster-General to furnish the government from time to time with the sort of patented lock, at a price stipulated, for the use of the government; that Nock, not having means at his command to manufacture the locks, agreed with the bank; if they would advance money for him, *on his drafts on the Postmaster*, or otherwise *on the proceeds to arise from his said contract*, to enable him to fulfil the same, that he would give them a specific lien on, and empower and authorize them to take out of *said drafts*, *when paid*, or *proceeds*, *whenever realized*, sufficient to repay to them the advances made, or to be made. The bill averred that under this arrangement they did make advances, and that Nock was so enabled to

fulfil his contract; but that for some reason but a small amount of the said proceeds were ever realized by Nock until lately; that he still owed the bank $8078.82.

That some time after the principal part of the advances were made, Nock executed an agreement, on the 2d of December, 1852, with the bank, to make to him further advances to *prosecute* his claim for payment; and that they did make such further advances; Nock agreeing that "the debt due by him to the bank for former advances, as well as the further advances then and thereafter to be made, for the purpose of *prosecuting his said claim*, should be first paid out of any receipts realized by him from the government."

That Nock, on the 6th of January, 1865, by written obligation, which was in these words, and signed by him: "I hereby renew and revive my indebtedness and obligations to the Bank of Washington, arising out of certain advances made to me for drafts on the Postmaster-General of the United States in 1840, and all the accruing interest thereupon, as well as for any other advances which have been made to me, or which may be made to me, on any account whatever, by the said Bank of Washington," did acknowledge all his said debt for the advances, and all the interest accruing thereon, and formally renewed his obligation to pay the same.

That after a long prosecution of his said claim, Nock had recently been awarded by the Court of Claims the sum of $27,000, in satisfaction of the contract to furnish locks, and the same was now about to be paid, but that Nock, refusing to pay the bank its advances, or to recognize the specific lien which it had on the fund, or the validity of his contracts, especially that of the 2d December, 1852, was about to and was seeking to receive the money, and to appropriate it to his own exclusive use, in contravention of equity.

The answer and proofs, which, independently of the answer, were few, showed the patent-right, and the contract with the postmaster, as alleged; that for the purpose of executing the contract Nock had got the advances; that he had drawn several drafts on the Postmaster-General, in reduction

of them; that the drafts were all paid, and that the balance asserted remained unpaid. They showed, also, that about four months after the first sum of money advanced by the bank, Nock having now received about $3000 of advances, by an instrument dated June 6th, 1840, reciting the advances to that date, and reciting also his desire to secure, "by an assignment of the patent, in manner hereinafter expressed," payment not only of those advances but of all such further sums as might be thereafter advanced, transferred the patent to the bank, upon trust, in case of his failure to pay the bank the money advanced or to be advanced, as it became due, to sell the patent after sixty days' notice by advertisement, and reimburse itself.

The answer, which was not disproved on these points, further set forth that the government having annulled its contract with the respondent, he, for the purpose of procuring the means necessary to sue it in the Court of Claims, entered into the agreement of 1852; but that *that* prosecution resulted, A.D. 1864, in a judgment *adverse* to his claim. That desiring to begin a *new* suit against the government, and to get from the bank money to carry it on, he signed the paper of 1865; but that the bank had never advanced under that agreement but $100 (which the respondent professed himself ready to pay back), declaring that they had no confidence in his claim, and would never advance another cent; that the bank thus refusing to advance money to prosecute the case anew, it then became necessary for the respondent to make other arrangements to get money, and that by aid of these new arrangements with other persons, he procured an act of Congress referring his claim again to the Court of Claims, in which court, without any assistance from the bank, he prosecuted his claim anew, and after having laid out over $11,000 in doing so, got the award of $27,000, upon which the bank sought to fix a lien.

The answer expressly denied that the drafts which Nock drew were to be "any lien on the contract," though it admitted that they were founded on it, and made to enable the bank to receive pay for such locks as should be delivered,

and the testimony of the officer of the bank with whom Nock made his original arrangement said: "We made different advances at different times on drafts. The understanding was, that as soon as the locks were delivered we were to draw the money." The bank prayed an injunction against Nock's drawing the amount of the judgment from the treasury until it was first paid its advances.

The Supreme Court of the district at special term granted the injunction and directed an account; but at general term dismissed the bill, when the bank brought the case by appeal here.

Messrs. Edward Swan and W. D. Davidge, for the bank:

It is submitted that the lien of the bank upon the fund is too plain for controversy. Without adverting to the effect of the drafts and the assignment of the patent, the lien is expressly declared and established by the agreements of December 2d, 1852, and January 6th, 1865.

The lien being established, the jurisdiction of equity to enforce payment attached.*

Mr. Morris, contra:

The only lien really set up in the bill itself, notwithstanding its loose language—"or otherwise on the proceeds to arise from said contract"—is a lien on the drafts or their proceeds. The testimony of the officer of the bank who made the original arrangement, shows that this was the only lien thought of. All the drafts given were paid. The whole case, therefore, falls.

Independently of this, the alleged contract was made in 1840. Within four months of the first sum given, and while but a part of the money was yet advanced, Nock assigned his patent. That the patent had value is proved by the judgment in the Court of Claims for $27,000. It had value when assigned. This bill was filed in 1867. The bank has never offered to reassign. Nock could not, now, compel a reassignment. Had the bank sold, it could have

* Wylie *v.* Coxe, 15 Howard, 415.

retained the proceeds. This long retention of the patent—a retention for twenty-seven years—amounts to an appropriation of it for the advances. At all events, the bank should show that the security was exhausted. If it has held on to it till it has lost all value, it has no case for equity.

The agreement of 1852 don't keep alive a debt not sued for till 1867. And as an agreement to create one by its own force, the sufficient answer is, that the prosecution which it was meant to assert ended in an adverse judgment.

As to the paper of 1865, the whole consideration for it fails, the bank not having advanced money for the second suit, it being impossible to suppose that $100, which was all that was advanced under it, was what was meant to be advanced to prosecute a claim whose prosecution cost $11,000. Under pretence of an advance, its real purpose was to get an acknowledgment of a debt no longer capable of being enforced. And to use it for any purpose, would be to use it fraudulently. The lien, if the bank ever had any, was lost by the abandonment and refusal on their part to prosecute, or to permit means for the prosecution of the claim. And when thereon, upon his own resources—the bank having declared themselves unwilling to further prosecute, or to provide means for prosecution—Nock was left to proceed in his own way, they virtually accepted the then condition of the case, with an adverse judgment; and when thereafter Nock, with such assistance as was within his power, prosecuted the matter, he prosecuted it for his own benefit, and not for the benefit of the bank.

Mr. Justice CLIFFORD delivered the opinion of the court.

Advances were made by the complainants, as they allege, to enable the respondent to fulfil a certain contract which he had previously made with the Postmaster-General to furnish to that department a certain number of mail locks and keys for the postal service of the United States.

Prior to the date of the contract, to wit, on the sixteenth of July, 1839, the respondent had obtained letters patent for the lock to be furnished, as a new and useful improvement,

with the exclusive right to make, use, and vend the same, for the term of fourteen years, and on the first day of August following he received orders from the head of that department for two hundred locks and six hundred keys, to be constructed in accordance with his patent.

Before the respondent had filled that order, to wit, on the eighteenth of November of the same year, he received another communication from the Postmaster-General, informing him that he was authorized to make mail locks and keys for the Post-Office Department, of certain specified descriptions, and at certain specified prices, and that orders would be given for the quantities required from time to time, as they were wanted, payment to be made on the delivery of the articles, as ordered for the use of the government.

Wanting more means than he had at command, to enable him to perform his contract, the respondent applied to the bank for a loan, and the complainants allege that he agreed, in consideration that they would advance money for him on his drafts on the Postmaster-General, to give the bank a specific lien on the drafts and their proceeds, whenever the same should be realized, to secure and reimburse the corporation for the full amount of the advances so made or to be made, with interest until the principal should be repaid. Cash advances to the respondent were accordingly made by the bank, under and by virtue of that agreement, and the complainants allege that the advances so made enabled the respondent to fulfil his contract, and to supply the locks and keys for the postal service, as ordered by the department.

Drafts were drawn on the Postmaster-General for the contract price of the locks delivered; but the complainants allege that, for some reason unknown to them, they never received more than two hundred dollars of the proceeds, and that there still remains due and owing to them for the advances made by them, including interest, the sum of eight thousand and seventy-eight dollars and eighty-two cents; that on the second of December, 1852, the respondent entered into a written agreement with the corporation, that if they would make him further advances to enable him to

prosecute his claim against the government, the debt due by him to the bank, for the former advances, as well as the further advances to be made, should be first paid out of any sums he might realize for his claim for the breach of the contract, and that the whole amount of the debt due to the bank should be paid without any discount if the amount he realized of his claim exceeded by thirty-three and one-third per cent. the amount of his debt to the bank.

They also allege that the respondent, on the eighth of January, 1865, by a written instrument of that date, under his hand and seal, acknowledged all the advances so made to him, and renewed and revived his said indebtedness and obligations to the bank for the said advances.

Moneys were subsequently advanced by the bank for the respondent to the amount of one hundred dollars, and they allege that the Court of Claims awarded in his favor the sum of twenty-seven thousand dollars, in full satisfaction for the damages claimed by the respondent for the acts of the department in annulling his contract to furnish such locks and keys for the postal service, and that he neglects and refuses to pay his indebtedness to the bank, or to recognize their specific lien on that fund, but that he is seeking to appropriate the same to his own exclusive use, which, as they allege, is contrary to equity and in fraud of their legal rights. Wherefore they pray that the advances they made to the respondent may be decreed to be a specific lien on the amount recovered in that judgment, and they also pray for an account and for an injunction to restrain the respondent from receiving this amount from the treasury of the United States.

Process having been issued and served, the respondent appeared and admitted that he was the original and first inventor of the lock in question; that he received letters patent for the same as a new and useful improvement, and that he made a contract with the Postmaster-General to furnish the same to that department for the postal service of the United States; that he received an order under that contract for one thousand and forty locks and seven hundred and fifty keys;

Restatement of the case in the opinion.

that he subsequently filled the order, and that the proceeds thereof, except the sum of one hundred and fifty dollars, together with the proceeds of other parcels of the same patented lock and key, to the amount of fifteen hundred and ninety-three dollars and thirty-five cents, were paid to the bank; that all locks and keys manufactured and delivered under the contract were paid for by the department, except twelve hundred, which the Postmaster-General refused to accept, and which the respondent delivered to the bank, in whose possession they have ever since remained, unavailable to the respondent.

Fearful that the proceeds of the drafts would not be sufficient to satisfy the claim for the advances, the officers of the bank demanded further security, and the respondent alleges that thereupon he assigned to the corporation his whole interest in the letters patent for the lock in question, and that the bank continued to hold the same until the letters patent expired. He admits that he executed the drafts and that they were drawn to enable the bank to receive the proceeds of the locks and keys as manufactured and delivered to the department, but he expressly denies that there was any understanding or agreement that the drafts were to be a lien on the contract, as alleged in the argument of the appellants.

Separate defences are also presented to the subsequent agreements set up by the appellants, and in respect to that of the second of December, 1852, he alleges that the advances were made to pay for the services of an agent to procure an extension of the patent and to prosecute his claim against the government for the annulment of his contract; that they were not made a lien on the contract, as supposed by the appellants, and that the application for the extension of the patent was refused, and that the suit in the Court of Claims to recover damages for a breach of the contract resulted in an adverse judgment.

Apart from that defence he also alleges that the bank employed the same agent and agreed to give him one-third of whatever sum they might receive towards their claim, in

case the agent was successful in procuring the extension of the patent, or the allowance of the claim.

In his answer the respondent also admits the execution of the agreement of the sixth of January, 1865, but he alleges that he never received under it more than one hundred dollars, and that when he needed funds to enable him to prosecute his claim to a successful result, the appellants refused to make him any advances, and informed him that they had no confidence in his claim, and that they would not advance him a dollar for that purpose.

By the order of the court the cause was referred to an auditor, and he reported that the several advances made to the respondent amounted to eight thousand seven hundred dollars and thirty-three cents, and the court, at a special term, on the fifth of August, 1867, entered a decree in favor of the complainants for that amount. But the respondent appealed to the full court in general term, where the decree was reversed and a decree entered dismissing the bill of complaint. Whereupon the complainants appealed to this court, and still insist that their claim is a lien upon the judgment recovered by the respondent against the United States in the Court of Claims.

Liens existed at common law, and they usually arise by statute or by contract, or by the usages of trade or commerce.* Such a contract, if alleged, must be proved, and when proved the rights of the parties depend upon the terms of the contract.†

The complainants contend that their claim is a lien upon the judgment recovered by the respondent, but he denies that proposition and insists that he never entered into any such contract. Before examining that question, however, in its general aspect, it becomes necessary to inquire and determine whether by the terms of the original arrangement it was agreed and understood between the parties that the

* Addison on Contracts, 1174; 3 Parsons on Contracts, 238.

† Randel *v.* Brown, 2 Howard, 406; Allen *v.* Ogden, 1 Washington's Circuit Court, 174.

advances made by the bank to the respondent were to be a lien upon the contract made by the respondent to manufacture the locks and keys and deliver the same to the Postmaster-General, or whether those advances were only to be a lien on the drafts to be drawn by the respondent for the proceeds of the locks and keys so manufactured and delivered, after the proceeds became due and payable.

Evidently the views of the complainants cannot be sustained by virtue of the original arrangement, unless they had a lien upon the contract between the government and the respondent, as the drafts drawn for the proceeds have all been paid and adjusted to the satisfaction of all concerned. Suffice it to say on this point that the complainants do not allege in the bill of complaint that they had any lien upon the contract; and if they had done so the allegation would not be of any avail, as the answer expressly denies the existence of any such lien, and there is nothing in the proofs to sustain any such theory.

What they do allege is, that they had a specific lien upon the drafts drawn for the proceeds of the locks and keys manufactured and delivered, but it is not alleged that there were any such drafts outstanding and unpaid by the government, which were included in the judgment recovered by the respondent. On the contrary, it is alleged in the answer, and not denied by the complainants, that all the drafts drawn for locks and keys manufactured and delivered to the department were paid in full by the government.

Twelve hundred locks were manufactured, which were refused by the Postmaster-General, but the averment of the answer is, that they were delivered to the bank, and it does not appear that any draft or drafts for the contract price of those articles were ever drawn, presented, or refused. Such advances were made by the bank at different times, and one of the appellants testifies that the understanding was that they were to draw the money as soon as the locks were delivered, and that the orders were given to enable them to draw the money due for locks and keys furnished to the department; and the respondent testifies that the whole amount

due for the locks furnished was paid by the government either to him or to the bank.

Much of the respondent's indebtedness to the bank was contracted prior to the sixth of June, 1840, and on that day he assigned his whole interest in the letters patent to the bank, or to one of the appellants for the benefit of the bank, as security for such advances, with authority, in case he should fail to pay the same when the advances became due, to sell and dispose of the patent at public or private sale, first giving sixty days' public notice of such sale, as provided in the instrument of assignment.

Dissatisfied with the arrangement the department refused to give further orders for the locks and keys, and on the sixth of December, 1841, the department annulled the contract, and entered into a new contract with another party to supply the locks and keys for the postal service of the United States.

All the drafts drawn by the respondent for the proceeds of locks and keys furnished to the department had been paid, and he had no claim upon the United States except for the breach of the contract.

Suppose all these suggestions are correct, still the complainants refer to the agreement of the second of December, 1852, and insist that they are entitled to a decree by virtue of that instrument. Undoubtedly the effect of that instrument was to renew and revive the original promise of the respondent to pay to the bank any balance which he owed the corporation for those prior advances, but it did not have the effect to renew or revive any prior lien on the contract between the respondent and the government, because no such prior lien ever had any existence. It removed the bar of the statute of limitations, but its effect in all other respects was only prospective.

Briefly stated, the terms of the instrument are, that the bank shall advance such sums of money as they may think proper for the necessary costs and expenses in prosecuting the claim of the respondent against the government, and that he, the respondent, agrees, in consideration thereof, that

their debt against him, together with the sums so advanced, shall first be paid out of any receipts realized from the government. Certain advances were accordingly made for that purpose, an agent was employed, a suit was instituted in the Court of Claims, but nothing was recovered, and the result was an adverse judgment against the claimant. Both the bank and the claimant abandoned the prosecution of the claim, and nothing further was done in that behalf for the period of twelve years. Nothing in fact was ever done by the bank or the respondent under that agreement after the suit was determined in favor of the United States.

Conditioned, as the instrument was, that the debts of the bank were to be paid out of the receipts which they might collect from the government, our conclusion is, that the supposed lien never attached to the claim of the respondent, as nothing was ever collected. Beyond doubt he owes the debt, as he received the advances, but the question is whether the bank acquired any lien by virtue of that instrument, and our conclusion is that no lien was created by it, because nothing was collected from the government.

Years elapsed before the respondent made any further attempt to obtain damages for the refusal of the Postmaster-General to fulfil the contract. Some new powers had been conferred upon the Court of Claims, and the respondent employed a new agent, who succeeded in procuring the passage of a resolution by Congress, referring the matter again to the Court of Claims for their adjudication. Encouraged by this resolution he instituted a new suit in the Court of Claims, and on the sixth of January, 1865, he gave the bank another written agreement renewing and reviving his indebtedness and obligations arising out of certain advances made to him for drafts on the Postmaster-General, and for all accruing interest, as well as for any other advances which have been or may be made by the said bank.

Reference is made by the plaintiffs to this instrument as showing a lien on the judgment in question in behalf of the complainants, but it is quite clear that the language of the instrument will not admit of any such construction. Un-

questionably it is a new promise, but it contains no language whatever to support the theory that the parties intended that it should have the effect to create a lien in favor of the bank upon the claim of the respondent against the United States.

Special reference is made in the instrument to the advances made for the drafts drawn on the Postmaster-General, not as creating or recognizing any lien on the original contract, but as descriptive of the indebtedness and obligations which it was the purpose of the respondent to renew and revive.

Two indorsements were made on the instrument, to wit, one for sixty dollars and the other for forty dollars, and it is true that those indorsements contain the recital that those sums were advanced in aid of the claim of the respondent, and that the appellants, as trustees of the bank, have an interest in the claim, but it is not there stated, even if the indorsements are competent evidence, what their interest is, nor that they have any other or greater interest than other creditors. They do not pretend that they advanced more than those two sums under the last agreement, and they admit that the respondent several times applied to them for money, and that they refused to supply his wants, which fully supports the allegations of the answer.

His theory is that they agreed to advance what was necessary to pay the expenses in the new prosecution of the claim, but the complainants deny that proposition, and insist that they let him have all they agreed to furnish, and if that allegation is true it affords strong ground to conclude that the instrument under consideration never was intended to create any such obligations as is supposed by the appellants. But if it will admit of such a construction then it is clear that the complainants cannot recover, as they never fulfilled the contract. They never advanced but one hundred dollars, and it is past belief that either party ever supposed that the expenses of prosecuting the claim to a successful result would not exceed that sum.

DECREE AFFIRMED.

BUSHNELL *v.* KENNEDY.

1. It would seem that the restriction in the 11th section of the Judiciary Act, giving original jurisdiction of the Circuit Courts, and which provides that they shall not "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," applies only to rights of action founded on contracts, which contain within themselves some promise or duty to be performed, and not to mere naked rights of action founded on some wrongful act, or some neglect of duty to which the law attaches damages.
2. However this may be, the restriction of the 11th section not being found in the language of the 12th, and the reasons for its being in the 11th section not existing for its being in the 12th, it is not to be considered as applying to cases transferred from State courts to the Circuit Court under this latter section.

ERROR to the Circuit Court for the District of Louisiana; the case being thus:

The 11th section of the Judiciary Act, a section which defines the original jurisdiction of the Circuit Courts,* enacts:

"That the Circuit Courts shall have *original* cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, . . . or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

But the section gives this original cognizance subject to two limitations, of which one runs thus:

"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."

* 1 Stat. at Large, 78.

Having thus conferred and limited the original jurisdiction, the act in the 12th section provides:

"That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, . . . and the defendant shall, at the time of entering his appearance in such State court, file a petition for the *removal* of the cause for trial into the next Circuit Court, . . . it shall then be the duty of the State court to accept the surety, and proceed no further in the cause, . . . and *the cause shall then proceed in the same manner as if it had been brought by original process.*"*

With these enactments in force, Kennedy & Co., merchants of New Orleans, brought suit against Bushnell, to recover from him the balance of ten thousand dollars, which had been intrusted or lent by them to Mills & Frisby, doing business at Baton Rouge, for the purchase of cotton, to be shipped to the firm in New Orleans. Bushnell borrowed the whole sum of Mills & Frisby under a promise to return it within six days; repaid, in fact, twenty-five hundred dollars, but failed to refund the balance. Thereupon, Mills & Frisby assigned all their claim to the debt of Bushnell to Kennedy & Co., who filed their petition against him in the Third District Court of New Orleans, and prayed a writ of attachment, which was issued accordingly.

Certain parties, resident in New Orleans, were made garnishees, and required to answer interrogatories touching the moneys, credits, or property of Bushnell in their hands, or under their control. These interrogatories were answered by the peremptory denial of the garnishees that they had in their hands, or under their control, anything belonging to Bushnell. Afterwards, a citation was issued against Bushnell, and served personally upon him, requiring an answer to the petition. Thereupon he appeared and filed a petition, averring that all the members of the firm of Kennedy & Co. were citizens of Louisiana, and that he was a citizen of Connecticut, and prayed that the suit might be removed into

* 1 Stat. at Large, 79.

the Circuit Court of the United States for the District of Louisiana. This petition was allowed, and the cause removed according to its prayer. But, by an order of the Circuit Court, the suit was remanded to the State District Court, and it was this order which was brought here for revision by the writ of error.

That Kennedy & Co., as assignees of Mills & Frisby, were entitled, under the laws of Louisiana, to sue in the State court upon the debt assigned to them, in their own names, was apparently conceded upon the argument at the bar. But it seemed to have been the opinion of the Circuit Court that they could not maintain a suit in that character in a court of the United States without averring in their petition that their assignors, Mills & Frisby, were citizens of another State than the defendant, entitled, if no assignment had been made, to maintain suit upon the debt against the defendant; the ground of this opinion, doubtless, having been the disability to sue in the National courts, imposed by the already quoted 11th section of the Judiciary Act upon the assignees of a *chose in action*, in cases of which those courts would not have jurisdiction if the suit were brought by the assignors.

Mr. Durant, in support of the order below:

A suit brought by original process in a Circuit Court of the United States, on a *chose in action* assigned to the plaintiff, must show on the face of the record that the action could be maintained under the jurisdiction of the court if no assignment had been made;* but the petition originally filed in the State court, and transferred to the United States Circuit Court, does not show on its face that the parties, Mills & Frisby, who assigned the claim sued on to Kennedy & Co., could have brought suit against Bushnell by original process in the Circuit Court. The Circuit Court was, therefore, on the face of the record, without jurisdiction.

The theory of the 11th section of the Judiciary Act of 1789 is, that the civic title or quality of citizenship pertain-

* Turner *v.* Bank of North America, 4 Dallas, 8; Mollan *v.* Torrance, 9 Wheaton, 538.

ing to him who assigns a *chose in action* is transferred by the assignment to the assignee, and will disqualify the latter, however qualified otherwise he may be, from suing in the Circuit Court, if the former were himself disqualified; and if his quality be not affirmatively set forth, it is as if he were presumed to be disqualified, and the suit cannot be maintained; or, as an equivalent expression, the citizenship of the assignor of the *chose in action* must be alleged in the petition. This necessity goes into the 12th section, which expressly enacts that the cause, when transferred, shall "proceed in the same manner as if it had been brought by original process." Had this cause been brought by original process, confessedly it would have been dismissed.

Mr. Ashton, contra.

The CHIEF JUSTICE delivered the opinion of the court.

That the indebtedness of Bushnell to Mills & Frisby was a *chose in action* cannot be doubted; for under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract. Nor can it be denied that every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the National Constitution and laws, gives to the court jurisdiction of his suit.*

In the case before us the suit was brought in the State court, where no question of jurisdiction, founded upon citizenship, could arise. In that court, therefore, there was no necessity for any averment in respect to citizenship. But under the 12th section of the Judiciary Act, any defendant, being a citizen of another State than the plaintiff or petitioner, is entitled, upon application at the proper time, to have his cause removed to a Circuit Court of the United States; and in the case under consideration, the defendant filed his petition, averring the requisite facts as to his own citizenship and the citizenship of the petitioners, and, thereupon, obtained an order for removal.

* Turner *v.* Bank of North America, 4 Dallas, 8.

The order was, doubtless, rightly made. The jurisdiction of the cause was regularly transferred to the Circuit Court, and the cause stood in that court as if brought there by original process. The jurisdiction thus acquired by the Circuit Court was in no sense appellate. Removal, under our peculiar system of State and National jurisdictions, is simply a mode in which the right to resort under certain circumstances to the latter rather than the former is secured to defendants as well as plaintiffs.

Two questions, then, arise in this cause:

(1st.) Whether the 11th section of the Judiciary Act applies to a suit instituted by the assignees of such a *chose in action* as is shown in the pleadings? and—

(2d.) Whether valid objection can be taken to jurisdiction of such a suit when removed to the Circuit Court by the defendant under the 12th section.

Upon the first question, it may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee; though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment.* So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent.† And it has also been determined that the assignee of a *chose in action* may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors.‡ And it has recently§ been very strongly argued that the restriction applies only to contracts "which may be properly said to have

* Bullard *v.* Bell, 1 Mason, 259 (1817); Bank of Kentucky *v.* Wister, 2 Peters, 321 (1829).

† Chappedelaine *v.* Dechenaux, 4 Cranch, 308 (1808).

‡ Deshler *v.* Dodge, 16 Howard, 631 (1853).

§ Barney *v.* Globe Bank, 2 American Law Register, N. S., 229 (1862).

contents;" "not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed."

And this view of the restriction seems to be warranted by the consideration of the mischief which it was intended to prevent. Not a little apprehension was excited at the time of the adoption of the Constitution in respect to the extent of the jurisdiction vested in the National courts; and that apprehension was respected in the Judiciary Act, which soon afterwards received the sanction of Congress. It was obvious that numerous suits, by assignees, under assignments made for the express purpose of giving jurisdiction, would be brought in those courts if the right of assignees to sue was left unrestricted. It was to prevent that evil and to keep the jurisdiction of the National courts within just limits that the restriction was put into the act.

This view has the sanction of Chief Justice Marshall, who, in the case of the *Bank of the United States* v. *The Planters' Bank of Georgia*,* used this language: "It was apprehended that bonds and notes given in the usual course of business, by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in a Federal court."

And when it is remembered what class of actions it is, which, upon the principles of the common law, can be maintained by an assignee in his own name, it may well be admitted that it would not have been an unreasonable construction of the restriction if it had been applied only to notes, bonds, and other written contracts, containing promises to pay money, upon which an assignee could sue without using the name of the assignor. Of such contracts, certainly, it may with more propriety be said that they have "contents," than of claims for damages arising either from torts or from breaches of contracts.

* 9 Wheaton, 904 (1824).

It is true that at an earlier day a different construction was given to it. In *Sere* v. *Pitot*,* it was held that an assignee, by act of the law, as the general assignee of the effects of an insolvent, could not sue in the Circuit Court unless the insolvent himself might sue. It is not easy to reconcile this opinion with the later jndgments; but it is not necessary now to determine definitely the true construction of the restriction, as we think that the jurisdiction of the Circuit Court over the cause before us can be well supported on the 12th section. That section, as we have already stated, provides for the removal of suits by defendants. The restriction in the 11th section is not found in the 12th. Nor does the reason for the restriction exist. In the 11th section its office was to prevent frauds upon the jurisdiction, and vexation of defendants, by assignments made for the purpose of having suits brought in the name of assignees, but in reality for the benefit of assignors. In the 12th it would have no office, for the removal of suits could not operate as a fraud on jurisdiction, and was a privilege of defendants, not a hardship upon them.

It is true, indeed, as was said in argument, that the section provides that after removal "the cause shall then proceed in the same manner as if it had been brought by original process;" but we cannot recognize the validity of the inference that the defendant, before pleading in the Circuit Court, may move to dismiss the suit for want of jurisdiction. This construction would enable the non-resident defendant in a State court to remove the suit against him into a Circuit Court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction, unless imperatively required by the plain language of the act, is wholly inadmissible. And it is clear that the language of the act does not require it. Its plain meaning is that the suit shall proceed, not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against his consent, but by his own act, and the suit is to proceed as if brought

* 6 Cranch, 332.

by original process, and the defendant had waived all exception to jurisdiction, and pleaded to the merits. Under the 11th section the exception to jurisdiction is the privilege of the defendant, and may be waived; for the suit is still between citizens of different States, and the jurisdiction still appears in the record. The first act of the defendant, indeed, under the 12th section, is something more than consent, something more than a waiver of objection to jurisdiction, it is a prayer for the privilege of resorting to Federal jurisdiction, and he cannot be permitted afterwards to question it.*

We cannot doubt, therefore, that the Circuit Court had jurisdiction of the case under consideration. We are all of opinion that the court erred in remanding the cause to the jurisdiction of the State court, and the order to that effect must be REVERSED.

NOONAN v. BRADLEY.

1. An administrator appointed in one State cannot, by virtue of such appointment, maintain an action in another State, in the absence of a statute of the latter State giving effect to that appointment, to enforce an obligation due his intestate. If he desires to prosecute a suit in another State he must first obtain a grant of administration therein in accordance with its laws.
2. In an action by a plaintiff as an administrator, the objection that, as to the causes of action stated in the declaration, he is not, and never has been, administrator of the effects of the deceased, may be taken by a special plea in bar.
3. *It would appear* that the objection may also be taken by a plea in abatement.
4. One plea in bar is not waived by the existence of another plea in bar, though the two may be inconsistent in their averments with each other. The remedy of the plaintiff in such case is not by demurrer, but by motion to strike out one of the pleas, or to compel the defendant to elect by which he will abide.
5. In an action by a plaintiff as administrator, a plea to the merits admits the representative character of the plaintiff to the extent stated in the declaration, and if that statement is consistent with the grant of letters

* Sayles *v.* Northwestern Insurance Co., 2 Curtis, 212.

within the State, it also admits his right to sue in that capacity;—but such a plea admits nothing more than the title stated in the declaration.

6. The substitution in this court of an administrator as a party in place of his intestate on the record, in a case pending on appeal, only authorizes the prosecution of that case in his name; it confers no right to prosecute any other suit in his name.

7. In an action in one State by an administrator appointed in another State, on a bond given to the intestate, a plea that the bond was *bona notabilia* on the death of the decedent, in the State other than the one which appointed the administrator suing as plaintiff, and that an administrator of the effects of the decedent in that State has been appointed and qualified, is a good answer to the action. It is an averment of facts which in law excludes all right to, and control over, the property in that State by the foreign administrator.

8. Where a bond for the purchase-money of certain land was delivered upon an agreement indorsed upon the bond by the obligee that he would not enforce the bond in case his title to the land should fail: *Held*, that the agreement was not limited in its operation to the time when the bond matured or the penalty became forfeited, but was a perpetual covenant not to enforce the bond in case the designated event at any time happened.

9. Where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter party; and where an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which upholds the right.

10. The agreement above-mentioned indorsed on the bond constitutes a part of the condition of the bond, qualifying its provisions for the payment of the instalments of the principal and interest, and declaring, in effect, that the payments shall not be required and the obligation of the bond shall cease in case the event designated happens.

ERROR to the Circuit Court of the United States for the District of Wisconsin; the case being thus:

In October, 1855, Noonan, the defendant in the court below, purchased of one Lee, and received from him a warranty deed of certain real property situated in the State of Wisconsin, and for the purchase-money gave his bond in the penal sum of eight thousand dollars, conditioned to pay four thousand dollars in four equal annual instalments, with interest, secured by a mortgage on the property. At that time the premises were in the possession of one Orton,

holding them adversely to Lee, and in consequence of this fact Noonan required from Lee, as a condition to the delivery of the bond, an agreement against its enforcement in case his title to the land should fail (except as against the United States for the portion of the river (Milwaukee) beyond a certain designated line), and to deduct from the sum stipulated the amount of any incumbrances which might be found on the property. Such an agreement was accordingly given, and was indorsed on the bond. It was as follows:

> I agree, if my title fails to the property for the consideration of which this bond is given, except as against the United States, for the portion of the river beyond the meandered line, that I will not *enforce* this bond; and if any incumbrances shall be found, that the amount of the same shall be deducted from the moneys to fall due on this bond.
>
> J. B. LEE.

A clause in the mortgage provided, that upon default of Noonan to pay any of the instalments of the principal, or the interest, or the taxes on the property, as they became due, the entire principal of the bond with interest should, at the option of Lee, be immediately payable.

In March, 1859, default having been made in the payment of the several instalments, Lee elected to claim the entire amount as due, and brought suit against Noonan and others in the District Court of the United States for the District of Wisconsin, then exercising Circuit Court powers, to foreclose the mortgage, praying in his bill for a sale of the mortgaged premises, the payment of the debt secured, and for general relief. Noonan answered the bill, setting up that Lee's title had failed before the commencement of the suit; but the court, by its decree, made in January, 1860, found that there was due on the bond a sum exceeding five thousand dollars, and directed a sale of the mortgaged premises, and the application of the proceeds to the payment of the amount found due, and that if the proceeds were insufficient the marshal should report the deficiency, and Noonan should

pay it with interest, and in default of such payment the complainant should have execution therefor.

From this decree Noonan appealed to this court, and, pending the appeal, for the purpose of trying his title to the land purchased, brought ejectment in one of the Circuit Courts of the State of Wisconsin against Orton, the party in possession. He then gave notice to Lee of the action, and required him to undertake its management. Lee at once retained counsel, who, for him, assumed the conduct of the action.

Pending the appeal in this court, and the action of ejectment in the State court, Lee died domiciled in New York, and Bradley, the plaintiff in this case, was duly appointed by the proper tribunal in that State administrator of his estate. On his application, Bradley was then substituted as representative of his intestate on the record in the case on appeal in this court.

At the December Term, 1862, this court gave its decision in the case, adjudging that the District Court erred in ordering the defendant Noonan to pay any deficiency which might remain of the principal and interest of the mortgage debt after applying the proceeds of the sale, and that complainant have execution therefor. To this extent the decree was reversed; in other particulars it was affirmed.

In the opinion delivered on rendering the decision the court observed, that upon the facts disclosed by the record it found no defect in the title of Lee, and that Noonan's title had not failed. In this language reference was of course had to the title as it appeared upon the evidence presented at the hearing in the District Court in January, 1860.*

Afterwards, in January, 1863, final judgment was rendered in the action of ejectment in the State court in favor of Orton, the party in possession, and against Noonan, upon the ground that the latter was not seized in fee of the premises, and acquired no title by his purchase from Lee, and that Orton was thus seized.

* Noonan *v.* Lee, 2 Black, 500.

Statement of the case.

When Lee died there were effects of value belonging to him in Wisconsin, and in February, 1865, one T. L. Ogden was duly appointed administrator of those effects by a tribunal having jurisdiction of the matter in that State; and he qualified and entered upon the discharge of his duties as administrator, and when this action was commenced had in his possession the bond given by Noonan to Lee on the purchase of the premises.

In September, 1866, Bradley, as administrator of the estate of Lee, under the appointment in the State of New York, brought the present action upon this bond of Noonan. The declaration set forth his title as administrator under this appointment, and contained four counts.

1. The first count was on the penalty of the bond simply.

2. The second was on the bond, setting out the condition written in the bond, and averring breach of the condition.

3. The third was on the bond, setting out the condition, averring a breach of the condition; and that Lee commenced suit to foreclose the mortgage given to secure the bond; the decree of the District Court, the appeal by Noonan; and that the Supreme Court, pending the appeal, substituted Bradley as administrator, affirmed a part of the decree; that Bradley filed the mandate in the court below; that a sale was had and confirmed, and $53.56 was applied "to the sums so due, by the terms of the said condition of said bond, and by the terms of said decree as aforesaid." "Yet the said defendant hath not paid said several sums *mentioned in said bond*," &c.

4. The fourth count was on the bond, giving a copy of the whole bond, and the *indorsement* upon it, and setting out the proceedings in the foreclosure suit more fully, and concluding: "Yet the said defendant hath not paid said several sums *mentioned in said bond*, and the condition thereof, nor either of them, nor any part thereof," &c.

Every count of the declaration was upon the *bond* itself, *not upon the decree in the foreclosure suit*, and the breach alleged as furnishing the cause of action was the non-payment of the money *called for by the bond.*

To the declaration the defendant interposed three pleas:

1st. That as to the supposed causes of action mentioned therein, the plaintiff was not and never had been administrator of the effects of the deceased.

2d. That there were effects of value of the decedent at the time of his death in the State of Wisconsin, among which was the bond in suit; that T. L. Ogden was duly appointed by a tribunal in that State administrator of those effects, and had qualified and entered upon, and was engaged in the discharge of his duties as such officer at the time the action was commenced; and that by reason of this appointment and qualification, the effects of the decedent, in Wisconsin, were, under the laws of that State, vested in him, with all rights of action in relation thereto, and that as a consequence the letters issued to the plaintiff in the State of New York, with reference to the causes of action stated in the declaration, were void and of no effect.

3d. That the title of Lee to the premises sold had failed, the plea setting up the agreement indorsed on the bond, and the proceedings and judgment in the ejectment suit, to bring the case within the agreement.

To the pleas the plaintiff demurred; the Circuit Court sustained the demurrer, and entered final judgment thereon in favor of the plaintiff for the penalty of the bond; and the defendant brought the case to this court on writ of error.

Messrs. M. H. Carpenter and I. P. Walker, for the plaintiffs in error; Mr. J. S. Brown, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The inquiry here is: What is the legal effect of the facts presented by the pleas of the defendant?

The first plea puts in issue the representative character of the plaintiff in the State of Wisconsin. It denies that, as to the causes of action stated in the declaration, he is or ever has been administrator of the effects of the deceased, and thus raises the question whether an administrator ap-

pointed in one State can, by virtue of such appointment, maintain an action in another State to enforce an obligation due his intestate. And upon this question the law is well settled. All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the State within which it was granted. All hold that in the absence of such a statute no suit can be maintained by an administrator in his official capacity, except within the limits of the State from which he derives his authority. If he desires to prosecute a suit in another State he must first obtain a grant of administration therein in accordance with its laws.

So far has this doctrine been extended that in *Fenwick* v. *Sears's Administrators*,* where the plaintiff had obtained letters of administration in Maryland, before the separation of the District of Columbia from the original States, it was held by this court that he could not, after the separation, maintain an action in that part of the district ceded by Maryland by virtue of these letters, but that he must take out new letters within the district.

The same doctrine is as applicable to the case of executors as to that of administrators; the right to sue in both instances depending upon the letters.†

Whether the objection to the character of the plaintiff as administrator or executor should be taken by a plea in abatement or a special plea in bar, would appear to have been, at one time, a matter upon which there was some diversity of opinion. In some of the cases the language used would indicate that a plea in abatement was the only appropriate form in which the objection could be presented, whilst in other cases the objection taken by a special plea in bar has been sustained. It was sustained by this court, when taken by a special plea in bar, in *Fenwick* v. *Sears's Administrators*, and in *Dixon's Executors* v. *Ramsey's Executors*, already cited. In the latter case a foreign executor brought an action in the

* 1 Cranch, 259.

† Dixon's Executors *v.* Ramsay's Executors, 3 Cranch, 319.

District of Columbia. The defendant pleaded that he had not obtained letters in the District or in the United States, and, on demurrer, the plea was sustained.

There is no principle in pleading which should prevent the objection from being taken in this way. It is only in virtue of his representative character that the plaintiff is entitled to the matters in controversy, and a plea which denies to him that character is, in its nature, a plea in bar of the action.

In *Langdon and others* v. *Potter*,* the Supreme Court of Massachusetts held directly that the objection taken in that case, that no letters of administration had been granted to the plaintiff except under the authority of another State, was pleadable in bar, and in referring to the diversity in the cases and opinions, as to the form of the plea by which the objection should be presented, observed that they might perhaps be "reconciled by considering the plea, that the plaintiff is not administrator, as one of those which may be pleaded in bar or in abatement." "There are many such cases," said the court, "where the matter of the plea goes to preclude the plaintiff forever from maintaining the action, and it may therefore be pleaded in bar; yet, as in point of form it is in disability of the plaintiff, it may also be pleaded to the person." These observations are just, and explain much of the apparent conflict in the decisions of different courts, or of the same court at different times.

The language used by this court in *Childress* v. *Emory*† and *Kane* v. *Paul*,‡ cited by counsel, was not intended to deny that the objection to the authority of the plaintiff as administrator or executor could be taken by a plea in bar, but was only intended to indicate that the objection must be specially pleaded, and could not be urged on demurrer to the declaration for alleged insufficient exhibition of letters testamentary, when profert of the letters was made, or under a plea to the merits.

In the first case the court observed that if the defendant

* 11 Massachusetts, 313. † 8 Wheaton, 642. ‡ 14 Peters, 33.

desired to object to the letters as insufficient, he should have craved oyer of them, and had them brought before the court, that unless oyer was craved and granted, the letters could not be judicially examined, and then added that if the plaintiffs were not executors, that objection should have been taken by way of abatement, and did not arise upon a demurrer in bar. The point decided was that the objection could not be taken, when profert of letters was made, without oyer of them, and did not arise in such case upon demurrer. There was no question as to the form of the plea to be used, if the objection were presented in that way; and it is clear that no determination as to the form was intended.

In the second case the plea was non-assumpsit, which admitted plaintiff's right to sue. It was objected that the letters testamentary appeared on their face to have been granted in violation of the law of Maryland, but the court observed that the plea was the general issue, and that a judicial examination into their validity could only be gone into upon a plea in abatement, meaning evidently that such examination could not be had unless the objection were taken by special plea. There was no intention on the part of the court to determine as to the form of the special plea in such cases.

The objection to the character of the plaintiff as administrator in this case is not waived by the third plea, which goes to the merits, as contended by counsel. One plea in bar is not waived by the existence of another plea in bar, though the two may be inconsistent in their averments with each other. The remedy of the plaintiff in such case is not by demurrer, but by motion to strike out one of the pleas, or to compel the defendant to elect by which he will abide. But here there is no inconsistency in the pleas; the one denying any right in the plaintiff, in his capacity as administrator, to the subject of controversy, and the other the release of the defendant from liability on the bond in suit by failure of its consideration. The averments of both may be true.

The proposition of law which the counsel invokes, that a plea to the merits admits the representative character of the

plaintiff, and his right to sue in that capacity, is only applicable where no other plea than one of that kind is interposed; it does not apply where a special plea traverses that character. A plea denying that an intestate entered into the obligation upon which the action is brought, or averring that he was released therefrom, standing alone, is undoubtedly an admission of the representative character of the plaintiff to the extent stated in the declaration, and if that statement is consistent with the grant of letters within the State, is also an admission of his right to sue in that capacity. The execution or the release of the obligation is in such case the only matter in issue, and of course is the only matter upon which evidence need be called or argument had. But, in the case at bar, had there been no other plea than the third plea, which goes to the merits, the character of the plaintiff, as administrator in Wisconsin, would not have been admitted, for the reason that the declaration states that the grant of administration to him was by letters issued in the State of New York, and the plea to the merits only admits the title as stated in the declaration.

This effect of a plea to the merits was decided as long ago as the time of Lord Holt, in the case of *Adams* v. *The Tertenants of Savage.** In that case the plaintiff brought a *scire facias* against the defendants, reciting a judgment recovered by his intestate against Savage, and that administration was committed to him by the Archdeacon of Dorset, whose jurisdiction did not extend to the place where the judgment was rendered. The tertenants traversed the seizin of Savage, and the finding being against them, motion in arrest of judgment was made, on the ground that the administration committed to the plaintiff was void. It was urged for the judgment, that though the plaintiff had shown a bad title, the defendants not traversing it, or taking any advantage of the invalidity of the administration, but pleading to the merits, admitted that the plaintiff was entitled to sue, and should not be permitted, when the right was tried against them, to

* 6 Modern, 134.

controvert what they had declined to insist upon; but Chief Justice Holt said: "If the plaintiff had not set forth what kind of administration he claimed by, but only generally alleged himself administrator of the goods and chattels of the intestate, and the defendant had not put you upon showing it by craving oyer of the letters of administration, as he might have done, but pleaded over; that had been an admission of the plaintiff's having a right of suing as administrator as he had alleged." And after stating that the plaintiff made title to himself by an administration which was invalid, the Chief Justice continued: "And when you yourself affirm this to be your title, how can we intend you have another; for of your own showing this is your title, which is manifestly bad? And there is a vast difference where a title does not appear fully for the plaintiff, and the party will not controvert with him about that, for then it may be well presumed if the party were not well satisfied of plaintiff's title he would have insisted on it in due time, and where the plaintiff himself shows he has no title, for then the court has no room for intendment." The authority of this case has not, so far as we are aware, ever been doubted, and were there no other ground against the position of the plaintiff, it would be decisive.

The substitution in this court of the plaintiff as administrator, in place of the intestate, in *Noonan* v. *Lee*, does not affect the present case, or give the plaintiff any greater right of action than if no such substitution had ever been made. It only authorized the further prosecution of that suit in his name, and gave no right, and could give no right, to prosecute any other suit in his name.

Nor is the position of the plaintiff aided by the statute of Wisconsin, which enables foreign executors and administrators to sue in certain cases in the courts of that State. That statute only applies where no executor or administrator of the estate of the decedent has been appointed in the State, and then only in the counties where the foreign executor or administrator has filed in the Probate Court an authenticated copy of his appointment.

The second plea, like the first, puts in issue the representative character of the plaintiff in Wisconsin; not by direct denial, as in the first plea, but by averring that there were effects of the decedent in that State at the time of his death, among which was the bond in suit; that an administrator of those effects had been duly appointed and qualified, and had entered upon, and was engaged in, the discharge of his duties as such officer at the time the action was commenced, and that by reason of this appointment and qualification the effects of the decedent, under the laws of Wisconsin, were vested in him, with all rights of action in relation thereto, and that as a consequence the letters issued to the plaintiff in the State of New York, with reference to the causes of action stated in the declaration, are void and of no effect.

This plea is a good plea in bar to the action. The bond in suit was bona notabilia in Wisconsin, and a plea that the subject of action constituting such bona notabilia was, on the death of the decedent, in another jurisdiction than the one which appointed the administrator suing as plaintiff, has always been a good answer to the action. It is an averment of facts which in law excludes all right to, and control over, the property in that State by the foreign administrator.*

The third plea sets up a defence to the action on the merits—namely, that the title to the premises, for the consideration of which the bond in suit was given, has failed; and that as a consequence, under the agreement of the intestate, the right to enforce the bond has ceased.

This plea alleges that the bond in suit was given only in consideration of the conveyance of a warranty deed by the intestate, and an agreement that in case his title failed he would not enforce the bond, and that by judicial proceedings, of which the intestate had notice and took charge, it was determined that the intestate was not seized at the time he executed the deed in fee of the premises, but that Orton, the party then in the possession, was thus seized of them.

* See 1 Saunders, 274, note 3; Stokes *v.* Bate, 5 Barnewall & Cresswell, 491.

The effect of this plea depends upon the construction which is given to the agreement of the intestate not to enforce the bond in case his title failed. The plaintiff contends that this agreement ceased to have any operation after the maturity of the bond or the forfeiture of the penalty; and that if subsequently the title failed, that fact could not be pleaded with the agreement in bar to an action on the bond, either by way of release or estoppel.

The argument presented in support of this construction is founded mainly upon the improbability that the parties could have contemplated a postponement of payment beyond the period stipulated in the bond. They could not, says the counsel, have intended to set aside the obligation to pay at those times; and it would have been a violation of the spirit of the agreement for the vendee to have refused the payments as they became due, if the title had not then failed.

Undoubtedly the parties contemplated that the payments would be made as they matured, but they also contemplated that payments should cease whenever the title of the grantor failed. They may have supposed that the validity of the title would be determined to their satisfaction before the maturity of any of the instalments stipulated, but they have inserted no provision in the agreement which limits its operation to that or to any other period. It is a perpetual covenant not to enforce the bond upon the happening of a certain event. It matters not that the obligee or his representative might have compelled its payment before the happening of that event. What would have been the rights of the obligor in that case; whether he would have had any remedy to recover back the amount paid, or would have been compelled to look to the covenant of warranty in his deed, are questions not now before us for determination. It is sufficient for our present consideration that the bond has not as yet been enforced, and the title to the property, which the intestate sold and undertook to convey to the defendant, has failed. It would be against manifest justice if, under these circumstances, the representative of the vendor, notwithstanding the vendor had no title to convey, could recover

of the defendant as though the vendor had transferred to him a good and perfect one.

If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that a party, who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right.*

This agreement not to enforce the bond, which is conditional in its terms, depending for its operation upon the happening of a contingent event, has, by the happening of that event, become absolute, and may be pleaded as a release to the action. It constitutes in fact a part of the condition of the bond, qualifying its provisions for the payment of the instalments of the principal and interest, and declaring, in effect, that the payments shall not be required, and the obligation of the bond shall cease in case the event designated happens.†

The decision in the foreclosure suit only determined that at the time the hearing was had in that case in the District Court, in January, 1860, the title had not failed. The language of the court in rendering the decision shows this. It says: "As the facts are disclosed in the record we find no defect in the title of Lee. We find that Noonan's title has not failed, and no incumbrance upon the property is shown. There has been, therefore, no breach of the agreement indorsed on the bond, nor has there been any breach of the covenant of general warranty in Lee's deed to Noonan." The case is entirely changed now; and facts not existing, or at least, not established then, but since determined by judi-

* Mayer *v.* Isaac, 6 Meeson & Welsby, 612.

† Burgh *v.* Preston, 8 Term, 483.

cial proceedings, present a case upon which this court has heretofore never passed.

We are of opinion that the pleas of the defendant constitute a bar to the action, and that the Circuit Court erred in sustaining the demurrer to them. It follows that its judgment must be REVERSED, and the cause remanded FOR FURTHER PROCEEDINGS.

Mr. Justice CLIFFORD, with whom concurred SWAYNE and DAVIS, JJ., dissenting.

I dissent from the opinion and judgment of the court in this case upon two grounds, which I will proceed to state without entering at all into the argument to support the respective propositions—

1. Because I think that the alleged disability to sue should have been pleaded in abatement and not in bar. Undoubtedly a different rule of pleading prevailed at common law, but there are three reported decisions of this court in which it is held that such a plea in a case like the present must be in abatement, and in view of our complicated system of jurisprudence I am not inclined to overrule those cases. They have been regarded as authorities for many years, and I am of the opinion that the rule which they establish is the better one as a rule of pleading in the Federal courts than the rule which prevailed at common law.*

2. I am also of the opinion that the decree in the former suit is conclusive as to the rights of the parties, and that it constitutes a complete answer to the defence in the present suit.†

* Childress *v.* Emory, 8 Wheaton, 642; Kane *v.* Paul, 14 Peters, 33; Ventress *v.* Smith, 10 Id. 161.

† Noonan *v.* Lee, 2 Black, 499.

THE MAYOR *v.* LORD.

1. A mandamus directed to the mayor and aldermen of a city is rightly enough directed, if it appears that they together constitute the city council and have the government of it, even although the city may be incorporated by the name of "the city of ——," and by that name have power under the charter to sue and be sued.
2. A State law prescribing rules of practice has no efficacy in the courts of the United States, unless those courts adopt it.
3. When a creditor has a judgment at law for a debt against a city on the city bonds, the city cannot set up in defence to an application for mandamus that the bonds were not sanctioned by a requisite popular vote.
4. An injunction from a State court against a city's levying a tax to pay certain bonds of the city, cannot be set up to prevent a mandamus from the Federal courts ordering the city to levy a tax to pay a judgment obtained against it on those same bonds. *Riggs* v. *Johnson County* (6 Wallace, 106), affirmed.
5. A recital in an alternative mandamus to a city to levy and collect a tax, in a coming year, on the real cash valuation of its property for that year (stating the value), that property in the city is subject to taxation at such real cash valuation, but that its assessed valuation had never exceeded one-half of that valuation, and that the mayor and aldermen were authorized by the city charter to correct the valuation when erroneous, and that they had hitherto neglected to perform that duty, is not traversed by a denial that the valuation never exceeded half the cash value, and an averment that the city council always performed its duty in respect to correcting erroneous assessments.

ERROR to the Circuit Court for the District of Iowa; in which court the United States, on the relation or one R. L. Lord, were plaintiffs, and asked and obtained a peremptory mandamus against the mayor and aldermen of the city of Davenport, defendants.

Messrs. Weed and Clark, for the plaintiff in error; Mr. Grant, contra.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

This case is brought before us by a writ of error to the Circuit Court of the United States for the District of Iowa. It is one of a class of cases, many of which, under different

aspects and presenting a variety of questions, have been heretofore decided by this court. It appears by the record that, on the 6th of November, 1867, the relator procured to be issued against the plaintiffs in error an alternative writ of mandamus, which was substantially as follows:

It recites that the relator recovered a judgment in that court against the city of Davenport, on the 15th of May, 1867, for the sum of $\$63{,}509\frac{68}{100}$, and costs; that the city is a municipal corporation, and that its affairs are managed by a mayor and aldermen, who perform all the duties of the corporation in relation to levying and collecting taxes, and paying its debts; that execution has been issued upon the judgment and returned, no property found, and that there is no property belonging to the city liable to execution; that the causes of action upon which the judgment is founded are the principal of certain bonds issued by the city in payment of her subscription to the stock of the Mississippi and Missouri Railroad Company in the years 1853 and 1854, and the interest on these bonds, and the interest on certain bonds of the city issued in the year 1857, under a vote of the people to borrow money for various city improvements; that the mayor and aldermen were empowered by an act of the legislature, of the 22d of January, 1858, whenever necessary, to levy a specific tax to pay the railroad bond debt and interest; that no interest has been paid on this debt since 1861, and that the principal is now due and unpaid; that the mayor and aldermen, besides the specific tax to pay the railroad bonds before mentioned, are authorized by the city charter of January 22d, 1855, to levy a general tax of five mills on the dollar, and, by the general city incorporation act of 1851, one mill on the dollar as a sinking fund to meet its bonded debt; that the valuation of property for the year 1867 is five millions of dollars, which is not more than one-half the cash value of the property; that the property of the city is subject to taxation at its real cash value; that the assessment is made by the city assessor; that the mayor and aldermen are authorized to correct the assessment, when erroneous, and that they have heretofore neglected to per-

form this duty; that it has been the duty of the mayor and aldermen, since the year 1861, to levy a specific tax amounting to $7500 a year, to pay the interest on the railroad bonds —a tax of one mill on the dollar amounting to $4000 on the assessed value, and $8000 on the real value of the property of the city, as a sinking fund, to be applied to the principal of the bonds, and a tax of ten mills on the dollar for general purposes, which, after defraying the ordinary city expenses (five mills on the dollar being sufficient for that purpose), would amount to $20,000 per year, taking the assessment as the basis of taxation, and $60,000 per year, if the basis were the real value of the property, whereas the whole annual interest of the debt of the city, since 1863, has not exceeded $25,000; that the mayor and aldermen, since the interest became delinquent, have not levied a general tax exceeding five mills on the dollar; that the relator has made a demand on the mayor and aldermen to levy a tax sufficient to pay said judgment; that they have neglected to do so, and that the relator is without other adequate remedy at law.

The mayor and aldermen are, therefore, commanded to levy and collect on the assessment roll for the year 1867 a special tax to pay the interest on the railway bonds, and to levy and collect a special tax of one mill on the dollar on the assessment of 1867, to be applied upon the principal of the bonds on which the judgment was recovered.

It is averred that these two levies, less delinquencies, would amount to between ten and eleven thousand dollars, which, when applied in payment of the judgment, would leave a balance of nearly $50,000 unpaid.

To pay this balance the mayor and aldermen are commanded to cause the real and personal property of the city to be assessed for the year 1868 at its real cash value, and upon such valuation to levy over and above the five mills on the dollar for ordinary city purposes, a specific tax sufficient to pay the balance of the interest on the railway bond debt, amounting to $\$22{,}390\frac{75}{100}$; and a specific tax of one mill on the dollar, to be applied in payment of the principal of the bonds embraced in the judgment; to levy and collect the

said tax on the valuation of 1867, and apply it on the judgment; to levy and collect the said tax on the real cash valuation of the property for the year 1868, and apply it in payment of the judgment; and if any balance should remain, of principal or interest, to continue to levy and collect the taxes yearly, and to apply them, when collected, in payment of the judgment, until the principal and interest, and costs of the judgment, are fully paid, or that the mayor and aldermen should appear before the court at the time specified and show cause why they refused to do so.

A motion was made to quash the writ, which was overruled. The same motion was subsequently made and again overruled. The mayor and aldermen thereupon made a return.

It sets out the following defences:

1. That the writ was issued in the name of the United States, instead of the President.

2. That it was erroneously directed to the mayor and aldermen.*

3. It denies that the affairs of the city are controlled by the mayor and aldermen, but avers that they are managed by the city council.

4. It denies that the mayor and council were authorized by the laws mentioned, or that it was their duty to levy and collect the taxes mentioned.

5. It denies that the issue of the bonds for improvements was authorized by a vote, as alleged.

It avers that on or about the 19th of June, 1861, the mayor and aldermen were, and ever since have been, enjoined by the decree of the District Court of Scott County from levying any tax to be applied in payment of the principal or interest of the railroad bonds in question.

* The more particular ground of this second objection, as stated in the argument of counsel, was that the city of Davenport was incorporated by the name and style of the city of Davenport, and by *that* name was to "have power to sue and be sued, to implead and be impleaded, &c., in all courts of law and equity, and in all actions whatsoever." And it was contended that the writ ought to have been addressed to the corporation by its legal name.—REP.

6. It denies that the assessed valuation ever amounted to $5,000,000,—that in the year 1867 it amounted to only $4,592,423.

7. It denies that the valuation never exceeded half the cash value, and avers that the city council has always performed its duty in respect to correcting erroneous assessments.

Some details are given as to the expenditures of the city, which it is not deemed necessary particularly to advert to. The relator asked leave to amend the writ as to the name in which it was issued. Leave was given and it was amended accordingly. To the averment that the writ was misdirected, he replied that it was directed properly, the mayor and aldermen composing the city council. To each of the several parts of the residue of the return he demurred specially. At the argument of the demurrer he abandoned his claim for the levying of a tax of one mill for a sinking fund, and the parts of the writ relating to the subject were stricken out. The court sustained the demurrer. The defendants elected to abide by it and made no further return. Thereupon the court awarded a peremptory mandamus, as prayed for.

The learned counsel for the plaintiffs in error have referred to a statute of Iowa as regulating the practice in this class of cases. It is proper to remark that the provisions of that statute not having been adopted by a rule of the Circuit Court for that district, could have no effect in this proceeding. A State law prescribing rules of practice has no efficacy *proprio vigore* in the courts of the United States. It can only be made effectual by adoption in the proper manner.

The point that the writ was misdirected is not well taken. The direction was substantially correct, and the court properly disregarded the objection.

To the proposition that the bonds issued by the city for improvement purposes were not sanctioned by the requisite popular vote there are two answers: (1.) The respondents are concluded by the judgment at law. They can not go behind it to raise any question touching the sufficiency of

either of the causes of action upon which it was rendered. (2.) It is not denied that the relator was an innocent purchaser. In that event, if the bonds could have been properly issued under any circumstances he had a right to presume they were so issued, and as against him the city is estopped to deny their validity.*

The injunction cannot avail the respondents. The relator was not a party to the proceeding. If he had been, it is not competent for a State tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the National courts, and has heretofore been applied by this tribunal, upon the fullest consideration, in other cases presenting the same question.†

The denials of the averments in the writ touching the cash value of the property assessed are immaterial. In any event it was the right of the relator to have the respondents required to supervise the valuation, and to correct the errors, if any, which might be found to exist.

The allegations of the return as to the tax laws relied upon by the relator, and the powers and duties of the respondents under them, could have been more appropriately presented upon the motions to quash the writ, or by a demurrer. They were not insisted upon in the argument at the bar. We shall, therefore, content ourselves by remarking that we are satisfied with the conclusions upon the subject reached by the court below.‡

We think the demurrer to the return was properly sustained, and the order for a peremptory writ of mandamus properly made.

The judgment of the Circuit Court is

AFFIRMED.

* Aurora City *v.* West, 7 Wallace, 82; Beloit *v.* Morgan, 1b. 619; Meyer *v.* The City of Muscatine, 1 Id. 393; Mercer County *v.* Hecket, 1b. 93; Van Hostrup *v.* Madison City, 1b. 297; Supervisors *v.* Schenck, 5 1d. 784.

† Riggs *v.* Johnson County, 6 Wallace, 166; United States *v.* The Council of Keokuk, 1b. 516.

‡ Butz *v.* City of Muscatine, 8 Id. 575.

THE SUPERVISORS *v.* DURANT.

1. Mandamus from a Federal court to officers of a county in a State, to levy a tax to pay interest on bonds issued by the county on which a relator has obtained judgment, and has no means of obtaining satisfaction but by the levy of a tax, cannot be, in any way, controlled by an injunction from a State court to those officers against a levy. *Riggs* v. *Johnson County* (6 Wallace, 166), affirmed.
2. It makes no difference whether the relator have been made a defendant to the proceeding in the State court for an injunction or not; nor whether the injunction have issued before or after his suit in the Federal court was begun.

ERROR to the Circuit Court for Iowa, the case being thus:

In 1853, 1854, and 1858, the county judge of Washington County, Iowa, submitted to the voters of that county propositions to subscribe certain sums, and issue bonds accordingly, to aid the making of certain railroads; and a majority of the voters voted in favor of the propositions. The vote required the levy by the county officers of yearly taxes to pay the interest. The bonds were issued, and several of them passed into the hands of one Durant. In April, 1860, certain taxpayers of the county filed a bill against the board of supervisors of the county; Durant, with other holders of the bonds, afterwards appearing and opposing, to enjoin the supervisors (the proper officers to lay taxes) from laying any taxes to pay either principal or interest of these bonds; the ground of the injunction being that the bonds were illegal and void, and that the county officers had no authority to levy and collect taxes to pay either the principal or interest of them. And the board of supervisors were enjoined accordingly. The interest being now unpaid, Durant sued the county in the Circuit Court of the United States for Iowa to compel payment of it. The county set up, by way of plea, the injunction in the State court against it, and the plea being overruled, and the case being fully heard on a case stated, judgment was given in the Federal court against the county. Execution having issued without satisfaction, an alternative writ of mandamus to levy a tax was asked for

and obtained by Durant against the county. By way of showing cause against a peremptory writ, the county here again pleaded the injunction from the State court. The plaintiff demurred; assigning as one cause among others, that this court having jurisdiction to render the judgment, had jurisdiction to enforce it, and that no State court could prevent it. The demurrer being sustained, the county brought the case here.

Mr. Henry Strong, for the plaintiff in error, argued elaborately, with numerous citations of cases,* that the question was one of jurisdiction, and that in the administration of the powers of the Federal court, it was recognized as a fundamental principle, that the judgment of the State court is binding upon the Federal court, when the State court had jurisdiction of the parties and subject-matter, and the controversy arises out of a contract created under the laws of the State; that the Federal courts are powerless to reverse, modify, or in any manner interfere with such a judgment of the State court, and cannot relieve a party from obedience to a writ issued thereon; that a conflict of jurisdiction was always to be avoided; that it had accordingly passed into an unquestionable principle, that where a court has jurisdiction, it has a right to decide every question that occurs in the cause, and that whether its decision were correct or not, its judgment, until reversed, was to be regarded as binding upon every other court; that "these rules had their foundation not merely in comity, but in necessity; for that if one court might enjoin, the other could retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in the one, if they dared to proceed in the other."

He sought to distinguish the case from *Riggs* v. *Johnson County*,† since there the relator was not a party to the suit for injunction, while here he was.

* Taylor *v.* Carryl, 20 Howard, 583; Elliot *v.* Piersol, 1 Peters, 328; Leffingwell *v.* Warren, 2 Black, 599; Randall *v.* Howard, 2 Id. 585.

† 6 Wallace, 166.

Mr. Grant, contra, submitted that there was nothing for him to argue to sustain the judgment for the peremptory writ; that the judgment on the coupons was conclusive, and that no defence could be made to the action after that under pretence of State court proceedings.

Mr. Justice STRONG delivered the opinion of the court.

Since the decisions which have been made by this court during the last four years, there is almost nothing in the record now before us remaining open for adjudication. Indeed, it is not now contended that mandamus is not a proper remedy in cases like the present, when a relator has obtained a judgment, which can be satisfied only by the levy of a tax, and when the proper officers of the municipality, against which the judgment has been obtained, refuse, or neglect to levy it. That it is a legitimate remedy has been ruled in very many cases.* In such a case "the writ is" (to use the language of the court in *Riggs* v. *Johnson County*) "neither a prerogative writ, nor a new suit. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and, when issued," it "becomes a substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract." It is a step toward the execution of the judgment, and necessary to the jurisdiction of the court.

It is insisted, however, that even if the Circuit Court may award a mandamus to aid in the enforcement of its judgments, the writ should not have been awarded in this case, because the District Court of Washington County had enjoined the defendants against levying and collecting any tax for the payment of the bonds and coupons, for a portion of which the relator had obtained his judgment. This injunction the defendants pleaded, and to the plea the relator de-

* The Board of Commissioners of Knox County *v.* Aspinwall et al. 24 Howard, 376; Von Hoffman *v.* The City of Quincy, 4 Wallace, 535; Supervisors *v.* United States, ex rel. State Bank, Id. 435; Riggs *v.* Johnson County, 6 Wallace, 166; Weber v. Lee County, Id. 210; The Mayor *v.* Lord, *supra*, 409.

murred. That such an injunction was wholly inoperative to prevent the Circuit Court of the United States from enforcing its judgment by mandamus to the defendants to compel them to levy the tax which the law authorized and required, is no longer to be doubted. Its invalidity to work such an effect has been placed beyond question by the rulings of this court in the cases already cited. In *Riggs* v. *Johnson County*, where it appeared that an injunction had been obtained, in one of the State courts, upon the county commissioners, enjoining them against levying any tax to pay certain municipal bonds and coupons, a mandamus was nevertheless sustained to compel the levy of a tax, at the suit of one who had obtained judgment in the Circuit Court for some of the coupons. That case is full authority for the doctrine that an injunction of a State court cannot control, or in any manner affect the action, the process, or the proceeding of a Circuit Court, not because the latter has any paramount jurisdiction over State courts, but because the tribunals are independent of each other. It is true that in *Riggs* v. *Johnson County* it appeared the relator in the information, or suggestion for the mandamus, was not a party to the injunction suit, while the relator here was a party defendant. That, however, can make no difference. The present relator, though made a party with the other defendants, was not enjoined. The decree upon the bill for an injunction was exclusively against the board of supervisors of Washington, at the suit of others than the relator. And had he been enjoined, it is not easy to see how that fact could have limited the power of the Circuit Court. We have already remarked that the true reason why the injunction was not a bar to the mandamus is, that the District Court of the State and the Circuit Court are independent courts, and that neither can interfere with the process or proceedings of the other. It would hardly be contended that a State court can enjoin a defendant against paying a judgment which has been, or may thereafter be recovered in a Circuit Court of the United States. If it may, Federal jurisdiction is a myth. It is at the mercy of State tribunals. Yet there is no substantial difference in principle

between the allowance of such an injunction, and that of one against a proceeding in aid of an execution; a mandamus to levy an authorized tax to pay a judgment. The District Courts of Iowa are independent of each other. Will the injunction of one District Court limit the power of another District Court to enforce its judgment? To this no one would hazard an affirmative answer. Certainly the Circuit Courts of the United States are as exempt from State control by State courts, as are the District Courts of the State from control by each other.

It is of course immaterial whether the injunction of the District Court of Washington County was before or after the judgment obtained by the relator in the Circuit Court of the United States, or whether before or after the institution of the suit. It is not a question which court first obtained possession of the case. In the case of *The Mayor* v. *Lord*,* the facts were that the plaintiffs in error had been enjoined against levying a tax, before suit was brought in the Circuit Court, yet it was held that the injunction was no sufficient answer to the alternative mandamus commanding them to levy a tax to pay the judgment afterwards recovered.

The plaintiffs in error are thus met at every point of their case by decisions of this court heretofore made, decisions which justify the court below in sustaining the demurrer to their return to the alternative writ, and in awarding a peremptory mandamus.

JUDGMENT AFFIRMED WITH COSTS.

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* *Supra*, 409.

Details of the case in the opinion.

THE FAIRBANKS.

Direct and positive oral testimony on a libel for collision between a steamer and a brig, going to show that the brig kept properly on her course, at least until the collision became inevitable, will not be controlled by the fact that the shape of the wound on the steamer tended to show that the brig could not have been at the instant of collision on such course, but must have changed it; it being possible enough that the shape of the wound was produced by a change in the brig's course, made, in the last moment, to avoid a collision rendered, in truth, unavoidable by the steamer's erroneous manœuvres, near the same time.

APPEAL from the Circuit Court for the Southern District of New York, in which court the owners of the brig Santiago filed a libel against the steamer Fairbanks, to recover damages sustained by the brig in a collision with the steamer.

The collision occurred in a fair, mild night of June. The weight of testimony from witnesses went to show that the brig had properly kept on her course, which was about north by east, and that the steamer, which was running about south by west, had not properly avoided her. Opposed to which was a fact, testified to by some witnesses, and which *seemed* to inspection to be true, viz., that the steamer had been struck in the collision by a square blow, indicative of the fact that the approach of the brig was at right angles.

The District Court decreed in favor of the brig. The Circuit Court on appeal reversed the decree.

Mr. J. C. Carter, for the appellant; Mr. R. D. Benedict, contra.

Mr. Justice CLIFFORD gave the details of the case, and delivered the opinion of the court.

Rules and regulations for preventing collisions on navigable waters, between ships and vessels engaged in our mercantile marine as well as between ships and vessels in the navy of the United States, have been prescribed by Congress.

Details of the case in the opinion.

Steam vessels, when under way, are required to carry a bright light at foremasthead, so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, to wit, from right ahead to two points abaft the beam, on either side, and of such a diameter as to be visible, on a dark night with a clear atmosphere, at a distance of at least five miles. They are also required to carry a green light on the starboard side and a red light on the port side, so constructed as to throw a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam, the former on the starboard side and the latter on the port side, and of such a character respectively as to be visible, on a dark night, with a clear atmosphere, at a distance of at least two miles. Both of the colored lights are required to be so fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.*

Sailing ships, under way, are required, by the first-named act, to carry the same lights as steamships, under way, with the exception of the white masthead light, which they shall never carry.

Reference will only be made to two or three of the sailing rules enacted by Congress, as none of the others have any application in this case.

By the fifteenth article it is provided that if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions, as to involve risk of collision, the steamship shall keep out of the way of the sailing ship. Steamships, when approaching another ship so as to involve risk of collision, are also required to slacken their speed, and, if necessary, to stop and reverse; and the eighteenth article provides that where one of two ships is required to keep out of the way the other shall keep her course, subject

* 13 Stat. at Large, 58; 14 Id. 228, § 11.

Details of the case in the opinion.

to the qualifications that due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from those rules necessary to avoid immediate danger.*

Sailing vessels employed in the mercantile service were not required to carry lights before the passage of the first-named act of Congress, but the sailing rules as previously defined by the decisions of this court in the particulars under consideration, were in substance and effect the same as those enacted by Congress, as appears by several reported cases.†

Beyond question those cases show that a steamship when approaching a sailing vessel must keep out of the way, and that sailing vessels are required to keep their course in order that the steamship may not be led into error or be baffled in her endeavors to keep out of the way. Bound to keep out of the way, the steamship may go to the right or left, and in order that she may determine the matter wisely, so as to prevent any disaster, the correlative duty is required of the sailing vessel that she shall keep her course.

Many of the material facts in this case are either without dispute or are so fully proved as not properly to be regarded as the subject of controversy. Both parties agree that the collision occurred at eleven o'clock in the evening of the fifth of June, 1864, off the coast of New Jersey, some fifteen miles east of the Highlands. Just before it occurred the brig was heading north by east, and was bound for the port of New York on a voyage from Turk's Island, and the witnesses agree that the wind was southeast and that the brig, when closehauled, would lay within six points of the wind, so that she had the wind five points free. Though not stormy it was rather dark, as there was some haze on the water, but the brig was sailing four or five knots an hour, and there were no other vessels in sight. On the other hand, the steamer was bound on a voyage from the port of New York

* 13 Stat. at Large, 61.

† Steamship Company *v.* Rumball, 21 Howard, 383; St. John *v.* Paine, 10 Id. 583; The Genesee Chief, 12 Id. 461.

to Washington, and was heading south by west, and her speed was eight knots an hour.

Some conflict exists in the testimony as to the point whether the brig had the required lights and whether she kept her course as alleged in the libel, or whether she changed it as alleged in the answer, but it will be sufficient to state the facts as they appear to the court without reproducing the testimony of the witnesses or attempting to reconcile their contradictory statements.

The vessels were less than half a mile apart when the brig was descried by the steamer, and it is satisfactorily proved that the brig had the required lights and that her lookouts were properly stationed on the forward part of the vessel. At that time it was the master's watch on board the steamer, but the better opinion from the evidence is that he was in the pilot-house and not on deck, as stated in his deposition. He admits, however, that he saw the approaching vessel, and that he knew that it was a sailing vessel, and his statement is that he changed the course of the steamer from south by west to south-southeast, which cannot be correct, because if he had done so there could not have been any collision, as the speed of the steamer was double that of the brig. But the second mate was on deck at the same time, and he states that the master was in the pilot-house, and that he went to the pilot-house where the master was and told him that there was a vessel ahead, and that the master directed the man at the wheel to change the course of the steamer half a point to the eastward; that he then went forward and walked around; that it appearing to him that the brig had also changed her course in the same way, he went back to the pilot-house and so informed the master, and that the master then told the wheelsman to let the steamer come up half a point more to the eastward. When the master gave the second order he came out of the pilot-house, as the second mate testifies, and looked at the approaching vessel. Beyond question he must at once have discovered that the order just given was insufficient to prevent a collision, and he immediately returned to the pilot-house and directed the helms-

man to change the course to southeast, which is the order he should have given in the first instance. But it is evident that his memory is unreliable, as it is clear that the collision could not have occurred if he had given that order, or the one he says he gave, when the brig was first seen by the steamer.

Precautions must be seasonable to be of any avail, but it was too late when he gave the last order, as the second mate testifies that the jibboom of the brig, by the time the order was obeyed, was not more than thirty yards from the steamer. Even if tested alone by the testimony of the witnesses on board the steamer the court is fully satisfied that the first two orders were not of a character to avoid a collision, and that the third order was not given in season to accomplish the desired result. Confirmed as this theory is by the testimony of the mate and pilot of the brig, the court has no hesitation in adopting it as correct.

Suppose the fact to be so, still it is contended by the claimants that the decree of the Circuit Court must be affirmed, because they insist that the brig changed her course, and that if she had kept it, as she was bound to do, the collision would not have occurred. Grant that the conclusion would follow if the theory of fact involved in the proposition was correct, still the views of the claimants cannot be sustained, as the fact alleged is not satisfactorily proved.

From the time the steamer was first seen to the time of the collision the deck of the brig was in charge of her mate, and he testifies positively that the brig did not change her course, as is supposed by the claimants; and the pilot of the brig, who went below before the collision, testifies that her course when he left the deck was north by east, and that when he came on deck, just before the collision, no alteration had been made in the course. No witness examined in the case on either side is able to support that theory by any positive statement, but the attempt of the claimants is to establish the theory by circumstances, of which the principal one is the appearance of the steamer where she was struck by the brig on her starboard bow. They contend that it was

a square blow, and that the character of the injury to the steamer shows that the approach of the brig was at right angles and not head on, as they were substantially approaching when each was first descried by the other.

Although it must be admitted that the argument is ingenious and exceedingly well put, still the decisive answer to it is that the circumstances adduced do not satisfy the court that any such change of course was made by the brig as is supposed, certainly not until the proximity of the two vessels was so close that a collision was inevitable, and then it is quite clear that the steamer made a sudden change, and it may be that the brig also changed her course, as is supposed by the claimants. Fault, under such circumstances, will not be imputed to the vessel required to keep her course if she was otherwise blameless.* An error committed by the vessel required to keep her course, after the approaching vessel is so near that the collision is inevitable, will not impair her right to recover for the injuries resulting from the collision if she was otherwise without fault, for the reason that those who put the vessel in that peril are chargeable with the error, and must answer for the consequences which it occasioned.† Examined in the light of these suggestions, our conclusion from the evidence is that the steamer was wholly in fault.

DECREE REVERSED, and the cause remanded with direction to

AFFIRM THE DECREE OF THE DISTRICT COURT.

FLANDERS *v.* TWEED.

1. The court expresses itself as disposed to hold parties who, under the act of March 3d, 1865, waive a trial by jury and substitute the court for the jury, to a reasonably strict conformity to the regulations of the act, if they desire to save to themselves all the rights and privileges which belong to them in trials by jury at the common law.

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* Steamship Company *v.* Rumball, 21 Howard, 384.

† Bentley *v.* Coyne, 4 Wallace, 512.

2. Accordingly, in a case where there was no stipulation filed for the waiver of a jury, and where the judge had filed his "statement of facts" three months after the date of the judgment rendered—which statement, so irregularly filed, the court regarded as a nullity—and no question of law was to be considered as properly raised on the pleading, the court stated that, according to the general course of proceeding in former like cases, the judgment below should be affirmed.
3. However, in this case—one from Louisiana—it being apparent that both parties supposed that a case had been made up according to the practice of that State, but one not having been made up by the court nor properly filed according to the requirements of the statute, so that, from that cause, the case, which it was meant by both court and parties to get here, could not be properly passed upon, the judgment, under the circumstances (the case being an important one), was not affirmed, but was reversed for mistrial, and remanded for a new trial.

ERROR to the Circuit Court for the District of Louisiana; the case being this:

The 4th section of an act of Congress of March 3d, 1865,* thus enacts:

"Issues of fact in civil cases in any Circuit Court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties or attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of the jury. The rulings of the court in the cause, in the progress of the trial, when excepted to, at the time, may be reviewed by the Supreme Court of the United States, upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

This statute being in force, Tweed brought suit, in the court below, against Flanders, to recover damages, some $40,000, for the seizure and detention of a quantity of cotton, in New Orleans. He had previously procured the possession of it by a writ of sequestration, according to the practice of the courts in that State. The petition charged that the de-

* 13 Stat. at Large, 501.

Argument for the plaintiff in error.

fendant was a deputy general agent of the Treasury Department of the United States. The defendant pleaded admitting that he was a deputy general agent, as described in the petition, and denied all the other allegations of it. A large amount of evidence was taken in the case on both sides; the plaintiff insisting that he bought the cotton at private sale from the individual owners, and the defendant that it was, at the time, under seizure, and in his possession, as special agent of the Treasury Department, holding it for the use of the government. This evidence and the proceedings of the court occupied about a hundred pages of the record. The court gave judgment against the defendant for $36,976.33. The judgment was rendered 26th February, 1868. A statement of facts by the judge was found in the record, filed May 29th, 1868, nearly three months after the date when the judgment was rendered. This finding of the facts began by stating that "the cause came on to be tried on the pleadings, by consent of the parties, by the judge presiding; and after hearing the evidence therein, and the argument of counsel, the court finds the following facts." This statement of the facts by the judge was the only evidence relied on of the consent of the parties to waive a jury, except what might be presumed from the circumstance that both parties proceeded with the trial before the judge without objection in the court below.

The case being brought by Flanders, the defendant below, on error to this court,

Mr. Hoar, Attorney-General, and Mr. W. A. Field, Assistant Attorney-General, going into the record as if the case were in form properly before this court, argued in his behalf that the judgment of the court below should be reversed for want of jurisdiction of the cause in the Circuit Court, with directions that the suit be dismissed. But that if it should be deemed that there was no defect of jurisdiction, then that sufficient ground was presented in the erroneous rulings of the court (which as they conceived they had sufficiently shown) for reversing the judgment, and directing a new trial.

Messrs. Ashton and T. D. Lincoln (*a brief of Messrs. Billings and Hughes being filed*), *contra*, argued, that the statement of facts made three months after the proper time, and in a way plainly irregular, was a nullity, and could not be considered here;* that the "statement" being thus disposed of, and there being no demurrer or other pleading on the part of the plaintiff in the record, nor any bill of exceptions, no question of law upon the pleadings, or upon the evidence on either side, was raised by the decision of the court below, and that none could be considered here. The whole subject had been fully settled at this term, in *Norris* v. *Jackson*.† The legal presumption in favor of the correctness of the judgment below would therefore prevail, and judgment would have to be affirmed if the petition of the plaintiff brought the case within the jurisdiction of the Circuit Court; a matter which the counsel then proceeded to argue that it did.

Mr. Justice NELSON delivered the opinion of the court.

The statement of facts by the judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity for which this court is bound to disregard it, and to treat it as no part of the record. The statement made out of court is, of course, no evidence before us of the facts stated, and this is the only evidence relied on, of the consent of the parties to waive a jury, except what may be presumed from the circumstance that both parties proceeded with the trial before the judge without objection in the court below. The objection is now taken here by the plaintiff in error.

It is impossible to misunderstand the condition upon which, according to the act of March 3d, 1865, the parties are authorized to waive a trial by jury, and substitute the court, and, at the same time, save to themselves all the rights and privileges which belong to them in trials by jury at common law. That condition is the filing with the clerk a written stipulation, signed by the parties, or their attorneys.

* Generes *v.* Bonnemer, 7 Wallace, 564.

† *Supra*, 125.

The necessity of this law, for the purpose designed, will appear by a reference to a few of the decisions of this court. One of the latest is the case of *Campbell et al.* v. *Boyreau.** It came up on error from the Circuit Court of the United States for the Northern District of California, and was an action of ejectment before the court, the jury having been waived by the express agreement of the parties. The opinion was delivered by the Chief Justice. He observed: "It appears by the transcript that several exceptions to the opinion of the court were taken at the trial by the plaintiffs in error,—some to the admissibility of evidence, and others to the construction and legal effect which the court gave to certain instruments in writing. But, it is unnecessary to state them particularly, for it has been repeatedly decided by this court that, in the mode of proceeding which the parties have seen proper to adopt, none of the questions, whether of fact or of law, decided by the court below, can be re-examined and revised in this court upon a writ of error." He also observed: "The point was directly decided in *Guild and others* v. *Frontin*,† which, like the present, was a case from California, where a court of the United States had adopted the same mode of proceeding with that followed in the present instance; and the decision was, again, reaffirmed in the case of *Suydam* v. *Williamson and others*,‡ and also in the case of *Kelsey and others* v. *Forsyth*, decided at the present term."§ He then states the grounds of these decisions, namely, "that by the established and familiar rules and principles which govern common law proceedings, no question of law can be reviewed and re-examined in an appellate court upon a writ of error (except only where it arises upon the process, pleadings, or judgment, in the case), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts, and referring the questions of law to the court."

The opinion contains a very full exposition of the princi-

* 21 Howard, 223. † 18 Id. 135. ‡ 20 Id. 432. § 21 Id. 85.

ples and proceedings in the common law cases, and the departure from them in trial of issues of fact before the court. This case, and those referred to by the learned Chief Justice, establish beyond question that the act of Congress was essential in order to preserve to the parties submitting a cause to a trial before a court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court. The act, while it provides specially the mode of submission, takes care to secure to the parties the right of review as it respects all questions of law arising out of the facts found by the court, giving to this finding the effect as if found by a jury, preserving, at the same time, the right of exceptions to the rulings of the court in the progress of the trial; and, when the finding is special, a right to the appellate court to determine the sufficiency of the facts found to support the judgment.

This act of Congress is the first one that has authorized the parties to dispense with a jury, and try the issue of fact before the court, in respect to all the Federal courts in the Union, except two special acts, one in respect to the State of Louisiana, in 1824, and California and Oregon, in 1864.* And it is quite important to settle the practice under it at an early day, and with a precision and distinctness that cannot be misunderstood. The act passed May 26th, 1824, relating to the courts in Louisiana, directed that the mode of proceeding in civil causes, in the Federal courts in Louisiana, should be the same as the practice and modes of proceeding in the District Courts of that State, subject to certain modifications mentioned in the act. The practice in these courts of the State was according to civil law proceedings, and the trial of issues of fact could take place before the court by consent of the parties. This act, unfortunately, not prescribing the mode of procedure when a jury was waived, and the trial before the court, as in the act of 1865, leaving the court to grope its way as best it could under the practice in civil law proceedings, the case to come up ultimately for

* 13 Stat. at Large, 4.

re-examination before a common law appellate tribunal, has led to the most painful and oftentimes protracted litigation at nearly every term since its passage, and that, too, not upon questions involving the merits, but questions of mere practice. As observed by Mr. Justice Grier in *Graham* v. *Bayne*,* "The very numerous cases on this subject, from *Field* v. *United States*† to *Arthurs* v. *Hart*,‡ show the difficulties we have had to encounter in reconciling our modes of review to the civil code of practice as used in the courts of Louisiana;" and these cases have not diminished since the delivery of the opinion in that case.

The history of the proceedings in the Federal courts in Louisiana under the act of 1824 admonishes us, if we may expect to avoid the like difficulties and disorders under the act of 1865, to require, in all cases, where the parties see fit to avail themselves of the privileges of the act, a reasonably strict conformity to its regulations. We have already held§ that this act of 1865 applies to the Federal courts in the State of Louisiana.

A copy of the stipulation of the parties, or attorneys, filed with the clerk, waiving the jury, should come up with the transcript in the return to the writ of error, so that the court could see that the act had been complied with. There having been no stipulation, nor any finding of the facts, in this case, and no question upon the pleadings, it would follow, according to the general course of proceeding in like cases, heretofore in this court, that the judgment below should be affirmed. There are, however, cases which, under very special circumstances, the court have made an exception, and have simply dismissed the writ of error, as in the case of *Burr* v. *The Des Moines Company*,‖ or have reversed the judgment below for a mistrial, and remand it for a new trial, as in the case of *Graham* v. *Bayne*.¶ See also *Guild* v. *Frontin*.** In the present case it is apparent the parties below supposed that they had made up a case, according to the

* 18 Howard, 61. † 9 Peters, 182. ‡ 17 Howard, 6.
§ Insurance Company *v.* Tweed, 7 Wallace, 44.
‖ 1 Id. 99. ¶ 18 Howard, 60. ** Ib. 135.

practice in Louisiana, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record; and, under the circumstances, the case being an important one, and intended to be carried up here for re-examination, we shall REVERSE the judgment for a mistrial, and REMAND it to the court below

FOR A NEW TRIAL.

[See *supra*, 125, *Norris* v. *Jackson*.]

UNITED STATES *v.* HOSMER.

The 3d section of the act of August 6th, 1861, which enacts that

> "All the acts, proclamations, and orders of the President of the United States, after the 4th of March, 1861, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved, and in all respects legalized and made valid, to the same intent, and with the same effect, as if they had been issued and done under the previous express authority of the Congress of the United States,"

validates and ratifies a proclamation and orders of the President, made in May, 1861; and where such proclamation and order promised to privates who entered the service a bounty of $100, "*when honorably discharged*," a private entering on the 15th July, 1861, is entitled to the bounty whenever honorably discharged; though he have served less than six months. The act of 22d July, 1861, the 1st section of which provides that

> "All provisions of law applicable to three years volunteers shall apply to two years volunteers, and to all volunteers *who have been* or may be accepted into the service of the United States for a period not less than six months,"

and whose 5th section provides that $100 shall be paid to privates "*honorably* discharged," who shall have served "*two years, or during the war, if sooner ended*," does not apply to him.

THIS was an appeal by the United States from the judgment of the Court of Claims, giving to a discharged soldier a bounty which he claimed of $100.

Mr. Talbot, for the United States; Mr. Schouler, contra.

Statement of the case in the opinion.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

The case was decided by the Court of Claims, upon a demurrer to the claimant's petition. The facts set forth in the petition were admitted by the demurrer. The only question before the court was the sufficiency of the facts alleged to warrant the judgment invoked. The case is presented for our consideration in the same manner. We cannot take cognizance of any fact beyond the scope of the record, as it was made up in the court below.

The petition sets forth that the claimant was a private in company B of the 15th regiment of Massachusetts Volunteers; that he was enrolled and enlisted in the service about the 15th of July, 1861, and was honorably discharged by reason of a surgeon's certificate of disability on or about the 5th of January, 1863; that on the 3d of May, 1861, the President called for a volunteer force for the enforcement of the laws, and the suppression of insurrection, by a proclamation, which stated that the details would be made known through the Department of War; that general order No. 15 of the War Department, of May 4th, 1861, and general order No. 25 of that department, of May 26th, 1861, provided that every private who entered the service under the plan set forth should be paid, when honorably discharged, the sum of one hundred dollars; that by the act of Congress of August 6th, 1861, the proclamation and orders were legalized; that the petitioner had duly demanded the sum of one hundred dollars; that his claim had been rejected by the paymaster-general; and that this rejection had been approved by the second comptroller. By consent, the petition was amended by inserting at the proper place that the regiment was organized and accepted under the proclamation and orders before mentioned for the term of three years; and that the petitioner was duly enrolled in the regiment. The United States demurred. The Court of Claims overruled the demurrer, and gave judgment for the petitioner. The United States thereupon brought the case by appeal to this court. The proclamation of the President and the orders of the

War Department, relied upon by the claimant, are correctly set forth in the petition, and need not be more particularly adverted to.

The 3d section of the act of August 6th, 1861,* declares that "all the acts, proclamations, and orders of the President of the United States, after the 4th of March, 1861, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved, and in all respects legalized and made valid, to the same intent, and with the same effect, as if they had been issued and done under the previous express authority of the Congress of the United States."

This made the case of the petitioner complete. It was unquestionably within the proclamation and orders thus legalized. Congress gave the same validity to the claim as if the petitioner had entered the service under an antecedent statute containing exactly the provisions of the orders under which the claim has arisen.

The attorney for the United States relies upon the act of the 22d of July, 1861.† The 1st section of that act provides that "all provisions of law applicable to three years volunteers shall apply to two years volunteers, and to all volunteers *who have been* or may be accepted into the service of the United States for a period not less than six months." The 5th section provides that $100 shall be paid to privates "honorably discharged," who shall have served "two years, or during the war, if sooner ended."

This was the first act passed by Congress for calling out troops to suppress the rebellion. It is insisted that it is retrospective as well as prospective in its operation; that it applies to volunteers who entered the service prior to its passage, under the proclamation, as well as those who entered subsequently under its provisions; and that the petitioner, not having served two years at the time of his discharge, was hence not entitled to the hundred dollars in question. It is unnecessary to consider this subject. Con-

* 12 Stat. at Large, 326.

† Ib. 268.

ceding the construction contended for to be correct, the consequence insisted on by no means follows. The prior act must yield to the later one. The act of August 6th ratifies the proclamation and orders in the strongest terms. It contains no exception or qualification. It gives to the orders the fullest effect, and leaves the claim of the petitioner in all respects as it would have been if the act of the 22d of July had not been passed. We may add that it would not comport with the dignity of the government thus to break faith with the gallant men who in that hour of gloom stood forth to peril their lives for their country. Viewing the two acts together, we are confident such was not the intention of Congress.

JUDGMENT AFFIRMED.

THE MAGGIE HAMMOND.

1. Where a libel was filed against a foreign ship, in an admiralty case, in an admiralty court of the United States, the libellant and claimant both being foreigners, the place of shipping and the place of consignment being foreign ports, and the whole ground of libel a matter which occurred abroad, this court considered the question of jurisdiction open for argument here, though it was not raised by the pleadings, and had not been suggested by any one in the court below.
2. The owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same.
3. Where a lien exists by the maritime law of foreign jurisdictions, our admiralty has jurisdiction to enforce it here even though all the parties be foreigners. Its enforcement is but a question of comity.
4. *Semble*, that by the law of Scotland, the shipper, where the goods have been sold, lost, or injured during the voyage, may have recourse upon the vessel as a guarantee for the personal obligation of the shipowner.
5. Under the statute of 24th and 25th Victoria, commonly known as the Admiralty Court Act, jurisdiction exists in the English courts of admiralty to enforce by proceedings *in rem* a claim by an owner, domiciled in Canada, of a bill of lading of goods carried into a port of Wales, where the master abandoned the voyage without lawful excuse, improperly entered into a new contract of affreightment, and proceeded on a distant voyage, leaving the goods at the Welsh port, and neither carrying them himself to their port of destination, nor seeking to forward them in another vessel.

Statement of the case

6. Redress may be had in our admiralty courts in the case of a master thus there acting, although the ship have been a foreign vessel, and the shipment made between foreign countries, as Scotland and Canada. And this is so whether the statute be regarded as giving a maritime lien or only a right to sue the ship.
7. The master of a vessel is bound to carry the goods shipped on her to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, the act of the shipper, or by some one of the perils excepted in the contract of shipment. When the vessel is disabled in the course of the voyage, and cannot be seasonably repaired to perform it, he is bound to transship the goods and send them forward in another vessel, if one can be had in the same or in any reasonably contiguous port.

APPEAL from the Circuit Court for Maryland, the facts of the case, so far as they presented questions which were passed on by the judgment of the court, having been these:

On the 23d of August, 1866, the Maggie Hammond, a British vessel, being then at Androssan, Scotland, and *owned by a British subject domiciled in Nova Scotia*, took on board for Morland & Co., British subjects also, residents of Montreal, Canada, a cargo of iron, to be transported from Androssan to Montreal. The bill of lading was in the usual form. The vessel, in consequence of stress of weather, which damaged her considerably, put back, after her voyage had been half accomplished, and reaching Milford Haven, on the coast of Wales, anchored there, September 18th. Surveys were held on the 18th and 25th, the result of which was that the ship being found unseaworthy, was ordered to Cardiff, about a hundred and fifty miles further along the coast, for repairs, there being no facilities for landing and storing the cargo at Milford. On the 9th October the master made formal protest at Cardiff, stating that it had been ascertained by surveys that the vessel could not be repaired in time to complete her voyage before the close of the season; navigation in the St. Lawrence being impeded by ice at a comparatively early time in the winter. The vessel was repaired, and on the 3d of November the surveyors certified that she was in a condition to proceed on her voyage. The average voyage from ports of Great Britain to Montreal is from

thirty-five to forty days. The navigation of the St. Lawrence to Montreal, closed as it appeared, in this year, 1866, on the 15th December, and was open in the spring of 1867, on the 22d April. Though, of course, the navigation was not open in all years alike, and though there was some conflict of testimony, the weight of it went to show that it had not usually, in previous years, closed earlier than this. The first vessel from sea in the spring of 1867 arrived 4th May. The agents of Morland & Co., asserting, on the vessel's putting back and returning, that there was no weather or distress which ought to have compelled her to give up the voyage, and that she could even now resume the voyage, and dispute arising on these points, a compromise was attempted. While, however, negotiations were going on, the vessel loaded and sailed for Baltimore with another cargo on the 21st November, leaving the cargo of Morland & Co. in store at Cardiff. The owners of the Maggie Hammond anticipated, as they alleged, when their vessel sailed, that she would be able to complete the voyage to Baltimore and be back at Cardiff in time for the spring navigation, then to take the iron aboard and sail to Montreal. But tempestuous weather made the voyage to Baltimore one of eighty-seven days. The vessel arrived there only on the 17th February, and was chartered back, with an expectation by her owners that she would arrive at Cardiff from the 15th to the 20th of April. This was nearly a month after vessels for Montreal usually leave the English ports. The agents of Morland & Co. accordingly made arrangements with another vessel and forwarded the iron on her. This vessel sailed May 29th, and reached Montreal July 22d.

While the Maggie Hammond was at Baltimore, Morland & Co. libelled her for breach of her contract with them.

The District Court, considering that the repairs were made in time to have allowed the Maggie Hammond to get off in the autumn, and that if they were not the master ought to have foreseen that they would not be, and have sent the cargo on by another ship, decreed in favor of the libellants; holding the ship responsible for the difference between the

value of the iron in Montreal on December 15th, 1866, when, as the court considered, it ought to have arrived, and its value in July, 1867, when it did arrive, with interest, &c. The Circuit Court affirmed the decree. The case being here, the questions argued and in issue were these:

I. *One of jurisdiction;* a point not raised in the pleadings nor by any one below, but suggested here by *Messrs. Brune and Browne, for the appellants*, and ordered by the court, through Mr. Justice Clifford, to be argued on these three questions:

1st. Had the libellants a lien upon the ship for the performance of the contract of affreightment at the place where the contract was made, or by the law of the place where the contract was to be performed?

2d. Did the act of the master in landing and storing the goods, and accepting new employment for the ship when the repairs were completed, create a lien upon the ship in favor of the libellants at the place where the cargo was landed, stored, and left?

3d. If the libellants did not acquire any lien, either by the law of the place where the contract was made, or by the law of the place where the cargo was landed, stored, and left, did the District Court have jurisdiction of the libel and of the cause of action therein set forth?

[In connection with these questions it is necessary to state that the British Parliament, in 1861,* by act of the 24th and 25th Victoria, gave jurisdiction to admiralty courts, to be exercised either by proceedings *in rem* or proceedings *in personam*,

"over any claim by the owner or consignee, or assignee of any bill of lading of any goods *carried* into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship *is* domiciled in England or Wales."]

* British Stat. at Large, 1861, chap. x, § 6.

Argument for the shipowners.

II. *Assuming jurisdiction to exist.*

1st. Whether the master unnecessarily delayed making the repairs? a question of fact merely.

2d. Whether at the date (November 4th) when he was certified that his vessel was in a condition to proceed on her voyage, he could safely have set off for a port so far north as Montreal? another question of mere fact.

3d. Whether, having believed, as he stated in his protest made at Cardiff on the 9th October that he did, that it had been ascertained that the vessel could not be repaired in time to complete her voyage before the close of the season, he was not bound to have procured another vessel if he could have done so, and forwarded the cargo by *it?* a question of law.

4th. Whether he could have procured such other vessel if he had sought for one? a question of mere fact.

This court assumed, on the evidence, that the master did delay his repairs; that he could have safely set off on the 4th of November; and that he could at an earlier date than this have found other vessels, though he might have had to pay a higher rate of freight than that for which he had himself contracted, and a higher rate of premium for insurance. So that the only questions of law, and the only questions, therefore, for report, were:

1. The point of jurisdiction.

2. The obligation of the shipowners in a case where the facts were as the court here assumed them to be.

Messrs. Brune and Brown, for the appellants:

I. *On the three questions put as to jurisdiction*, went into a very learned argument to show,

1st. That by the law of Scotland, where the iron was shipped, the libellants had no lien cognizable in courts of admiralty; citing herein the British statute of 1 William IV, ch. 69; Bell, Dictionary of Scottish Law;* and the case of *The Bold Buccleugh*,† &c. That the same want of lien

* Tit. Court of Admiralty.

† 7 Moore's Privy Council, 267.

existed equally by the law of Canada, where the owners of the vessel and of the cargo resided; the counsel here citing the language of the Commission to the Vice-Admiralty Courts there, essays by Canadian lawyers,* British Statutes,† the Lower Canada Reports, and old French Arrêts.‡

2d. That the act of the master, in landing the goods and accepting new employment, gave no *maritime lien*, unless one was created by the statute of 24th and 25th Victoria; but that this act did not profess to create maritime liens, but only to confer jurisdiction by proceedings *in rem*,§ as appeared by the case of *The Pacific*;‖ that there was a great difference between creating a maritime lien and authorizing a proceeding *in rem*; that the former, if created, would follow the vessel, while the latter, by being merely authorized, came to nothing, unless the proceeding was instituted, and the vessel was a fugitive from justice, which was not the case here.

3d. That there being no maritime lien by the law of England, and the contract being British as to ship, parties, mode of performance, place where made, and place where to be performed—British every way, in short, and without any citizen having any interest in the matter—our courts ought not to originate rights, and to give a privilege which would not be given in the home of the parties.

II. *On the point of the master's obligation.* The learned counsel argued this point elaborately, but the argument was, after all, chiefly on the facts, and to show a case different from that assumed by the court, and presented, of course, as the case by the reporter. There was thus but little presented on the point for report.

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* Preface to Stuart's Vice-Admiralty Reports.

† 2 William IV, ch. 51, Acts relating to Canada, 1 Stephens's Commentaries, 6th ed. 110, 112.

‡ Saisie Arrêts, provided for by Cond. Stat. Lower Canada, ch. 83, §§ 46 and 47.

§ Baldwin *v.* Gibbon, Robertson's Digest, 361; The Friends, Stuart's Vice-Admiralty Cases, 115.

‖ Browning & Lushington, 246.

Argument for the owners of the cargo.

Messrs. Teacle Wallis and J. H. Thomas, contra:

I. *As to jurisdiction*, having observed that the first and second of the inquiries had a point in common, argued that neither of them could be answered without determining a question of foreign law; that the shipment was made and the bill of lading executed in Scotland; and the cargo was to be delivered in Canada, and was landed and left in Wales; that each of these three places had its separate system of jurisprudence, Wales being governed by the English law; that the Scotch and colonial laws were held by the English courts to be foreign laws, and were required to be proven, as matters of fact, precisely as the laws of foreign nations; and that in the absence of proof—of which there was none here—the foreign law and our own must be presumed to be the same. No suggestion had been made in the pleadings or made below to show that the foreign laws differed in any respect from the general maritime law, as administered by the admiralty courts of this country, and the fact that they did not so differ being thus conceded throughout, the appellees had no reason for taking testimony to establish what was not disputed; *Ennis* v. *Smith*,* as well as prior cases, precluding the appellant from mooting, in the tribunal of last resort, a question of fact not raised by the record.

The counsel then went into an examination of Scottish authors, seeking to disprove by the writings of Dr. Bell, that which the opposite side cited them to show; and they contended, on his authority and that of other Scotch writers,† that the Scotch admiralty was altogether free from the restrictions and embarrassments which so much narrowed the jurisdiction in England, and was governed, like our own admiralty, by the broader rules and principles of the ancient usages, customs, and ordinances of the sea. It had "the decision of all maritime and seafaring causes," and the rules which governed its jurisdiction and remedies were derived

* 14 Howard, 426–7.

† 1 Bell's Commentaries on Commercial Law, ed. of 1826, 497, 500; Erskine's Institutes, 35; and see the American case of The Rebecca, Ware, 190.

from the identical sources to which this court resorted in *Vandewater* v. *Mills**, for the principle that "the ship is bound to the merchandise and the merchandise to the ship."

As to the scope and rules of admiralty jurisdiction in Canada, where the cargo in controversy was to be delivered, they stated that they had found no information in any books within their reach, and they relied on the fact of the difficulty of getting accurate information from books with which the profession here was necessarily unacquainted, and from which, if they knew them, they might derive erroneous ideas—the information being wholly separated from practical knowledge of the matters treated of—as but another illustration of the propriety of requiring all such matters to be established by proof. As to Canadian legislation, they had discovered nothing which threw any light upon the question.

As to the 3d question put, on the point of jurisdiction, while the jurisdiction of the English Admiralty Court to *enforce* the lien by process *in rem* did not exist before the recent statutes of Victoria, it seemed to them clear upon authority that the lien, though not enforceable, nevertheless did exist as part of the English admiralty law.† The elementary writers were stated by them to be unanimous upon this point. Lord Tenterden used the strongest language in regard to it. "That principle of maritime law, therefore," said Kent, "*lays dormant*, from the want of a court of law or equity to enforce it *in rem*."

But whatever difficulty might have formerly existed as to jurisdiction in England, had been entirely removed by the act of 24 and 25 Victoria.

In *The Bahia*‡ and *The Ironsides*,§ the words, "carried into England or Wales," were decided to have been purposely employed in their widest signification, and the statute, it was said, was not intended to be restricted to cases of

* 19 Howard, 90.

† Abbott on Shipping, marg., pp. 126, 127, and 285; 3 Kent, 8th ed. 281, note *a*; The Rebecca, Ware, 192.

‡ Browning & Lushington, 61.

§ Lushington, 458.

importation. The iron, then, in this case, was carried into a port of Wales. The sole owner of the ship was domiciled in Nova Scotia, and not in England or Wales. The complaint is of breach of duty and contract on the part of the master and the ship. The case, therefore, came directly within the provisions and scope of the statute. All the discussion about Scott on Canadian law was irrelative. Unless it could be successfully argued that giving a remedy against the ship by proceeding *in rem* did not impose a lien, there seemed to be no room for dispute as to the existence of the lien by virtue of and under the statute. The lien having existed previously in England, and nothing having been needed but jurisdiction for its enforcement, there was no necessity of deriving a lien from the statute, and the statute would be regarded as authorizing an enforcement *pro tanto* of a lien already existing.

But the lien was given by the statute; and this was settled notwithstanding some loose language used in *The Pacific*. In *Harmer* v. *Bell*,* the privy council laid down the doctrine of maritime lien, definitively and exactly, in the language of Story, J., in *The Nestor*.† They say:

"*In all cases where a proceeding in rem is the proper course, there a maritime lien exists*, which gives a privilege or claim upon the thing, to be enforced by legal process. This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

If the injured shipper of goods, under the law of the place where the contract was violated, could have found his remedy by a proceeding *in rem*, the shipowner certainly could not complain that the same proceeding was taken for the same wrong, in a court of corresponding jurisdiction,

* 22 English Law and Equity, 72; and see The Feronia, Law Reports, 2 Admiralty and Ecclesiastical, 73; The Ella A. Clark, Browning & Lushington, 32.

† 1 Sumner, 78.

where the offending *res* was found. The proceeding *in rem*, after all, was but "a mode of proceeding and process," as defined by this court,* and its allowance or refusal constituted no "question of jurisdiction."

The fact that all the parties to this proceeding were aliens did not, in itself, and at this stage of the cause, furnish any ground for ousting, or even doubting, the jurisdiction. The lien, as between foreigners, was always administered in our courts by process *in rem*, on principles of comity.† It was a matter of sound judicial discretion and not of jurisdiction, and like all matters of discretion could not be the subject of revision in the Supreme Court, or a ground of appeal to it. In the present case, the exercise of the discretion was not only lawful but just. The port of Baltimore was much nearer to the places of residence of both parties than any port of Great Britain. It was as easy of access to one party as the other, and the ship was within the jurisdiction of the District Court of Maryland, a fugitive, as it were, from her duty.

II. On the point of the master's obligation, the counsel replied to the argument of the other side, as to what the case on the evidence was; showing it to be that given by the reporter, and on which the law was scarcely a matter of question.

Mr. Justice CLIFFORD delivered the opinion of the court.

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are insurers of goods shipped, and are liable in all events and for every loss and damage, however occasioned, unless it happens from the act of God or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading.

Whenever the goods intended for transportation are ship-

* The St. Lawrence, 1 Black, 526; The Potomac, 2 Id. 581.

† Mason *v.* The Blaireau, 2 Cranch, 240; Davis *v.* Leslie, Abbott's Admiralty Reports, 131; The Jerusalem, 2 Gallison, 191; The Bee, Ware, 332; The Howard, 18 Howard, 231; The Ada, Davies, 409.

ped on board, or delivered to the carrier or his agent for that purpose, it is the duty of the master, in the absence of any stipulation as to the period of sailing, to commence the voyage within a reasonable time, and he must proceed on the voyage in the direct and usual route to the port of delivery without any unnecessary deviation. Unless it becomes necessary to deviate for the purpose of making repairs or to avoid a storm, or an enemy or pirates, or to obtain necessary supplies, or for the purpose of assisting another vessel in distress, no deviation from the direct and usual route can in general be justified, nor will any other cause be admitted, except under very special circumstances, as a valid defence for any such delay in the transportation of the goods shipped under the bill of lading or other legal contract of shipment.

I. Certain parcels of pig-iron, amounting in the whole to three hundred tons, consigned to the libellants, were, by their agents, resident in England, shipped August 23d, 1866, on board the Maggie Hammond, then lying at Ardrossan, Scotland, and bound on a voyage from that port to the port of Montreal, where the libellants reside. By the bill of lading, it appears that the iron constituting the consignment was shipped in good order and condition, and that the contract of shipment was that it should be delivered to the consignees at the port of destination in like good order and condition, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted."

Subject to the terms of that contract the merchandise in question was delivered to the carrier; and having been duly laden on board, the ship sailed on the following day for the port of delivery, and until the seventh of September she proceeded on her voyage in perfect safety, when she encountered heavy gales which continued through the night, causing the ship to leak, and doing great damage to the sails; and it appears that the master, at six o'clock in the afternoon of that day, finding that the weather exhibited no appearance of improvement, and having consulted with the

other officers of the vessel, and the crew, decided to bear away for some port of refuge, and that "they wore ship with her head to the eastward."

Prior to that change of course they had accomplished half the contemplated voyage, as it appears from the evidence that the ship, at noon of that day, was in latitude forty-nine degrees one minute north, and in longitude thirty degrees sixteen minutes west. Precisely what change was immediately made in the course of the ship does not appear; but it does appear that the master, on the following day, called the crew aft, and submitted the question to them whether they would go to the westward, or continue to go to the eastward, and that they decided to proceed to the eastward, which was equivalent to a decision to return. Much injury had doubtless been done to the sails, but they had spare sails, and it appears that the crew, before they were called aft, had bent and set the foresail, the maintopsail, the jib, the foretopmast staysail, the maintopmast staysail, the mizzen staysail, and the spanker, and the protest shows that the wind had subsided, and that the weather was more moderate.

Principal reason given by the crew for refusing to go westward, as reported in the protest, was, that they had not sufficient sails, that the ship was leaking badly, and that they were not able to do any more work until they had some rest.

Midway between western and eastern ports, and with a ship as seaworthy to go forward as to go back, the master nevertheless yielded readily to the suggestions of the crew, and decided to proceed to the eastward, and on the seventeenth of September the ship came to anchor, without any further damage, in the port of Milford, in Wales. Immediate steps were taken for a survey, which was held on the following day, but some of the recommendations of the surveyors were not satisfactory to the master, and he declined to carry them into effect. Dissatisfied with the results of that survey he called another, which was not held until the twenty-fifth of the same month, when it was recommended

that the ship should proceed to Cardiff, where there were greater facilities for landing and storing the cargo and for repairing the vessel. Influenced by that recommendation the master, two days afterwards, weighed anchor, and the ship having been taken in tow by a steamtug, arrived at Cardiff on the next day and was safely moored for repairs in the dry-dock at that port. Subsequent surveys were also held, confirming the prior conclusion that the ship was in need of repairs, and thereupon the cargo was landed and stored. Expenses were incurred in executing the repairs to the amount of one hundred and eighty-five pounds and seventeen shillings, but the mechanics in accomplishing the work, stripped the vessel of her yellow metal, valued at one hundred and thirty pounds, which was allowed as a credit to the owner of the ship.

On the ninth of October the master made a formal protest, that the repairs recommended could not be completed until the season would be too far advanced for the ship to complete the voyage before winter. Her repairs were finished prior to the third of November, and on that day the surveyors certified that the ship was in a "seaworthy state to proceed on her intended voyage." Although the ship was ready for sea, still the master refused to reload the cargo and proceed to fulfil his contract, alleging that the season was too far advanced. Negotiations were instituted between the consignees and the owner of the ship for a compromise of the controversy, but before any conclusion was reached the ship, on the twenty-first of November, took on board another cargo and sailed for Baltimore, leaving the merchandise constituting the consignment of the libellants in store at the port where the repairs were made.

Left in store the merchandise remained there until the twenty-ninth of May of the next year, when the agents of the ship forwarded the same in another vessel, but the vessel with the goods did not arrive at the port of delivery until the twenty-second of July, eleven months after the iron was shipped on board the vessel of the respondent. Aggrieved by such unusual delay and learning that the ship had ar-

rived at her port of destination, under the new contract of affreightment, the shippers and consignees of the iron stored and left at Cardiff, filed their libel in the District Court for the district where the ship then was, alleging a breach of the contract set forth in the bill of lading. Process of attachment was issued and the ship was seized on the 26th of February, 1867, the day before she finished discharging her cargo at Baltimore. Hearing was had and a decree was entered in favor of the libellants in the District Court for three thousand and ninety-two dollars and thirty cents, together with costs of the proceedings. Determined to contest the matter further the claimant appealed to the Circuit Court, and the appeal to this court is from the decree of the Circuit Court affirming the decree of the District Court.

II. Several questions of importance and of no inconsiderable difficulty are presented for decision in this case. Most of the material facts are exhibited in the preceding statement, and in view of that state of facts the libellants submit the following propositions:

1. That it was the duty of the master, as the agent of the shipowner, to transport the merchandise to the port of destination and deliver the same to the consignees without unnecessary delay, unless he was prevented from so doing by the act of God, the public enemy, or some one of the perils expressly excepted in the bill of lading; and that the evidence in the case does not show that the failure to transport and deliver the consignment was occasioned by any such causes.

2. That the ship, when she sprung aleak, and when her sails were injured, inasmuch as she was as near to western ports as to those situated to the eastward, should have proceeded to some one of the former for repairs, and that the circumstances did not justify the master in putting back to an eastern port for that purpose.

3. That if he was justified in putting back to the port selected as a port of refuge, that his subsequent conduct in respect to the merchandise shipped by the libellants was wholly indefensible; that he had no right to leave the mer-

chandise in store, enter into a new contract of affreightment, and sail with a new cargo for a distant port; that he was bound, as a carrier for hire, either to repair his own vessel, reload the cargo and resume and complete the voyage, as stipulated in the bill of lading; or, if the necessary repairs could not be made in season to enable him to fulfil his contract to transport and deliver the consignment before the fall navigation would close, then it was his duty to procure another vessel and to transship the merchandise and send it forward to the port of delivery without unnecessary delay.

All of these propositions are controverted by the appellants, and they contend that the conduct of the master was in all respects justifiable; that he did everything which he, as such carrier, was required to do under the contract as expressed in the bill of lading, and that the libellants have no just cause of complaint.

Aside from the merits of the controversy, they also contend that the District Court had no jurisdiction of the case; and as that is a preliminary question it will be first considered before examining the questions more immediately involved in the pleadings. No such question is directly presented in the pleadings, and none such was raised in the court below, still the better opinion is that the question is open to the appellants, as it substantially appears that the home port of the ship is Yarmouth, Nova Scotia, and that both the libellants and claimant are foreigners. By the answer it appears that the claimant is a resident of the place where the ship belongs, and the libel describes the consignees as residents of Montreal, in Canada, and that the iron was shipped at Ardrossan, in Scotland.

Undoubtedly the owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same, as much as the shipowner has upon the cargo for the freight, as expressed in the maxim, *Le batel est obligé à la marchandise et la marchandise au batel.* Subject to the exception that the lien of the shipowner may be displaced by an unconditional delivery of the goods

before the consignee is required to pay the freight, or by an inconsistent and irreconcilable provision in the charter-party or bill of lading, the rule is universal as understood in the decisions of the Federal courts, that the ship is bound to the merchandise and the merchandise to the ship for the performance on the part of the shipper and shipowner of their respective contracts.

Shipowners contract for the safe custody, due transport, and right delivery of the cargo, and for the performance of their contract the ship, her apparel and furniture, are pledged in each particular case, and the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfilment of their contract the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement.*

Consequently where the lien or privilege is created by the *lex loci contractus*, says Judge Story, it will generally, although not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the *lex fori*.†

Such a lien is regarded as being in effect an element of the original contract, but in controversies wholly of foreign origin, and between citizens and subjects of the same foreign country, the admiralty courts of the United States will not, in general, entertain jurisdiction to enforce the maritime lien or privilege in favor of shipper or shipowner, in a case where the libellant would not be entitled to such a remedy in the place where the contract was made or where the cause of action set forth in the libel accrued.‡

* The Eddy, 5 Wallace, 493; Dupont *v.* Vance, 19 Howard, 168; The Bird of Paradise, 5 Wallace, 554; Alsager *v.* Dock Co., 14 Meeson & Welsby, 798; Foster *v.* Colby, 3 Hurlstone & Norman, 715.

† Story on the Conflict of Laws (6th ed.), 428; 3 Burge's Commentaries, 770, 779

‡ The Infanta, Abbott's Admiralty, 267; Whiston *v.* Stodder, 8 Martin's (Louisiana), 134; The Havana, 1 Sprague, 402; The Jerusalem, 2 Galison, 191; The Kenneway, Abbott's Admiralty, 321; Brig Napoleon, Olcot, 215; Brig Nestor, 1 Sumner, 73; New Brig, 1 Story, 244; Pope *v.* Nickerson, 3 Id. 465-476.

Where the lien exists only by some local statute, and is not given by the maritime law, admiralty courts in another jurisdiction can no more take jurisdiction of a case not within the local statute than the courts of the country could do where the cause of action arose, but where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the Federal courts by the Judiciary Act.

Courts of justice, and text writers, everywhere concede that the ship, under the maritime law, is bound to the merchandise and the merchandise to the ship, independent of any local usage or statute; but it is true, as suggested by the appellants, that such a lien cannot be enforced in some countries, because the courts of admiralty, which alone are competent to give effect to the same by a proceeding *in rem*, are not, as now constituted, invested with any authority, except to a very limited extent, to exercise such a jurisdiction.

Maritime liens are of little or no value, in a country where there are no appropriate tribunals for their enforcement, as they must remain dormant and unavailable, but the denial of such jurisdiction to her admiralty courts, by one country, whether it be by legislation or by the prohibitions of her common law courts, cannot have the effect to impair or diminish the jurisdiction in such cases of the admiralty courts of any other country, if they are legally clothed with the power and authority to enforce such remedies for the breach of a maritime contract.*

Such a remedy will not in general be accorded, in our courts of admiralty, to the citizens or subjects of a foreign country whose courts are not clothed with the power to give the same remedy in similar controversies to the citizens of the United States, but the question whether they will do so or not is not a question of jurisdiction in any case, as it is

* The Rebecca, Ware, 190; The Phebe, Ib. 270; Abbott on Shipping (ed. 1854), 167.

clear they may do so if they see fit, and in some cases they will take jurisdiction to prevent loss and injustice, especially if no objection is made by the consul of the nation to which the vessel belongs.*

Viewed in the light of these suggestions the case seems to be one where the jurisdiction may be sustained without difficulty, even though it be true that the shipper had no lien upon the ship by the law of the place where the contract of shipment was made. Appellants contend that the law of the place where the contract was made gives no such lien to the shipper in any case, but there is very respectable authority for a different opinion, independent of the usual presumption that the law of the place where the contract was made is the same as that of the forum where the remedy for the breach of it is sought.†

Maritime law, says a learned commentator upon the law of Scotland, partakes more of the character of international law than any other branch of jurisprudence; and he adds, what is more material to the present inquiry, that in all the discussions respecting the same in the courts of that country the continental collections and treatises on the subject are received as authority by their judges where not unfitted for adoption there by any peculiarity which their practice does not recognize. Reference is then made to the principal continental treatises, usually referred to here, and frequently recognized by this court as the sources from which the rules of the maritime law were drawn.‡

Speaking of the power and authority of the master of the ship, the same commentator says that he may hypothecate the ship for the supply of necessaries, and, as a last resort, he may sell the ship and cargo for that purpose. Abroad he has full authority to enter into a charter binding the owners

* The Havana, 1 Sprague, 402; The Volunteer, 1 Sumner, 555; The Spartan, Ware, 145; Harmer *v.* Bell, 22 English Law and Equity, 72.

† Chase *v.* Insurance Co., 9 Allen, 311; Leavenworth *v.* Brockway, 2 Hill, 201; Story on the Conflict of Laws, § 637.

‡ Vandewater *v.* Mills, 19 Howard, 89; 1 Bell's Commentaries (6th ed.), 364; Dupont *v.* Vance, 19 Howard, 168.

and the ship, and he cites in support of that proposition the continental writers usually referred to as authority for that well-known rule of maritime law.*

Shipowners, the author says, have a lien as carriers for the security of the freight, and that the shipper, where the goods have been sold, lost, or injured, during the voyage, may have recourse upon the property of the vessel as a guarantee for the personal obligation of the shipowner. He admits that the rule last mentioned is not generally followed in England, and that there is no adjudged case to that effect in the courts of Scotland, but he insists there is in their jurisprudence no reason for denying the privilege given in such cases by the maritime law, and he expresses the opinion that such a remedy would be sustained in their courts.†

Suppose, however, that neither of the preceding propositions are correct, still it is clear that the jurisdiction in this case may be sustained upon another ground. Two causes of action are set forth in the libel, and before entering further into the discussion of the question of jurisdiction it becomes necessary to ascertain what they are and where they respectively arose, as alleged in the libel and as shown in the evidence. Obviously the first cause of action is founded solely on the alleged failure of the shipowner to fulfil the contract of affreightment to transport the iron from the place of shipment to the port of destination, and to deliver the same to the consignees.

Non-delivery of the merchandise is the gravamen of the charge set forth in both articles of the libel, but the libellants also allege that the master, after the ship departed on her voyage, abandoned the same, and made some improper disposition of the shipment; that he neglected to transport and deliver the same, and that he entered into a new contract of affreightment with another party, and that the ship subsequently sailed for the port of Baltimore, in charge of another master, not having the iron of the libellants on board.

Subsequent to the landing and storing of the goods the shipowner discharged the master and appointed another in

* Dupont *v.* Vance, 19 Howard, 162. † Ibid. 440.

his place, and the ship took another cargo on board and sailed for the port where the process was served in this case, the shipowner claiming the right so to do upon the ground that the season was too far advanced for the ship to proceed to her port of destination, and insisting that he might lawfully detain the shipment until spring, in order that the ship might complete the voyage and earn full freight.

In determining the question of jurisdiction the court must assume that the several propositions submitted by the libellants in respect to the merits of the controversy are correct. Assume that to be so, then it follows that the master improperly put back for repairs; that he abandoned the voyage without any lawful excuse; that he improperly entered into a new contract of affreightment, subjecting the ship to new perils and to a new lien, and that she had proceeded on a distant voyage, leaving the consignment of the libellants at the port where the same was stored at the time the iron was landed from the ship.

Landed and stored as the merchandise was in Wales, the question is, whether the refusal of the master either to transport the goods in his own ship or to transship the same and send the shipment forward in another vessel, and the subsequent abandonment of the voyage, gave the shippers and consignees any lien on the ship by the law of the country where those wrongful acts of the master took place.

Jurisdiction is possessed by the Admiralty Court of England "over any claim by the owner or consignee, or assignee of any bill of lading of any goods *carried* into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."*

Prior to that enactment the jurisdiction thereby conferred

* 24 and 25 Victoria, Pub. Gen. Stat., 1861, ch. 10, § 6, p. 132; Williams & Bruce, Admiralty Practice, 85.

could not have been exercised by that court, and consequently the extent of the jurisdiction depends entirely upon the meaning of that provision. By the words of the act the jurisdiction conferred is confined to the case of goods *carried into England or Wales*, and it is equally clear that the claim must be made by the owner or consignee, or by the assignee of the bill of lading, but it cannot be denied that the case before the court in all those respects comes within the very words of the enactment.

As construed by the courts of that country the intent of the act is to give a remedy to the owner or consignee whenever the ship arrives in a British port and the cargo is not duly delivered in consequence of a breach of contract or duty on the part of the owner, master, or crew of the ship; and the meaning has been so extended by construction that the admiralty court will entertain a claim for short delivery of the cargo, or a case where the goods are only incidentally brought into a port in England or Wales, the court holding that the word *carried* is not used in the sense of imported, but that it includes every case of a breach of contract or duty by the carrier whenever the ship arrives in a British port.*

Where the master of a ship, on a voyage from New York with cargo consigned to Dunkirk, put into a port in England in consequence of an accident, and there landed the cargo and refused either to give delivery of it there or to carry it on to its destination, the court held that there was a clear breach of duty over which it had jurisdiction.†

Special reference is made by the appellants to the case of *The Pacific*,‡ as showing that the sixth section of the Admiralty Court Act gives merely a conditional right to sue the ship, that it does not create a maritime lien; but the decision in that case is not an authority for the proposition as applied to the case before the court, as the conclusion would be in-

* The Danzig, Browning & Lushington, 102; The St. Cloud, Ib. 14.

† The Bahia, Browning & Lushington, 61; The Norway, Ib. 227; The Ironsides, Lushington's Admiralty, 458.

‡ Browning & Lushington, 243.

consistent with what the same learned judge decided in the case of *The St. Cloud*,* where he said the act was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the shipowner in foreign parts, the common law tribunals could not afford effectual redress.

Effectual redress in such a case cannot be afforded, even in an admiralty court, without authority to arrest the ship; and wherever that authority exists the proceeding may be *in rem*, which is an admiralty proceeding, founded upon a lien; and it makes no difference whether it is held in the courts of the particular jurisdiction, that it exists by maritime usage, or that it was created by statute, if it be of such a character that it is recognized in our courts as a maritime lien. Extended argument upon the subject, however, seems to be unnecessary, as the later decisions in the admiralty courts of that country have disapproved of the prior decisions, and adopted a more liberal construction of the sixth section of the act.†

Tested by these suggestions the better opinion is that the sixth section of that act does give a maritime lien in a case like the present; but suppose it is otherwise, that it merely gives the right to sue the ship, still the concession cannot benefit the appellants, as the admiralty courts here administer the foreign law, and the consequence is that the filing of the libel in the District Court here secures to the libellant the same lien in the ship as if the libel had been filed in his behalf in the jurisdiction where the wrongful acts set forth in the libel were committed.

Process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it. Unless, therefore, the suit *in rem* can be prosecuted in the jurisdiction where the property is found it cannot be prosecuted at all, as the suit cannot be main-

* Browning & Lushington, 14.

† The Nepoter, Law Rep., 2 Adm. & Eccl. 376; The Beta, Law Rep., 2 Privy Council Cases, 447.

tained without service of process upon the property described in the libel.*

Process having been duly served in the district where the ship was found and where the libel was filed, the jurisdiction of the District Court is without any well-founded legal objection. In this country, says Mr. Parsons, it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, but the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.†

Jurisdiction being established it becomes necessary to examine the merits and to state our conclusions whether the decree from which the appeal was taken should be reversed or affirmed.

Grave doubts are entertained whether the master was justified in putting back for repairs, as he was quite as near to western ports as to those situated to the eastward, and the record furnishes no reason to conclude that he would have encountered any greater perils or difficulties in proceeding to the westward than he did in putting back to the port selected as the port of refuge; but it is not necessary to pursue that inquiry, as it is not the intention of the court to rest the decision upon that ground.

Ships, to be seaworthy, ought in general to have spare sails where the voyage is a long one, and if the ship in this case was properly furnished in that behalf the conduct of the master in putting back for the reasons assigned in the protest is quite indefensible, as it is clear that he might have gone forward just as safely, and if he had done so it cannot be doubted that he might have gone to any one of a half-

* The Propeller Commerce, 1 Black. 581; The Reindeer, 2 Wallace, 403; Nelson *v.* Leland, 22 Howard, 48.

† 2 Parsons on Shipping, 226; The Johannes Christoph, 2 Spink, 98; The Jerusalem, 2 Gallison, 191; The Aurora, 1 Wheaton, 96; Taylor *v.* Carryl, 20 Howard, 611; The Gazelle, 1 Sprague, 378.

dozen western ports where he could have repaired his ship in ample season to have enabled him to complete the voyage, deliver the cargo, and return to the open sea without the least danger of any obstruction from ice in the river navigation. None of these matters, however, were much urged by the appellees at the argument, and they are accordingly passed over without further remark.

Grant that the conduct of the master in putting back is without objection, and that he was justified in landing and storing the goods with a view to a survey, and for the purpose of repairing the ship, the question then is whether his subsequent conduct in refusing, after the repairs were finished, to complete the voyage or to procure another vessel, transship the goods, and send them forward, and in sailing for another and a distant port under a new contract of affreightment, leaving the goods of the libellants in store, without making any provision for their transportation and delivery, constitutes a breach of the contract of affreightment made with the shippers of the goods, as set forth in the bill of lading.

As agent of the owners the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some one of the perils expressly excepted in the contract of shipment. When the vessel is wrecked, or otherwise disabled in the course of the voyage, and cannot be seasonably repaired to perform the voyage, or cannot be repaired without too great delay and expense, the master is at liberty to transship the goods and send them forward in another vessel, so as to earn the whole freight, but he is not entitled to recover for freight if he refuses to transship the goods, unless he repairs his own vessel within a reasonable time and carries them on to the place of delivery.

He is not only at liberty, in case of such a disaster, to transship the goods and send them forward, but it is his duty to do so, if he cannot repair his own vessel in a reasonable

time, and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance; and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured.*

Shipments are made that the goods may be transported to the place of delivery, and the master should always bear in mind that it his duty to accomplish that object. Inexcusable delay occurred before it was ascertained what repairs were necessary, and before the work was actually commenced. They came to anchor in Milford Haven on the seventeenth of September, and a survey was called on the following day, but the master was dissatisfied with the result, and on the twenty-fifth of the same month he called another, so that the ship did not arrive at the port where the repairs were made until the twenty-eighth of the month, ten days after her arrival at Milford.

Duties remain to be performed by the master or the owner, after the vessel is disabled. His obligation of safe custody, due transport, and right delivery still continues and is by no means discharged or lessened while it appears that the goods have not perished in the disaster.†

Nothing will excuse the carrier under such circumstances but the causes stipulated in the bill of lading, and he is still bound by virtue of his original contract to use his utmost exertions to transport or send forward the goods to the port of delivery. Such carriers may be answerable for the goods in case of loss or injury, even though no actual blame can be imputed to them; and after the loss or injury is established the burden lies upon the respondent to show that it was occasioned by one of the perils excepted in the contract of shipment or bill of lading.‡

Diligence and promptitude were due in this case from the

* Niagara *v.* Cordes, 21 Howard, 24.

† King *v.* Shepherd, 3 Story, 358; Elliott *v.* Rossell, 10 Johnson, 7.

‡ Clark *v.* Barnwell, 12 Howard, 272; Rich *v.* Lambert, Id. 347; Chitty on Carriers, 242; Story on Bailment, §§ 528-529; 3 Kent, 213; 1 Smith's Leading Cases, 313; Smith Mercantile Law, 348.

master, especially if he believed that there was any danger that the time which would be occupied in making the repairs would render it impracticable to carry forward the goods before the close of the fall navigation; and if he was of the opinion, in view of all the circumstances, that the repairs could not be completed in season to transport the goods to the port of delivery, he was bound to procure another vessel, transship the goods, and forward them to the consignees.

Much testimony was introduced by the appellants to show that another vessel could not have been procured, but most of it is not of a character to apply to the case before the court. Bound to keep safely, duly transport, and rightly deliver the goods, it is no defence for the carrier to allege that the price of freight at that time was higher than it would have been earlier in the season, as the charge for the increased price would have fallen upon the goods and not upon the appellants. They had contracted to transport the goods, and it is no defence to a suit for the breach of the contract that the rate of the insurance at that time was higher than it was earlier in the season. Excuses of the kind constitute no defence to such an action, as the carrier is bound to perform his contract unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading or contract of shipment.

Under the circumstances of this case the appellants were bound to transport the goods in their own vessel, or to procure another and send them forward to the port of delivery. Opposed to this view is the suggestion that they were not bound to transship immediately, as they had the right to detain the goods and repair their own vessel for that purpose; but the decisive answer to that suggestion is, that they had no right to detain the goods for any such purpose, unless the repairs could be made in time to enable the ship to transport the goods to the port of delivery before the navigation closed.

Without entering into the details of the evidence, suffice it to say, the court is of the opinion that another vessel might

have been procured for that purpose, and that it was the duty of the master to have transshipped the goods unless he could repair his own vessel in season to complete the voyage.*

Aside from that proposition, however, the court is of the opinion that the repairs were finished in season to have enabled the master to transport the goods in his own vessel, and it is clear that he was bound to do so unless he was prevented by some one of the causes expressed in the bill of lading. Mere fear that he might encounter ice in the voyage, or that he might not be able to return till spring, if he transported the goods to the port of delivery, constitutes no defence, as he was bound by his contract to complete the voyage without unnecessary delay, unless, as before explained, he was prevented by some one of the causes expressed in the bill of lading. His ship was fully repaired on the third of November, and the navigation did not close until the fifteenth of December following, which would have given him ample time to deliver the cargo and complete the voyage. Forty days would have been a long voyage, and probably it might have been accomplished in thirty-five.

Viewed in any light, as shown by the evidence, the decree of the Circuit Court is correct.

DECREE AFFIRMED.

COPELIN *v.* INSURANCE COMPANY.

1. If a party assuring a vessel which has been sunk, gives notice that he abandons her, as for a total loss, when by the terms of the policy he has no right so to abandon, the company, even if not accepting the abandonment, will nevertheless make itself liable as for a total loss, if taking possession of the vessel under the provisions of the policy, for the purpose of raising, repairing, and returning her, they do not raise, repair, and return in a reasonable time. Holding the vessel for an unreasonable time is a constructive acceptance of the abandonment.

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* Cannan *v.* Meaburn, 8 Moore, 141.

Statement of the case.

2. This is so, notwithstanding there is a provision in the policy that the acts of the insurers, in preserving, securing, or saving the property insured, in case of danger or disaster, should not be considered or held an acceptance of abandonment. The provision refers only to authorized acts.
3. When a court below makes a special finding, this court will not go into an examination of the evidence on which it was founded to ascertain whether or not it was right. The finding is equivalent to a special verdict.

ERROR to the Circuit Court for the District of Missouri, in which court Copelin brought suit against the Phœnix Insurance Company, on a policy of insurance for $5000 on the steamer Benton, valued in the policy at $45,000. The policy contained these stipulations:

"In case of loss, the party insured shall use every practicable effort for the safeguard and recovery of said steamboat, and if recovered cause the same to be forthwith repaired; and in case of neglect or refusal, on the part of the assured, to adopt prompt and efficient measures for the safeguard and recovery thereof, then the insurers are hereby authorized to interpose and recover the said steamboat, and cause the same to be repaired for account of the assured, to the charges of which the said insurance company will contribute in proportion as the sum herein assured bears to the agreed value in this policy. The acts of the assured or assurers, or of their joint or respective agents, in preserving, securing, or saving the property insured in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of abandonment."

The cause having been submitted to the court without a jury, the court found that the boat insured struck a snag, and sunk in the Missouri River, November 3d, 1865, and that the injury was caused by one of the perils against which the company had insured; that though the plaintiff had no right to abandon for a total loss, he gave notice that he did so abandon; but the defendants did not accept such abandonment; that they did, however, under the provisions of the policy, take possession of the vessel for the purpose of raising and repairing her, and returning her to the plaintiff; that accordingly they raised the boat, proceeded to

repair her, and tendered her to the plaintiff, at the home port, on the 9th of May, 1866, more than six months after she had been injured. It was further found, that the repairs and tender were not made within a reasonable time; that had the boat been tendered earlier in the season, so as to be used for the spring trade on the river, she would have been worth $5000 more to the plaintiff; that when she was tendered to him, the repairs made were not sufficient to indemnify him for the injury the boat had sustained; that it would have required an expenditure of $5000 more to have made the additional repairs necessary to complete the indemnity; and that the plaintiff refused to receive the boat when she was tendered to him, but did not point out the deficiencies in the repairs. It was still further found that the expense of raising and repairing the boat, actually incurred by the defendants, was $12,150.62, of which $1763.70 was the cost of the repairs made; that the boat, as tendered to the plaintiff, was worth $12,000, and that when injured she was worth $25,000. Upon the facts thus found, the Circuit Court gave judgment for the plaintiff for the amount named in the policy. And the insurance company brought the case here.

Mr. J. O. Broadhead, for the Company, plaintiff in error:

If there was no right to abandon as for a total loss, and no acceptance of abandonment, the question becomes simply one of damages under the policy. The vessel, when tendered to the owner, was worth $12,000. It would have taken $5000 to put her in complete repair,—that is to say, to make her as good as she was before she received an injury. This would make $17,000. But the underwriters paid $12,150.62, the expense of raising and repairing the vessel; and if they are now, by the judgment of the court, required to pay, in addition, the amount of the policy, $5000, with interest, they pay over $17,000 to the owner; in other words, they pay more than a total loss; so that, although there was no right to abandon, and no abandonment accepted, and no total loss, the insurer is held liable for a total loss.

It is provided by the terms of the policy that the acts of the assurer or assurers, or their agents, in preserving, securing, or saving the property insured, in case of damage or disaster, shall not be considered or held to be a waiver or acceptance of abandonment.

The expenses for raising and repairing the boat, $12,150, were paid out by the underwriters, under the policy, in attempting to rescue the boat, "to the charges of which the insurance company is only bound to contribute in proportion as the sum assured bears to the agreed value in the policy,"—that is, as $5000 is to $45,000, or one-ninth part of those expenses,—the balance, of course, to be paid by the boat; and the insurance company may make the expenses in rescuing the boat for account of the assured. One-ninth of $12,150 is $1350, leaving $10,800 due by the assured. If from this is deducted $5000, the amount necessary to put the boat into complete repair, there remains $5800 due, which is more than the amount of the policy, if there was no abandonment, no total loss.

The judgment below proceeds on an idea, that although there was no total loss, yet the insurance company has rendered itself liable for a total loss; in other words, that there was a constructive total loss; but how can it be said that there is a constructive total loss when there is no right to abandon, no acceptance of abandonment, and of course no abandonment?

If the assurer has failed, after saving the boat, to put her in complete repair, the most that can be said is that he has failed to make good the loss to the assured, and that is all the contract requires the assurer to do.

[The learned counsel then went into an examination of the evidence on which the court below made its finding, to show that it was the fault of the assured that the boat was not repaired and tendered to him in a reasonable time.]

Messrs. Glover, Shepley, and Rankin, contra.

Mr. Justice STRONG delivered the opinion of the court.

Nothing in this record requires us to look beyond the

special finding of the facts made by the court, or to do more than determine whether, upon the facts found, the plaintiff below was entitled to the judgment given.

As the sum insured by the policy was not greater than the sum required to make the additional repairs necessary to indemnify the plaintiff, it is difficult to perceive why, in any aspect of the case, he was not entitled to the judgment given. The defendants complain, however, that they have been held liable as for a constructive loss, when there was no right to abandon, and when the abandonment of which the plaintiff gave notice was not accepted. Doubtless had the defendants taken possession of the boat, as they were authorized to do, by the provisions of the policy, and had they raised, completely repaired, and returned her to the plaintiff in a reasonable time, they could not have been held liable for a total loss. It is an established fact that there was no right to abandon when they did take possession of the vessel. And it was expressly stipulated in the policy, that the acts of the assured, or insurers, or of their joint or respective agents, in preserving, securing, or saving the property insured, in case of danger, or disaster, should not be considered, or held to be, a waiver or acceptance of an abandonment. It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences. And an acceptance need not be expressly made. It may even be refused, and yet the insurers, by their conduct, may make themselves liable as for a total loss. Though, by the terms of the policy, these defendants had a right to take possession of the boat, and repair her for account of the plaintiff, yet this was a privilege accorded to them only, that they might thus make indemnity for the loss. Taking possession to make partial repairs, not amounting to indemnity, was not contemplated by the contract. It was not authorized. Nor did the contract warrant taking possession of the boat, and holding her for an unreasonable time. The insurers were bound to repair and return without unnecessary delay. In holding longer than was neces-

sary for making repairs, they must be regarded as acting, not as insurers, but as owners, for they had no other authority than that of owners for their failure to return within a reasonable time. Their action was, therefore, a substantial recognition and acceptance of the abandonment of which they had been notified, for in no other way had they become owners. On no other theory can this delay be considered lawful. It is true the policy stipulated that the acts of the insurers in preserving, securing, or saving the property insured in case of danger, or disaster, should not be considered or held an acceptance of abandonment, but this manifestly refers only to authorized acts. Retaining possession of the boat an unreasonable time, and then offering to return her unrepaired, were not authorized acts, and consequently they are unaffected by the stipulation. They must therefore be regarded as constructive acceptance of an abandonment. This is a principle asserted and well sustained by the authorities. In *Peele* v. *The Suffolk Insurance Company*,* where the jury had found that the underwriters, who had taken possession of the stranded vessel, had not offered to restore her in a reasonable time, the court said, "The underwriter has his duties as well as his rights. If he take the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage, if not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon." The principle, said the court, rests upon the very nature of the law of insurance, which is a fair and honest indemnity for loss. The same doctrine was asserted in *Reynolds* v. *The Ocean Insurance Company*,† and it was also held that the underwriter's duty and liability in such a case, are not varied by a clause in the policy of insurance, stipulating "that the acts of the assurers in recovering, saving, and preserving the property insured in case of disaster, shall not be considered an acceptance of an abandonment." Such also was the ruling in a case between the same parties,‡ and

* 7 Pickering, 254. † 1 Metcalf, 160. ‡ 22 Pickering, 191.

in *Norton* v. *The Lexington Fire, Life, and Marine Insurance Company.** It is in our judgment sustained by sound reason.

The plaintiffs in error, however, insist that the doctrine cannot be applied to the present case, because the court below found there was no right, under the facts shown on the part of the plaintiff, to abandon for a total loss, although he gave notice that he did so abandon, and that there was no acceptance by the insurers of such an abandonment. But this must be considered in connection with the other facts found. It is equally a fact in the case, that the defendants took possession of the boat, repaired her very insufficiently, and after having held her an unreasonable time, offered to return her. The legal effect of this we have seen. Taking these facts together, the finding that the defendants did not accept the abandonment which the plaintiff offered at a time when he had no right to abandon, means no more than that there was no express or avowed acceptance. This is quite consistent with the judgment, that by their failure to return the boat within a reasonable time, they made themselves liable to pay the full amount of the policy.

We cannot follow the plaintiffs in error into an examination of the evidence, in order to inquire whether it was not the fault of the assured that the boat was not repaired and tendered to him in a reasonable time. Our judgment is necessarily founded exclusively upon the finding of facts by the court. That is equivalent to a special verdict, and upon that we think the plaintiff below was entitled to the judgment which he obtained.

JUDGMENT AFFIRMED.

* 16 Illinois, 235.

Statement of the case.

LIONBERGER *v.* ROUSE.

1. By the second limitation in the proviso to the 41st section of the National banking act, which enacts that the tax which the section allows the States to impose on the shares held by persons in the said banks, "shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located," Congress meant no more than to require of each State, as a condition to the exercise of the power to tax the shares in National banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.
2. Accordingly, where a State, having at the time only two banks of issue and circulation, both of which two it had by contract with them disabled itself from taxing beyond a certain amount, had also numerous banks not banks of issue, having a far greater capital than the two of issue, laid a tax on all shares of stock in banks and incorporated companies generally,—the fact that it could not collect a tax past a certain amount in the two banks of issue which it had at that time, was held no bar to the collection of the tax on the shares of the National banks for a greater amount.

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

Prior to 1857, there had been in Missouri, and there were in the State at that time, several institutions which—under the name, for the most part, of savings banks, loan institutions, saving associations, and the like, though sometimes with the title of *banks* only—transacted business often known as "banking;" that is to say, which received deposits, lent money, and dealt in exchange; but which had not the privilege of issuing notes to circulate as money; not, therefore, banks *of issue*.

In the year just named, 1857, the State established ten banks, which, in addition to the powers of receiving deposits, lending money, and dealing in exchange, had also the power of *issuing paper money;* the ordinary banks of deposit, discount, and *issue* or *circulation*. There were thus in the State, "banks" which were not banks of issue, and banks which were banks of this kind. The act establishing the ten banks of issue declared that

Statement of the case.

"*Each banking company* (incorporated under it) agrees to pay to the State annually *one per cent.* on the amount of capital stock paid in by the stockholders other than the State, which shall be *in full of all bonus and taxes* to be paid to the State by the respective *banks.*"

And an act amendatory of the act of incorporation provided that this one per cent. on the amount of capital stock should be a full compensation for all taxes of every kind whatsoever.

In 1863, these ten banks of discount, deposit, and issue, as also numerous other banks not banks of issue, but banks of the sort first above described, being in existence, Congress, by act of 25th of February, of that year, entitled "An act to provide for a National currency," authorized the establishment of National banks; giving power in the act to State banks to become National ones. Under this act of Congress (the State legislature also authorizing any bank, savings institution, savings association, or other corporation having banking powers and privileges in the State, under the laws thereof, to form associations for the purpose of doing a banking business under the act of Congress of February 25th, 1863), eight of the already mentioned ten banks of issue, and which had the privilege while State banks to pay the one per cent. annually in lieu of all taxes, made themselves National banks. Two, however, did not. These two remained State institutions with the privilege of the one per cent., as before. The old associations, that is to say, the banks not of issue, all of which had charters independently of the act of 1857, and which had not the privilege to pay one per cent. in lieu of all other taxes, remained State institutions.

In this state of things, Congress, on the 3d of June, 1864, passed an act regulating the right of States to tax the shares of National banks. The 41st section of this act* provided:

"That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person,

* 13 Stat. at Large, 111.

from being included in the valuation of personal property of such person in the assessment of taxes imposed by or under State authority, at the place where such a bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

"*Provided further*, that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located."

These enactments, Federal and State, being in force, the legislature of Missouri, by an act of the 4th February, 1864, concerning revenue, provided that "shares of stock in *banks* and other incorporated companies" should be subject to assessment as other property. The statute provided the mode of assessment as follows:

"Persons owning shares in banks and other incorporated companies, taxable by law, are not required to deliver to the assessor a list thereof; but the President or other chief officer of such corporation shall deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same.

"The tax assessed on shares of stock, embraced in said list, *shall be paid by the corporations respectively*, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from dividends accruing on such shares."

Under this act, a tax of nearly two per cent. was levied by the State on the assessed valuation of the shares of one Lionberger, a resident of St. Louis, and a shareholder in the Third National Bank of St. Louis. Payment of the tax being refused, the collector, a certain Rouse, collected it forcibly. Lionberger thereupon brought suit against him, in one of the State courts, for the alleged wrongful act; asserting that the proviso in the 41st section of the act of 1864, imposing a limitation on the power of the States, had

reference to banks of issue alone; that the State had disabled itself by its contract with them to tax that sort of bank otherwise than it had contracted for (one per cent.), and that the assessment and collection, if made under color of law, were without any legal authority whatever. It was not denied that the two State banks of issue held a very inconsiderable portion of the banking capital of the State, and that the shares of all other associations in the State (of which there were many, some created after 1857, and some before), with all the privileges of banking except the power to emit bills, were taxed like the shares in National banks. The court in which the suit was brought decided adversely to the position set up, and on appeal the Supreme Court of the State—observing that the moneyed associations, saving and banking institutions of the State, were banks to all intents and purposes, and that their shareholders were taxed at the same prescribed rate as the shareholders in the National institutions—affirmed the decision. The case was now brought here for review. Many shareholders in the National banks in Missouri had also refused to pay the tax laid under the State statute, and the present case was in the nature of a test case to settle its validity; more than $300,000 of such taxes, as was said, being dependent on the judgment.

Messrs. Evarts and Broadhead, for the plaintiff in error:

1. We assume, as matter of law, that the State of Missouri has disabled itself by contract with the two now existing State banks of issue from laying any tax upon *them*, or upon their shares, but that of one per cent.* And we assume also, that no taxation by the State upon the capital of the National banks can be at present made, under any Federal legislation existing, nor any upon the shares except under the permissive and restrictive authority of the 41st section of the act of Congress of June 3d, 1864.† How, then, can

* Home of the Friendless *v* Rouse, 8 Wallace, 430.

† Gordon *v.* The Appeal Court, 3 Howard, 133; Van Allen *v.* The Assessors, 3 Wallace, 573; People *v.* The Commissioners, 4 Id. 244; Bradley *v.* The People, Ib. 459.

the tax in question, even admitting it to be a tax on shares, as distinguished from one on capital, be justified? The fact that certain State institutions—sometimes called banks, and without impropriety—are subjected to the same rate and method of taxation as are applied to the National banks is no answer to our question; for the 41st section provides, as the final condition to the validity of State taxation of the shares of National banks, that the tax so imposed "shall not exceed the rate imposed upon the shares in *any* of the banks organized under the authority of the State," where the National bank is located. But,

2. The tax is really a tax on the capital of the banks. The *shares* are not taxed at all. The shareholder has nothing, under the Missouri statute, to do with the matter. *He* makes no return of his shares. It is "the president or other chief officer of such corporation" who delivers to the assessor the list of *all* the shares in the bank; and it is the corporation which, by the express words of the State statute, pays the tax. That the corporation gets it afterwards, as it can and if it can, does not change the case.

Messrs. Blair and Dick, contra:

1. The Supreme Court of Missouri has decided that the two institutions organized under the act of 1857, are not the only "banks" in the State, but on the contrary, that the banking institutions organized under the laws of the State which confer banking privileges without the power of issuing paper, are banks; and this is in harmony with the ruling of this court in the case of *The Bank for Savings* v. *The Collector*,* which says:

"Banks, in the commercial sense, are of three kinds, to wit: 1st, of deposit; 2d, of discount; 3d, of circulation; all or any of these functions may be and frequently are exercised by the same association; but there are still banks of deposit, without authority to make discounts, or issue a circulating medium."

* 3 Wallace, 495, 512.

The revenue laws of Congress also recognize banks without circulation as "banks" for the purposes of taxation.

The meaning given by the plaintiff to the State statute, assumes that the word "banks" means, always, "banks of issue," which it does not always mean.

2. The bank is made by the State statute the agent of each individual shareholder, and acts merely as such. This is a convenience to him as also to the State; and is not unlawful.

Mr. Justice DAVIS delivered the opinion of the court.

This case has received the careful consideration of the court, as well on account of the principle involved, as of the large amount of money dependent on the decision of the suit.

It is no longer an open question in this court, since the decision in the case of *Van Allen* v. *The Assessors*,* that the shareholders in a National bank are subject to State taxation, although the entire capital of the bank be invested in the bonds of the United States, which cannot be taxed by State authority. The difficulties which have arisen since that decision do not relate to the abstract right of taxation, but grow out of the supposed conflict of State legislation with the provisions of the act of Congress on the subject. The forty-first section of the act of Congress of 3d of June, 1864,† placing these shares within the reach of the taxing power of the States, annexed two conditions to the exercise of the power. The State was forbidden to tax them higher than it taxed other moneyed capital in the hands of its own citizens, or to impose on them a tax exceeding the rate imposed upon the shares in any of the banks organized under State authority. If there was no discrimination in these particulars the State could lawfully tax shares in the National banks. It is conceded the tax exacted from the plaintiff in error was not greater than was assessed on other moneyed capital belonging to individuals or corporations, but it is claimed that it is higher than the rate paid by the State banks.

* 3 Wallace, 573.

† 13 Stat. at Large, 111.

And this brings us to the consideration of the main question in the case. It is contended that the tax in question is invalid, because the two State banks chartered in 1857, which did not, like the remaining eight, become National banks, cannot be taxed more highly than one per cent., while the assessment of the shares of the plaintiff in error equals nearly two per cent. It is not denied that these two banks hold a very inconsiderable portion of the banking capital of the State, and that the shares of all other associations in the State (there being many), with all the privileges of banking except the power to emit bills, are taxed like the shares in National banks, but it is claimed the proviso in the forty-first section of the National banking act, imposing a limitation on the power of the States, has reference alone to banks of issue. To ascertain the sense in which the word bank is used in the proviso to this section, it is necessary to recur to the mischief which Congress desired to guard against. The National banks were established to provide a National currency, at a time when the State banks furnished the entire paper circulation of the country. In providing a system by which the States, where National banks were located and did business, could tax their shares, it was important, as their notes came in competition with State bank paper, that there should be no unfavorable discrimination against them. It was easy to see that an unfriendly State could legislate so as to drive them out of circulation, and this consideration induced Congress to limit the State power of taxation in two particulars. In declaring that National bank shares should be taxed like other moneyed capital, and that no burdens should be imposed on them from which State banks were exempt, all was done that the necessity of the case required. There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of National bank circulation. It seems, therefore, clear, that the proviso to the forty-first section was meant by Congress to apply to banks of issue. It is proper in this connection to observe, that the changed condition of the banking interests of the country, has been the occasion of

further legislation by Congress on this subject, and that *now* the power of State taxation over the shares of National banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens.*

Having determined that Congress, in imposing conditions on the power of the State to tax, had reference to banks of circulation, the question arises whether the tax in this case was invalid because of the status of the two banks left in Missouri. According to the words of the law the tax was not warranted, but did Congress intend that the law should have such an effect? Did it contemplate that the shares of National banks should escape taxation, if the State complied, so far as it had the ability to do so, with the requirements of the forty-first section of the National Banking Act? In our opinion the answers to these inquiries must be in the negative. It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice.†

It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the National banks. The measure itself had reference to prospective legislation by the States, and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing, as that the power of the State to tax should depend on its doing an act, which it had obliged itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals or corporations, could grant away the right of taxa-

* 15 Stat. at Large, p. 34.

† Dwarris on Statutes, chap. 12; Perry *v.* Skinner, 2 Meeson & Welsby, 477; Stocker *v.* Warner, 1 Commons' Bench, 149.

tion, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different States; while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes, others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, in this condition of things in the country, meant to confer a privilege by one section of a law which by another it made practically unavailable? If the construction contended for by the plaintiff in error be allowed, then a State so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power given to tax the shares of National banks. And this further consequence would follow, that the shareholders of National banks located in one State would escape all taxation, while those whose property was invested in banks in a different locality, would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to such manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the National Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in National banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.

Testing the case in hand by this rule it is apparent that the tax complained of was properly assessed and collected. Missouri has complied, so far as it had the ability to do it, with the demands of the law.

The legislature, as soon as the National banking system was created, passed a law enabling the ten banks of issue in the State to wind up their business, in order that their shareholders could, if they chose, transfer their interests to the

new system. Eight of these banks availed themselves of the privilege, surrendered their charters as State corporations, and became National bank associations. Two of them declined the proposition tendered by the State, and are still doing business in St. Louis. There is no way the State could compel them to relinquish their charters, nor has it the power to tax their stockholders on their shares of stock. Having contracted with these banks to accept from them annually, in lieu of all taxes, one per cent. on their paid-in capital stock, it cannot turn round and assess a tax on the shareholders. As the State did all that it could to conform its legislation to the requirements of the law, it was therefore in a condition to impose the tax in question on the shares of stock held by the plaintiff in error.

It is objected that the mode of assessment provided by the general revenue law of the State, is inconsistent with the provisions of the act of Congress of June 3d, 1864, as it requires the tax assessed on the shares of stock, to be paid by the corporations respectively instead of the individual shareholders. This was one of the questions in the case of the *National Bank* v. *Commonwealth*, decided at this term,* and it was there held that this mode of assessment was not inconsistent with the terms of the law, but in all respects unobjectionable. It is unnecessary to repeat the argument presented in that case, or to consider the point further, as we see no reason to question the soundness of that decision.

JUDGMENT AFFIRMED.

THE CITY *v.* LAMSON.

1. A holder of coupons which have been cut off from the bond to which they were originally attached, may bring suit on them, if they represent interest already due, notwithstanding he be no longer holder of the bond to which they belonged. He need not, if he declares properly, produce the bond.

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* *Supra*, 353.

2. In suing on the coupons in such case it is proper enough to recite the bonds in such general way as explains and brings into view the relation which the coupons originally held to the bonds, and in some respects still hold.
3. The suit does not by such recital—that is to say, by one in the nature of inducement and by way of preamble only—become a suit upon the bond. It is still a suit on the coupons.
4. A coupon, if of the ordinary sort, being but a repetition, as respects each six months or other stated term, of the contract which the bond itself makes on that subject, and but a device for the convenience of the holder, a suit upon it is not barred by the statute of limitations, unless the time prescribed in the statute be sufficient to bar also suit upon the bond.
5. A debt for a specific sum contracted by a city, and invalid because a statute which authorized the city to contract a debt did not also limit the extent of it, is made valid by a subsequent statute recognizing the validity of the debt as contracted.
6. Where bonds issued to *bonâ fide* holders for value, are valid by the judicial decisions of a State when issued, subsequent decisions in the same State cannot destroy their validity in such hands. *Gelpcke* v. *City of Dubuque* (1 Wallace, 175), affirmed.

ERROR to the Circuit Court for the District of Wisconsin, the case being thus:

The 3d section of the 11th article of the Constitution of Wisconsin ordains that

"It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, *and to restrict their power of borrowing money, contracting debts, and loaning their credit*, so as to prevent abuses in contracting debts by such municipal corporations."

With this provision in force as fundamental law, the legislature of the State, on the 2d March, 1857, by an act* which amended and consolidated the several acts relating to the city charter, authorized the common council of the city of Kenosha to "borrow, on the corporate credit of the city, *any* sum of money, for *any* term of time, at *any rate of interest*, and payable at *any* place deemed expedient, issuing bonds or scrip therefor." The city accordingly did borrow $100,000 to aid

* Chap. 133, Private Laws.

in the construction of the Kenosha and Rockford Railroad, and it issued bonds in sums of $500 and $1000 each for payment. They were headed,

"*Issued according to law to the Kenosha and Rockford Railroad Company, to aid in the construction of their railroad;*"

and were made payable twenty years from date, at the People's Bank, in the city of New York, with interest, at the rate of ten per cent. per annum, to be paid semi-annually, upon the presentation of the proper coupons for said interest. For the payment of the bonds and interest, the faith of the city was declared to be pledged. The bonds were certified by the mayor and city clerk to have been issued under an act of the legislature, passed March 2d, 1857, giving authority to the city to lend its credit, for the sum specified; and also, in pursuance of a vote of the freeholders of the city, taken for the purpose of the loan of the $100,000 to the railroad company.

Attached to each bond were a series of coupons, like those now usually attached to railroad bonds, for the semi-annual interest as it should become due in each year. The following was the form of those on the bonds for $500:

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the 1st day of September, 1860, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due on that day on the bond of said city, numbered 1, dated this 1st day of September, 1857.

G. H. PAUL,
Mayor.

H. T. WEST,
Clerk.

Subsequent to the issue of the bonds the name of "The Kenosha and Rockford Railroad Company" was changed to "The Kenosha, Rockford and Rock Island Railroad Company;" and a statute of 1859 provided that "the common council of the city of Kenosha should have generally the charge and control of all interest the city of Kenosha *now has, or may hereafter have* in that railroad." The act then provided that the common council should appoint a railroad

commissioner, that when duly appointed he should be *ex officio* a member of the board of directors of the railroad; and a statute of 1862 authorized the city "to issue new bonds, in exchange for the bonds and scrip *heretofore* issued by said city, on railroad account, now outstanding and unredeemed, for the purpose of compromising *the indebtedness* of said city on such terms as may be agreed upon between the city and its *creditors*."

One Lamson having one hundred and seventy-two coupons for the interest due on the bonds in 1860 and 1861, and unpaid, brought suit against the city to recover it. The declaration recited in very general terms, the several bonds to which the coupons that the plaintiff held had been originally annexed, setting forth that these bonds themselves had been sold and disposed of, to *bonâ fide* purchasers, and had since passed from hand to hand in the stock market, like other negotiable securities, so that the plaintiff could not produce them to the court; that the interest had accrued on the same; that the city had neglected and refused to pay it at the time and place designated; and that the interest and coupons were owned by the plaintiff, and that he brought the coupons into court to be cancelled.

The defendant pleaded, 1st, nil debet; 2d, that the several supposed causes of action had not accrued to the plaintiff within six years from the commencement of the suit; the statute of limitations. The plaintiff took issue on the first plea, and demurred to the second, which demurrer was sustained.

From the bill of exceptions, it appeared that the plaintiff gave in evidence the one hundred and seventy-two coupons, his doing which was objected to, but that the objection was overruled. It was admitted that all the coupons, with the exception of four, which were annexed to a bond produced, were coupons of different bonds of the same issue, but the bonds were not given in evidence. It was admitted also that more than six years had elapsed since the interest accrued on them.

After the plaintiff rested, the counsel for the defendant

prayed the court to charge the jury, 1st, that the bonds declared on, as well as the coupons, should have been produced, in order to sustain the declaration under the issue; and 2d, that the city of Kenosha had no authority to issue the bonds. Both prayers were refused.

The jury found a verdict for the plaintiff on the first issue to the amount of the several coupons, and judgment having been given accordingly the city brought the case here.

Mr. Cary for the city of Kenosha, plaintiff in error:

1. If the declaration was upon the coupons, the plea of *actio non accrevit infra sex annos* should have been sustained and the plaintiff's demurrer thereto overruled, for all the coupons recovered upon were more than six years past due. If the declaration counts upon the bonds, then the plea of *nil debet* not having been demurred to put in issue every fact necessary to the plaintiff's recovery, and required them to be proved. Certainly no recovery could be had upon the bonds without producing them, when they were counted upon as the cause of action and their existence denied by the plea. There was no proof that any such bonds had ever been made.

2. The only pretence of authority in the city to issue these bonds, rests in an act which is in plain repugnance to the constitution of the State. It is difficult to conceive a more absolute grant of power, or one that would more completely subject the whole property of the city to the wild and reckless schemes of the city council, for fancied improvements, than that act gives. It would be the duty of this court, under any circumstances, to hold the act unconstitutional and void. But the act has already been declared void by the Supreme Court of the State of Wisconsin,* which is the proper tribunal to determine its validity under the constitution of Wisconsin, and the decision of that court on this question, is conclusive upon this court.

Messrs. Carpenter and Lynde, contra.

* Foster *v.* Kenosha, 12 Wisconsin, 616.

Mr. Justice NELSON delivered the opinion of the court.

We agree that if this were an action upon the bonds to recover instalments of interest that had accrued thereon, although such instalments had been duly assigned to the plaintiff, there would be great difficulty in maintaining it in his name, as well as without producing the bonds, as the proper evidence that interest was due. The plaintiff, under such circumstances, doubtless, would have a remedy for withholding the interest; but it is not necessary or material to stop and point it out in the present case; for we do not regard the action as founded upon the bonds, but upon the coupons. The bonds are recited in very general terms, it is true, in the declaration; but, it is by way of explaining and bringing into view the relation which the coupons originally held to the bonds; and which, in an important sense, they still hold, though distinct as it respects ownership, as they represent the interest that had become due upon them. The relation we refer to is, that these coupons are not received, or intended to have the effect of extinguishing the interest due on the bonds; as this collateral security, or rather, this evidence of the interest, upon well-settled principles, cannot have that effect without an express agreement between the parties. Besides, the coupons are given, simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds. There is no extinguishment till payment.

The recital is by way of inducement, as is familiar to special pleaders at common law, which Mr. Chitty says is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference.* The office of an inducement is explanatory, and does not, in general, require exact certainty. Thus, says Mr. Chitty, when an agreement with a third person is stated only as an inducement to the defendant's promise, which is the principal cause of action, it is considered, in general, sufficient to state such agreement without certainty of name,

* 1 Chitty on Pleading, 290.

place, or person,* and where the matter is unnecessarily stated by way of inducement, and might be struck out as surplusage, and, as we shall show hereafter, may be said of that in the present case, the failure to make proof of the statement is not material.

The action, then, being founded upon the coupons, the material question arising on this branch of the case is whether or not the plea of the statute of limitations constitutes a good defence. It is admitted that more than six years have elapsed since the interest accrued on the coupons, and, if barred by this lapse of time, the defence is complete, and the court below erred in sustaining the demurrer.

As we have seen, the coupons were made contemporaneously by the city with the bonds for the accruing interest thereon. This appears on their face. The city of Kenosha, on the first September, &c., will pay twenty-five dollars at the People's Bank, &c., on presentation of this coupon, being the interest due that day on the bond of said city, numbered one, dated 1st September, 1857, which bond itself contains a covenant for the same interest. The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature; and the bond, being of a higher security than a simple contract debt, is not barred by lapse of time short of twenty years; and, as we have seen, this contemporaneous coupon does not operate as an extinguishment of the interest, unless there has been an express agreement to that effect. These coupons are, substantially, but copies from the body of the bond in respect to the interest, and, as is well known, are given to the holder of the bond for the purpose, first, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and, second, to enable the holder to realize the interest due, or to become due, by negotiating the coupons to the bearer in business transac-

* 1 Chitty on Pleading, 291.

tions, on whom the duty of collecting them devolves. This device affords great convenience to all persons dealing in these securities, especially to the holders in foreign countries, who otherwise would be obliged to forward the bond to the place of payment of the interest each time it became due, or trust them to the hands of their correspondents in the country where the payment is made.

This convenience in the collection by the use of coupons, as is apparent, very much facilitates the negotiation of these securities abroad, and enhances their value in the foreign market. And any decision that would have the effect to lessen or impair the higher security for the interest as found in the bond, by the use of these coupons, would necessarily, to that extent, defeat the purpose for which they were designed. As we have seen, there is nothing in the contract between the parties that would lead to the conclusion the nature or character of the security by the bond for the interest was to be changed or lessened by the issue of the coupons, but the contrary; for if any such change had been intended, it should have been in some way indicated in the body of them. There was but one contract, and that evidenced by the bond, which covenanted to pay the bearer five hundred dollars in twenty years, with semi-annual interest at the rate of ten per cent. per annum. The bearer has the same security for the interest that he has for the principal. The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due. Their great convenience and use in the interests of business and commerce should commend them to the most favorable view of the court; but, even without this consideration, looking at their terms, and in connection with the bond, of which they are a part, and which is referred to on their face, in our judgment it would be a departure from the purpose for which they were issued, and from the intent of the parties, to hold, when they are cut off from the bond for collection, that the nature and character of the security changes, and becomes a simple contract debt, instead of partaking of the nature of the higher security of

the bond, which exists for the same indebtedness. Our conclusion is, that the cause of action is not barred by lapse of time short of twenty years. Recurring again to the declaration, we have said that the preamble, or inducement, was unnecessary, and might well be rejected as surplusage. As we have seen, it recites, in very general terms, the bonds to which the several coupons in suit were annexed. Now, each coupon itself contains substantially, on its face, all this information. It is issued for interest due at a certain day and place on a bond, giving its number and date. Another form adds the amount, but this is unimportant, as the bond is sufficiently identified without it. The production of the coupon, therefore, at the trial, will show the relation it bears to the bond, and, if our opinion is sound, that in this connection it cannot be legally severed from it till the interest is paid, a count upon the coupon is all that can be material.

The only remaining question in the case is as to the authority of the city of Kenosha to issue bonds to which the coupons were annexed.

The act of 1857 of the legislature which amends and consolidates the several acts relating to the charter of the city, confers full authority upon the common council to borrow on the corporate credit of the city any sum of money for any term of time, at any rate of interest, and payable at any place deemed expedient, issuing bonds or scrip therefor. It is admitted this authority would be sufficient, but it is insisted that the statute exceeds the authority of the legislature under the third section of the eleventh article of the State constitution, which, it is asserted, requires the legislature to limit or restrict the amount of money to be raised by the city. Without inquiry into this question, it is sufficient to say that, after the city had passed the ordinance lending its credit to the railroad company to the amount of $100,000, the legislature ratified it. This was equivalent to an original limit of this amount.

It is urged also that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon

the city to lend its credit, and issue the bonds in question, was in violation of the provision of the constitution above referred to. But, at the time this loan was made, and these bonds were issued, the decisions of the court of the State favored the validity of the law.* The last decision, cannot, therefore, be followed.†

JUDGMENT AFFIRMED.

Dissenting, Mr. Justice MILLER.

INGLE *v.* JONES.

1. Although by the statutes of Maryland which are in force in that part of the District of Columbia which makes the county of Washington, judgment against an administrator for his testator's debts should be entered only for assets as they shall come into his hands, still, a judgment in the ordinary form will not prevent the creditors filing a bill to charge the realty where the record shows that after such judgment the auditor of the court has, in pursuance of a reference by the court to him, found the personalty insufficient to pay the debt, and that recourse must be had to such realty.
2. The law governing there, makes the proceeding against the administrator and the heir, when the latter proceeding is necessary, entirely independent of each other. If it be necessary to resort to the realty to discharge debts, a proceeding against the heir must be instituted, and in that case, whatever has been done by the administrator is without effect, as to the property sought to be charged. A judgment against the administrator is not evidence against the heir, and the demand must be proved in all respects as if there had been no prior proceeding to effect its collection.
3. When a will imposes on an executor, who is named, duties foreign to those which come within the scope of an executor's ordinary functions, such powers do not pass to an administrator unless it be clear that it was the intention of the testator to make him a donee of the power.
4. A mere administrator, not the donee of such a power, cannot plead the statute of limitations to defeat a suit brought on a judgment, by a creditor seeking to charge the realty with his debt.
5. The three months allowed by the 69th of the Rules in Equity, for the

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* See Dean *v.* Madison, 7 Wisconsin, 688; Clark *v.* Janesville, 10 Id. 136.—REP.

† Gelpcke *v.* Dubuque, 1 Wallace, 175.

taking of testimony, has reference to the taking of testimony by both parties; defendants as much as complainants. It is for the court below to decide whether further time shall be given or refused, and ordinarily the determination of the question would not be deemed a fit subject for review by this tribunal, though cases may occur of so flagrant a character that it would be its duty to interpose.

6. It refused to interpose, though the court below had been prompt in setting down a case for hearing, the case having been one by a complainant having a pretty plain right, from the enjoyment of which he was kept by a defendant in possession, who had been contesting the case for eighteen years with great pertinacity, and with the interposition of all kinds of technical objections.

7. The necessity of an order for the sale of real property to pay debts being clear, the court may direct an ascertainment of the *whole* amount of the testator's liabilities when the sale is confirmed. It is not indispensable that such ascertainment have been made before the sale was ordered.

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

By certain ancient statutes of Maryland, in force within the District,* it is enacted that in suits against an administrator he need not plead *plene administravit*, nor anything relative to assets; and that he shall not be burdened further than these have come to his hands; but that after verdict against the administrator, the court shall assess the *pro rata* which he ought to pay; and to do this the court is authorized "when the real debt or damages are ascertained (meaning by verdict or confession) to refer the matter to an auditor, to ascertain the sum *for which judgment shall be* given." In case the judgment shall be for a sum inferior to the real debt, it shall go on and say, "that the plaintiff is entitled to such further sum as the court shall hereafter assess on discovery of further assets in the hands of the defendant."

These statutes being in force—and the 69th of the Equity Rules set forth by this court for the governance of courts below in equity causes, prescribing that "three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the

* Act of 1786, chapter 80, § i; act of 1798, chapter 101, subchapters 7, 8, §§ vii, viii, ix.

time"—Zephaniah Jones, a builder, entered in 1851 into a contract with Miss Ann R. Dermott for building her a large house in Washington; she agreeing to pay him $24,000 for his work; parts of the sum to be paid as the building advanced. The house was so far built as to be ready for delivery in May, 1852, and it was delivered to Miss Dermott accordingly; its yearly rental being subsequently estimated at from $7000 to $8000. Before the completion of things on either side, misunderstandings arose, and Miss Dermott refusing to pay the balance claimed by Jones, he sued her to recover it. The suit was earnestly contested; technical objections being raised wherever they could be set up. Jones obtained a verdict and judgment, but it was reversed here on objections of this kind. Being thus sent back he then obtained a second verdict and judgment, which was reversed on like grounds. Settlement of the claim was thus greatly protracted.

In the progress of the contest Miss Dermott departed this life, leaving debts; leaving the house which Jones had built and the ground on which it stood (her chief realty), some (not very considerable) personalty, and a will of a peculiar kind.

By this will she appointed eight executors, one of them being a certain John P. Ingle. The executors and their survivors, in the performance of the "powers, commissions, charges, functions, and duties," which she gave them along with "the exclusive care, management, and stewardship of her estate," were to have its entire management and control during an uncertain time named by her. They were to rent the real estate, and out of the rents and the personal estate, not otherwise disposed of, were to pay her funeral expenses, and her other debts, without regard to limitations of time, "if found according to *their best judgment really due in conscience;*" to pay several legacies, and to pay also an annuity, while their duties were executing, though after the execution accomplished, it was to be a charge on the estate; they were to pay all such debts of her brother, contracted by him in a place and within a time named, as they should,

"according to the best of their *judgments and discretions, deem due in conscience*, and no other debts or pretended debts of his contracting." They were authorized to sell certain lots in an old cemetery, and to buy others in a new one, and to build there a vault to receive her remains. The power was given to mortgage her real estate, if found necessary to pay debts. After the debts and legacies were all satisfied the entire estate was to be delivered over to twenty trustees, named in the will, one Stringfellow being the first named, to whom and their heirs it was devised for a charity described; a charity, however, which now was confessedly void, and which could not be enforced as against her heirs.

All the persons named as executors declined to act except one of them, John P. Ingle, already named. He, however, after taking letters and defending against Jones's suit, but not wholly settling the estate, died during the progress of the controversy; thus leaving no executor to the will. Miss Dermott had provided in that instrument that if the surviving executor should die while the trusts were yet executory, the execution of her will, &c., "shall *not* devolve upon the executor of such deceased executor, but upon such person or persons as the vestries of St. John and Trinity Churches* may elect to go on and complete this will in so far as the execution thereof is committed to my said executors, and that proper letters of administration with the will might be granted by the court or authority competent for the purpose, to the person or persons so elected." But the vestries of the two churches named by Miss Dermott did not elect any one in pursuance of her will to take his place, and the court in Washington competent for that purpose, acting under a statute† which authorized the appointment of such an administrator, but was silent as to the powers which such a representative of the decedent shall have, appointed one John H. Ingle, administrator *de bonis non*, with the will annexed.

Against this administrator *de bonis non*, &c., Jones finally,

* Two Episcopal churches in Washington.

† Act of Maryland, 1798, chapter 101, subchapter 5, § 6, &c.

in 1865, and after fifteen years' prosecution of his suit, obtained a judgment. The record entry of it was "for $20,136, with interest from April 5th, 1852, with costs, to be levied of the goods and chattels which were of the said Ann Dermott at the time of her death, which have come, or at any time hereafter shall come, to the hands of the said John H. Ingle, to be administered, if such goods and chattels be sufficient to discharge said damages and costs and all other just claims against the same; and if not sufficient, then said damages and costs to be levied of said goods and chattels ratably with all other just claims against the same." The record proceeded:

"And, because it is unknown to the court here whether all or only such ratable part of said damages and costs ought to be so levied, it is referred to the auditor to inquire thereof, according to the statute in such case made and provided, and report accordingly."

The auditor reported that there were no assets in Ingle's hands which could be applied to payment of the debt. Jones thereupon filed a bill in equity in the court below—the bill to the decree on which the present appeal was taken—to subject the testator's real estate to the payment of the judgment. And the complainant alleging that Ingle, being administrator of the unadministered personalty only, had no concern with the realty, the court appointed a receiver, one *Wilson*, to take charge of it, and to receive the rents.

The bill thus now brought, made *Ingle administrator*, &c., and Hoe and several others, heirs-at-law of Miss Dermott, and Stringfellow with other trustees, parties defendant. The former denied the justice of the demand, and pleaded the statute of limitations. Hoe and some others filing their answers, confessed its validity, did not plead the statute, and agreed to the sale of the realty as prayed for. And against Stringfellow and the trustees the case went by default.

The cause was put at issue on the 6th of March, 1866. The 69th rule in equity, as already stated, allowed the par-

ties three months thereafter to take their testimony. The complainant began the taking of his on the 14th of that month. Between that time and the 23d, inclusive, he examined nine witnesses; the complainant's counsel, to whom notice had been given, appearing and cross-examining those of them whose testimony was the most important. An adjournment was ordered by the examiner, from the 23d of March until the 2d of June. A deposition relating to a formal matter was then taken, and the complainant's counsel announcing that he had closed the examination of witnesses on his part, the examiner on that day (four days yet remaining of the three months) sealed up the depositions and transmitted them to the court; no objection being at this time made by the defendants.

A side issue, made also about this time, must here be referred to. It has been mentioned that the answers of the heirs-at-law admitted the justice of Jones's claim, and assented to the granting of his prayer for satisfaction from the realty. On the 23d of May they filed a petition, setting forth that these answers were obtained from them by fraud practised upon them by an emissary of Jones, and asking leave to withdraw those answers, and to file answers *de novo*. The particulars of the case were given by them. Jones answered, denying them; but the issue having been one of fact, there is nothing in it worthy of report, further than that the particular matter was set down for hearing on the 11th of June, and that on the 14th the court, refusing to allow the withdrawal prayed for, dismissed the petition asking it.

Returning now to the main case. Six days before this dismissal—that is to say, on the 11th of June, and still, therefore, before the three months for taking testimony had *completely* expired—the court set down the motion for publication of the testimony on the 8th of June, 1866, and on the same day set down the cause for hearing at the then term; the petition to take the answers off the file being still not passed on and pending. On the 10th of June, the defendants gave notice that they would take testimony on the 19th of the month, and filed objections against the case being

heard at the then term, and showing afterwards as cause that no sufficient opportunity had been allowed to them to take rebutting testimony, after the evidence in chief on the part of the complainant was closed on the 2d of June, and because none was allowed the defendants, heirs-at-law, to take evidence in support of the allegations of their petition, filed May 23d, for withdrawal of their answers. The court below, however, heard the case, and on the 3d of July, 1866, finding the amount due to the complainant, and that it was necessary to sell the real estate described in the bill to pay it, ordered the premises to be sold, and the proceeds to be held subject to the further order of the court. From this decree it was that Ingle now appealed.

Messrs. R. J. and J. L. Brent and S. L. Phillips, for the appellant:

1. By the old statutes of Maryland which regulate the subject, no judgment can be rendered against an administrator until it is judicially ascertained, on an auditor's report or otherwise, that there is, or is not, any assets in hand, and when this fact is ascertained, the judgment is entered and moulded accordingly. The true entry and form of making up of the record, in such a case as this was, is shown in Harris's Entries,* in which old and approved book of precedents, it will be seen that there is no entry even of an interlocutory judgment on a confession of the debt (or by analogy on a verdict establishing it), until the auditor's report is made. There was thus in law no judgment whatever on this verdict.

2. Did the administrator *de bonis non* with the will annexed, who sets up the illegality of the claim and also the statute of limitations, succeed to the trust estate vested in the executor, these trusts being yet unexecuted when that executor died? No doubt the testatrix contemplated the occurrence of two events, viz., the nomination by the vestries, and its ratification by the Orphans' Court. But she has failed

* Page 104.

to say what her intention was in case the Orphans' Court appointed a person, upon the *failure* of the vestries *to nominate*. Did she mean to let the great trusts of her will fail in this last case? Certainly not. We must therefore construe her will as containing two intents—first, a particular intent that her administrator should be named by the vestries; secondly, a *general intent*, that her administrator, however appointed, should be the trustee. If so, and both intents cannot be gratified, the rule is to construe the will upon the *cy-pres* doctrine, and sacrifice the particular intent, which in such case is construed as merely directory and not imperative. If this court takes that view, we are let into both defences. Of course, if our view is right, the appointment of a receiver was improper. [The counsel then went into these points.]

3. The answers of the heirs-at-law of Miss Dermott were obtained by contrivance and fraud, and should have been taken off the files, that they might answer *de novo*. [The counsel then argued this point.]

4. The court erred in ordering publication, and refusing to allow the defendants to take evidence on the merits. The complainant consumed the three months by his evidence in chief, and then announced it closed, and on the same day had it filed and moved for publication. The defendants in vain excepted, and prayed for an extension of time (under the 69th rule) to rebut the testimony taken; but the court below held that we were in fault for not taking testimony *pari passu* with the complainant. The action of the commissioner in closing and sealing the depositions, on the 2d of June, cut us out of four days of the three months during which we were entitled to take testimony; and even if we had served a notice *de novo* to take it, such had been the course of the other side that the time would have been too short for us. We were at any rate clearly entitled to keep the depositions open for four days to examine any witnesses we chose.

Then on the 5th of June, before the three months had expired, the court set down the motion for publication of the testimony on the 8th of June, 1866, and on the same day

Recapitulation of the case in the opinion.

the cause was set down for hearing by order of the court. The petition to take answers off *file* was still pending, and the defendants could not take evidence while pleadings were being perfected. If they had gone on to take it under those disputed answers, it would have prejudiced their petition to take them off the file. In addition, the defendants could not know what rebutting evidence to adduce until the complainant closed his case on the 2d of June, 1866.

This particular error of the court below was a great one, for it saps the foundations of justice, by paralyzing all attempts at defence.

5. The decree was erroneous on its face. Without any reference to the auditor to report what other debts than Jones's existed, it decrees the sale of the whole real estate; omitting to adjudicate the amount or insufficiency of the personal estate, so as to subject the realty to the payment of the deficiency for which it was only responsible.

Messrs. Davidge and J. H. Bradley, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an appeal in equity from the decree of the Supreme Court of the District of Columbia. The record is voluminous, and contains numerous exhibits, and much of detail, which we have not found it necessary to consider. The material facts lie within a narrow compass, and the questions presented for our determination are neither numerous nor difficult of solution. On the 22d of April, 1851, the testatrix and the appellee entered into a contract for the erection by the latter of a large building in the city of Washington. She was to pay for the structure the sum of $24,000; $5000 on the 1st of July, 1851; $5000 on the 1st of October following, provided certain parts of the building were then ready for occupation; and the remaining $14,000 on the 1st of January, 1860, with interest, as stipulated. The first instalment was duly paid. Nothing has been paid since. Possession of those parts of the building to be first completed was delivered in December, 1851, and of the residue in April,

1852. In May, 1852, Jones sued for the instalment due on the 1st of October, 1851, and recovered. The judgment was reversed by this court.* The declaration was then amended by withdrawing the special counts and enlarging the *ad quod damnum* to $40,000, and a verdict and judgment were recovered for $22,149, and interest. This judgment was also reversed.† The case was again tried, and a verdict and judgment were recovered for $20,136.23, with interest from the 5th of April, 1852. The auditor of the court was directed to ascertain the amount of assets in the hands of Ingle, the administrator, which could be applied in payment of the debt. He reported that there were no assets available for that purpose. Jones thereupon filed this bill to subject the real estate therein described to the payment of his demand.

It is insisted by the counsel for the appellants that the judgment is erroneous in form, and is, in fact, only interlocutory. This objection is well taken. According to the statutes of Maryland, which are in force in the county of Washington, the judgment, under the circumstances, should have been entered only for assets as they should thereafter come into the hands of the administrator. But this fact is immaterial. The case is governed by the local law. That law makes the proceeding against the administrator and the heir, when the latter proceeding is necessary, entirely independent of each other. The duties of the administrator are confined to the personal estate, and never extend beyond it. If that be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the heir must be instituted. In that event, whatever has been done by the administrator is without effect, as to the property sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceeding to effect its collection,

* 23 Howard, 220.

† 2 Wallace, 1.

and the statute of limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative.*

We have examined with care the proofs in the record of the complainant's demand as set forth in the bill, and are satisfied with the amount found by the decree. It could be productive of no good to vindicate this view of the subject, by entering into an analytical examination of the testimony. We are not unmindful of the length of time through which the complainant has been pursuing his remedy, nor of the verdicts which have been rendered in the trials at law. They were the results of vigorously contested litigation, after the most elaborate preparation of the case. Nor are we unmindful that the court below, in the case before us, came substantially to the same conclusion. Our judgment, however, has been formed upon grounds wholly apart from these considerations. If the question were *res integra* in this case, and now for the first time to be passed upon, we should have no difficulty in sustaining the decree. We think the full amount found by the court is justly due.

Ann R. Dermott, by her will, appointed eight executors, and clothed them with important powers and duties. They were to have the entire management and control of the estate during the uncertain time specified. They were to rent out the real estate. Out of the rents and the personal estate, not otherwise disposed of, they were to pay her debts, without regard to limitation of time; to pay her funeral expenses; several legacies, amounting in the aggregate to between $3000 and $4000; to pay an annuity of $400, while their duties were executory, after which it was to be a charge upon the estate; they were to pay, in their discretion, certain debts of her brother; they were to build a vault to receive her remains, and they were authorized to sell two cemetery lots. The power was given to mortgage, if found necessary to pay debts. After the debts and legacies were all satisfied, the entire estate was to be delivered over to twenty trustees,

* Statutes of Maryland of 1786 and 1798; Collinson *v.* Owens et al., 6 Gill & Johnson, 4; 8 Peters, 528.

named in the will, to whom and their heirs it was devised, to enable them to found and support a female orphan asylum. The beneficiaries were to be such destitute white orphans as the trustees, or any corporation which might succeed them, should select. The provision for this charity is admitted on both sides to be void. The statute of the 43d Elizabeth never was in force in Maryland. The trust resulted for the benefit of the heirs-at-law.* All the persons named as executors declined to act, except one of them, John P. Ingle, who qualified, and took out letters testamentary. He died, whereupon the defendant, John H. Ingle, was appointed administrator, with the will annexed. The will provides, that if the surviving executor should die while the trusts are executory, their execution should devolve upon such person or persons as the vestries of St. John and Trinity Churches should elect to go on and complete their execution, so far as they were committed to the executors, and she desired that letters of administration, with the will annexed, or other competent authority, should be granted to the person or persons so elected. The vestries made no election. Letters were granted by the judge of probate to John H. Ingle, as if the will contained no such provision.

The question whether the administrator thus appointed could exercise any authority as to the real estate is deemed an important one by the counsel on both sides, and has been fully argued. The Maryland statutes which bear upon the subject provide for the appointment of an administrator *de bonis non*, with the will annexed, but are silent as to his powers. By the common law his duties are confined to the personal estate, unadministered by his predecessor. Whatever authority he may possess as to the real estate must be derived from the will. If not found there in express terms, or by necessary implication, it has no existence. Hence the test, in all such cases, is the intention of the testator. Many of the duties enjoined upon the executors were foreign to those which come within the scope of their ordinary func-

* Dashiell *v.* Attorney-General, 5 Harris & Johnson, 400; Same *v.* Same, 6 Id. 9; Wildeman *v.* The Mayor of Baltimore, 8 Maryland, 554.

tions. Such a power never passes by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become the donee of the power, in place of the executor appointed by the will. If no provision be made by the will for such substitution, the power does not become extinguished, but the case falls within the category of those where a court of equity will not permit a trust to fail for the want of a trustee, but will appoint one, and clothe him with authority adequate to the duties to be discharged.* In the case under consideration it is clear the testatrix did not intend that any one not clothed with the sanctions she prescribed should be intrusted with any duty touching her estate. The administrator occupies the same relation to the realty as if he were administrator *de bonis non* without the will annexed, and the testatrix had died intestate. This disposes of the questions raised as to the statute of limitations. The administrator alone has interposed that defence. It cannot avail those who represent the real estate, and who are the only parties in interest in this proceeding.

It was proper for the court to appoint a receiver. Until this was done there was no one authorized to take charge of the property and receive the rents.

Upon looking carefully into the record we find no foundation for the imputation that the answers of the heirs-at-law were obtained by fraud or contrivance. It was within the discretion of the court to allow them to be taken off the files and the parties to answer *de novo*, or to overrule the application made for that purpose. We think this discretion was not abused.

It was strenuously insisted that the court erred in refusing further time to the defendants to take testimony. The earnestness with which the point was pressed has induced us to examine it with more care than we should otherwise have deemed necessary. The cause was put at issue on the 6th of March, 1866. The 69th rule in equity allowed the parties

* Egerton, Administrator, *v* Conklin, 25 Wendell, 233; De Peyster *v.* Clendining, 8 Paige, 296; Dominick *v.* Michael, 4 Sandford, 402; Cole *v.* Wade, 16 Vesey, 42; 1 Chance on Powers, 658, 681.

three months thereafter to take their testimony. The complainant commenced taking his on the 14th of that month. Between that time and the 23d, inclusive, he examined nine witnesses. Notice was given to the defendant's counsel. He appeared and cross-examined the witnesses so far as he chose to do so. An adjournment was ordered by the examiner, from the 23d of March until the 2d of June. A single deposition relating to a formal matter was then taken. The examiner thereupon closed the testimony and returned it to the court. It does not appear that the defendants made any objection to the adjournment, or manifested any desire to take testimony during the period of more than two months between the time of the adjournment and the time to which it extended. The application for further time was heard and overruled by the court on the 8th of June. The rule referred to provides that "three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time." The three months are allowed for the taking of testimony by both parties. The limitation applies as much to defendants as to complainants. It is for the court or judge to decide whether further time shall be given or refused, and ordinarily the determination of the question would not be deemed a fit subject for review by this tribunal. Cases may, however, occur of so flagrant a character that it would be our duty to correct the error. In the case before us the complainant's testimony was substantially closed on the 23d of March. The defendants had from that time until the 6th of June to take testimony on their part in the regular way. No reason is given why they neglected to do so. Indeed they were bound to proceed as soon as the cause was at issue. They had no right to wait until the complainant was through. They knew from the previous trials at law what his testimony would be. If there was any surprise, and an extension of time was necessary, doubtless it would have been given. The complainant was pursuing the residue of his compensation for the house he had built. He had delivered

possession years before. The house was large and valuable. The proof is that it rented for from seven to eight thousand dollars per year. His expenditures had been large. He had received less than a quarter of the contract price, and nothing for his extra work. He had recovered two verdicts for the amount claimed. He had been engaged for more than fourteen years in a bitter and expensive litigation, in which every possible impediment had been thrown in his way. In the light of these facts we are not prepared to say that the court below erred in the ruling complained of.

There is no error apparent on the face of the decree. It finds the amount due to the complainant, and that it was necessary to sell the real estate described in the bill to pay it. It orders the premises to be sold in the manner prescribed, and the proceeds to be held subject to the further order of the court. The auditor had found and reported the deficiency of assets requisite to give the court jurisdiction and to entitle the complainant to the relief sought by his bill. The necessity of making the sale, if the complainant's demand was to be paid, was clear upon the proofs, and was not denied by the answers. The amount of the liabilities to be paid out of the proceeds might have been ascertained before the decree of sale was made, but that was not indispensable. It may as well be done when the sale is confirmed. The rights of all parties in respect to the fund can then be ascertained, and payment and distribution be ordered accordingly. It is not alleged that the premises were susceptible of division, or if they were, that it was not necessary to sell the whole. No such issue is made in the pleadings, and no such proof is found in the testimony.

It is now nearly eighteen years since the complainant commenced a suit to recover what has been adjudged to him in this case. The conflict has been flagrant ever since. The demand seems to us to be simple and just. We find no error in the record, and the decree of the court below is

AFFIRMED.

NOTE.

In sequence to the preceding case should be reported another, an offspring from it, and like it, from the Supreme Court of the District, the case of

HOE ET AL. *v.* WILSON.

1. Where certain heirs at law seek to set aside a sale of their ancestor's realty made under a decree of a competent court ordering, at a creditor's instance, such sale for the payment of a debt due him, they should make the creditor on whose application the sale was made a party. All the heirs also should be parties. It is not enough that those who bring the suit profess to file their bill "for themselves and the other heirs at law," these last being known and not numerous.
2. This court will reverse and remand a case thus defective as to parties, although this deficiency have not been made a point at the bar below.
3. It will not consider a case upon documents not in the cause below, though filed here by consent as if returned under a writ of diminution.

THE decree of the Supreme Court of the District ordering a sale of Miss Dermott's real estate, which the affirmance in the preceding case adjudged was rightly made, having been executed and a sale made, and the property *bought by Wilson*, who as stated in the report of the case had been appointed receiver of its rents, Hoe, there also mentioned as an heir-at-law of Miss Dermott, with eight others, her heirs also, who joined with him, filed a bill against this Wilson to set aside the purchase, the ground of their bill being that he had purchased below the real value of the property, and that having been receiver, he was incompetent, with proper regard to those rules which equity places around all persons standing in positions of confidence, to purchase at all. The nine heirs who thus filed the bill professed to file it "for themselves and the other heirs at law," averring that there were such others, but not naming them nor saying anything as to their number, nor indeed anything else about them. The testimony showed the existence of four, and gave the names of two in full, with a statement that the full names of the two others were not remembered, but that in their names occurred, in the one, "O'Neal," and in the other, "Jane." The

post-office address of the first two was given, and of the other two it was stated that they lived "somewhere in Alabama, post-office address not remembered."

Jones, the creditor at whose instance the property was sold, and whose debt was to be paid by the proceeds of the sale, was not made a party either.

The court below heard the case on its merits, and dismissed the bill; no objection being made there at the bar on the ground of defect of parties. The complainants brought the case to this court, and the record being here the counsel on both sides agreed that there should be added to the record of the principal case, to have the same effect as if returned under a writ of diminution, the following proceedings in that cause, to wit, "the final decree of sale, the trustees' report of sale, the exceptions filed to the ratification of the sale and the order of the court thereon, the order of ratification of the sale, the deed of the trustee to the purchaser."

Messrs. Melloy and Brent, for the appellants, contended that upon obvious principles a receiver should not be permitted to bid for the lands of which he has previously had the management, citing numerous cases, and especially *Anderson* v. *Anderson*.*

Messrs. Cox and Davidge, for the appellees, denying this proposition and arguing on it *contra*, contended that decision on the point could not be made, because the bill was defective in parties. The suit could not be instituted by some in the names of others; those not joined not being stated to be unknown, nor the case otherwise one of that class recognized in the books, for a suit for the benefit of parties not joined; as where parties are too numerous, or are members of a large association or of a large class.

To this it was replied that this point had not been taken below, and could not be first taken here.

Mr. Justice SWAYNE delivered the opinion of the court.

The case presented by the record, so far as it is necessary to state it, is as follows: The complainants represent themselves to be heirs-at-law of Ann R. Dermott, deceased, and allege that

* 9 Irish Equity Reports, 24.

they bring their bill against the defendant "for themselves and the other heirs-at-law of the said Ann R. Dermott." The bill alleges that by virtue of a decree of sale in the case of *Zephaniah Jones* v. *Stringfellow and others*, wherein these complainants and others were defendants, Wilson, the defendant in this suit, became the purchaser of certain real estate of the said Ann R. Dermott, deceased, which is particularly described; that this purchase was made by Wilson on the 2d of January, 1867, from the trustees named in the decree; that long prior to the purchase, and prior to the rendition of the decree under which the sale was made, Wilson was, by order of the court in that case, appointed receiver of the estate of Ann R. Dermott, with authority to manage and rent the property, which appointment he accepted, and executed his bond as such receiver, which was accepted and approved; that he collected a large amount of rents as such receiver; that he was receiver down to the time of the purchase in question, and still continued to be such. It is averred that by reason of his fiduciary relation to the property in question he was incapacitated to purchase; that the sale is void at the election of the complainants; and that they elect to avoid it, and to have the property resold at the risk of Wilson. The bill prays for appropriate special, and for general relief. Wilson answered. The answer admits the decree of sale, the sale by the trustees appointed to make it, the purchase by Wilson, and that he was receiver as alleged in the bill. It denies that he was incapacitated to buy, and insists that the sale was valid. It avers that he has paid all the purchase-money, and received a deed for the property.

We pass by the questions whether the proper remedy of the complainants was not by appeal from the order of the court below confirming the sale, and whether the bill is not fatally defective on its face in not averring such confirmation before it was filed. These points have been fully argued, but the view which we take of the case renders it unnecessary to decide them. The defence that the validity of the sale is *res judicata* by reason of the proceedings of these complainants, touching the order of confirmation, is not set up in the answer, and cannot, therefore, be considered.

But Zephaniah Jones, the complainant in the suit in which the decree of sale was made, and the other heirs-at-law of Ann

Statement of the case.

R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, *sua sponte*, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made. Instead of this being done the cause was heard and decided upon its merits. This was a manifest error. The decree must, therefore, be reversed, and the cause remanded to the court below. In that court both parties can take leave to amend and can modify their pleadings so as to exhibit the case as they may desire respectively to present it. If testimony be necessary that also can be taken. We do not consider the supplement to the record filed in this court as before us. It was not in the case in the court below. To recognize it here would involve the exercise of original instead of appellate jurisdiction. Whether it was competent for the receiver to buy at the sale made by the trustees is a point upon which we express no opinion. We have not reached it, and have not, therefore, had occasion to consider the subject.

It is ordered that the decree of the court below be REVERSED, and that the cause be remanded, with directions to that court to proceed

IN CONFORMITY TO THIS OPINION.

THE NONESUCH.

The court has no jurisdiction of a cause transferred here from the Circuit Court by consent of parties. *The Alicia* (7 Wallace, 572) affirmed.

THIS was an appeal from the District Court of the United States for the Northern District of Florida to the Circuit Court for the same district. There had been no decree rendered in that court, but consent of parties was given to the transfer of the cause into this court. The record was accordingly filed, and the case docketed. Upon the case

being called, it was *submitted by Mr. Field, Assistant Attorney-General for the United States, no opposite counsel appearing.*

The CHIEF JUSTICE delivered the opinion of the court.

This court cannot acquire jurisdiction of a cause pending in a Circuit Court by transfer. This was determined at the last term in the case of *The Alicia.** In that case the record had not been filed, and a motion was made to docket and dismiss. That motion was denied, on the ground that the court could not take jurisdiction. In this case the record has been filed, and the cause has been docketed here. The order, therefore, must be that the cause be

DISMISSED FOR WANT OF JURISDICTION.

THE GRAY EAGLE.

1. A neglect by one vessel, on approaching another in the night, to show proper signal lights, or her showing a wrong one, does not absolve such other vessel, under the act of Congress of April 29th, 1864, prescribing the lights which sailing vessels shall carry, from obligation to observe the usual laws of navigation, or such reasonable and practicable precautions generally as the circumstances allow.
2. A loss equally divided between two vessels, on facts, set forth in the case, showing fault in both.

APPEAL from the Circuit Court for the District of Wisconsin.

The owners of the schooner Perseverance filed a libel in the District Court of Wisconsin against the schooner Gray Eagle, for a collision in which their vessel had been sunk. The collision occurred in the Straits of Mackinaw, soon after midnight of the 23d of November, 1864, the night not having been a dark one; not so dark at least as that the sails of vessels could not be seen for near a quarter of a mile. The Perseverance had lost her lights in a storm, and was sailing

* 7 Wallace, 572.

with a white light, contrary to the rules prescribed by the act of Congress, "fixing certain rules and regulations for preventing collisions on the water," approved April 29th, 1864, and which made it her duty to carry a green light on her starboard side, and a red one on her larboard, "and no others" anywhere. She was sailing down the strait on a course E. by S., with the wind south, and discovered the lights of the Gray Eagle about a mile ahead, coming up the strait, on a course of about W. N.W.* The witnesses differed a little as to these points, but this was according to the weight of the testimony. The libel alleged, and the evidence of all the libellant's witnesses corresponded with its statements, that when the Gray Eagle was first seen, or soon afterwards, she showed a red light; but that this soon disappeared; after which she showed a green light until near the moment of the collision, when she again showed her red light. The libellants asserted that they had a right to suppose that the Gray Eagle would pass on the starboard of the Perseverance; but that shortly before the disaster she kept away, and, although the master of the latter called on her to luff several times, in a loud voice, and at the same time ordered his own man at the wheel to put the wheel hard a-starboard, the Gray Eagle made no reply, but kept on her course, and in less than two minutes struck the Perseverance stem on, abreast the starboard quarter, with such force as to sink her in about two minutes, the master and crew with difficulty saving their lives.

The defence set up by the answer for the Gray Eagle was, chiefly,

1st. That the other vessel was sailing without the regulation lights and in violation of the act of Congress.

2d. That at a certain place in the bay mentioned "a white light was seen about a mile distant, bearing about a point on the Gray Eagle's port bow, which was supposed to be a light on shore, or upon a vessel at anchor; that the Gray Eagle was then kept away about a point and steadied on her

* A diagram on page 509 may, perhaps, assist the non-nautical reader in understanding the statement.—REP.

course to give berth to the light; that *the light was not discovered to be a vessel's light in motion by the commanding officer until the Perseverance got within about three lengths of the Gray Eagle*, the said light being then nearly ahead and to windward; that the light was then supposed to be the binnacle light of a vessel that had hauled up all she could to pass the Gray Eagle to windward; that the mate, not seeing any other light, ordered the helm hard a-port, so as to pass on the port side and keep off and clear the stern of the vessel, and stepped to windward of his vessel, and then heard for the first time a cry from the other vessel to port the helm hard down, but that it was too late, and that the vessels were right together."

It seemed from the evidence that the light on the Perseverance was not reported to the mate in charge of the Gray Eagle till near the moment of collision. The mate testified that as soon as he saw it he ordered the "wheel up;" a wrong order. The men who had been watching the light cried out, "hard down;" a right order, but not the one obeyed.

The District Court dismissed the libel, principally on the ground that the Perseverance, having lost her lights, ought to have lain by at anchor in the night time, and was expressly prohibited from sailing with a white light. The Circuit Court reversed this decision, and decreed that both vessels were in fault, and that the damages should be divided between them. From this decree the owners of the Gray Eagle appealed.

Messrs. Emmons and Vandyke, for the appellants:

Conceding that the Perseverance lost her regulation lights by a *vis major*, there was no compulsory necessity for her to have been under way in the night, in a narrow strait. She ought to, and could have lain at anchor. If she must, or chose to run, she should have hooded her light, and kept out of the way of all other vessels.

She was guilty of premeditated wrongdoing, of violating positive law, in carrying a light which she had no right to carry, and in not carrying those which, if she insisted on

sailing at night, she was bound to have. This was the primal and proximate cause of the disaster. She criminally kept her way and course, displaying a lying signal, and when a collision has happened—as collision could hardly else than happen—she, then—contemptuously putting aside, as of no importance, what it was that her white light indicated and declared to the other vessel,—demands damages from that other vessel; a vessel itself in the observance of every requirement and which she has recklessly misled. This cannot be done.* A party himself in fault cannot recover from any one.

No fault is shown on the part of the Gray Eagle. The vessels were running on nearly parallel courses. The light thus approaching in so nearly a direct line, there was nothing to indicate that it was in motion, and the Gray Eagle supposing it to be a light on shore, or a vessel at anchor, kept away about a point, and steadied on her course. It was not discovered to be the light of a vessel in motion, until they were close aboard one another. The *fact* that this discovery was not made is indisputable. The Gray Eagle cannot be held responsible for what may afterwards prove to have been an error or mistake in orders given in a moment of peril and danger, and when the collision had become inevitable or imminent, nor for mistakes originating in or proceeding from the fault of the other vessel.

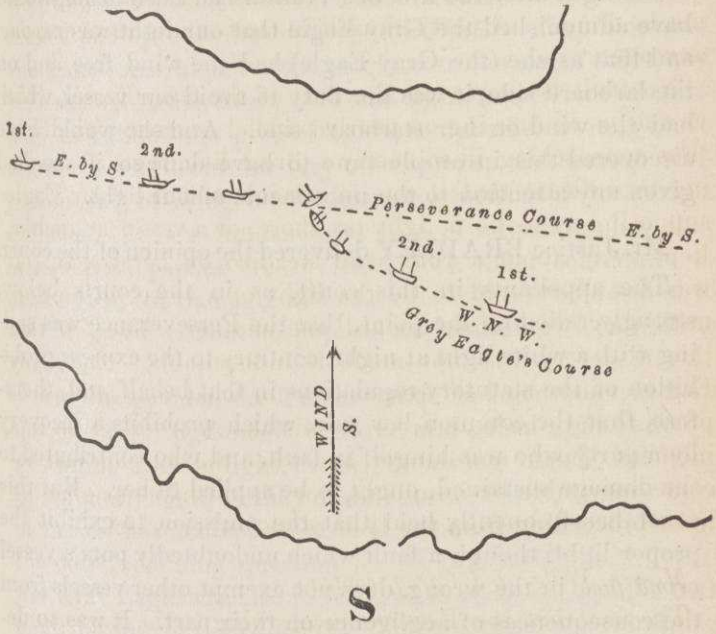
Messrs. Willey and Carey, contra:

The fact that the Perseverance, owing to the misfortune of having lost her regulation lights, had a light prohibited to vessels while sailing, did not of itself absolve the Gray Eagle from the observance of that degree of caution, care, and nautical skill, which the exigencies of the case required. If a white light *usually* represented a vessel at anchor, the officers and seamen of the Gray Eagle had no right to conclude that it *always* did. It was their duty, from the moment the light was seen, to have watched it carefully, in order to ascertain from its bearings, whether the vessel was in motion

* Waring *v.* Clarke, 5 Howard, 465.

or at anchor. And if, in the exercise of ordinary nautical skill and care, this could have been done, and was omitted, and this omission contributed to the accident, then the Gray Eagle must share the burdens of the loss, although the Perseverance was in fault in running with a prohibited light.

Now the courses of the vessels at first were obviously converging courses. The Perseverance held her course of E. by S., closehauled, *until the very instant of collision*, as was her duty.



S

The Gray Eagle on discovering our light, a mile distant, made it about a point over her larboard bow. She then ported about a point, to go to the right, or to the starboard of our light. Her course was thus made N. W. by W., one point higher up than her first course of W. N. W. Now if the light had been stationary, after the Gray Eagle had laid her course so as to avoid it, it would have continued to bear over the larboard bow of the Gray Eagle, *increasing* in its bearings as the light was approached; and this they must

have known would be the fact. But as our vessel advanced, the Gray Eagle would have to be constantly changing her course to hold our light on her larboard. In point of fact, as the result showed and as must necessarily have been the fact, our light must have got over on their *starboard* bow, by the advance of our vessel, and constantly increased in its bearings off the starboard bow of the Gray Eagle, as our vessel advanced, which they must have known could not be if the light was stationary. All this, with the least watching of the light after the first observation had been made, would have admonished the Gray Eagle that our light was *moving*, and that as she (the Gray Eagle) had the wind free and on the larboard side, it was her duty to avoid our vessel, which had the wind on her starboard side. And she would have discovered this in ample time to have done so, if she had given any attention to the movements of our light.

Mr. Justice BRADLEY delivered the opinion of the court.

The appellants in this court, as in the courts below, strongly relied on the point, that the Perseverance was sailing with a white light at night, contrary to the express prohibition of the statutory regulations in that behalf, and, therefore, that the common law rule, which prohibits a recovery by a party who was himself in fault, and who contributed to the damage sustained, ought to be applied to her. But this court has frequently held that the omission to exhibit the proper light, though a fault which undoubtedly puts a vessel *primâ facie* in the wrong, does not exempt other vessels from the consequences of negligence on their part. It was so decided in the case of *Chamberlain* v. *Ward*.* That case arose under the act of March 2d, 1849, it is true; but that act seems quite as stringent in its provisions as the act of 1864, and the court, in reference to this question, says: "Failure to comply with the regulation, in case a collision ensues, is declared to be a fault, and the offending party is made responsible for all losses or damage resulting from the neglect; but it is not declared by that section, or by any other rule

* 21 Howard, 548, 567.

of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. Absence of signal lights in cases falling within the acts of Congress renders the vessel liable to the extent already mentioned, but it does not confer any right upon the other vessel to disregard or violate the laws of navigation, or to neglect any reasonable and practicable precaution to avoid a collision which the circumstances afford the means and opportunity to adopt." We are of opinion that the same construction must be given to the act of 1864, and that the exhibition of a prohibited light, as well as the omission to exhibit the proper lights, is insufficient to relieve another vessel from the duty of observing the laws of navigation and of using all practicable precautions to avoid a collision. It is a fundamental rule of admiralty law that where both parties are in fault, both must contribute to make good the damage, and this rule will not be deemed to be abrogated without an express declaration of Congress to that effect.

Supposing, then, the Perseverance to have been in fault for not supplying herself with red and green lights, and for exhibiting a white light, or for not casting anchor and lying by till morning, or for any other reason (which, as her owner or master has not appealed, it is to be presumed she was),* the only remaining question for us to consider is, whether the Gray Eagle was also in fault, so as to be chargeable with contributing to the collision. This question, we think, has been properly answered by the Circuit Court. It is admitted by the answer of the appellants that the light of the Perseverance was seen when about a mile distant, bearing about one point on the Gray Eagle's port bow, and was supposed to be a light on shore, or upon a vessel at anchor; and that the Gray Eagle was kept away about a point and steadied in her course to give berth to the light; and that it was not dis-

* See Chittenden *v.* Brewster, 2 Wallace, 196; McDonough *v.* Dannevy, 3 Dallas, 198.

covered to be a vessel's light in motion, by the commanding officer, until the Perseverance was within about three lengths of her. This is a very remarkable admission. The courses of the two vessels, after this light was seen, must have been at an angle of about two points of the compass with each other, and it is demonstrable from all the evidence taken together that the Perseverance must have passed from the Gray Eagle's port bow to her starboard bow before the collision took place, and yet it is said that the commanding officer did not discover that the light was in motion until within three lengths of her. The appellees' witnesses all testify that the red light of the Gray Eagle was first seen, and then disappeared, after which her green light only was seen until just before the collision. This shows that the Perseverance had crossed the Gray Eagle's course, and that her motion must have been seen had a proper lookout been kept on the latter. It also shows that the Perseverance properly kept on her course; and had the Gray Eagle kept on hers the collision would not have occurred. The night was not dark; the sails of the vessels could be seen nearly or quite a quarter of a mile. It seems to us evident that there must have been great negligence on the part of those having charge of the Gray Eagle. From the evidence of the appellants' witnesses it appears that there was much confusion on board of her just as the collision was about to take place. One of the men on the lookout forward says: "When I sung out to put the wheel down, the mate sung out to put the wheel up." The man at the wheel testified to the same thing, and says that he obeyed the mate's orders, and that undoubtedly caused the collision. Had the mate been on the lookout, as an officer in command, with a light ahead, ought to have been, the difficulty would not have occurred. We are, therefore, of opinion that the men in charge of the Gray Eagle were delinquent in their duty under the circumstances of the case, and that this delinquency contributed to cause the collision in question, and, as a consequence, that the loss should be divided between the parties.

DECREE AFFIRMED.

Statement of the case.

THE WASHINGTON AND THE GREGORY.

1. Where a collision between two vessels results from the fault of both of them, a party sustaining injuries from the collision may recover damages against both vessels, and they may be proceeded against in the same libel.
2. The damages recovered in such case may be apportioned by the decree equally between the two vessels; and at the same time the right be reserved to the libellant to collect the entire amount of either of them in case of the inability of the other to respond for her portion.

APPEALS from the Circuit Court for the Southern District of New York.

This was a libel in admiralty by Ann Cavan, to recover damages for injuries sustained by her whilst a passenger on board the ferryboat D. S. Gregory, crossing the Hudson River, from a collision, which occurred September 16th, 1866, between that boat and the steamboat George Washington. The ferryboat was at the time making one of her regular trips from her slip at the foot of Montgomery Street, in Jersey City, to her slip at the foot of Desbrosses Street, in the city of New York. The Washington was an excursion boat, and was bound from the pier at the foot of Christopher Street to Barclay Street, in New York, intending to proceed thence down the bay. The ferryboat was crossing the river diagonally, and moving at the rate of between nine and ten miles an hour. The steamboat was going down the river at the rate of twelve miles an hour, distant about two hundred yards from the piers in New York. The collision took place in the morning, between the hours of ten and eleven. The weather was clear at the time, and the river in the vicinity of the collision quite free of boats of all kinds. In the courts below, and in this court, each vessel endeavored to throw the blame of the collision upon the other. The District Court and the Circuit Court held that the collision was caused by the fault of both vessels; that each was endeavoring to cross the bows of the other, and to force the other to pass under her stern. The libellant was at the time on her way to New York to attend church, the day being Sunday.

The injuries she received from the collision were of the most serious character, resulting in permanent disability. The District Court awarded her ten thousand dollars damages, to be recovered against both vessels. The Circuit Court affirmed the decree, but added to it that the damages should be equally apportioned between the two vessels; that upon the payment by the claimants of one vessel of one-half of the damages and costs, with interest and charges, proceedings against her for the collection of the residue should be stayed until execution for such residue against the claimants of the other vessel was returned unsatisfied, or until it otherwise appeared that the libellant was unable to collect the residue of them by process from the court. The decree also gave the parties liberty to apply to the court, if occasion should require, touching the enforcement of the decree.

The claimants of both vessels appealed to this court.

Mr. Sidney Webster, for the claimants of the Gregory. Mr. Charles Donohue, for the claimants of the Washington. Messrs. Adams and Van Sandvoord, for the libellant.

Mr. Justice FIELD delivered the opinion of the court.

The extent and character of the injuries sustained by the libellant are not disputed; and we do not think the amount at which her damages were assessed by the District Court, and which was approved by the Circuit Court, at all excessive. At the time the collision occurred the libellant was on her way to the city of New York to attend public worship, and was seated in the ladies' cabin, a few feet from the forward end. The bow of the Washington struck the ferry-boat near where she was seated, and passed through the cabin, tearing up the planks and timbers, and the inner partition separating it from the track of the wagonway, carrying the libellant through on to the track, and hurling upon her the loosened planks and timbers. Her left leg was broken, and the ankle sprained. Both bones of the right leg received three distinct fractures between the ankle and knee, and the lower part of the leg bone was crushed. Her

right cheek and ear and the back of her head were cut, and severe bruises were inflicted upon her body. From the injuries received she was unable for several weeks to assist herself, and required constant attention, suffering all the time intense pain. At the trial in the District Court, more than a year after the accident occurred, she could not move without pain, and it is the opinion of the surgeon who attended her that she is permanently disabled. We do not think, therefore, that any just objection can be made to the amount found.

The principal question made in the courts below was, whether the libellant was entitled to recover against both of the vessels, or only against one of them; and if only against one of them, which one; and this question depends for its solution upon the further question, whether the collision resulted from the fault of only one of the vessels, or from the fault of both of them.

The libellant alleges that the collision was caused by the negligence, want of skill, and improper conduct of the persons navigating both of the vessels.

The claimants of the Gregory contend that the collision was caused by the attempt of the Washington to continue her course and cross the bow of the Gregory after the latter, as they allege, had ported her helm so as to head to the New York shore and pass to the right of the Washington, and had blown two blasts of her whistle, at short intervals between them, as signals to the Washington of the course she intended to take.

The claimants of the Washington, on the other hand, impute the collision to the deviation of the Gregory from her usual course, which they contend would have taken her under the stern of the Washington, and her attempt to cross the bow of the Washington after the latter had indicated, as they allege, by two blasts of her whistle, that she was going ahead of the Gregory.

We have looked into the evidence presented by the parties with much care. As in nearly all collision cases, it is, in some respects, conflicting, but, in our judgment, shows that

both vessels were in fault. The collision occurred in open day, between the hours of ten and eleven in the morning. The weather at the time was clear, and the vessels were in full sight of each other from a distance of several hundred yards until they collided. The Washington was moving at the rate of twelve miles an hour, going down the river, about two hundred yards from the piers on the New York side. The Gregory was moving at the rate of between nine and ten miles an hour, crossing the river diagonally. Neither of the vessels paid any attention to the signals given by the other, but each continued on her course without waiting for a response, or coming to an understanding with the other vessel as to her course, and neither attempted to slacken her speed until too late to prevent the collision. We agree with the Circuit Court that neither pilot nor master of either vessel could have been taken by surprise at the meeting of the vessels, as each must have seen that the courses adopted and pursued necessarily led to it, and also that those courses were deliberately pursued by the pilot and master of each with the purpose of compelling the other vessel to change her course.

We do not feel called upon to vindicate our conclusions by citations from the evidence, which fills over one hundred and thirty printed pages of the record. The citations would illustrate no principle, and serve no useful purpose.

Both vessels being in fault, both were liable to the libellant, and both could be proceeded against in the same libel. The damages were properly apportioned equally between the two vessels, the right being reserved to the libellant to collect the entire amount of either of them, in case of the inability of the other to respond for her portion.*

DECREE AFFIRMED.

* The Steamer New Philadelphia, 1 Black, 62.

Statement of the case.

THE KEOKUK.

1. The law creates no maritime lien on a vessel as security for the performance of a contract to transport a cargo, unless some contract of affreightment has been made.
2. Such a contract cannot be implied against a transportation company from the fact that a man has loaded a barge belonging to the company, by means of his own men, without any knowledge by the company of what he has done, and then delivered bills of lading to the agent of a steamer of the line, the agent at the moment being very much engaged with other matters, just before the steamer, which it was expected by the shipper would tow the barge, sets off; no sufficient statement being made by the shipper, when so delivering the bills, what bills they are, and the agent himself having no knowledge of what has been done in the particular case, nor of the contents of the bills.

APPEAL from the Circuit Court for the District of Wisconsin; the case being this:

The La Crosse and Minnesota Steam Packet Company were, during the year 1865, owners of the steamer Keokuk and of several barges, including one named the Farley, which were running on the Mississippi River between La Crosse and Winona, and engaged in carrying freight. On the 23d of October, in that year, the Keokuk towed the barge Farley to Winona, and left her moored at the dock at that place, not however in any one's charge. On the 27th, at about five o'clock in the afternoon, one Robson, a shipper at Winona, getting on the barge, took her to the elevator near by, and with his own men, loaded her with wheat to be shipped to La Crosse. He did not ask permission of the master of the Keokuk to load the barge, nor inform either him or any other person of his intention to load her. He had, however, previously, at times, taken possession of barges and loaded them, and they were afterwards towed by the packet company to La Crosse; he had done this by permission of the officers of the packet company, but had never had permission to do it from the captain then in command of the Keokuk.

The Keokuk did not arrive at Winona from La Crosse

that night until after dark. The night was a very stormy night, and it was snowing hard. The vessel landed at what was known as the lower landing, about fifty rods from the elevator, where the barge then was, and after unloading put off again at about twelve o'clock at night for La Crosse. While the boat was laying where she was, the bookkeeper of Robson came to her second clerk, who was "very busy checking off freight," in the dark in the storm, a lantern in one hand and his book in the other, and handed to him two papers, saying, "Here are the bills of that barge." The clerk took them with some assenting remark, and put them in his pocket without opening them; "so that the rain should not spoil them." There was no explanation what bills the bills were, and nothing further took place between the parties. No book was presented to the clerk to sign and no receipts asked for. This clerk subsequently laid the bills on the first clerk's desk in the boat, the place where he usually put bills. He was not positive, but he thought that when he put them there he said to the first clerk, "Here are those bills." He did not himself know their contents. No other notice than that already mentioned was given to the officers of the boat that the barge had been loaded, and none of the officers were aware of the loading of the barge until they were one-third of the way back to La Crosse. The papers were then discovered to be memorandum bills of lading of the barge. The barge was not watched by Robson, and in the morning it was found sunk at the dock where he had left it. Thereupon Robson filed a libel in the District Court of Wisconsin against the steamer, the barge, and the packet company, charging that the barge was unseaworthy, and that the cargo was lost by carelessness of the master and officers of the steamers. There was no proof to sustain the charge of unseaworthiness.

The District Court decreed for the libellant; the Circuit Court affirmed the decree. The packet company appealed.

Mr. J. W. Cary, for the appellant:

The law creates no lien on a vessel as a security for the

performance of a contract to transport a cargo, until a cargo is shipped under it. In *Vandewater* v. *Mills*,* this court says: "Maritime liens are *stricti juris*, and will not be extended by construction. The obligation between the ship and cargo is mutual and reciprocal, and does not take place till the cargo is delivered on board." Now here there was no sufficient delivery.

Mr. Emmons, contra:

The rule, as laid down by this court, in the case cited by Mr. Cary, is explained by it in *Bulkley* v. *The Naumkeag Steam Cotton Company*.† There the master receipted for a hundred bales of cotton, to be carried on his vessel, and placed it on a lighter, of which he had control, to be transferred from the warehouse in the city of Mobile, to his vessel, lying outside the bar. The cotton was lost by fire on the lighter before reaching the vessel. It was held that a delivery of the cotton to the lighterman was a delivery to the master, and bound the vessel.

Mr. Justice DAVIS delivered the opinion of the court.

It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it.‡ The inquiry then arises whether there was any contract to carry the wheat in question, and, if so, was the barge containing it delivered to the custody of the steamer? It is very clear, had the steamer taken the barge in tow, the lien would have attached, although the bills of lading were not executed, because the act of towing the barge would be evidence that the grain was received, and

* 19 Howard, 82.

† 24 Id. 386.

‡ Schooner Freeman *v.* Buckingham, 18 Howard, 188.

that there was a contract to carry it safely. And the steamer would be equally liable if the barge had been left at the landing by the fault of the officers of the boat. But the evidence not only fails to prove this, but establishes the contrary conclusion. The only witness on the part of the libellant, whose testimony has any bearing on the subject, is his bookkeeper. He says, that on the night in question he gave to the second clerk of the steamer, who was on the levee checking freight, two bills of lading, with the statement (of this he is not positive), "These are the bills of that barge," to which the clerk made some assenting remark. But the clerk denies that he knew the contents of the papers when handed to him, or that anything was said at the time from which he could infer their contents. And his subsequent conduct shows that the observation of the bookkeeper, if any was made, failed to arrest his attention; for he put the papers in his pocket and remained on the levee until he had completed his work, and afterwards, without examining them, placed them in the condition in which they were received by him on the desk of the first clerk.

If he is not mistaken in his recollection, that the first clerk was present on the occasion, and that he told him "here are the bills" (which is very doubtful from the evidence), yet it is manifest the first clerk attached no importance to the bills, for he did not notice them until after daylight, when the Keokuk was far on her way to La Crosse. Each clerk, doubtless, acted on the supposition that the other knew to what particular freight the bills related, but it seems both were equally uninformed concerning them. It is not pretended that in any other way than this, was any information conveyed to any one connected with the boat of the intended shipment of grain by the libellant. Neither the master, nor any person on the steamer, or in the employment of the company, had notice that he had taken the barge and loaded it with grain, or that he contemplated doing so. If it be conceded the course of business between the two parties justified him in taking possession of the barge and loading it, without the direct permission of the master, yet it falls far

short of showing that the barge, when loaded, was considered in the custody of the steamer without notice to any of her officers. Indeed, it would be unreasonable to suppose the parties dealt with each other on any such understanding, for it would place the advantage altogether on the side of the shipper, who would be relieved of care and risk as soon as the barge was filled with grain, and the master could exercise no discretion about receiving it.

As there was, then, no agreement in this case which changed the legal rights of the parties, it is clear the steamer is not subject to a maritime lien. The wheat and barge were, at the time of the accident, in the control of the libellant, and their custody was not changed by handing unsigned bills of lading to the second clerk of the steamer, who did not know their contents, nor had any reason to suppose they related to the barge Farley. It was the misfortune of the libellant that he transacted his business so loosely, and if it be the corporation is somewhat to blame for this, the steamer has not on that account committed any fault for which she is chargeable in admiralty. As no one in her behalf contracted with the libellant to transport the barge to La Crosse, and as he did nothing to transfer the possession to the steamer, the libel cannot be sustained.

The case of *Bulkley* v. *Naumkeag Cotton Company* is cited in opposition to the views we have presented, but it is not applicable. There the goods were delivered to a lighter in the control of the ship; here the shipper took control of the barge, and did not deliver either barge or cargo to the steamer.

The decree of the Circuit Court is REVERSED, and this cause is remanded to that court with directions to

DISMISS THE LIBEL.

THE ALLEGHANY.

A steam vessel entering a short, narrow, and artificial channel, in some parts shoal, such as the "Straight Cut" at Milwaukee, in which it is liable to meet tugs coming from the other end with tows, is bound to exercise caution as to the way it enters and proceeds, and to have and keep itself, both as to course and rate and speed, entirely under control.

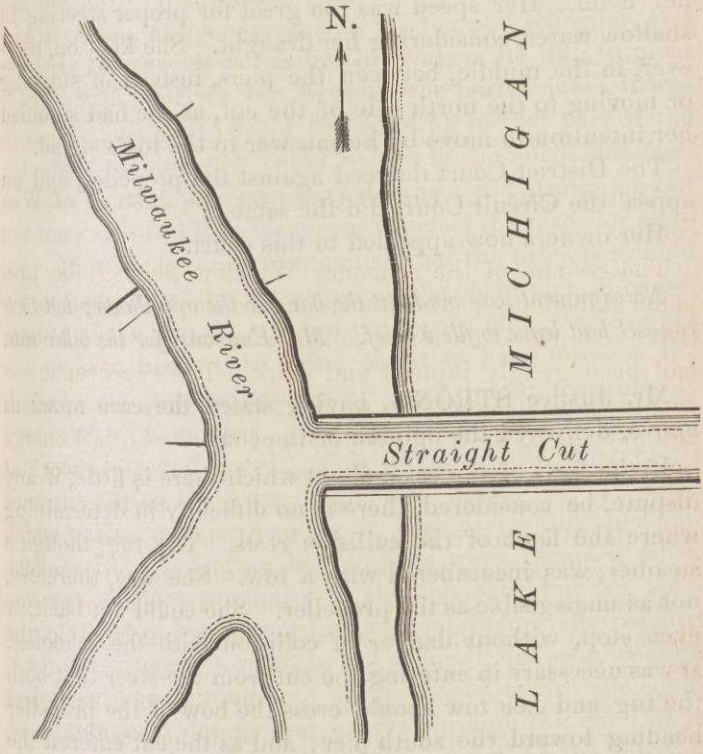
APPEAL from the Circuit Court for the District of Wisconsin.

The owners of the schooner Winslow libelled the propeller Alleghany in the District Court for Wisconsin, to recover compensation for a collision by which the schooner had been greatly injured and sunk. The catastrophe occurred on a mild morning of May, when there was no wind, and nothing to obstruct the vision of those who had charge of the propeller, in what is known as the "Straight Cut" at Milwaukee, a sort of canal which makes the harbor entrance from the Milwaukee River to Lake Michigan, and of which an idea will perhaps be conveyed by a diagram on page 523.

Although the testimony was in some particulars very conflicting, the controlling facts were either admitted in the answer, or were satisfactorily proved.

The cut is eleven hundred and fifty feet in length, and about two hundred and sixty feet in width between its piers. Its course is from east to west, and it enters the river nearly at right angles. At its west end, though between the piers, there is a bar extending inward from the north pier toward the middle of the cut, and, of course, reducing the depth of the water. The schooner had left her dock in the river, and she was proceeding out through the cut into the lake, in tow of the steamtug Muir, and about twenty-five feet astern of the tug. Shortly after leaving the dock the propeller was seen entering the eastern end of the cut from the lake, and the tug signalled to her by one whistle to keep to the starboard or north side. To this signal the propeller responded by a similar signal, thus announcing an intention to pass the tug and the schooner on their port side. A second signal

to the same effect was given by the tug when the vessels were nearer each other, but to this no answer was returned.



The collision took place shortly after, soon after the tug had entered the cut, when she was still headed toward the south pier, and before she had been able to straighten out her tow. The exact place of the collision was not certainly established, but it was clearly south of the middle of the cut, and not far from its western entrance. Its effect was to break in the bow of the schooner, and sink her in fifteen minutes. The propeller entered the cut at a high rate of speed. She had been racing on the lake to reach the entrance in advance of another vessel, and, according to the answer made to the libel, she was running eight miles an hour when she entered. She did not shut off her steam at all until within half her length of the piers, and then only partially. Her steam was

not entirely shut off until she had proceeded a considerable distance within the cut. She steered wildly, not obeying her helm. Her speed was too great for proper steering in shallow water, considering her draught. She kept on, however, in the middle, between the piers, instead of stopping or moving to the north side of the cut, as she had signified her intention to move by her answer to the tug's signal.

The District Court decreed against the propeller, and on appeal the Circuit Court did the same.

Her owners now appealed to this court.

No argument was made at the bar for the appellants; but their counsel had leave to file a brief. Mr. Emmons, for the other side.

Mr. Justice STRONG, having stated the case much as above, delivered the opinion of the court.

If the facts of the case, about which there is little, if any dispute, be considered, there is no difficulty in determining where the fault of the collision rests. The tug, though a steamer, was incumbered with a tow. She was, therefore, not as manageable as the propeller. She could not back, or even stop, without danger of collision with the schooner. It was necessary in entering the cut from the river that both the tug and her tow should cross the bow of the propeller heading toward the south pier; and as the cut entered the river at nearly right angles, it was also necessary for her to increase her speed at the entrance in order to bring the schooner into line and prevent her running against the south pier. The course of both the tug and the schooner required to be changed not less than ninety degrees within a distance not much exceeding two hundred feet. All this was known to the master of the propeller. His steamer was entering the harbor. It was, of course, his duty to move with great caution. He knew that the entrance was narrow and difficult, especially if other vessels were to be passed. He knew that near the west end of the cut the water on the north side was shoal, and he knew how much water the propeller needed. He knew also that at the west end a tug passing

out to the lake, with a tow in charge, must change her course to the east, and keep up her speed in order to straighten out the tow. What, then, was his duty? Apprised, as he was in season, of the approach of the tug and schooner, and planning, as the answer to the libel avers he did, to meet them, not in the river, but between the harbor piers, it was obviously his duty to avoid the meeting in that part of the cut where the propeller could not go to the north side, and to make no attempt to pass until the tug could straighten out her tow. He had it in his power to select the place for passing. If it be, as is now contended, that the propeller could not at that part of the cut go nearer the north pier, in consequence of the bar, she was not the less in fault. She ought not to have been there. She ought to have foreseen the difficulty and guarded against it. And this fault was closely connected with another. The propeller entered the cut at too great a rate of speed. This increased the danger. It brought her to the place of greatest difficulty at the most unfavorable time for passing it, besides making her unmanageable. It is true her engines were reversed when she was in close proximity to the schooner, but not soon enough to stop her forward movement before she reached the most dangerous point in the channel, not soon enough to prevent her running into the schooner before she could be straightened out for her course through the cut. It is thus manifest that the collision was caused by the misconduct of those in charge of the propeller.

We do not perceive that the tug was at all in fault. It was not in her power to stop without either colliding with the schooner or permitting the schooner to run upon the south pier. At the time of the collision both the tug and the schooner were on the south side of the channel, where they had a right to be.

DECREE AFFIRMED WITH INTEREST AND COSTS

Statement of the case.

THE NORTHERN BELLE.

1. It is the duty of the carrier of grain in bulk, in barges on our Western rivers, in the way now usual, as distinguished from the old way in sacks, to see that his barge is capable of resisting, without subjecting the cargo to injury, all the external forces to which it is subjected in the ordinary course of navigation, including especially those incident to the narrow, crooked, and shallow water, and the often changing courses in the currents, of the rivers where they are; and to the force with which the large steamers which have them in tow are often brought against their sides in landing, as they do, for the purposes of their ordinary business, every few miles on the river.
2. The barge must be so tight that the water will not reach the cargo, so strong that these ordinary applications of external force will not spring a leak or sink her, so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this she is seaworthy; if she is not, she is unfit for the navigation of the river. No other test can be given, and this must be determined by the facts in each particular case.
3. It is the duty of the carrier to have his barges often examined and thoroughly inspected so as to be sure of their condition. He should not use a barge after she has become from age or decay or injury unfit for use, and should repair them often and well, so long as they can by repairing be safely used, and no longer. For this he is to be held rigidly responsible.

APPEAL from the Circuit Court for Wisconsin, the case being this:

The La Crosse and Minnesota Steam Packet Company, owners of the steamboat Northern Belle, and engaged in the carrying trade on the Upper Mississippi, undertook to carry for a certain Robson, in their barge Pat Brady, five thousand bushels of wheat from Hastings, in Minnesota, to La Crosse, in Wisconsin, and safely deliver the same, the unavoidable dangers of the river and fire only excepted. On the voyage the barge was sunk and the wheat damaged, and the Home Insurance Company, which had given a policy on the wheat and paid it, filed a libel in admiralty against the steamer and her barge, to recover the loss.

The principal question in issue was the seaworthiness of the barge. The injury occurred May 12th. About the latter part of June following, after another accident and loss

of a cargo on the same barge, she was placed upon the ways for repairs. And the depositions of several witnesses who examined her carefully at this time were now before the court. One of these witnesses testified that he found over ninety timbers rotted and gone, so much so that they were not strong enough to make a fastening to. At one point there were four side timbers rotted out, so as to leave about five feet without support. Her floor-timber ends were much decayed. Another witness stated that on one side he found about fifty rotted timbers, some of them entirely rotted off; on the other side about the same, fifteen or twenty of them rotted entirely off. A third witness, a ship carpenter, confirmed this, testifying that the effect of it would be that any strong pressure against her sides or bottom, from getting aground or surging against a steamboat, would cause her to leak; an inference which it hardly needed a ship carpenter to draw for the court.

The evidence in the immediate case showed that on the occasion when the present catastrophe took place, the steamboat was descending the river in the night, when a slight shock was felt on the barge, so slight that it was not communicated to the boat. It did not stop or retard either the barge or the boat, but in a few minutes the former was found to be sinking, and had to be grounded on the nearest sandbar. No rock or snag was proved to be in the river at the place where the shock first occurred.

The Pat Brady was an old barge which had been formerly called Fort Snelling. But about a year before this catastrophe, she had been repaired and sent forth with a new name.

The District Court decreed in favor of the libellant, and the Circuit Court affirmed that decree. The case was now brought here by the packet company.

Mr. Cary, for the appellant; Mr. Emmons, contra.

Mr. Justice MILLER delivered the opinion of the court.

As the decision of the cause turns upon the fitness of the

barge for the purpose of the voyage, or, in the language of the admiralty, on its seaworthiness (a question which, as applicable to the peculiar condition of this navigation, is before us for the first time), we propose to examine into some of the principles on which that question must be decided.

For many years the grain which was transported by steamboats on the Western rivers was first put in sacks, and then placed in the hold of the vessel, or if that was filled, was laid around on the decks. But as this commerce in the cereals increased in importance, including, as it does, the wheat, corn, rye, oats, barley, &c., of that immense agricultural region, it became a necessity to have the freight as cheap as possible. The cost of the sacks in which the grain was carried, and the labor of filling and securing them, and loading and unloading, was a heavy item in transportation. The railroads, which had become active competitors for this carrying trade, did not use sacks, but placed the grain in bulk in cars adapted to the purpose. To facilitate the loading and unloading of grain these railroad companies introduced on their lines, and at the termini of their roads on the rivers, immense buildings called grain elevators. In these buildings the grain was carried by machinery up into bins, and then by its own gravity let down through conductors into the cars, which were thus loaded in a few minutes. The introduction of this mode of loading and carrying grain by the railroads, and the competition which they presented to river transportation, introduced in the latter the use of barges, in which grain was carried in bulk, without sacks, and loaded from elevators, as was done by the railroads. This mode of river transportation, which is often auxiliary to the railroads, has superseded almost entirely the old mode of carrying by sacks in the hold of the vessel, and its present importance and future growth can hardly be over-estimated. It is, therefore, of great consequence to determine, upon sound principles, the rights and liabilities of the carrier and the owner of the cargo in these cases, in regard to these barges, so far as they are open for consideration.

The barges are owned by the same persons who own the

steamboats by which they are propelled, and are generally considered as attached to and making part of the particular boat in connection with which they are used; though quite often an individual or corporation owning several boats, running in a particular trade, have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage.

The question that arises in the case before us has reference to the extent of the duty or obligation which the law imposes upon the owners of such a steamboat in regard to the condition of the barge in which grain is so carried in bulk, as to seaworthiness or fitness to perform the voyage which her owners had undertaken that she should perform safely, with the exception of the unavoidable dangers of the river and of fire.

This duty is one which must obviously belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it.

When we come to consider what shall constitute fitness or unfitness for the voyage we must take into account the nature of the service which she is to perform, and the dangers attending the navigation in which she is engaged. This is very different in the narrow current and shallow water of the river from what it is in open seas or lakes or their bays and inlets. The necessities of river navigation require steamboats and barges to pass through narrow and crooked channels, and to venture on very shallow water, a water which is constantly varying in its depth, and a channel which often changes its course in a few days very materially. The consequence of this is that both steamboats and barges often get aground temporarily and are soon got off and resume their voyage. Often they rub the bottom of

the river for many feet on crossing a sand-bar at low water, and pass on without injury or interruption. These large steamboats, having a barge or barges in tow, lashed to them loosely, as they must be, are often brought against their sides with much force. They land for the purposes of their ordinary business at every ten or twelve miles of their voyage at the towns and landings on the river, and in doing so must necessarily impinge with more or less force against the barge which is between the boat and the shore. These are the daily and hourly external forces to which the barge is subjected in the ordinary course of navigation.

It is the duty of the carrier to see that his barge is capable of resisting these forces without subjecting the cargo to injury. She must be so tight that the water will not reach the cargo, so strong that these ordinary applications of external force will not spring a leak or sink her, so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this she is seaworthy; if she is not, she is unfit for the navigation of the river. No other test can be given, and this must be determined by the facts in each particular case.

In the one now under consideration, if regard be had to the evidence as to the condition of the Pat Brady, there is not much difficulty. [The learned Justice here recapitulated the testimony as already given as to the condition of the boat.] It is argued by the claimants that the barge struck a sunken rock or snag with such force as to tear open her planks, and that the sinking was one of the unavoidable dangers of the river. But without attempting any nice criticism of that phrase, we are entirely satisfied that there was no shock or force which a strong, well-built barge would not have sustained without injury. The slight character of the shock, the rotten condition of the barge, the additional fact that she was an old barge which had been repaired and had her name changed a year or so before the accident, all prove this. No snag or rock was proved to exist there. It was, in all probability, an ordinary rub over a sand-bar, which the

barge, in her decayed condition, could not stand without leaking.

DECREE AFFIRMED.

UNITED STATES *v.* PADELFORD.

1. Claimants under the Captured and Abandoned Property Act, of March 12th, 1863, are not deprived of the benefits of that act because of aid and comfort *not* voluntarily given by them to the rebellion.
2. But voluntarily executing as surety, through motives of personal friendship to the principals, the official bonds of persons acting as quartermasters or as assistant commissaries in the rebel army, was giving aid and comfort to the rebellion; although the principals, by their appointment to the offices named, escaped active military service, and were enabled to remain at home in the discharge of their offices respectively.
3. Taking possession of a city by the National forces was not, of itself, and without some actual seizure of it in obedience to the orders of the commanding general, a capture, within the meaning of the act, of the cotton which happened to be in the city at the time of the entry of the forces.
4. Hence, where prior to any such seizure an owner of cotton, who, though opposed to the rebellion, had given aid and comfort to it to the extent above-mentioned, but was not within any of the classes excepted by the President's proclamation of December 8th, 1863, and in regard to whose property in the cotton no rights of third persons had intervened—took the oath prescribed by that act and kept it—*Held*, after a seizure and sale of the cotton by the government, that he was entitled to the net proceeds as given to loyal owners under the Abandoned and Captured Property Act. Having been pardoned, his offence, in executing the bonds, could not be imputed to him.

APPEAL from the Court of Claims. That court had found the following case:

That among the citizens of Georgia during the late rebellion was one Edward Padelford. That he never gave any *voluntary* aid or comfort to the late rebellion or to persons engaged therein; but "consistently adhered to the United States," unless the matter of certain special facts constituted in law such aid and comfort. The special facts were these: "In April, 1861, after the breaking out of the rebellion, a subscription for a loan of $15,000,000 to the Confederate government was opened in the city of Savannah, and all

persons were expected and required to subscribe to it who were able to do so, and declarations and threats were publicly made, that all who did not subscribe voluntarily should be made to subscribe. These threats were openly made at the place of subscription, and by persons influential with the populace. Padelford's name was mentioned, his absence was remarked upon, and inquiries were made as to where he was; and it was publicly threatened that if the Marine Bank, of which he was a director, did not subscribe liberally, it should be pulled down. Padelford was informed of these things, and advised to subscribe to the loan because of them, by friends, loyal as well as rebel; and under these threats and the pressure of circumstances stated, he subscribed $5000 to the loan, and declared he did it unwillingly and because of the public excitement, and he sold out the stock he had subscribed for in two weeks after.

"The Marine Bank of the city of Savannah was, in 1861, under the direction of Northern men, and Padelford was one of its most influential directors and largest stockholders. When the other banks of Savannah increased their capital stock, and lent their funds to the aid of the Confederacy by exchanging them for Confederate notes and securities, the Marine Bank objected to doing so, and instead, contracted its business for its own security. This conduct and the known loyalty of many of the directors of the bank subjected it to public odium, and it was nicknamed the Yankee Bank. At the time the subscription to the loan was opened in Savannah the political excitement was at its highest point, and it was, as has been stated, publicly threatened that if the bank did not subscribe liberally it should be pulled down. Under these threats and the pressure of the circumstances stated, the bank subscribed $100,000 to the Confederate loan. This was the least it could subscribe according to its capital; and its refusal to subscribe would have endangered the bank and its directors; but Padelford opposed the loan made, and from that time absented himself for the most part from the meetings of the directors, on the ground that the course of the bank was controlled by outside pressure."

Statement of the case.

In addition to these facts, the Court of Claims found that Padelford, during the rebellion and prior to October, 1863, "voluntarily executed" as surety three different bonds, conditioned for the performance by the different principals of their duties—one as commissary of the rebel army; one as assistant commissary, and one as assistant quartermaster; that all the principals in these bonds were, and for some years had been, respectively, intimate personal friends of Padelford; that two of the principals were within the terms of the conscription acts pending or in force at the time of the execution of their several bonds, and that by their appointment to office they escaped active military service in the field, and were enabled to remain at their homes in office respectively; and that Padelford was induced to execute the bonds by motives of personal friendship and regard for the several principals.

So far the findings of the court as to the loyalty of Padelford.

An act of July 17th, 1862,* having by its thirteenth section authorized the President at any time thereafter, by proclamation, to extend to persons who might have participated in the rebellion, pardon and amnesty, with such exceptions and at such time, and on such conditions as he might deem expedient for the public welfare, President Lincoln did, by proclamation dated December 8th, 1863,† make known to all persons who had directly or by implication, thus participated, with some exceptions specified, that on their taking a certain oath, the form of which his proclamation set forth, and thenceforth keeping and maintaining it inviolate, "a full pardon was thereby granted to them and each of them, with restoration of *all* rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened."

About a year after this proclamation, that is to say on the 21st December, 1864, the city of Savannah was captured by the government forces under General Sherman; Padelford

* 12 Stat. at Large, 592. † 13 Id. 737.

and one Mott being owners, at the time, of a large amount of cotton in store there. On the 18th of January, 1865, and, as the Court of Claims found, before any actual seizure or taking possession of the property in question by the military, otherwise than by the capture of the city, Padelford, in due form of law, took and subscribed the oath of amnesty and allegiance to the United States government prescribed by the President's proclamation issued in pursuance of the act; he not having been, as to his person or property, within the exceptions of the proclamation; and he thenceforth complied with all the requirements and conditions named in the act and proclamation, and kept and maintained his oath of allegiance and amnesty inviolate. *After* Padelford thus took the oath, the cotton was taken possession of by the military authorities, and by them turned over to the proper agents of the United States treasury, under whose direction it was transported to New York and sold, and the net proceeds, amounting to $246,277, paid into the treasury of the United States. Padelford and Mott, now, March, 1866, filed a petition in the Court of Claims to have these proceeds; their petition being founded on the act of March 12th, 1863*— entitled "An act to provide for the collection of abandoned property, &c., in insurrectionary districts within the United States," and which provided as follows:

"Any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court (1) of his ownership of said property, (2) of his right to the proceeds thereof, and (3) that he has never given *any* aid or comfort to the present rebellion, receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

After the petitioners had filed their claim, Congress by an

* 12 Stat. at Large, 820.

act of June 25th, 1868,* enacted "that whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant or party asserting the loyalty of such person to the United States, during such rebellion, shall be required to *prove affirmatively* that such person did, during said rebellion, constantly adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion."

The petitioners were permitted to sever in their claim, and to sue severally for their respective interests. And in the suit of Padelford judgment was rendered in his favor for one-half ($123,138) of the net proceeds of the cotton. From this judgment the United States appealed.

The view of the court was, as matter of law, that Padelford's conduct prior to the capture of the city, did not constitute the giving of aid or comfort to the rebellion, or to persons engaged in the rebellion within the provisions of the acts of March 12th, 1863, and June 25th, 1868, and did not bar him from recovering in this action the net proceeds of the property in question. And apparently that if it had, he was entitled to recover, having taken the oath and been loyal afterwards.

Mr. J. S. Hale, special counsel of the United States:

1. The Abandoned and Captured Property Act provides that the claimant shall prove "that he has never given *any* aid or comfort to the rebellion." And the subsequent act, that he shall "prove affirmatively" that he "did during said rebellion consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion." The findings of the court come short of these requirements. In each case the words of the statute are carefully chosen, and this prescribed form of words cannot be supplied by the general averment that the claimant did "consistently adhere to the United States."

* § 3, 15 Stat. at Large, 75.

2. The facts found by the court, in regard to the inducements to the claimant for making the contribution of $5000 to the Confederate loan, do not excuse the complainant from the consequences of his act. The finding of the court only amounts, in substance, to the fact that there was popular enthusiasm and popular clamor in behalf of the subscription to this loan. This is not the force, coercion, or putting in fear which the law recognizes as an excuse for the commission of an offence, or for the performance of a forbidden act. Such an act can only be excused on the ground of fear, proceeding from an immediate and actual danger threatening the very life of the party.*

The contribution by the Marine Bank of $100,000 to the Confederate loan is of the same character, and the claimant is chargeable as a participator in that loan. He was "one of its most influential directors and largest stockholders." It is found by the court below that he opposed the loan, but not that he persistently and to the end refused to be a party to it. On the contrary, his final assent is fully implied.

However this may be, the obligations which the claimant entered into as surety in the bonds, and by which he aided to place men in the actual military service of the rebellion, and to effect and maintain the organization of the rebel armies, and thereby enable them the more efficiently to prosecute the war against the United States, certainly afforded aid and comfort to the rebellion. And these acts of the claimant are found by the court to have been voluntary acts. The inducements or motives found not only do not detract from the voluntary character of the claimant's acts, but affirm their voluntary character. It was from motives of personal friendship to his several principals—the rebel officers in question—that these acts were done.

3. The taking of the amnesty oath by the claimant, in January, 1865, after the capture of Savannah, does not relieve him from the disability effected by the statutes. By

* United States *v.* Vigol, 2 Dallas, 346; United States *v.* Haskell, 4 Washington's Circuit Court, 402, 406.

that capture the *cotton* was captured. It was the only capture of it that could be made. The rights of the United States in respect to the property were fixed and vested by it, and no subsequent act of the claimant could operate to revest the title in himself.

The cotton having been captured in fact, the claimant, by his petition, places himself on the distinct issue that he never gave aid or comfort to the rebellion. The exclusion of the claimants from the Court of Claims, by reason of acts of disloyalty under the statutes, is not in the nature of a penalty which could be remitted by the Executive power of pardon and amnesty. The statutes in question are not penal statutes. They do not purport to inflict a penalty or punishment for a crime. The jurisdiction of the Court of Claims is purely statutory; and when Congress, in providing for claims growing out of the war of the rebellion, deems it just and proper to provide that such claims shall not be entertained by that court, except by those who satisfy the court by proof that they have had no part or lot in the support or prosecution of such rebellion, such a limitation cannot be removed by Executive action. The power of pardon and amnesty, under the Constitution, or under the act of 1862, is merely to relieve from the penalties of guilt. "Amnesty" may, perhaps, have a wider effect than pardon, and wipe out the evidence of the fact, so that it could not be alleged and proved by another, to the prejudice of the party amnestied. But here the party claiming the benefit of the jurisdiction of the Court of Claims is required to prove affirmatively the fact that he never did certain acts; to prove it as an historical fact, not a constructive one. And here the finding of the court below establishes that the actual historical fact is the other way.

Messrs. Carlisle and McPherson, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The Captured and Abandoned Property Act of March 12th, 1863, under which the claim in this case was made,

has been frequently under the consideration of the court. In the several cases decided during this term, and especially in the case of *United States* v. *Anderson*,* it has been held to be remedial in its nature, requiring such a liberal construction as will give effect to the beneficent intention of Congress. That intention was that all property captured or found abandoned during the war, after the date of the law, should be turned into money under the direction of the Treasury Department; and that the proceeds should be placed in the treasury, subject to the right of any person preferring a claim against any portion of the property, to have the net proceeds restored to him on proof of his ownership, of his right to the proceeds, and that he never gave any aid or comfort to the rebellion.

A later act, passed since the petition of Padelford was filed in the Court of Claims, requires every claimant under the original act to prove affirmatively that he constantly adhered to the United States during the rebellion, and gave no aid or comfort to persons engaged in it. We do not think that this act changed essentially the nature of the proof required of claimants by the former act. The particular description of proof required by the later act seems to be included in the more general description of the earlier. Questions arising under the act of 1868, therefore, need not be further considered in this connection.

The record exhibits the findings of fact by the Court of Claims and its conclusions of law. Among these findings is one that the petitioner "never gave any voluntary aid or comfort to the late rebellion," . . . unless certain facts, also found, constitute in law such aid and comfort. On the part of the government it is objected to this finding that it is insufficient, because the statute authorizes relief only on proof that no aid or comfort was given. But we think otherwise. It would violate the soundest maxims of interpretation if we were to construe the act so as to deprive claimants of the benefits intended to be given by it because of aid and comfort to the rebellion not voluntarily given.

* *Supra*, 56.

But the court also find that the petitioner executed as surety three official bonds, two of commissaries and one of a quartermaster in the military service of the so-called Confederate States, from motives of personal friendship to the principals. No compulsion is alleged. On the contrary, these acts are found to have been voluntary. We cannot doubt that these facts did constitute aid and comfort to the rebellion within the meaning of the act. The finding of the court, qualified as it was, is a virtual finding that the petitioner did give such aid and comfort. The general facts found of opposition to the rebellion, so far as opposition would be tolerated, and of earnest good will to the National cause, establish, doubtless, a strong claim upon the favorable consideration of Congress; but do not warrant the courts in relaxing, by a forced interpretation, a rule which Congress has established for the guidance of the Court of Claims in passing upon claims to the proceeds of abandoned or captured property.

But, in our judgment, it was not necessary to determine this point in this case.

The Court of Claims, in addition to the facts already referred to, found that the cotton was stored in Savannah at the time of its capture, on the 21st of December, 1864; that one-half belonged to the claimant; and that "afterwards, on the 18th of January, 1865, before any actual seizure or taking possession of the property in question by the military authorities, otherwise than by the capture of the city, the claimant did, in due form of law, take and subscribe the oath of amnesty and allegiance to the United States government prescribed by the President's proclamation of December 8th, 1863, issued in pursuance of the 13th section of the act of Congress, approved July 17th, 1862; that he was not, as to his person or property, within the exceptions of the said proclamation; and that he thenceforth complied with all the requirements and conditions named in the said act and proclamation, and kept and maintained said oath of allegiance and amnesty inviolate." Upon this finding several questions arise.

And, first, was the property of the petitioner captured within the meaning of the act before it was actually seized and taken into military possession?

As early as the 3d of July, 1863, the Secretary of the Treasury, in a circular letter of instructions* addressed to the supervising special agents of the department, charged with the duty of collecting abandoned and captured property under the act of March 12th, 1863, defined captured property as property "which had been seized or taken from hostile possession by the military and naval forces of the United States." This definition must be taken as the interpretation practically given to the act by the department of the government charged with its execution; and we think it correct. In the case of *Mrs. Alexander's Cotton*,† it was determined that cotton, though private property, was a proper subject of capture by the National forces, during the recent civil war. The court regarded this particular species of property as excepted, by its peculiar character and by circumstances, from the general rule of international law which condemns the seizure of the property of private persons not engaged in actual hostilities, though residing in a hostile territory or region. But the case contains no intimation that such property can be considered as captured before actual seizure. The rule, we think, is otherwise. Rights of possession in private property are not disturbed by the capture of a district of country, or of a city or town, until the captor signifies by some declaration or act, and, generally, by actual seizure, his determination to regard a particular description of property as not entitled to the immunity usually conceded in conformity with the humane maxims of public law.

Rights of possession in public property belonging to the hostile organization, or used in actual hostilities, depend on different principles. Such rights are transferred at once to the captor, upon the capture of the place in which the property may be.

The principles just stated in respect to private property

* Acts, &c., concerning Commercial Intercourse, &c., p. 33.

† 2 Wallace, 404.

may be further illustrated by reference to the case of *The Venice.** That vessel, with a cargo of cotton, was lying in Lake Ponchartrain at the time of the capture of New Orleans, and was, doubtless, within the discretion of the captors, subject to seizure, though private property. But Flag Officer Farragut and Major-General Butler, commanding respectively the naval and military forces of the Union, thought proper to give distinct assurances, before and after surrender, of safety and protection to the rights of persons and property. And this court held that these assurances expressed the general policy of the government, to respect and enforce those rights, whenever, in any part of the insurgent country, the authority of the National government should be fully re-established. In accordance with these principles, the Venice and her cargo, which were seized, some days after the capture of the city, by a ship of war of the United States, were restored, by the decree of this court, to their private owner.

Applying the principles above stated to the case before us, three propositions seem to be established: (1.) That the cotton of the petitioner was, by the general policy of the government, exempt from capture after the National forces took possession of Savannah. (2.) That this policy was subject to modification by the government, or by the commanding general, in the exercise of his military discretion. (3.) That the right of possession in private property is not changed, in general, by capture of the place where it happens to be, except upon actual seizure in obedience to the orders of the commanding general.

It appears as matter of fact that the property of the petitioner was not seized until after the 18th of January, 1865. Whether it was then seized in pursuance of any order, either particular or general, emanating from competent military authority, does not appear. But we may assume that it was.

And, then, the next question in this case is to be considered, namely, what was the condition or status of the peti-

* 2 Wallace, 278.

tioner at that time; and how far was the liability of his property to seizure affected by that status or condition?

The findings of the court show clearly enough that the petitioner disapproved of the rebellion; opposed it as far as he thought opposition prudent or safe; and was gratified by the restoration of the National authority. It appears further, that on the 18th of January, 1865, he testified his adhesion to the constitutional government of the Union by taking the oath prescribed by the proclamation of pardon issued by President Lincoln on the 8th of December, 1863;* that he was not within any of the exceptions of the proclamation; and that he has faithfully kept his oath.

This proclamation, if it needed legislative sanction, was fully warranted by the act of July 17th, 1862,† which authorized the President, at any time thereafter, to extend pardon and amnesty to persons who had participated in the rebellion, with such exceptions as he might see fit to make. That the President had power, if not otherwise yet with the sanction of Congress, to grant a general conditional pardon, has not been seriously questioned. And this pardon, by its terms, included restoration of all rights of property except as to slaves and as against the intervening rights of third persons.

Now we have already seen that at the time when the petitioner took the prescribed oath no right of any third party had intervened; for even if it could be admitted that a right of the government derived from capture is an intervening right of a third person within the meaning of the proclamation, it is certain that no such right accrued to the government until actual seizure, which was after the pardon had taken full effect. In the case of *Garland*,‡ this court held the effect of a pardon to be such "that in the eye of the law the offender is as innocent as if he had never committed the offence;" and in the case of *Armstrong's Foundry*,§ we held that the general pardon granted to him relieved him from a

* 13 Stat. at Large, 737.
† 12 Stat. at Large, 592, § 13.
‡ 4 Wallace, 380.
§ 6 Id. 769.

penalty which he had incurred to the United States. It follows that at the time of the seizure of the petitioner's property he was purged of whatever offence against the laws of the United States he had committed by the acts mentioned in the findings, and relieved from any penalty which he might have incurred. It follows further that if the property had been seized before the oath was taken, the faith of the government was pledged to its restoration upon the taking of the oath in good faith. We cannot doubt that the petitioner's right to the property in question, at the time of the seizure, was perfect, and that it remains perfect, notwithstanding the seizure.

But it has been suggested that the property was captured in fact if not lawfully; and that the proceeds having been paid into the Treasury of the United States, the petitioner is without remedy in the Court of Claims unless proof is made that he gave no aid or comfort to the rebellion. The suggestion is ingenious, but we do not think it sound. The sufficient answer to it is that after the pardon no offence connected with the rebellion can be imputed to him. If, in other respects, the petitioner made the proof which, under the act, entitled him to a decree for the proceeds of his property, the law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion. A different construction would, as it seems to us, defeat the manifest intent of the proclamation and of the act of Congress which authorized it. Under the proclamation and the act, the government is a trustee, holding the proceeds of the petitioner's property for his benefit; and having been fully reimbursed for all expenses incurred in that character, loses nothing by the judgment, which simply awards to the petitioner what is his own.

These views require the affirmance of the judgment of the Court of Claims, and it is

ACCORDINGLY AFFIRMED.

MICHIGAN BANK *v.* ELDRED.

1. Evidence that by the articles of partnership one partner had no right to indorse negotiable paper, is inadmissible to defeat a *bonâ fide* holder of such paper indorsed with the firm name by a member of the firm, and taken by such *bonâ fide* holder for value, and without notice of the articles.
2. Where a partnership is in the habit of indorsing negotiable paper, having blanks left for the date, and gives the paper so indorsed to a person to use—he to fill the blank when he wishes to use it—the firm is liable on the paper with the date filled in, when, thus complete, it has passed to the hands of innocent *bonâ fide* holders for value.
3. The power to fill the blanks for dates implies in favor of such holders a power in the person trusted, to change the date, after the note has been written, and before it is negotiated.
4. It is error to charge upon a state of facts of which no evidence has been offered.

ERROR to the Circuit Court for Wisconsin, the case being this:

The Michigan Insurance Bank brought suit against Anson Eldred, Wm. Balcom, and Elisha Eldred, composing the firm of Eldreds & Balcom, as indorsers of a promissory note dated June 12th, 1861, given by one F. E. Eldred, and the body and signature of which were in his handwriting.

The summons was served upon Anson Eldred, the only defendant residing within the District of Wisconsin, and the only one who appeared in the cause. The execution of the note, its indorsement by Elisha Eldred, one of the firm of Eldreds & Balcom, with the firm name, demand of payment from the maker, non-payment by him, and notice to the indorsers of non-payment, were all proved. The date of the note, as originally written by the maker, F. E. Eldred, had been August 12th, 1861; and the word "June" had been written by him over the word "August."

The defendant, Anson Eldred, then offered to read in evidence a clause of the articles of copartnership of the firm of Eldreds & Balcom, to the effect that Elisha Eldred, one of the firm, and who, as above stated, had indorsed this note

in the firm name, had bound himself not to use the firm name except for the benefit of the said joint business. The evidence was objected to by the defendant, but the objection was overruled, and testimony received.

There was no pretence that the bank had any knowledge of the articles of copartnership or of the purpose for which the copartnership's name in this instance had been used.

The defendant then introduced the deposition of F. E. Eldred, the maker of the note, and the brother of Anson Eldred, the defendant. He testified that the note was in his handwriting; that the indorsement of Eldreds & Balcom was made by Elisha Eldred, one of the firm; that he transferred the note as security for a loan about the time the note bore date. He said further:

"I had an arrangement with the firm of Eldreds & Balcom, by which they indorsed my notes and I indorsed theirs; and the indorsements were made in blank, and were filled by the holders as they wanted to use them. This note was indorsed in that way, and this arrangement was known to Anson Eldred as well as to the other partners. The word 'June' was written by me, and was written by me before I used the note."

The defendant then read depositions, which showed that this note was transferred to the bank as collateral security for moneys lent to F. E. Eldred, the maker. Here the defendant rested, and upon this evidence the judge, in charging, made use of the following language:

"If the note in suit was never actually negotiated to the bank, but got up by Eldred and accepted by the bank in pursuance of a corrupt agreement between said Eldred and the bank to defraud the defendant, then the plaintiff cannot recover."

The testimony was without the least proof tending to show that this note had not been negotiated to the bank, or any tending to prove that it was "got up by Eldred and accepted by the bank in pursuance of a corrupt agreement between said Eldred and the bank to defraud the defendant."

Verdict and judgment having gone for the defendant, the bank brought the case here.

Mr. Lynde, *for the plaintiff in error*, submitted as too plain for argument,

1. That the paper having been negotiable paper, and received by the bank before due for a valuable consideration, the court had erred in allowing the clause from the articles of copartnership of Eldreds & Balcom to be read, without proof that the bank had notice of the clause.*

2. That the court had charged the jury upon a supposed or conjectural state of facts, of which no evidence has been offered; inducing them perhaps to indulge in conjectures, instead of to weigh the testimony; a sort of charge which was decided by this court, in *United States* v. *Breitling*,† to be "*clearly* error."

Mr. Cary submitted that the transactions, from beginning to end, were irregular; that when Elisha Eldred, who in indorsing under any circumstances acted in violation of his duty to his partners, indorsed here, he indorsed in blank, in blank as to both dates and amounts; and that the instrument in its altered date bore on its face such marks of irregularity as to justify the charge.

To this it was replied, that F. E. Eldred was authorized by the arrangement between him and the firm to fill up the blanks; *dates* as well as amounts. *He* wrote the whole note originally, and the word "June" afterwards; but the word was written before the instrument was negotiated.

Mr. Justice CLIFFORD stated the case, and delivered the opinion of the court.

Promissory notes, given for the payment of money, without any condition or contingency, and payable to order or bearer, are as much commercial instruments as bills of exchange, and the title to the same, and their transfer from

* Murray *v.* Lardner, 2 Wallace, 110.

† 20 Howard, 252.

one person to another, are governed and regulated by the same rules of commercial law.

Authorities may be found where it is held that it is not essential to the character of a promissory note or bill of exchange that it should be negotiable, and that other words besides the words "or order," or the words "or bearer," may be employed to express the quality of negotiability; but it is not necessary to discuss those topics, as the inquiry before the court has respect to the execution, transfer, and title of a negotiable promissory note in the ordinary form.*

Examined carefully, the pleadings and evidence exhibit the following facts, which are material to the present investigation: Claiming title to the note in question, the plaintiffs instituted the present suit against the defendant and one Uri Balcom and Elisha Eldred, alleging that they were copartners in trade under the firm name of Eldreds & Balcom. They, the defendants, were engaged in business both in Chicago and Milwaukee, and the record shows that they were sued as indorsers of the note described in the declaration. Only one of their number, to wit, the defendant, resided in that State, and he only was served with process. Besides a special count against the defendants as the indorsers of the note, the declaration also contained the common counts, to which was annexed a copy of the note, as notice that the note would be offered in evidence under those counts. Process having been served, the present defendant appeared, and pleaded the general issue, and the parties went to trial, and the verdict and judgment were for the defendant. Exceptions were duly taken by the plaintiffs to the rulings and instructions of the court, and they sued out this writ of error, and removed the cause here for re-examination.

Some further reference to the facts proved at the trial is necessary, in order that the precise nature of the questions presented in the bill of exceptions may be understood.

Founded as the declaration was upon a promissory note, it was only necessary for the plaintiffs, under the general

* Wells *v.* Brigham, 6 Cushing, 6; Raymond *v.* Middleton, 29 Pennsylvania State, 530; Story on Bills, § 60.

issue, to prove the execution of the note, the signature of the indorsers, the demand of payment of the maker, the dishonor of the note, and notice of the dishonor, and non-payment to the indorsers. Having proved those facts, they introduced the note in evidence, of which the following is a copy:

DETROIT, June 12, 1861.

$4000. Sixty days after date I promise to pay to the order of Eldreds & Balcom four thousand dollars at the Michigan Insurance Bank, value received.

(Signed) F. E. ELDRED.

Indorsed on the back of the note is the name of the firm to which the defendant belongs, to wit, Eldreds & Balcom, and the allegations of demand, protest, and notice of dishonor and non-payment were fully proved.

Witnesses were examined upon both sides, from whose testimony, as reported in the bill of exceptions, it appears that the maker of the note was engaged in business at Detroit, in the State of Michigan; that he and the firm of which the defendant is a member entered into an arrangement to interchange accommodation indorsements for business purposes; that the understanding was that the firm should indorse whatever paper he, the maker of that note, should find it necessary to use in his business, and that he, in consideration thereof, should indorse their paper intended for discount, to such an extent as they might desire.

Pursuant to that arrangement the respective parties indorsed numerous blank notes for each other, and it appears that the senior partner of the firm indorsed at one time some fifty or fifty-five blank notes of the kind, and that the defendant knew what was done, and advised that the indorsements should be made. Packages of such blank notes, signed by the maker of the note in controversy, were sent by express to that firm for their indorsement, and when they were indorsed in blank they were returned through the same channel to the party by whom they were forwarded, and it appears that the note described in the declaration is one of the notes indorsed by the senior partner of the firm.

Approved as the arrangement was by the defendant, he has no cause for complaint; and it also appears that the maker of the note borrowed money of the plaintiffs and that he indorsed the note to them as collateral security in the regular course of business.

Depositions were also introduced by the defendant, and he offered in evidence the third article in the copartnership agreement of the indorsers of the note, which reads as follows: "That neither of the parties shall employ any of the moneys, goods, or effects belonging to the said copartnership, *or engage the credits thereof*, except for the benefit of the said joint business."

Seasonable objection was taken by the plaintiffs to the introduction of that article as evidence, upon the ground that it was irrelevant and incompetent, but the court overruled the objection and the same was read to the jury, and the plaintiffs then and there excepted to the ruling of the court. Instructions, supposed to be pertinent to the issue, were then given by the court to the jury, to which no exceptions were taken, but the court also instructed the jury to the effect that if the note in suit was never actually negotiated to the bank, but was got up by the maker of the note, and was accepted by the bank, in pursuance of a corrupt agreement between the maker of the note and the bank to defraud the defendant, then the plaintiffs cannot recover; to which instruction the plaintiffs then and there excepted.

Objection, in the first place, is taken by the plaintiffs in argument to the ruling of the court in admitting in evidence the third article of the copartnership agreement. Attempt is made to sustain that ruling, upon the ground that the evidence tended to show that the partner who indorsed the note with the firm name was unauthorized "to engage the credit" of the firm except for the joint business of the company; but there are two decisive answers to that suggestion: (1.) That the indorsements were made in pursuance of a previous understanding and arrangement between the firm and the maker of the note, and the evidence reported in the bill of exceptions shows that the defendant advised his partner to

indorse the parcel of notes which contained the one in controversy. (2.) That the plaintiffs had no knowledge of the contents of the articles of copartnership, nor of any fact or circumstance showing, or tending to show, that the indorsement was made without authority. On the contrary, the maker of the note, examined by the defendant, testified that the indorsement on the note described in the declaration was made by one of the partners of the defendant; that he, the witness, transferred the note to the plaintiffs as security for a loan made at the time the note bears date; that he had an arrangement with that firm that they should indorse his notes and that he would indorse their notes; that the indorsements were made in blank, and were filled up by the respective makers as they wanted to use the notes in their business, and that the note in controversy was indorsed in that way with the knowledge of the defendant as well as the other partners.

Unaccompanied by evidence showing, or tending to show, that the plaintiffs had knowledge of the restriction contained in the copartnership agreement, or the subsequent introduction of such evidence, it is quite clear that the article of the copartnership agreement read to the jury was irrelevant and incompetent, as it clearly appeared that the plaintiffs were indorsers for value at the date of the note in the usual course of business, without notice of any equities between the antecedent parties.

Such a party is regarded, in the commercial law, as a *bonâ fide* holder of the negotiable instrument, and the rule is irrepealably established by the decisions of this court that the indorser under those circumstances takes the title unaffected by any equities between the antecedent parties to the instrument, and may recover thereon, although, as between the antecedent parties to the same, the transaction may be without any legal validity.*

* Goodman *v.* Simonds, 20 Howard, 363; Murray *v.* Lardner, 2 Wallace, 110; Bank of Pittsburgh *v.* Neal, 22 Howard, 108; Swift *v.* Tyson, 16 Peters, 15; Goodman *v.* Harvey, 4 Adolphus & Ellis, 870.

Bills of exchange or promissory notes may be transferred by indorsement, or, when indorsed in blank or made payable to bearer, they are transferable by delivery; and the settled rule of law is, that if such a bill or note, so indorsed or made payable to bearer, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen and is subsequently negotiated for a valuable consideration to a third person, who receives it in the usual course of business, without knowledge of the condition annexed to the possession of the instrument, or of the means by which the possession was acquired, his title is wholly unaffected by any such breach of trust, or by any such unauthorized or felonious acquisition or appropriation of the note, and may recover the amount against any of the prior parties to the instrument.*

Nothing can be inferred adverse to the authority of the member of the firm to make the indorsement from the fact that the blanks in the note were not filled up when he received it from the maker, as it is fully proved that the maker of the note was authorized by the arrangement between him and the firm to fill up the blanks and insert the date and the amount of the notes as he found it necessary to use the same in his business, and that defendant, as one of the partners, had knowledge of that arrangement.

Suppose, however, there was no proof of such knowledge on the part of the defendant, still it is well settled law that where a party to a negotiable bill of exchange or promissory note containing blanks, intrusts it to the custody of another, whether the blanks are in the date or the amount of the note, and whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used to raise money for his own benefit, such bill or note, especially if it be indorsed in blank, or is made payable to bearer, carries on its face an implied authority, in the person to whom it is so intrusted, to fill up the blanks in his discretion; and, as

* Chitty on Bills, ed. 1842, 257; Belmont Branch Bank v. Hoge, 35 New York, 65; Hoge v. Lansing, 35 Ib. 136.

between such party to the bill or note and innocent third parties, holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody; and the legal conclusion is, that in filling up the blanks he acted under the authority of that party, and with his approbation and consent.*

So, where a party signs his name to a blank paper, as a means of accommodating another person, he thereby authorizes that person to whom he delivers the paper, and for whose accommodation he signed it, to fill up the instrument, and the conclusion of law is, that the filling up the instrument under those circumstances, inasmuch as it is done by the authority of the party who signed the paper, is his act, and that as between him and innocent holders of the instrument after it is filled up, he is bound by his signature, if the instrument was negotiated for value before it fell due, and in the usual course of business.†

Testimony was introduced by the plaintiff to show that the indorsement of the firm name on the back of the note was made before the same was negotiated to them as security for the discounts to the maker, but the introduction of such evidence was unnecessary, as the presumption of law, in the absence of opposing testimony, is that such an indorsement, if without date, was made at the time the bill or note was executed, and before the same was negotiated to the holder.‡

II. Apart from that ruling of the court, the plaintiffs also contend that the instruction given to the jury, as recited in the bill of exceptions, is erroneous, and that the judgment should be reversed on that account, even if it be held that

* Mitchell *v.* Culver, 7 Cowen, 336; Goodman *v.* Simonds, 20 Howard, 361; Violett *v.* Patton, 5 Cranch, 142; Russel *v.* Langstaffe, 2 Douglass, 514.

† Bank *v.* Kimball, 10 Cushing, 373; Collis *v.* Emett, 1 H. Blackstone, 313; Montague *v.* Perkins, 22 English Law & Equity, 516.

‡ Ranger *v.* Cary, 1 Metcalf, 369; Balch *v.* Onion, 4 Cushing, 559; Rice *v.* Isham, 1 Keyes, 44.

the ruling of the court in admitting in evidence the third article of the copartnership agreement is correct.

Contradicted as the first assumption of the instruction is by the testimony of the maker of the note, it does not seem to require any extended argument to show that it is unfounded, especially as it finds no support in any fact or circumstance introduced in evidence by either party.

Discounts were obtained of the plaintiffs by the maker of the note, and he negotiated the note in controversy to the plaintiffs as security for such loans, transferring the note to them at the time the loans were made.

Parties sometimes obtain discounts on such paper by indorsing their own name on the note, but it is a regular course of business frequently adopted and equally legitimate for a party to give his own note for the amount of the loan, and to negotiate a note like the one in question to the lender as collateral security; and, whether the business is transacted in the one way or the other, the title of the lender of the money to the note negotiated as security for the loan is equally valid to the amount of the money loaned.*

But the second assumption of the instruction is even more unjustifiable than the first, as it imputes concerted action, and a corrupt agreement between the maker of the note and the plaintiffs to defraud the defendant, when in point of fact there is not a particle of evidence in the record to sustain the charge, or which has any tendency to support any such theory. When a prayer for instruction is presented to the court, and there is no evidence in the case to support the theory of fact which it assumes, the prayer for instruction should be denied, and if given by the court it is error, as the tendency of such an instruction is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue.†

It is clearly error in a court, said Chief Justice Taney, in

* Chicopee Bank *v.* Chapin, 8 Metcalf, 40; Stoddard *v.* Kimball, 6 Cushing, 469; Blanchard *v.* Stevens, 3 Ib. 162; Atkinson *v.* Brooks, 26 Vermont, 569.

† Goodman *v.* Simonds, 20 Howard, 359.

United States v. *Breitling*,* to charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered. Such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the charge of the court, and if there is no evidence which they have a right to consider then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead, and may induce them to indulge in conjectures instead of weighing the testimony.

Reference is made to the fact that the word June is written over the word August in the date of the note, showing that the date originally was August, instead of June, as it now is; but the conclusive answer to that suggestion is, that the maker of the note testifies that he wrote the word June as it now is in the date of the note before he negotiated the note to the plaintiffs, and as he was the agent of the firm in filling up the note, the defendant, as between him and the plaintiffs, has no cause of complaint.

JUDGMENT REVERSED, and the cause remanded, with directions to issue

A NEW VENIRE.

UNITED STATES *v.* ADAMS.

1. Where, after an appeal taken to this court from the Court of Claims, a party and his counsel are aware that the finding of the Court of Claims on a point of fact is erroneous, in time to have it corrected, before the hearing here, by an application to this court to remit the case to that court for correction, this court will not, after it has heard the case and given a decree as if the finding were in all respects correct, stay the mandate and reform their decree, so that the party alleging the error may obtain a correction of the record from the Court of Claims, and have the cause heard again.
2. And this is so, although the party and his counsel honestly entertained the opinion that the fact, so erroneously found and stated, was not a material one in the case; an opinion in which they were not sustained

* 20 Howard, 252.

Statement of the case

by the opinion of this court as afterwards given. This at least so *held*, in a case where the action of the party himself had somewhat precluded his allegation of the error.

ON motion to amend a decree of this court affirming a decree of the Court of Claims, stay, mandate, &c. The case was thus:

Adams filed, some time since, a petition in the Court of Claims against the United States, claiming $112,748 for certain mortar-boats, tug-boats, cabins, pilot-houses, and other work, furnished by order of General Fremont in the Western Military District, during the summer of 1861. One of the defences relied on by the United States against it was, that the government had appointed a board of commissioners to hear and determine this claim among others; that in December, 1861, the petitioner had presented it before that board, who after having heard the same, adjusted his accounts, and awarded a balance due him of $95,655, which he had been paid by the government, giving a receipt for the sum in full of all demands. It was not denied by himself that *he had received this money;* nor by the government that he had received it only under protest.

The Court of Claims gave a decree in favor of his claim, and the United States appealed.

A rule of this court regulating appeals from the Court of Claims prescribes, in respect to the way in which that court shall prepare and certify its record to this court for review, that it make "a finding of the facts in the case, and the conclusions of law on the facts on which the court founds its judgment or decree; the finding of the facts and the conclusions of law to be stated separately, and certified to this court as part of the record." In accordance with this rule the Court of Claims, on the appeal by the United States from its decree, did find and certify as part of the record, the facts; stating among them "that in December, 1861, *the petitioner* presented to said commission his claim for said mortar-boats, tug-boats, cabins, &c., in two accounts, setting forth the same."

The appeal was elaborately and ably argued at the last

term by *Mr. Hoar, Attorney-General, and Mr. Dickey, then Assistant Attorney-General*, for the government—they arguing that the settlement and receipt of the money upon the basis of a *quantum meruit* (which they endeavored to show was the basis on which Adams had received his money), precluded the assertion of the claim made in the Court of Claims—and by *Messrs. Carpenter, Carlisle, Corwine, and Wills, contra;* who contended that the receipt which had been given, was no bar to the claim.

This court on the appeal reversed the judgment of the court below, giving an opinion which can be seen in the report of the case in 7th Wallace.* The main ground of that opinion was thus presented:

"In the view we have taken of the case, the giving of this receipt is of no legal importance. The bar to any further legal demand against the government does not rest upon this acquittance, but upon the voluntary submission of the claims to the board; the hearing and final decision thereon; the receipt of the vouchers containing the sum or amount found due to the claimant; and the acceptance of that amount under an act of Congress providing therefor."

The court, in that opinion, agreed that the creditors of the government were not bound to present their claims before that board, but might withhold them, and, as the Secretary of War had refused to recognize them, seek relief before Congress or the Court of Claims.

The counsel of Adams—now filing his affidavit to the effect that the finding of fact sent up by the Court of Claims, as part of the case, was not true, but was *erroneous;* that the petitioner did not present his claim before that board, but, on the contrary, that the accounts were referred to it *by General Meigs, at the head of the bureau*, before whom this class of accounts had to be presented for adjustment; that it was heard *ex parte;* and that the materiality of this fact had been discovered since the delivery of the opinion, above mentioned,

* Page 463.

of this court reversing the judgment of the Court of Claims—moved to amend the decree of this court, reversing the decree of the Court of Claims; and to stay the mandate, in order to enable Adams to obtain a correction of the record from that court, and that the cause might be again heard.

The ground of this motion was, of course, that the record from the Court of Claims was erroneous in a material fact stated in it, and upon which it was supposed that this court mainly placed its judgment of reversal.

It appeared from the affidavit of the appellee, in support of the motion, that this error in the record was observed by him, and known to his counsel, at the argument on the appeal; but that no steps were taken to have it corrected, their belief having been that the action of the board of commissioners could have no binding effect upon the rights of the claimant.

Such substantially, as the court regarded it, was the case as now before it.

But there were certain other facts in the matter which it thought fit also to refer to. They were these: Accompanying the petition and affidavit of Adams, was the original record of the evidence before the Court of Claims. The Secretary of War, in October, 1861, as it showed, suspended the payment of the present claims, among many others originating in the then Western Military District, upon charges of fraud alleged against them, and appointed a board of commissioners to hear and pass upon the same before payment. After the appointment of this board, and when General Meigs was pressed to pay this claim, with others, he constantly advised the claimants that the claims must be heard and adjusted before the board, and, until then, they would not be recognized or paid; and, on the 4th January, 1862, the papers upon which the claims of Adams were founded were, by direction of the General himself, placed before the board, with a request to hear and determine the amount justly due.

This step, taken by General Meigs, *was well known to the appellee, who was present in St. Louis at the time, where the board*

Statement of the case.

sat. It was true that there was no proof in the record to show that *he* presented his claims before the board, or that *he* procured any witnesses to appear before them in the course of their investigations. Four witnesses were examined on the part of the government on the subject of the reasonableness of the prices charged for the mortar-boats, gun-boats, and other work. They proved, if not mistaken, a considerable overcharge in the work and materials. No witnesses were produced on the part of the appellee, nor were those on the part of the government cross-examined; but, on the 13th of January, 1862,* he addressed a letter to the board, dated at St. Louis, *expressing a desire to submit to them some facts in relation to the construction of the mortar-boats, which constituted the principal item in his accounts.* In that letter he states the history of his communications with the Navy Department and with General Meigs on the subject of his plans for the construction of the mortar-boats, and of the adoption of the same by General Fremont, and of the contract for building the same, and closes it by saying that "when this contract was made, I supposed I would have to pay much higher for materials and labor than I have, and, therefore, the job has been more profitable in figures than I expected. To do this work I had to contract debts to workmen and all classes who have furnished me materials; and claim, as I have in no respect been remiss on my part, the government should deal promptly and liberally with me."

As mentioned in the earlier part of the reporter's statement, the board of commissioners adjusted Adams's accounts and allowed a balance due to him of $95,655, for which he accepted a voucher and gave a receipt in full; accepting payment of the same under a resolution of Congress, passed soon afterwards, for the payment of claims audited and allowed by this board of commissioners.

Messrs. Wills and B. R. Curtis, in support of the motion.

The Attorney-General, Mr. Hoar, contra.

* The date as given in the record was 1861, but this manifestly was an error.

Opinion of the court.

Mr. Justice NELSON delivered the opinion of the court.

The court is of opinion that a case has not been presented by the appellee, which would justify it in the exercise of its equitable powers to grant this relief.

The second rule of this court on appeals from the Court of Claims, in respect to making up the record, is as follows: "A finding of the facts in the case by the said Court of Claims, and the conclusions of law on the facts on which the court founds its judgment or decree. The finding of the facts and the conclusions of law to be stated separately, and certified to this court as part of the record."

The remedy, in case the Court of Claims falls into a mistake as to the finding of the facts, is familiar. It is by an application to this court to remit the case back for correction, if it be shown, satisfactorily, that a mistake has been committed.

In the case before us, it is admitted that the mistake was known to the party and his counsel in season to have had it corrected before hearing; but, relying on its immateriality, no step was taken to have the correction made. We do not doubt but that this opinion was honestly entertained, and that this motion is made in good faith; but it is impossible not to see that, if granted, the precedent might lead to great abuse and delay in the hearing of these cases. We should allow either party to lie by till the cause was decided, and the opinion delivered, and then to apply for the correction, as the exigency of the case might require, or as the materiality of the fact might appear from the ground upon which the decision was placed. On an appeal, the parties are entitled to have all the facts proved in the case before the court below, in the judgment of the court, truly found, and stated in the record, that either deemed material to the decision; and, as we have seen, the remedy is ample to correct any mistakes committed, if applied for prior to the hearing in this court. The court are not willing to go farther, and permit the remedy to be applied after the case is heard and decided, as we fear that such a precedent would work greater injustice and hardship, in its

general use and application, than that which may exist in any particular case.

There is another view also, arising out of the facts upon which this motion is founded, which should be stated. Although it is true that the appellee did not present his claims before the board, as stated in the finding in the record on appeal, it cannot, in view of the facts which appear in the original record of the evidence before the Court of Claims,* well be denied but that he made himself a party to their proceedings, and took the benefit of the adjustment of his accounts by them, which brings the case within the principle decided in 7th Wallace.

MOTION DENIED.

HORNTHALL *v.* THE COLLECTOR.

1. The jurisdiction of suits between citizens of the same State, in internal revenue cases, conferred by the act of March 2d, 1833, "further to provide for the collection of duties on imports" (4 Stat. at Large, 632), and the act of June 30th, 1864, "to provide internal revenue," &c. (13 Id. 241), was taken away by the act of July 13th, 1866, "to reduce internal taxation, and to amend an act to provide internal revenue," &c. (14 Id. 172). *Insurance Company* v. *Ritchie* (5 Wallace, 541), affirmed.
2. Where such citizenship as is necessary to give jurisdiction to the Federal courts is not averred, the suit cannot be maintained.
3. Where the Circuit Court dismisses a bill for want of jurisdiction apparent on its face, the general rule is not to allow costs.

APPEAL from the Circuit Court for the Southern District of Mississippi; the case being thus:

The Judiciary Act of 1789 limits the jurisdiction of the Federal courts, so far as determined by citizenship, to "suits between a citizen of the State in which the suit is brought and a citizen of another State."

An act of 1833,† "to provide further for the collection of

* Given, *supra*, p. 557, in the latter part of the reporter's statement, beginning with the sentence, "Accompanying the petition," and ending with the words (foot of p. 558), "allowed by this board of commissioners."—REP.

† 4 Stat. at Large, 632.

duties on imports," extended the jurisdiction to cases arising under "*the revenue laws* of the United States," where other provision had not been made. And it authorized any person injured, in person or property, on account of any act done "under any law of the United States for the protection of *the revenue or* the collection of duties on imports," to maintain suit in the Circuit Court. It also allowed any person sued in a State court, on account of any act done "under the *revenue laws* of the United States," to remove the cause, by a mode which the act itself set forth, into the Circuit Court of the United States.

With the passage of the internal revenue laws made necessary by the late rebellion, it was doubted by some persons whether this act of 1833 extended to cases under the new enactments. And the internal revenue act of 1864,* by its fiftieth section, extended in general words "the provisions" of the act of 1833 to cases arising under the *internal* revenue acts.

By an internal revenue act of the 13th July, 1866,† however (§ 67), Congress made provision for removing cases from State courts to the Circuit Court, authorizing such removal in a way which it particularized, "in any case, civil or criminal, where suit or prosecution shall be commenced in any court of any State against any officer of the United States, . . . or against any person acting under or by authority of any such officer, on account of any act done under color of his office," &c.

And by the sixty-eighth section, immediately following, it "repealed" the fiftieth section of the act of 1864, with, however, this proviso:

"*Provided*, That any case which may have been removed from the courts of any State under said fiftieth section to the courts of the United States, shall be remanded to the State court from which it was so removed, with all the records relating to such cases, unless the justice of the Circuit Court of the United States in which such suit or prosecution is pending shall be of opinion that said case would be removable from the court of the State

* 13 Stat. at Large, 241.

† 14 Id. 172.

to the Circuit Court under and by virtue of the provisions of *this* act."

In this state of the statutes Hornthall & Kuhn, describing themselves in the same as "partners in trade in the city of Vicksburg, *State of Mississippi*," filed a bill against one Keary, described in it as "collector of internal revenue of the United States for the second collection district of the *State of Mississippi*," praying for an injunction to restrain Keary from collecting an internal revenue tax assessed on certain cotton of theirs, which tax they alleged was not due, but which the respondent nevertheless threatened, as they alleged, to collect by distraint of their goods. In the subpœna both parties were described as citizens of the State of Mississippi. On demurrer the court below, sustaining the demurrer, dismissed the bill *for want of jurisdiction apparent on its face, and awarding costs to the respondent.* The other side took this appeal.

Mr. Hoar, Attorney-General, and Mr. Field, Assistant Attorney-General, for the collector:

The case is both plain and simple. No question as to whether the collector was right or wrong in what he did or threatened to do can trouble this court, nor whether any injunction would lie to restrain him, conceding that he was wrong. We are stopped before getting so far, for the bill does not show affirmatively that the complainants and respondent are citizens of different States; but, on the contrary, shows by implication that they are not. The appeal must, of course, be dismissed for want of jurisdiction.*

Mr. Sharkey, contra:

The assumption of the counsel of the government is not one exactly accurate. The collector is not named in the bill as a citizen of Mississipi, but is sued in his official capacity, without naming his residence. He is sued as an officer of the United States.

But has not the Federal judiciary jurisdiction in all reve-

* Insurance Company *v.* Ritchie, 5 Wallace, p. 541.

Restatement of the case in the opinion.

nue cases? It is supposed that the counsel below acted on this presumption. Without extended argument on this subject, which is far more familiar to the court than it is to the counsel, the case is respectfully submitted.

Mr. Justice CLIFFORD stated the particulars of the case, and delivered the opinion of the court.

Owners or holders of cotton, produced within the United States, upon which no tax has been levied, paid, or collected, are required by the act of the thirteenth of July, 1866, as amended, to pay a tax upon the same of two and one-half cents per pound, and the provision is that such tax shall be and remain a lien thereon in the possession of any person whomsoever from the time the act took effect, or the cotton was produced as aforesaid, "until the same shall have been paid."* Due notice in writing was given by the appellee, as collector of internal revenue for that district, on the ninth of May, 1866, to the appellants, that a tax on three hundred and forty-one bales of cotton, amounting to three thousand one hundred and forty-seven dollars and twenty-three cents, had been assessed against them under that act as amended, by the assessor of that collection district, and that a list of the same in due form had been transmitted to him for collection. Payment of the tax having been delayed beyond the time allowed by law, they were also notified that they had become liable to pay five per cent. additional upon the amount of the same, together with interest from the first day of January preceding the date of the notice, and that, if the tax was not paid within ten days from the service of the notice, the same would be collected by distraint and sale of property. Before the ten days expired the appellants filed their bill of complaint in the Circuit Court for that district, praying that the appellee, as such collector, might be enjoined from enforcing the payment of the tax for several reasons, of which the following are the most material:

1. They admit that, during the winter preceding the filing of the bill of complaint, they shipped from that port three

* 14 Stat. at Large, 98; Ib. 471.

hundred and forty-one bales of cotton, but they allege that the internal revenue tax on the same was duly paid to the collector, or to his legally authorized deputy; that the permits for the shipment were duly issued by that officer, though they cannot be exhibited, as they still remain in his possession; and they also allege that the charge in the notice that the tax on the cotton is unpaid is a fraudulent and corrupt fabrication.

2. That the proceedings threatened by the collector are not authorized by the acts of Congress providing for the collection of such taxes; that such proceedings are applicable only to the collection of taxes on incomes, licenses, and the like, and not to the collection of the cotton tax, as that is made a specific lien on the cotton, which cannot be removed from the district where it was produced until the tax is paid or a bond given to secure such payment.

Pursuant to the prayer of the bill of complaint an injunction was issued forbidding the collection of the tax until the further order of the court, but on motion of the district attorney the injunction was subsequently dissolved. Required to plead, answer, or demur, the district attorney demurred specially to the bill of complaint, showing for cause: (1.) That it was not the proper remedy for the alleged grievance; that the remedy, if any, was by appeal to the commissioner. (2.) That the Circuit Court has no jurisdiction in equity to enjoin the collection of internal revenue taxes. Both parties were heard, and the court sustained the demurrer, dismissed the bill of complaint, and awarded costs to the respondent, and the complainants appealed to this court.

Jurisdiction of the Circuit Court in the case is denied in argument by the appellee upon two grounds: (1.) Because the parties to the suit are citizens of the same State. (2.) Because the Circuit Court has no power to afford a remedy by injunction for such a grievance; but in the view taken of the case it will not be necessary to examine the second proposition with much particularity, as the first is clearly correct and must prevail.

Controversies between citizens of different States are

plainly within the judicial power of the United States, as conferred by the Constitution; and Congress provided in the eleventh section of the Judiciary Act that the Circuit Courts should have original cognizance, concurrent with the courts of the several States, of suits between a citizen of the State where the suit is brought and a citizen of another State.* Citizenship of the parties to a suit, where it is the foundation of jurisdiction in the Federal courts, must be distinctly averred, so as to show not only that they are citizens of different States but also that one of them is a citizen of the State where the suit is brought.† Express allegation of the facts material to give jurisdiction is necessary, because such courts are courts of special and not of general jurisdiction, and consequently there is no presumption in favor of their jurisdiction where the facts requisite to show it do not appear in the record.‡ Nothing of the kind is shown in this case, either in the pleadings or in any part of the proceedings in the suit. On the contrary, the complainants are described in the bill of complaint as partners in trade in the city of Vicksburg, State of Mississippi, and the respondent is therein described as the collector of internal revenue of the United States for the second collection district of Mississippi, leaving it to be clearly inferred that both parties are citizens of the same State. But the matter is not left to inference, as the parties are in express terms described as citizens of Mississippi in the subpœna which was issued at the same time on motion of the complainants.

Unable successfully to deny that proposition, the next suggestion of the appellants is that all revenue cases are within the jurisdiction of the Circuit Courts, but the suggestion cannot be sustained, as will be seen by reference to the several acts of Congress upon that subject.§

* 1 Stat. at Large, 78.

† Conkling, Treatise, 4th ed., 344; Bingham *v.* Cabot, 3 Dallas, 382; Gassies *v.* Ballon, 6 Peters, 761.

‡ Turner *v.* Bank of America, 4 Dallas, 8; Sullivan *v.* Steamboat Company, 6 Wheaton, 450.

§ Insurance Company *v.* Ritchie, 5 Wallace, 541; Philadelphia *v.* Collector, Ib. 728.

Provision was made by the second section of the act of the second of March, 1833, that the jurisdiction of the Circuit Courts should extend to all cases in law or equity arising under the several laws of the United States for which other provisions were not already made by law.* Undoubtedly the act was passed for the protection of the officers charged with the collection of import duties, but the same provision was, by the fiftieth section of the act of the thirtieth of June, 1864, extended to cases arising under the laws for the collection of internal duties.†

Strong doubts are entertained whether the Circuit Courts, even during the period when that provision was in force, were authorized to enjoin the collection of internal revenue taxes, but it is not necessary to decide the point, as Congress subsequently repealed the fiftieth section of the last-named act, and expressly enacted that the original act should not be so construed as to apply to cases arising under the other sections of the act, or to any act in addition thereto, or in amendment thereof, nor to any case in which the validity or interpretation of said act or acts shall be in issue.‡

Suits between citizens of different States may still be brought in the Circuit Courts, but where both parties reside in the same State the Circuit Courts have no original cognizance of any case arising under the internal revenue laws. Such cases, when commenced against an officer acting under those laws, in a State court, may be removed, on petition of the defendant, into the Circuit Court for the district, and the jurisdiction of the court is clear beyond dispute, irrespective of the citizenship of the parties; but the act of the second of March, 1867, provides that no suit for the purpose of restraining the assessment or collection of a tax shall be maintained in any court.§

Viewed in any light the Circuit Court had no jurisdiction of this controversy, and consequently this court has no power to grant the relief prayed for in the bill of complaint.

Costs were improperly allowed in the court below, as the

* 4 Stat. at Large, 632. † 13 Ib. 241, § 50. ‡ 14 Id 172, § 67.
§ 14 Stat. at Large, 475; Philadelphia v. Collector, 5 Wallace, 730.

case was dismissed for the want of jurisdiction on the face of the pleadings, and in such cases the general rule is that costs will not be allowed in this court.* Sometimes an exception to that rule is admitted, as where the defendant in the court below is the defendant in this court, but inasmuch as the costs were improperly awarded in his favor by the Circuit Court, the better opinion is that he is not entitled to the benefit of that exception, as the decree in his favor must be reversed to correct that error.†

Decree REVERSED, and cause remanded, with directions to dismiss the bill of complaint, but

WITHOUT COSTS.

NOTE.

Soon after the preceding case was adjudged, there came up and was adjudged another involving the same point of jurisdiction. It was the case of

THE ASSESSORS *v.* OSBORNES.

In which the first two points adjudged in the preceding case, and the points adjudged in *Insurance Company* v. *Ritchie* (5 Wallace, 541), are affirmed; including the point adjudged in this last case, to wit, that where jurisdiction depends wholly on a statute, suits brought during the existence of the statute fall with its repeal.

IN this case, which came on error from the Circuit Court for the Northern District of New York, the same condition of enactment and repeal of statutes presented itself as in the last case. It is set forth, *supra*, pp. 560–562. It makes the fundamental part of this case as of that. And the reader who desires to read the report of this case as well as the report of that, will please to recall it thence, or refer to it there.

* McIver *v.* Wattles, 9 Wheaton, 650; Strader *v.* Graham, 18 Howard, 602; Inglee *v.* Coolidge, 2 Wheaton, 363; Montalet *v.* Murray, 4 Cranch, 47; Bradstreet *v.* Potter, 16 Peters, 318.

† Winchester *v.* Jackson, 3 Cranch, 514.

Arguments.

In the present case, D. & J. Osborne, manufacturers, brought suit to June Term, 1866, against one Gates, assessor of internal revenue, to recover damages for his having illegally assessed against them taxes upon certain articles manufactured by them. A case was stated for the judgment of the court. In one clause of it, it was agreed that "the plaintiffs, for several years past, have been manufacturers of reaping and mowing machines at the city of Auburn, and within the 24th collection district of the State of New York;" and in another clause, that "the defendant, as the assessor of the 24th district, did require of the plaintiffs that they should return, &c., the number of tons," &c.

In the declaration a similar representation was made as to the citizenship of the parties. It alleged that the plaintiffs bring "their certain declaration against Joseph Gates, the assessor of internal revenue for the 24th district of the State of New York, which is in and within the said Northern District of New York;" and it thus began: "And whereas the said D. M Osborn & Company, so being the exclusive manufacturers, &c., at their said manufacturing establishment in the said city of Auburn, and within the said 24th collection district of the said State."

The court gave judgment for the plaintiffs, and the government brought the case here on error.

Mr. Hoar, Attorney-General, and Mr. Field, Assistant Attorney-General, for the assessor.

The cases of the *Insurance Company* v. *Ritchie*, and of *Hornthall* v. *The Collector*,* conclude this case, irrespective of merits. Any discussion of these is, therefore, irrelative. The parties were obviously all resident within and all probably citizens of the State of New York, and it was perfectly settled by the first of the cases cited, as it is also affirmed by the second, that in the present state of the statutory law, a Circuit Court of the United States has no jurisdiction of a suit originally brought there for an alleged illegal assessment of internal revenue taxes collected or paid, unless the citizenship of the parties be such as to give it jurisdiction, and unless, also, this citizenship be averred.

Mr. D. Wright, contra, submitted,

1st. That it did not appear that the case had not been brought

* 5 Wallace, 541; and *supra*, 560.

Restatement of the case in the opinion.

originally in a State court and removed into the Circuit Court, as required by the statute of July 13th, 1866, to give the Circuit Court jurisdiction under existing laws.

2d. That it did not appear that the plaintiff and defendant were not citizens of different States, as required to confer jurisdiction upon the Circuit Court.

3d. That if the case was properly cognizable in the Circuit Court at the time it was commenced, the subsequent repeal of the provision conferring such jurisdiction would not impair the right of the plaintiffs to maintain the suit.

Mr. Justice CLIFFORD stated the particulars of the case, and delivered the opinion of the court.

Damages are sought to be recovered by the plaintiffs of the defendant, as the assessor of internal revenue taxes for the twenty-fourth district in the State of New York, because, as they allege, he illegally assessed against them certain internal revenue taxes upon certain articles which they manufactured during the period specified in the declaration.

They brought their suit on the twentieth of July, 1866, and the declaration contains forty-one counts. Twenty-eight of the counts relate to certain internal revenue taxes alleged to have been illegally assessed by the defendant against the plaintiffs upon certain iron castings of two classes therein described. One class consisted of castings of iron exceeding ten pounds in weight for each casting, and the other class consisted of castings of iron of ten pounds weight for each casting, or less, as more fully set forth in the first fourteen counts.

Machines, in a finished condition, for reaping and mowing, were also manufactured by the plaintiffs during the same period, and the remaining thirteen counts relate to assessments made by the defendant against the plaintiffs upon reaping and mowing machines which were in a finished condition; and the charge is, that the last-named assessments were also illegal, and that the defendant, as such assessor, transmitted the lists to the collector of the district, and that the plaintiffs paid the taxes under protest, as in the case of the assessments upon the castings of iron, which were in fact used as component parts of the finished machines.

For several years prior to the assessment of the taxes in question the plaintiffs had been manufacturers of the Kirby Har-

vester and Mower, at Auburn, within that collection district. They were the exclusive licensees for the manufacture and sale of those machines under the several patents granted for that invention, and the agreed statement shows that they make the castings used as parts of the machines as well as the machines in their organized and finished condition, and it is admitted that the castings which they make cannot be used for any other purpose than as component parts of their machine, nor as parts of any different machine made by any other manufacturers.

Castings manufactured by the plaintiffs are made from pig-iron, upon which the internal revenue duties imposed under the acts of Congress have been fully paid. All of the castings, after being taken from the moulds, require to be polished, examined, and tested, to see if they are perfect and fit for the purpose before they can be used as component parts of a reaper or mower, and many of them have also to be painted and varnished.

Reapers and mowers, when sold by the plaintiffs, include as parts thereof all the necessary pieces of castings and of wood-work to constitute a complete working machine; but they do not put all of the several parts together until the purchaser is ready to use the machine in the field, as it is much more convenient to transport the several parts in their separate condition than the embodied machine.

Prior to the year 1865 the plaintiffs had never made any returns to the assessor or assistant assessor of any castings which they manufactured, nor had they ever been required to make any such return, either by the assessor, assistant assessor, or commissioner; but the commissioner, in March of that year, directed the defendant, as such assessor, to require of the plaintiffs such a return, specifying the number of tons of such castings which they had manufactured, of the two classes mentioned in the declaration, for the six months next preceding the month of March of that year, and also the number of finished machines which they had manufactured and sold during the same time, in order that the same might be separately taxed, as follows: (1.) That the castings of ten pounds weight or less each casting might be taxed at the rate of five per cent. *ad valorem*. (2.) That the castings exceeding ten pounds in weight each casting might be taxed at the rate of three dollars per ton. (3.) That the finished machines sold during that time might be taxed five

Restatement of the case in the opinion.

per cent. *ad valorem*, without any deduction being made for the castings used as component parts of the machines.

Pursuant to the directions of the commissioner the plaintiffs made the required return, and paid the taxes to the collector, under protest, and brought this suit to recover compensation for the illegal acts of the defendant. Process having been served, the defendant appeared and pleaded that he was not guilty, which was duly joined by the plaintiffs, and the parties entered into stipulation waiving a jury, and consenting that the cause might be tried by the court without the intervention of a jury.*

Hearing was accordingly had before the court and judgment was rendered for the plaintiffs in the sum of nine thousand eight hundred and five dollars and twelve cents, besides costs and charges. Whereupon the defendant sued out a writ of error and removed the cause into this court.

Besides the first assessment, which included the month of July, 1864, and extended to February, 1865, both inclusive, there were subsequent assessments for each month following, up to and including May, 1866, and the agreed statement finds that the same state of facts apply to every month thereafter until the passage of the act of the thirteenth of July, 1866, which transferred reapers and mowers to the free list.†

Where internal revenue taxes are illegally assessed it is well settled that the injured party, if he complies with the conditions specified in the act of Congress upon that subject, and pays the taxes under protest, may maintain an action of assumpsit against the collector to recover back the amount so paid.‡

Collectors in such cases are not required to reimburse themselves for such liabilities, but the provision is, that all such judgments against them shall be paid by the commissioner, including the costs and expenses of the suit. Such a judgment against the collector is in the nature of a recovery against the United States, and consequently the amount recovered is regarded as a proper charge against the revenue collected from that source. Grant all that and still the concession does not touch the question involved in this case, as the suit in the case before the court is against the assessor to recover back taxes paid to the collector, which presents a question never adjudi-

* 13 Stat. at Large, 5.

† 14 Stat. at Large, 149.

‡ Philadelphia *v.* The Collector, 5 Wallace, 731.

cated in this court. Assessors may, perhaps, be liable for an illegal assessment in cases where they have no jurisdiction to make any assessment, but the question whether an assessor is liable to an action of assumpsit for taxes paid to a collector is a very different question, and it is quite certain that such a theory finds no support in any prior decision of this court.*

Actions of the kind may, under some circumstances, undoubtedly be maintained against the collector, and it may be that an assessor, acting in a case where he has no jurisdiction, may be liable to the injured party for an illegal assessment of internal revenue taxes, but neither the collector nor the assessor can be sued in the Circuit Court of the United States by any party who is a citizen of the same State with such collector or assessor. Suits in such cases, that is, where the plaintiff and defendant are citizens of the same State, may be brought in the State courts, but such suits cannot be maintained in the Circuit Courts under existing laws unless the plaintiff and defendant are citizens of different States. Consequently, where the parties are citizens of the same State, the action must be brought in the State court, but the defendant, if he sees fit and seasonably takes the proper steps, may remove the cause into the Circuit Court for trial.

Cases arising under the revenue laws were declared to be cognizable in the Circuit Courts by the act of the second of March, 1833, unless where it appeared that other provisions for the trial of the same had been previously made by law. Laws for the assessment and collection of internal revenue duties were not in existence at that time, but those provisions were extended by the fiftieth section of the act of the thirtieth of June, 1864, to cases arising under the acts of Congress providing for the collection of internal revenue duties, and the same section provides that all persons authorized to assess, receive, or collect such duties or taxes under those laws shall be entitled to all exemptions, immunities, benefits, rights, and privileges therein enumerated or conferred.†

* Barhyte *v.* Shepherd et al., 35 New York, 238; Weaver *v.* Devendorf, 3 Denio, 117; Swift *v* Poughkeepsie, 37 New York, 511; Dickinson *v.* Billings, 4 Gray, 42; Railroad *v.* Charlestown, 8 Allen, 245.

† 13 Stat. at Large, 241.

Such an action, to recover back internal revenue duties, illegally assessed, and paid under protest, might undoubtedly have been maintained in the Circuit Courts while that provision remained in force, although both parties were citizens of the same State, as the jurisdiction was made to depend upon the subject-matter, but the first proviso in the sixty-seventh section of the act of the thirtieth of July, 1866, expressly enacts that the original act, to wit, the act of the second of March, 1833, shall not be so construed as to apply to cases "arising under any of the internal revenue acts, nor to any case in which the validity or interpretation of those acts shall be in issue."*

Unquestionably the effect of that proviso was to confine the original act to the purposes for which it was passed, and to limit its scope and operation, standing alone and unaffected by the fiftieth section of the subsequent act, to cases arising under the acts of Congress providing for the collection of import duties. But that proviso left the fiftieth section of the act of the thirtieth of June, 1864, untouched and in full force, and if legislation had stopped there, persons duly authorized to assess, receive, or collect internal revenue duties would still have been entitled to the same exemptions, immunities, benefits, rights, and privileges under the original act as persons employed to assess, receive, or collect import duties. Legislation, however, did not stop there, but the sixty-eighth section of the act of the thirteenth of July, 1866, repealed the fiftieth section of the act of the thirtieth of June, 1864, altogether, subject to the proviso contained in the same repealing section, which enacts that any case removed, from a State court, into the Circuit Court, under the former regulations upon the subject, shall be remanded, unless the justice of the Circuit Court shall be of the opinion that the same, if pending in the State court, might be removed into the Circuit Court under the new provision contained in the sixty-seventh section of that act.

Since the passage of that act and the repeal of the fiftieth section of the prior act, the Circuit Courts have no jurisdiction of cases arising under the internal revenue laws to recover back duties illegally assessed and paid under protest, unless the plaintiff and defendant therein are citizens of different States. Such

* 14 Stat. at Large, 172; Philadelphia *v.* The Collector, 5 Wallace, 728; Insurance Company *v.* Ritchie, Ib. 541.

actions must be commenced in the State courts if the parties are citizens of the same State, but the defendant may, at any time before the trial, upon petition to the Circuit Court of the district in which he is served with process, remove the cause, upon due proceedings therein, into such Circuit Court, and the provision is that the cause thereafter shall be heard and determined as a cause originally commenced in that court.*

Assumpsit for money had and received is the appropriate remedy to recover back moneys paid under protest for internal revenue duties illegally assessed; and, if commenced in a State court, the action may be removed, on petition of the defendant, into the Circuit Court for the district where the service was made, and in that state of the case the jurisdiction of the Circuit Court is clear beyond doubt, irrespective of the citizenship of the parties, but if the action is originally commenced in the Circuit Court the cause must be dismissed for the want of jurisdiction, unless it appears that the parties were citizens of different States.

Three propositions are submitted by the plaintiffs as being severally sufficient to take the case before the court out of the operation of that rule: (1.) They contend that it does not appear that the case was not removed from the State court into the Circuit Court, as required to give the Circuit Court jurisdiction under existing laws. (2.) That it does not appear that the plaintiff and defendant in the case are not citizens of different States, as required to confer jurisdiction upon the Circuit Court. (3.) That the case was properly cognizable in the Circuit Court at the time it was commenced, and that the subsequent repeal of the provision conferring such jurisdiction does not impair the right of the plaintiffs to maintain the suit.

Unsupported in fact as the first proposition is, it does not seem to be necessary to enter into any argument to refute it. Suffice it to say, that the record shows that the suit was commenced in the Circuit Court, and that it was not removed into that court from the State court, which is all that need be said in reply to the first proposition.

When the jurisdiction of the Circuit Court depends upon the citizenship of the parties it is not enough that it does appear that they are not citizens of the same State, but the facts neces-

* 14 Stat. at Large, 171, § 67.

sary to give the Circuit Court jurisdiction must be distinctly alleged. Circuit Courts are courts of special jurisdiction, and therefore they cannot take jurisdiction of any case, either civil or criminal, where they are not authorized to do so by an act of Congress.*

Jurisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress.†

Applying these principles to the present case it is clear that the Circuit Court had no jurisdiction of this case. Usually where a court has no jurisdiction of the case the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has improperly given judgment for the plaintiff. In such a case the judgment in the court below must be reversed, else the plaintiff would have the benefit of a judgment rendered by a court which had no authority to hear and determine the matter in controversy.

JUDGMENT REVERSED, and the cause remanded with directions to dismiss the case

FOR THE WANT OF JURISDICTION.

LITCHFIELD *v.* THE REGISTER AND RECEIVER.

1. The rule established in *Gaines* v. *Thompson* (7 Wallace, 347), that the courts will not interfere by mandamus or injunction with the exercise by the executive officers of duties requiring judgment or discretion, affirmed and applied to registers and receivers of land offices.
2. The fact that a plaintiff asserts himself to be the owner of the tract of land, which these officers are treating as public lands, does not take the

* Sheldon *v.* Sill, 8 Howard, 449; Turner *v.* The Bank, 4 Dallas, 10; McIntire *v.* Wood, 7 Cranch, 506; Kendall *v.* United States, 12 Peters, 616.

† Norris *v.* Crocker, 13 Howard, 438; Yeaton *v.* United States, 5 Cranch, 281; The Rachel, 6 Id. 329; The Irresistible, 7 Wheaton, 551; Maryland *v.* Railroad Company, 3 Howard, 534; 1 Kent (11th ed.), 465; Butler *v.* Palmer, 1 Hill, 324.

case out of that rule, where it is the duty of these officers to determine upon all the facts before them, whether the land is open to pre-emption or sale.

3. In such cases, if the court could entertain jurisdiction against the land offices, the persons asserting the right of pre-emption would be necessary parties to the suit.

APPEAL from the Circuit Court for the District of Iowa.

Litchfield filed his bill in the court below against Richards, Register, and Pomeroy, Receiver of the United States Land Office at Fort Dodge, Iowa, asking an injunction to restrain them from entertaining and acting upon applications made to them to prove pre-emptions to certain lands which lay within the land district for which they were respectively register and receiver. The bill, which was very full, recited the various acts of Congress and of the State of Iowa, by which the complainant maintained that a large list of tracts of land, supposed to belong to an original grant to the Territory of Iowa for the purpose of improving the navigation of the Des Moines River, became his property. The history of that grant has been recently the subject of report in these volumes in several cases, and it is unnecessary to repeat it. It is sufficient to say that the bill giving that version of the matter which was favorable to the title of the complainant, averred that he was the legal owner of the lands; that they were not public lands, and were in no manner subject to sale or pre-emption by the government, or its officers. The defendant demurred, and the bill was dismissed for want of equitable jurisdiction. Whereupon the complainant appealed.

Mr. Litchfield, the complainant, insisted that the facts as stated in the bill must be taken as confessed by the demurrer, and that they showed that the land officers were exceeding their authority, and would give certificates of pre-emption and entry, which would cloud and embarrass his title, and that they should, therefore, be restrained.

Mr. Kelsey, contra.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

The principle has been so repeatedly decided in this court, that the judiciary cannot interfere either by mandamus or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of *Gaines* v. *Thompson*,* decided at the last term of this court, the whole subject was fully considered, and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of *The Secretary* v. *McGarrahan*, of the present term,† reaffirms the principle, which must now be considered as settled. Both these cases had reference to efforts similar to the present, to control the officers of the land department.

It is insisted, however, by the complainant, that the present case does not come within the rule so laid down, and his argument is plausible. A little consideration, however, will show that it is unsound.

The lands in controversy are situated within the land district over which these officers have authority to receive proof of pre-emption, and grant certificate of entry. There are within that district, of course, lands open to sale and pre-emption. There would be no use for the land office if there were not. The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reser-

* 7 Wallace, 347.

† *Supra*, 298.

vations of the departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the land department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. If they give patents to the applicants for pre-emption, the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the land department the functions which the law confides to them and exercise them by the court.

Another objection, equally fatal to the bill, is the want of necessary parties.

It appears on its face, that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to pre-empt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform. They might let the injunction be issued without defence, and thus a proceeding almost *ex parte* be made

to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settler on the land before the court.

DECREE AFFIRMED.

THOMSON *v.* PACIFIC RAILROAD.

1. Although, confessedly, Congress may constitutionally make or authorize contracts with individuals or corporations for services to the government; may grant aids by money or land in preparation for and in the performance of such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution, and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them; yet in the absence of all legislation on the part of Congress to indicate that such an exemption is deemed by it essential to the full performance of the party's obligations to the government, the exemption cannot be applied to the case of a corporation deriving its existence from State law, exercising its franchise under such law, and holding its property within State jurisdiction and under State protection, only because of the employment of the corporation in the service of the government.
2. The point decided in *McCulloch* v. *Maryland* does not establish a broader doctrine even if some of its reasoning may seem to do so.

ON certificate of division in opinion between the judges of the Circuit Court for the District of Kansas. The case was this:

The Union Pacific Railway Company, Eastern Division, was originally incorporated in 1855, by the legislature of the Territory of Kansas, as the Leavenworth, Pawnee, and Western Railroad Company, with authority to construct the road from the west bank of the Missouri to the western boundary of the Territory. Subsequently, in 1862, under an act of the State of Kansas, it assumed its present name, with authority to unite or consolidate with any other com-

pany or companies organized, or to be organized, under the laws of the United States, or of any State or Territory.

Some months later, the Union Pacific Railroad Company was incorporated by Congress, with power (conferred by the original act of 1862 and various amendatory acts) to construct a railroad and telegraph westward through the territory of the United States, from the hundredth meridian east of Greenwich, to connect with the Central Pacific Railway Company, incorporated by the State of California, and so to form, in connection with eastern roads, a continuous line from ocean to ocean. Several other railroad companies, already incorporated by Missouri and Iowa, as well as the company just mentioned, chartered by Kansas, were authorized to construct roads through the National territory, so as to join the Union Pacific road on the hundredth meridian; and to all these roads large grants of land were made, and large subsidies engaged on the security of a second mortgage, upon the condition of paying, at maturity, the bonds advanced by way of subsidy, and of rendering certain services to the government in the transmission of messages, and in the transportation of mails, troops, munitions, and other property, at reasonable rates of compensation.

But neither by the original act, nor by any amendment, did Congress undertake to incorporate any railroad company, or authorize the construction of any railroad within the limits of any State, without the consent of the State concerned. And this was as true of the Union Pacific Railway Company, Eastern Division, as of any other of the roads aided by Congress. Whatever was done by Congress in reference to this last-named road, was done not merely with the consent, but upon the solicitation of the State of Kansas. The corporation, however, remained a State corporation, though entitled to certain benefits, and subject to certain duties under the legislation of Congress.

In this state of things, and the legislature of Kansas having passed a law laying certain taxes upon the property of the company, one Thomson and numerous other persons filed a bill in the Circuit Court of the United States for the

District of Kansas, against the Union Pacific Railway Company, Eastern Division, and three persons, whom the bill named, treasurers, respectively, of Douglass, Wyandotte, and Jefferson counties, in the State of Kansas. The bill stated that the complainants were stockholders in the railway company; that under an act of the legislature of Kansas certain taxes had been imposed on the railroad and telegraph property of the company, which the treasurers of the counties named were proceeding to collect; that the property of the company was mortgaged to the United States; that the company was bound to perform certain duties, and ultimately to pay five per cent. of its net earnings to the United States; that the company would be greatly hindered and embarrassed in the performance of its obligations and duties to the United States, if the taxes imposed should be collected; and that, to some extent, taxes of the same description had been already paid by the company, to the prejudice of the just rights of the complainants and of the securities of the United States. Upon this case the complainants prayed an injunction to restrain the company from paying, and the other defendants from collecting, the taxes assessed; and a temporary injunction was allowed by the district judge.

The answer of the company admitted the allegations of the bill. The answers of the three county treasurers admitted the assessment of the taxes under the laws of Kansas, but denied that such taxes had been imposed with any view to impede or embarrass the railway company, and insisted that the property of the company only bore its due proportion of the taxes levied upon all property in the State of Kansas, and that no discrimination was made against the company in the matter of taxation.

To these answers no replication was put in; but an agreed statement of facts was filed, which recited sundry resolutions of the Kansas legislature, urging upon Congress legislation in aid of the railway company; and admitted that the property of the company was liable, under the laws of Kansas, to be taxed for State, county, and municipal purposes; that the taxes complained of had been assessed in conformity

with the statutes of the State; that the company had executed a first mortgage prior in lien to the debt to the United States, and that a table of earnings and expenditures for 1867–8, appended to the agreed statement, was correct.

Upon these pleadings and this agreed statement the question arose, whether the property of the railway company described in the bill was subject to the tax which the statutes of Kansas authorized to be levied on all other property, not specially exempted, for State, county, and municipal purposes. And upon this question the judges of the Circuit Court were divided in opinion, and certified it for decision here.

Mr. Hoar, Attorney-General, and Mr. Usher, for the complainant:

The question is of the gravest importance, not so much to the complainants, in this case, as to the railroad companies organized and deriving their powers under the acts of Congress providing for the construction of the Union Pacific Railroad and its branches, and the States, Territories, and municipalities through which those roads pass, and that shall hereafter be formed or created along their course.

These roads have their eastern termini one hundred and fifty miles east of the geographical centre of the United States, and every part of them will be subject to local laws, and the capriciousness of those who shall make and execute those laws, unless, by the law of their being they are exempt from such control.

This property is exempt for two reasons:

1st. A minor one. Because by the sixteenth section of the charter of the company the State has the right to purchase the road at the end of fifty years. The section is as follows:

"Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the State or States through which the said road shall pass shall be at liberty to purchase said road by paying to said company the amount at which it shall be valued by persons to be mutually chosen by the State and by said company."

Argument against the tax.

The State has, therefore, an interest in the road—a special property—and by its fundamental law cannot tax it.*

2d. A greater reason. The history of this road is matter of public knowledge. It is one and a part of a system of roads constructed under the direction and authority of Congress for the use and purposes of the United States, in the exercise of its powers to "provide for the common defence and general welfare of the United States, to regulate commerce among the several States, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrections and invasions."

For many years the necessity of a Pacific railroad was pressed upon Congress through conventions and petitions; but upon the breaking out of war its necessity to the government as a means for the preservation of its authority over all its territory upon the Pacific coast became so apparent, that provision was made for building the road, at a time when the expenditures of the government were more than a million of dollars per day for carrying on the war. When, two years afterward, it was found that the work had languished because of the inadequacy of government assistance, additional aid was given by Congress to secure the speedy construction of the work; and this, though the nation was then daily expending larger sums in carrying on the war, and though its debt had increased by hundreds of millions. It is a military, postal, and commercial road, and came out of the throes of the rebellion. It was designed to promote the unity and indivisibility of our people. It was to stretch forth the hands of the Great Valley until they clasped in peace and unity the hands of Oregon and California, to bind and cement in indissoluble bonds a dissolving Union; to carry the mails "safely" and "speedily" to the people inhabiting half of the National domain; to transmit telegraphic despatches to all these people with the rapidity of thought; to send troops and munitions of war to protect the defenceless men, women, and children of the frontier,

* Inhabitants *v.* Railroad, 4 Metcalf, 564.

against Indian barbarities; to enable the landless to have homes of their own; to develop and convert to the National uses the stores of gold and silver, and other valuable minerals imbedded in the mountains, and inaccessible but by these and other roads; to enable the government to suppress insurrections and repel invasions, should any occur, in all the country west of the mountains, and that the people might be brought into easy, cheap, and frequent communication with each other, whereby they should live together in lasting harmony and peace. Such was its history and well-known design; a work which, more than any other ever undertaken by the government, tends to consolidate peace, and to maintain the dignity, and reflect the glory of the nation. How in the face of all this history and all this design, can it be held that the action of Congress was a purposeless use of the lands and credit of the United States, for the benefit of divers corporations beyond the control of Congress? and that the United States was to be placed in the relation to them of a simple contract creditor, confined to such remedies as the laws of the numerous States and Territories traversed by the road and its branches afford?

Will it be said that because Congress, in devising the means by which it should execute the powers conferred by the Constitution, has profited of corporations created in part by Congress for the purpose, and in part by other authority, and because the normal condition of these corporations was such as would make them liable to taxation—the fact that Congress has created the one and adopted the others to its use—does not affect the right of the State to tax and subvert all this property, and so put an end to the scheme devised by Congress for the use and preservation of the government?

The answer is plain. The Congress of the United States, in the exercise of its constitutional power, has adapted this artificial body to its use, has made it its agent, has clothed it with new and additional powers to enable it to execute the lawful will of Congress, and the State cannot in any manner retard, impede, burden, or control the operations of

this agent, the company, in the discharge of its duties and obligations to the Federal government.

If it was necessary, the wisdom of the laws under consideration could be easily vindicated; but it is enough to say that Congress intended to and did provide for the execution of certain of its delegated powers. And this has been done in the mode and way which Congress deemed most appropriate; one in which the greatest economy could be practised, and the greatest benefit secured to the public, with the least expenditure of the public money.

Consider the effect of these Kansas tax laws upon this property. If sold by virtue of them for non-payment of taxes, the purchaser is to have a deed in fee simple of the premises or parcel of land that he purchased, not a deed that constitutes him a corporation, or that establishes any relation between him and the company, or the United States. But how is it possible for the State to invest him with a fee simple title?

And what becomes of the personalty—the "rolling stock," as it is called? That is to be seized by the sheriff and sold; and being personalty, and necessarily in the possession of the sheriff, it shall come to pass that the locomotive and train transporting the mail, troops, and war material of the United States over this road through Kansas, destined for New Mexico, Colorado, or elsewhere beyond to protect the inhabitants or suppress an insurrection, shall be seized by the Kansas sheriff for the non-payment of taxes.

The case of *McCulloch* v. *Maryland** seems to decide this one. This court, there holding that Congress under the Constitution has absolute and exclusive power to determine whether an act of legislation is or is not necessary for carrying into effect one or more of its enumerated powers, proceeds to say that acts passed by it to these ends cannot be controlled by State law. It says further:

"The power to create is the power to preserve. The power to tax is the power to destroy, and a power to destroy, wielded

* 4 Wheaton, 316.

by a different hand, is incompatible with a power to create and preserve. . . . . The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its own authority, but it does not extend to *those means which are employed by Congress* to carry into execution powers conferred on that body."

And, again:

"We find on just theory a total failure of the original right to tax *the means employed by the government of the Union for the execution of its plans.* This right never existed, and the question whether it has been surrendered cannot arise. . . . . If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail, the mint, patent rights, the papers of the custom-house, and all the means employed by the government. This was not intended by the American people."

It was not the intention of Congress to bargain with a corporation in Kansas for the use of their road and telegraph. They did not mean to take a lease for years and enforce their rights therein by action. On the contrary, it was an ordinary act of legislation to secure a political end of government. Congress intended to create an agent and to compel its active employment by means of law and powers reserved in transporting mails, troops, munitions of war, and necessary information.

A brief was also submitted against the right of the States to tax, by *Mr. J. H. Storr, of counsel for the Central Pacific Railroad of California, and of the Western Pacific Railroad Company.*

Mr. Banks, for the defendants; a brief of Mr. Thatcher being filed.

The CHIEF JUSTICE delivered the opinion of the court.

In this case the court has no concern with any of the connected roads which form, or are destined to form, links in

the great chain of transcontinental railway. We have only to consider the liabilities and rights of the Union Pacific Railroad Company in respect to taxation under State legislation. Argument has been heard on behalf of some of the connected corporations, only because of their interest in the question, by reason of their similar situation and circumstances in reference to like legislation.

The counsel for the complainants have justly said that the question certified here for decision is one of very grave importance.

It was suggested, rather than argued, by one of them, that the property of the State is exempt by the State constitution from taxation; and that the State, having reserved to itself in the charter the right to purchase the road at the end of fifty years at a valuation then to be made, upon two years' notice to the company, has, therefore, a property in the road which cannot be taxed. But it is too plain for argument that the interest thus reserved is too remote and too contingent to be regarded as within the meaning of the exemption.

The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. It is to be observed that this exemption is not claimed under any act of Congress. It is not asserted that any act declaring such exemption has ever received the sanction of the National legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the General Government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the State.

The case of *McCulloch* v. *Maryland* is much relied on in support of this position. But we apprehend that the reasoning of the court in that case will hardly warrant the conclusion which counsel deduce from it in this. In that case the main questions were, Whether the incorporation of the Bank of the United States, with power to establish branches, was an act of legislation within the constitutional powers of Congress, and, whether the bank and its branches, as actually established, were exempt from taxation by State legislation. Both questions were resolved in the affirmative. In deciding the first the court did not hold, as counsel suppose, that Congress, under the Constitution, has absolute and exclusive power to determine whether an act of legislation is or is not necessary and proper as a means for carrying into effect one or more of its enumerated powers. It defined the words "necessary and proper" as equivalent in meaning to the words "appropriate, plainly adapted, not prohibited, but consistent with the letter and spirit of the Constitution," and held that the incorporation of a bank with branches was a necessary and proper means to the effectual exercise of granted power within the definition thus given. It held further that Congress was, within this limit, the exclusive judge as to the means best adapted to the end proposed, and that its choice of any means of the defined character was restricted only by its own discretion. But the question whether the particular means adopted was within the general grant of incidental powers was determined by the court. A great part of the argument was directed to the proposition that the incorporation of a bank was an exercise of incidental power within the true meaning of the terms "necessary and proper," as explained by the court—an argument which would have been quite superfluous if that question was to be determined finally by the legislative and not by the judicial department of the government.

We do not doubt, however, that upon the principles settled by that judgment, Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corpora-

tions for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.

But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect?

It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence, or any of its qualities, to State legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.

In like manner other means and operations of the government have been held to be exempt from State taxation: as bonds issued for money borrowed;* certificates of indebtedness issued for money or supplies;† bills of credit issued for circulation.‡ There are other instances in which exemption, to the extent it is established in *McCulloch* v. *Maryland*, might have been held to arise from the simple creation and organization of corporations under acts of Congress, as in the case of the National banking associations; but in which

* Weston *v.* City of Charleston, 2 Peters, 467.

† The Banks *v.* The Mayor, 7 Wallace, 24.

‡ Bank *v.* Supervisors, Ib. 28.

Congress thought fit to prescribe the extent to which State taxation may be applied.* In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The State tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

It is true that some of the reasoning in the case of *McCulloch* v. *Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States.

And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon State taxation, derived from the express permission to tax shares in the National banking associations, is to be so construed as not to embarrass the imposition or collection of State taxes to the extent of the permission fairly and liberally interpreted.†

We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch* v. *Maryland* beyond its terms. We cannot apply it to the

* Van Allen *v.* The Assessors, 3 Id. 573; Bradley *v.* The People, 4 Id. 459; People *v.* Commissioners, Ib. 244.

† National Bank *v.* Commonwealth, *supra*, 353; Lionberger *v.* Rowse, *supra*, 468.

case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection.

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within its constitutional sphere. We fully recognize the soundness of the doctrine, that no State has a "right to tax the means employed by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.

No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.*

We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National government and its service, is very great. And this amount is continually increasing; so that it may admit of question

* Lane County *v.* Oregon, 7 Wallace, 77; National Bank *v.* Commonwealth, *supra*, 353.

whether the whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the State governments.

The nature of the claims to exemption which would be set up, is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the General Government. The allegation is, that the government has advanced large sums to aid in construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this State corporation, owing its being to State law, and indebted for these benefits to the consent and active interposition of the State legislature, has a constitutional right to hold its property exempt from State taxation; and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government.

We are unable to find in the Constitution any warrant for the exemption from State taxation claimed in behalf of the complainants; and must, therefore, answer the question certified to us

IN THE AFFIRMATIVE.

MERRYMAN *v.* BOURNE ET AL.

1. In California a judgment in ejectment has the same conclusiveness as a judgment in any common law action, and in determining its effect the same principles are applied which control the result of the like inquiry in other cases. A defeated plaintiff may bring a new action upon an after-acquired title with the same effect as a stranger, in whom such title

might have been vested, and the former judgment will not be a bar to the new action.

2. If a party who has entered into possession of land as a tenant under another is threatened with suit upon a paramount title, the threat, under such circumstances, is equivalent to eviction. He may, thereupon, submit in good faith, and attorn to the party holding a valid title, to avoid litigation. In such case it is incumbent upon him, and those who have profited by his submission, to show the existence and superiority of the title in question.

3. In this case W. had recovered in ejectment, upon an adverse title, against some of the parties in possession of the premises holding under one F.; and he threatened suit against the others, who to avoid expensive litigation acknowledged the title of W., and took leases from him, and at the expiration of the leases surrendered the possession to him. This possession is found to have been fairly and honestly acquired, without force, fraud, or surprise: *Held*, that if the holding of the parties under F. was that of tenants, the relation of landlord and tenant between them was thus extinguished; but if the holding by them was as grantees in fee, they were not estopped from denying F.'s title. Grantees in fee hold adversely to all the world, and have the same right to deny the title of their vendors as the title of any other party.

4. The alcalde was the chief executive officer of the pueblo of San Francisco, and, as such, had authority to make grants of the pueblo lands subject to the authority lodged in the ayuntamiento, and the still higher authority of the departmental governor and assembly.

5. The ordinance of the common council of San Francisco, known as the Van Ness ordinance, gave to parties holding alcalde grants within certain defined limits in that city, where the grants had been recorded in the proper books, deposited with the recorder of the county of San Francisco, on or before April 3d, 1850, a new title upon which an action would lie, if the grants were by themselves without that ordinance ineffectual to pass the title.

6. The act of Congress of July 1st, 1864, is a confirmation of the title held under the Van Ness ordinance, and took effect by relation as of the time when the act of the legislature of the State confirming the ordinance was passed.

ERROR to the Circuit Court for the District of California.

Merryman brought ejectment, in April, 1860, against Bourne and several others for a parcel of land situated within the corporate limits of the city of San Francisco, as defined by her charter of 1851. The case was tried by the court without a jury, by stipulation of parties in writing. The facts found by the court, and its conclusions of law, were as follows:

Statement of the case.

1st. That on the 15th day of April, 1847, there was duly issued by Edwin Bryant, then alcalde of the town of San Francisco, to S. E. Woodworth, one of the defendants, in due form, a grant in fee of a one hundred vara lot,* within the corporate limits of said town, which embraced the premises described in the complaint in this action, and which grant was registered and recorded in a proper book of records deposited in the office, or custody, or control of the recorder of the county of San Francisco, on or before the 3d day of April, A.D. 1850.

2d. That soon after this grant was issued the said S. E. Woodworth entered into possession of the said lot, and inclosed the same with a fence, and so continued in possession for some months then next ensuing.

3d. That subsequently the fence, having either fallen down or been removed by trespassers, one Fulton, claiming under a grant issued by one Colton, a justice of the peace, for said lot, entered on a portion of the lot; and thereupon Woodworth, in the year 1850, brought an action of ejectment against Fulton in the Court of First Instance, at San Francisco, to recover the possession of the premises, in which action judgment was rendered in favor of Woodworth, on which a writ of restitution issued, by virtue of which Woodworth was restored to the possession, after which Fulton appealed to the Supreme Court of the State of California, by which court the judgment was reversed and the cause remanded; whereupon a final judgment was afterwards rendered in the lower court in favor of Fulton, and by virtue of process issued thereon Fulton was restored to his possession, and he and those claiming under him continued in possession until they were ejected as hereinafter stated.

4th. That in January, 1852, the said S. E. Woodworth, by a good and sufficient deed of bargain and sale, conveyed the said one hundred vara lot, including the premises in controversy, to F. A. Woodworth, now deceased, who, in the years 1853 and 1854, instituted in the District Court of

* A one hundred vara lot is a lot 275 feet square.

the 4th judicial district in San Francisco, actions of ejectment against some of the parties in possession of the premises claiming under Fulton, and recovered judgments on which writs of restitution were issued and served, by virtue of which F. A. Woodworth was restored to the possession of the premises occupied by the defendants in said writs, and the remaining persons in possession of said premises under said Fulton, and who were not included in said ejectment suits, on being threatened with suits by said F. A. Woodworth to recover the possession of the premises held by them, and with a view to avoid expensive litigation, acknowledged the said Woodworth's title and took leases from him; at the expiration of which leases they surrendered the possession to him, Woodworth; and the possession of said Woodworth, so obtained under writs of restitution and by surrender, was fairly and honestly acquired, without force, fraud, or surprise.

5th. That on the 12th December, 1849, Colton, justice of the peace, already mentioned, issued a grant to one Atwill for the said one hundred vara lot, and on the 11th February, 1850, Atwill conveyed to the said Fulton whatever title he acquired by the grant in and to the premises in controversy; and the plaintiff, before and at the time of the institution of this suit, had acquired and held by regular mesne conveyances all the title of Fulton.

6th. That at the time of the commencement of this action the said F. A. Woodworth, and the other defendants under a license from him, were in possession of the premises in controversy.

And as conclusions of law from the facts aforesaid, the court found:

1st. That the grant from Colton, the justice of the peace, to Atwill was void, and conveyed no title to the premises; and that the judgment in the suit of *Woodworth* v. *Fulton* was in no respect an affirmance of the validity of the title of Fulton, but only a disaffirmance of the validity of the title of Woodworth, the plaintiff in that suit, as the title was then set up and held by him.

Argument for the plaintiff in error.

2d. That as against the defendants in this suit, peaceably in possession of the premises in controversy, the plaintiff must recover on the strength of his own title; that the title set up by him was invalid, and the judgment aforesaid did not estop the defendants to deny the validity of said plaintiff's title.

3d. That the judgment aforesaid was a decision that the defendant Woodworth's title, as then held by him, was invalid, but it did not estop him to set up any title to said premises acquired since the said judgment.

4th. That by virtue of an act of the legislature of the State of California, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," approved March 11th, 1858, and by virtue of the ordinances referred to in said act, and of the 5th section of the act of Congress entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864, all the title of the United States, and of the city of San Francisco, in and to the premises in controversy, became and was vested in F. A. Woodworth, and by virtue thereof the defendant, S. E. Woodworth, as executor of the said F. A. Woodworth, deceased, was entitled to the possession of the premises described in the complaint and every part thereof.*

Judgment was accordingly rendered for the defendants, and the plaintiffs brought the case to this court on writ of error.

Mr. Cushing (*who filed a brief of Messrs. Turner, Patterson, Jarboe, and Harrison*), *for the plaintiff in error:*

The decision by the Supreme Court of California† in the case of *Woodworth* v. *Fulton*, was a final judgment, involving and determining the *invalidity of the grant* which is relied upon as a defence to this action. That determination was

* For a more minute statement of the provisions of the Van Ness ordinance and act of Congress, see Lynch *v.* Bernal, *supra*, p. 315.

† 1 California, 295.

(and is) not only the law of that case but the law of *that piece of property.*

The defendant, Woodworth, and all claiming under him, as against Fulton and the plaintiff (here), who is in privity with him, are *barred from asserting that title.* The same evidence which Woodworth relied upon in *Woodworth* v. *Fulton*, *i. e.*, the alcalde grant, is now relied on as a defence to this action.* The facts in *Woodworth* v. *Fulton*, as to Woodworth's title and right of possession, are the same as in this case, and the *decision* in that case was upon the law of the alcalde grant.† It will not be pretended that while Fulton and his tenants and privies were in possession, under the writ of restitution and judgment in *Woodworth* v. *Fulton*, they were trespassers on the said premises, or that a judgment for mesne profits could have been recovered against them? The law after a solemn determination placed them there, and they were therefore rightfully there. When did that right *cease?* Never by any act of theirs.

In California the action of ejectment, as at common law, was never used. There it is "an action for the recovery of real property; or of an estate or interest therein; or for the determination in any form of such right or interest."‡

The facts found as to the mode in which F. A. Woodworth obtained possession of part of the premises from Fulton's tenants—his threats and compromises—show a tampering with them; and, having entered under our tenants, he himself becomes our tenant, and is estopped from asserting that the plaintiff is not entitled to possession.

Conceding that, by the later decisions of California, an alcalde grant, such as was here set up, may be valid, those decisions cannot affect the prior unreversed case of *Woodworth* v. *Fulton*, in which it was held otherwise.

So far as the act of Congress of July 1st, 1864, is relied on, it is enough to say, that it was passed more than four

* Broom's Legal Maxims, 229; Eastman *v.* Cooper, 15 Pickering, 285; Baker *v.* Rand, 13 Barbour, 152; Burkland *v.* Brown, 5 Sandford, 134.

† Betts *v.* Starr, 5 Connecticut, 550; Pleak *v.* Chambers, 7 B. Monroe, 566.

‡ *Vide* Practice Act.

years after the institution of this suit. Of course, it cannot be considered.

Mr. G. H. Williams, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This case is brought before us by a writ of error to the Circuit Court of the United States for the District of California.

The plaintiff in error was the plaintiff in the court below. The suit was ejectment, brought to recover the premises described in the plaintiff's declaration. They are situated in the city of San Francisco. The parties stipulated in writing that the cause should be tried by the court without a jury, and it was tried accordingly. The court found the facts specially, pursuant to the statute which governs the practice in such cases, and they are set forth in the record. Judgment was given for the defendants, and the plaintiff thereupon sued out this writ of error. So far as the facts of the case are concerned the findings of the court are conclusive between the parties. The only questions open for our consideration are questions of law, arising upon the facts as thus presented in the record.

Three grounds are relied upon for the reversal of the judgment.

Two of them are substantially the same, and will be considered together.

It is insisted that the rights of the parties, touching the premises in controversy, were settled in favor of the plaintiff in error, in the case of *Woodworth* v. *Fulton*, reported in 1st California Reports, 295.

This is an error. Woodworth prosecuted the action. The premises were the same with those involved in the present suit. The Supreme Court of the State decided two points, and none other: (1.) That the alcalde grant to S. E. Woodworth was void for want of the requisite authority in the officer who made it—the court holding that an alcalde was incompetent to give any title; (2.) That if a recovery could

be had in an action of ejectment, upon mere prior possession, no sufficient possession was shown on the part of the plaintiff. Nothing was decided or said by the court as to the title of the defendant.

In California a judgment in ejectment has the same conclusiveness as a judgment in any common law action, and in determining its effect the same principles are applied which control the result of the like inquiry in other cases. A defeated plaintiff may bring a new action upon an after-acquired title with the same effect as a stranger in whom such title might have been vested, and the former judgment will no more bar one than the other.*

It appears by the finding of facts that F. A. Woodworth did bring a new action against a part of those in possession. He recovered and ousted the defendants by writs of restitution. The other parties in possession thereupon surrendered and attorned to him. He thus acquired possession of the entire premises, and he, or those claiming under him, held it when this suit was instituted.

The cases in which the judgments were recovered are not before us. Who the defendants were, and what title was developed by the plaintiff, we do not know. For all the purposes of this case the judgments must be held to have been properly rendered, and to be valid. They cannot be collaterally questioned in this proceeding.

It is insisted also that Woodworth obtained possession of a part of the premises by tampering with the tenants of Fulton, under whom the plaintiffs in error claim, and thus became such tenant himself, and hence is estopped from denying the validity of the alleged Fulton title.

The language of the finding upon this subject is as follows: "And the remaining persons in possession of said premises under said Fulton, and who were not included in said ejectment suits, on being threatened with suits by said F. A. Woodworth to recover possession of the premises held by them and with a view to avoid expensive litigation, ac-

* Barrows v. Kindred, 4 Wallace, 399.

knowledged said Woodworth's title, and took leases from him, at the expiration of which leases they surrendered the possession to the said Woodworth, and the possession of said Woodworth so obtained under said writs of restitution, and by surrender, was fairly and honestly acquired, without force, fraud, or surprise."

How many such parties were in possession, what portion of the premises their possession embraced, and whether their possession under Fulton was as vendees, lessees, or otherwise, does not appear.

If they were grantees in fee the principle relied upon has no application. It is one of the incidents of subinfeudation, and was brought into the common law from the feudal system. It does not reach the relation of vendor and such a vendee. The latter holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party.*

Error is not to be presumed. It must be affirmatively shown. Doubts are to be resolved in favor of the judgment rather than against it. But if the parties were the tenants of Fulton, the fact would not avail the plaintiff in error. The principle sought to be applied is subject to several well-settled qualifications. It may be shown that the landlord's title has ceased by expiration or transfer. If the tenant be evicted, he may take a new lease from the party evicting him. It has been held, that if threatened with suit upon a paramount title, the threat, under such circumstances, is equivalent to eviction. He may, thereupon, submit in good faith, and attorn to the party holding a valid title, to avoid litigation. In such case it is incumbent upon him, and those who have profited by his submission, to show the existence and superiority of the title in question.†

* Blight's Lessee *v.* Rochester, 7 Wheaton, 535; Watkins *v.* Holman, 16 Peters, 26; Croxall *v.* Shererd, 5 Wallace, 268; Osterhout *v.* Shoemaker, 3 Hill, 518; Barker *v.* Soloman, 2 Metcalf, 32.

† Mayor of Poole *v.* Whitt, 15 Meeson & Welsby, 577; Emery *v.* Barnett, 4 Common Bench, N. S. 423; Lunsford *v.* Turner, 5 J. J. Marshall, 106; Cutbertson *v.* Irving, 4 Hurlstone & Norman, 758; Jordan *v.* Twells, Cases *tempore* Hardwicke, 172.

Opinion of the court.

Upon the disavowal of the landlord's title the relation of landlord and tenant ceases, and, as between them, the tenant becomes a trespasser. The statute of limitations begins to run, and the landlord may sue at once to recover possession. He need not wait for the end of the leasehold term.*

In the case under consideration, Woodworth had recovered upon the adverse title against a part of those in possession, and threatened suit against the others. They yielded, to avoid the inevitable adverse consequences of a contest. This they had a right to do. The court found that the possession was obtained by Woodworth "fairly and honestly," "without force, fraud, or surprise." This is conclusive as to the integrity and validity of the transaction, and brings the case within the authorities referred to. The relation of landlord and tenant between Fulton and those parties, if it subsisted before, was thus extinguished.

Woodworth claimed title under an alcalde grant of the 15th of April, 1847. Fulton, under a grant from a justice of the peace, of the 21st of December, 1849. It is not claimed that the latter grant is of any validity.

Emanating, at the time it bears date, from such a source, it is as if it came from any other person unauthorized to give it, and did not carry with it even color of title. It is utterly void. It may, therefore, be laid out of view, as an element in the case of no moment.

The conquest of California by the arms of the United States is regarded as having become complete on the 7th of July, 1846. On that day the government of the United States succeeded to the rights and authority of the government of Mexico. The dominion of the latter sovereignty was then finally displaced, and succeeded by that of the former. Before that time, the pueblo or village of San Francisco existed, and under the laws of the country was entitled to the territory within certain prescribed limits, known as pueblo lands. It had also an ayuntamiento or town council, and an alcalde. The alcalde was the chief

* Willison v. Watkins, 3 Peters, 43.

executive officer of the pueblo, and, as such, had authority to make grants of the pueblo lands.

The exercise of this function was subject to the authority lodged in the ayuntamiento, and to the still higher authority of the departmental governor and assembly. In the case of *Woodworth* v. *Fulton*,* it was held by the Supreme Court of the State that, from the time of the conquest, these pueblo lands, so far as they had not been granted to individuals, became a part of the public domain of the United States, and, as such, subject to the exclusive control and disposition of Congress. This doctrine was subsequently overruled in the case of *Cohas* v. *Raisin*.† It was there held that the conquest had no such effect, but that the lands continued to be the public property of the municipality, as before the war; and that the laws of Mexico relating to the subject continued in force until changed by the legislative authority of the State. It was further held that an alcalde grant, made after the conquest, was to be presumed valid, and was competent to convey title. These doctrines are now firmly established as a part of the rules of property of the State.‡

But it is insisted, in behalf of the plaintiffs in error, that these adjudications cannot affect the prior unreversed judgment in the case of *Woodworth* v. *Fulton*, in which the rulings were otherwise. Conceding this to be so, the result of this case must still be against the plaintiff in error. The common council of San Francisco, by an ordinance of the 20th of June, 1855, known as the Van Ness ordinance, relinquished all her rights in the pueblo lands of the city to the parties respectively within the category of Woodworth, and to those claiming under them by competent mesne conveyances. This ordinance was confirmed by an act of the legislature of the State of the 11th of March, 1858.§

This gave to Woodworth, and those claiming under him, a new and after-acquired title, upon which, according to the

* 1 California, 295.

† 3 California, 434.

‡ Hart *v.* Burnett, 15 California, 530; Payne & Dewey *v.* Treadwell, 16 Id. 221; White *v.* Moses, 21 Id. 34.

§ 15 California, 627, note 3.

later adjudications referred to, he was entitled to recover, and to an action upon which the prior judgment in *Woodworth* v. *Fulton* was not and could not be a bar. The act of Congress of July 1st, 1864, was a further confirmation of the Woodworth title, and operated in the same manner as the ordinance of the city council and the act of the legislature before mentioned.

It is said that the act of Congress was passed after the institution of this suit, and cannot, therefore, be considered. To this there are two answers. It is by no means clear that the act was necessary to the completeness and validity of the title in question. The later adjudications referred to, made before the passage of the act, held by necessary implication that it was not. But if it were necessary, we have no difficulty in holding that it took effect by relation, as of the time when the act of the legislature confirming the ordinance of the council was passed.*

We think the facts found by the court below fully sustain the judgment given, and it is

AFFIRMED.

PUBLIC SCHOOLS *v.* WALKER.

Where counsel desire to have a case reheard, they may—if the court does not, on its own motion, order a rehearing—submit without argument, a brief written or printed petition or suggestion of the point or points *which they think* important. If upon such petition or suggestion any judge who concurred in the decision thinks proper to move for a rehearing the motion will be considered. If not so moved, the rehearing is denied as of course.

THIS case was argued at an earlier part of the term; and the court, after advisement, having announced its judgment of affirmance,† *Messrs. Blair and Dick, for the plaintiffs in error,*

* Poole et al. *v.* Fleeger et al., 11 Peters, 185; Jackson *v.* Dickenson et al., 15 Johnson, 309; Hammond *v.* Warfield et al, 2 Harris & Johnson, 155; McConnell *v.* Brown, Littell's Select Cases, 460; Pearson *v.* Darrington, 21 Alabama, 175.

† *Supra*, 290.

now submitted, without oral argument, a printed brief, asking for rehearing and setting forth certain points of the case, including a fundamental fact, on which as they conceived, the court had fallen into misapprehension.

Having taken time to examine the brief,

The CHIEF JUSTICE now delivered the opinion of the court.

No member of the court who concurred in the judgment desires a reargument, and the petition must, therefore, be denied.

The rule on this subject, long since established, was stated by Chief Justice Taney at the December Term, 1852, in these words:

"No reargument will be granted in any case unless a member of the court who concurred in the judgment desires it, and when that is the case it will be ordered without waiting for the application of counsel."

The grounds of this rule were fully explained in that case, and need not be restated.*

Where the court does not on its own motion order a rehearing, it will be proper for counsel to submit without argument, as has been done in the present instance, a brief written or printed petition or suggestion of the point or points thought important. If upon such petition or suggestion any judge who concurred in the decision thinks proper to move for a rehearing the motion will be considered. If not so moved the rehearing will be denied as of course.

* Brown *v.* Aspden, 14 Howard, 25; United States *v.* Knight's Adm., 1 Black, 489.

Statement of the case in the opinion.

EX PARTE MORRIS AND JOHNSON.

1. It is the duty of a court below to obey and give effect to the mandate of this court, as far as practicable. Where the mandate is for restitution of moneys, recovered by persons under a decree of the court below, all persons within the reach of the territorial jurisdiction of that court should be required by the proper order to refund what they have received. If they fail to do so, they should be dealt with promptly, by attachment, for contempt. This in no wise interferes with common law remedies, except that the parties entitled to restitution cannot be paid twice.
2. If a party within the jurisdiction is in possession of any part of the fund ordered to be paid back, which was received by another who is out of the jurisdiction, the rights of the petitioners follow the money into his hands, and he is liable for it. Such party, within the jurisdiction, should, on an allegation of his possession, be required to disclose the facts touching that subject, and if he is in such possession, he should be required to restore the money so received.
3. Where a marshal, who is bound under a mandate from this court to make restitution, returns that he has deposited the money in bank pursuant to directions from the United States, the circumstances of the deposit should be inquired into. If the money was deposited, pursuant to instructions from the proper authority, he is exonerated, and in that event the proper certificate should be given by the court to the petitioners, and they be left to seek redress in the appropriate manner. The court has no authority to order the United States to refund.

THIS was a petition presented by *Mr. P. Phillips, in behalf of Morris and Johnson*, for a writ of mandamus against Richard Busteed, judge of the District Court of the United States for the Middle District of Alabama.

Mr. Justice SWAYNE stated the facts, and delivered the opinion of the court.

The United States filed an information in the District Court for the Middle District of Alabama, against certain bales of cotton, which it was alleged were liable to seizure and confiscation, and had come into the possession of the petitioners. The court entered a personal decree against them for the value of the cotton. They brought the case here by appeal. This court reversed the judgment and remanded the cause, with directions to the District Court "to cause restitution to be made to the appellants of whatever

they have been compelled to pay under that decree." A mandate to this effect was sent to the District Court.* Nothing effectual has been done under it. The petition, which is the foundation of this proceeding, was filed in this court. The district judge waived the issuing of a rule to show cause, and submitted a return by which the following facts appear.

After the rendition of the decree the judge made an order directing the money, when collected, to be distributed as therein prescribed. Five per cent. was to be paid to F. Q. Smith, the attorney of the United States; one per cent. to John Hardy, the marshal; one per cent. to E. C. F. Blake, the clerk of the court; and one-half of the entire amount, less costs and charges, to E. R. McCrosky, the informer. The other half was to be held in the registry of the court, subject to the order of the Secretary of the Treasury. A *fi. fa.* was issued on the decree, and the full amount collected from the petitioners. The mandate of this court was presented to the District Court, and proceedings instituted to enforce the order of restitution. Written answers were filed by the parties who were brought before the court.

McCrosky, the informer, was beyond the limits of the State of Alabama. He did not appear or answer. The district attorney admitted that he had received the amount adjudged to him; but insisted that he had a right to hold it. In his oral examination before the court it was proposed to show by his testimony that he had received a large part of the money paid to the informer. This was objected to by his counsel, and the objection was sustained by the court.

The clerk answered that he had received nothing under the order.

The marshal answered that after paying Smith and McCrosky, he had deposited the residue, less the costs of the case, in the First National Bank of Selma, pursuant to instructions from the Interior Department. That bank has since failed, and is now in the hands of a receiver. The receiver's answer is in the case, but requires no particular notice.

* 7 Wallace, 579.

Opinion of the court.

Under these circumstances the district judge was at a loss how to execute the mandate heretofore sent to him, and submits himself to this court for further instructions.

The duty of the District Court is simple and obvious, and its power ample. The mandate of this court must be obeyed as far as practicable. All the distributees within reach of the territorial jurisdiction of the court, except the United States, must be required by the proper order to refund what they have received. If they fail to do so, they should be dealt with promptly, by attachment, for contempt. This will in no wise interfere with any other remedy to which the petitioners may be entitled, except that they cannot be paid twice.

If Smith, the district attorney, received from McCrosky any part of the fund ordered to be paid to the latter, the rights of the petitioners followed the money into his hands, and he is liable for it.* He should have been required to disclose the facts touching that subject, and if they were as the petitioner sought to show, he should have been required to restore the money so received, as well as that which was paid to him under the order of distribution.

McCrosky being beyond the reach of the court, no order can be made in relation to him. He will be amenable to a suit at law wherever he may be found.

The circumstances of the marshal's deposit should be inquired into. If the money in question was deposited in the Bank of Selma, pursuant to instructions from the proper authority, he is exonerated. In that event, the proper certificate should be given by the court to the petitioners, and they must be left to seek redress in the appropriate manner. The court has no authority to order the United States to refund.

A writ of mandamus will be sent to the District Court, directing it to proceed to execute the mandate of this court

IN CONFORMITY TO THIS OPINION.

* Taylor *v.* Plumer, 3 Maule & Selwyn, 562; Oliver *v.* Piatt, 3 Howard, 401.

UNITED STATES *v.* AYRES.

The mere making and pendency of a motion in the Court of Claims, for a new trial, under the act of June 25th, 1868, § 2, is not a sufficient ground for dismissal of an appeal taken to this court prior to the making of such motion. But the granting of such motion, and the order for a new trial, vacating, as it does, the judgment appealed from, is.

THIS case was an appeal from the Court of Claims, and the matter here reported presents the case of two motions, made at two different times, for the defendant in error to dismiss it; made the first time under one state of facts, and the second time under another and new state; and also a motion on the other side, under the new state of facts, for a special action by this court hereinafter stated. The case in its whole history was thus:

One Ayres brought suit against the United States in the Court of Claims, and obtained a judgment for the amount claimed by him. An appeal was taken by the government and was now pending here. While the appeal was thus pending, the counsel for the United States made a motion in that court for a new trial. This motion for the new trial was made under an act of June 25th, 1868,* in these words:

"That said Court of Claims, at any time, *while any suit or claim is pending* before or *on appeal from said court*, or within two years next after the final disposition of any such suit or claim, may, on motion, on behalf of the United States, grant a new trial on any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States. But until an order is made staying the payment of the judgment, the same shall be payable, and paid as now provided by law."

While the motion for a new trial was thus pending in the court below, and *before any action upon it by that court*, *Mr.*

* 15 Stat. at Large, 75, § 2.

Statement of the second case.

Hughes, in this court, *for the defendant in error*, Ayres, moved to dismiss the appeal, insisting on the part of the claimant that the two proceedings, the one of appeal, and the other of motion for a new trial, were inconsistent, and not in accordance with a reasonable interpretation of the act; that the counsel of the United States was bound to elect which of the two remedies he would adopt, and having, in this instance, elected the motion for a new trial, the appeal should be dismissed.

Mr. J. S. Hale, *special counsel for the United States*, opposed the motion, contending that the act allowed both proceedings at the same time.

And now, in this condition of the case,

Mr. Justice NELSON delivered the first opinion of the court in the matter.

"We shall not now undertake to give a construction of the several provisions of this section, which are new and anomalous, but shall leave that until cases of actual inconsistency or conflict may arise between the two modes of proceeding. So far as the present question is concerned, there is no great difficulty. The act expressly provides that the motion for a new trial may be made in the court below while the appeal from the judgment there is pending in this court. So far the section is clear; and, although it may be regarded as giving to the government a considerable advantage in the litigation, the power to give it by Congress, cannot, we suppose, be doubted."

The motion to dismiss was accordingly DENIED.

Soon after this action by this court, the Court of Claims granted the new trial which the government had asked for, and stayed payment of the judgment until the final hearing of the cause or the further hearing of the court.

Mr. Hughes now came forward again, asking, for the claimant, to have the appeal dismissed, the ground now assigned being that a new trial had been actually granted.

Mr. Hale, opposing this motion in the form asked, presented on the other hand, for the government, a motion asking that the record in the cause pending here might be remitted to the court below for further proceedings in that court, *reserving all questions that might arise in the judgment brought up by the appeal, or for such other order as the court might deem proper.*

And now, on this new state of things, after argument at the bar and advisement,

Mr. Justice NELSON delivered the opinion of the court.

The case stands thus: the petitioner has obtained a judgment in the court below against the government, from which an appeal has been taken, and is pending in this court. A new trial has since been granted by the court below, and the payment of the judgment stayed. The act of Congress furnishes no solution to this anomaly.

We are of opinion the granting of the motion to dismiss the appeal, on the ground that the court has granted a new trial in the cause under the act of Congress, will furnish the best solution of the embarrassments in which the parties find themselves involved. It is quite apparent that the counsel for the government is desirous to retain the appeal notwithstanding the order for a new trial, under an impression that for some unknown or unanticipated occurrence in the proceedings in the court below, the new trial might fall through, and never take place; and, for the like reason, the counsel for the petitioner desires to have the appeal terminated, so as not to be available to his adversary. But, it is quite clear, that the order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause. This is the legal effect of the new trial by a court competent to grant it. There is no reason, therefore, for continuing any longer the case on our docket. The motion to dismiss the appeal is

GRANTED.

WORTHY *v.* THE COMMISSIONERS.

1. Where a party claims below wholly in virtue of the laws of a State and the highest court of the State decides that under these laws the claimant has no case, no writ of error lies here under the 25th section.
2. Allegations by counsel here, and attempts to show that the plaintiff's right under the Constitution of the United States, has been infringed by the decision, do not help the case, if the right has not been specially set up in the court below and there decided against.

ON motion to dismiss, the case was this:

Section 3 of the 14th amendment to the Constitution ordains that no person shall hold office under any State, who having previously taken an oath as an executive officer of any State to support the Constitution of the United States, has engaged in rebellion against the same, or given aid and comfort to the enemies thereof; and a statute of North Carolina enacts that no one disqualified under that amendment should hold office in North Carolina.*

These provisions being in force, it appeared that Worthy, the plaintiff in error, having received a majority of the votes cast at an election of sheriff, held in Moore County, North Carolina, presented his bond to the defendants in error, who were commissioners of the county, and offered to qualify under the law of the State. A majority of the commissioners refused to receive his bond or permit him to qualify as sheriff, on the ground that he had been sheriff of the county before the rebellion; that the office of sheriff was an executive office; that Worthy, as former sheriff, had taken an oath to support the Constitution and had afterwards aided in the rebellion, and that he was thus disabled from holding the office by the already mentioned 14th amendment, and was, moreover, prohibited, because of that disability, by an act of the legislature of North Carolina, from qualifying under that act, and from holding office in that State.

Worthy thereupon filed his petition in one of the State

* Acts of 1868, chapter i, § 8.

courts of North Carolina, for a mandamus against the commissioners. His petition set forth that the laws of North Carolina created the office of sheriff; that it provided a particular mode of election; that by such mode he was duly elected; that it was necessary to give a certain bond, and that he was ready to give the bond, and was therefore entitled. But he did not claim or set up in any way any title, right, privilege, or exemption, under any clause of the Constitution, or under any statute or treaty of the United States, or commission held under them.

The decision of the county commissioners, rejecting him, was affirmed by the judgment of the Supreme Court of the State, and thereupon he took this writ of error, conceiving the case to fall within the 25th section of the Judiciary Act, which gives this court a right to review the judgments of the highest State courts, in certain cases, including those—

Where the validity of a statute or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, is drawn in question, and the decision is in favor of such their validity; or—

"Where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission."

Mr. Boyce now moved to dismiss the writ for want of jurisdiction, on the ground that the plaintiff in error had not set up below any claim under the Constitution, laws, or authority of the United States, but on the contrary had claimed exclusively under the law of North Carolina.

Mr. Scheffer, contra:

The 1st section of the 14th amendment of the Constitution of the United States, declares* that, "No State shall make

* Article xiv, § 1.

or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The Supreme Court of North Carolina has decided that a sheriff is an executive officer, and that the right to hold office by a person formerly a sheriff, and afterwards engaged in rebellion, is taken away by the 3d section of the 14th amendment. This is an assault upon an immunity and privilege granted to us by the 1st section of that same amendment. We have a right to know how far the guaranty of the 1st section extends; to complain at Washington that it has been insufficiently administered at Raleigh. Cases involving rights that are *protected* by the Constitution, come within the appellate jurisdiction of the Supreme Court, no matter whence the rights may spring.

The CHIEF JUSTICE delivered the opinion of the court.

It is manifest that this court has no jurisdiction of the present cause. There was no decision by the Supreme Court of North Carolina against the validity of any treaty or act of Congress, or authority exercised under the United States; nor in favor of the validity of a statute of, or authority exercised under a State, and alleged to be repugnant to the Constitution, treaties, or laws of the United States.

It is true that, in the brief of the counsel for the plaintiff, it is urged that the right of the plaintiff is protected by the 1st section of the 14th amendment; but this right does not appear to have been set up, or specially claimed in the State court; and this is essential to jurisdiction here.

We have no authority, therefore, to examine the question presented by the record; but must allow the motion of the defendants in error, and dismiss the cause for

WANT OF JURISDICTION.

UNITED STATES *v.* MERRILL.

Under the Act of July 13th, 1866, amendatory of the 4th section of the Act of March 3d, 1865, an officer in the regular army who during the rebellion accepted a commission of colonel in the volunteer organization, is not entitled to the three months' pay given by those acts to officers of that grade on being honorably discharged under the terms of the act from "military service;" he resuming his duty and rank in the regular army, and being still in the said service.

APPEAL from the Court of Claims.

Mr. Talbot, for the United States; Mr. Chipman, contra.

Mr. Justice CLIFFORD stated the case and delivered the opinion of the court.

Congress provided, by the fourth section of the act of the third of March, 1865, that all officers of volunteers now in commission, below the rank of brigadier-general, who shall continue in the military service to the close of the war, shall be entitled to receive, upon being mustered out of *said service*, three months' pay proper.*

Subsequent to the passage of that act, to wit, on the thirteenth of July, 1866, Congress passed another act upon the same subject, in which it is enacted that the fourth section of the prior act shall be so construed as to entitle all officers of volunteers to the three months' pay proper provided for therein, who were in service on the day when that act was passed, and whose resignations were presented and accepted, and who were mustered out at their own request, or otherwise honorably discharged from the service, after the ninth of April of that year.†

Prior to the month of August, 1861, the appellee was an officer in the regular army of the United States, and on the twenty-third of that month he was commissioned as a colonel of the second regiment of Missouri cavalry, which was a

* 13 Stat. at Large, 497.

† 14 Id. 24.

volunteer organization. He remained in such service until the fourteenth of December, 1865, when he was honorably discharged from the volunteer service, and resumed his duty and rank in the regular army.

None of those facts are controverted, and the appellee, by virtue of the premises, claimed that he was entitled to receive the sum of three hundred and thirty dollars for the three months' pay proper as such military officer, because he was in service on the day when the first-named act was passed, notwithstanding the fact that at the time he was discharged from the volunteer organization in which he was commissioned as colonel, he resumed his duty and rank and became entitled to his pay and emoluments as an officer in the regular army.

Although he was never mustered out of the military service of the United States, still he claimed three months' pay proper by virtue of his discharge from the volunteer organization, and accordingly applied to the proper officer of the department for the payment of the amount so claimed to be due, as provided in those acts of Congress; but the application was rejected because he was still in the military service under existing laws.

Payment being refused by the proper officers of the department, he filed his petition in the Court of Claims, setting forth the foregoing facts, and insisted that when he ceased to be an officer of volunteers in the manner prescribed by law he ceased to be in the military service as an officer of such volunteer organization, and that an honorable discharge from such volunteer service as much entitled him to the three months' pay proper as if he had been discharged altogether from the military service of the United States.

His theory of the law is that it bestowed a gratuity upon officers of volunteers, and that it makes no difference that he found himself immediately transferred to another branch of the military service by virtue of a commission in the regular army which he held before he was commissioned as colonel of volunteers and throughout the entire period of

that service; but it is not possible to concur in that proposition, as it seems much more reasonable to suppose that the object which Congress had in view was to provide for the loss to which the volunteer officers, when discharged from the military service, were exposed for the want of employment before they would be able to resume, to any considerable extent, their accustomed avocations in civil life. Most of the officers of that class left civil occupations to engage, for a period of uncertain duration, in the military service of the country, and the obvious purpose of that provision was that when they came to be discharged they should not be left without any compensation during the period which, in all probability, would elapse before they would be able to establish themselves in remunerative business pursuits.

Grant that the allowance was intended as a gratuity, still it does not follow that it was intended as double pay, or to embrace any officer who was to remain in the regular service. Read separately from the amendatory provision the fourth section of the first-named act describes three conditions, all of which must concur in order to establish the right to that allowance: (1.) That the claimant was an officer of volunteers in commission at the date of that act. (2.) That he continued in the military service to the close of the war. (3.) That he was honorably mustered out of the *said service* prior to the application, which means unquestionably that he was honorably mustered out of the military service of the United States.

Continuance in the service to the close of the war was essential under that provision; but the subsequent act provides that the applicant shall be deemed to be entitled to the allowance if his resignation was presented and accepted, and he was mustered out at his own request, or was otherwise honorably discharged from the service, after the month of April of that year.

The word service, as used in that act, means, beyond question, the military service of the United States, and it is equally clear that no such officer is entitled to that allowance unless it is shown that he was mustered out of the

military service of the United States, or was otherwise honorably discharged from that service subsequent to the time specified in the amendatory act.

By the finding in the court below it appears that the appellee was honorably discharged from the volunteer service; but the same finding shows that he, at the same time, resumed his duty and rank in the regular army, which is totally inconsistent with the condition prescribed in the act of Congress, that he must have been mustered out of the military service of the United States. He was honorably discharged from the volunteer organization, but that discharge did not terminate his connection with the military service of the country under his antecedent commission. On the contrary, he became thereby entitled to the pay and emoluments due to his rank as an officer in the regular army the moment his connection ceased with the volunteer organization.

None of the reasons which induced Congress to make the provision under consideration exist in the case of the appellee, as he has never been out of public employment for a moment since he accepted his commission in the regular army, and has no occasion to desire to re-engage in business pursuits.

DECREE REVERSED, and the cause remanded, with directions to

DISMISS THE PETITION.

IRVINE *v.* IRVINE.

1. When one makes a deed of land covenanting that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition enures to the grantee on the principle of estoppel.
2. Where a person has bought land and paid for it, the deed subsequently made in consequence does not confer a new title on him; but confirms the right which he had acquired before the deed was made.
3. The acts of September 4th, 1841, § 12 (5 Stat. at Large, 456); of May 29th, 1830 (4 Id. 420); and January 23d, 1832 (Ib. 496), relate to pre-

emptive rights conferred upon actual settlers, and do not apply to a case where the entry has not been made under any of them.

4. The deed of an infant purporting to convey lands operates to transmit the title, and is voidable only, not void.
5. Although it is not necessary to the affirmation of an infant's voidable deed that there be an act of affirmance by him, after he comes of age, as solemn in character as the original act itself, still *mere* acquiescence without anything else, is not generally sufficient evidence of affirmance. Any ratification or affirmance of a clear and unequivocal character, showing an intention to affirm the deed, is, however, enough.
6. Where the infant, having come of age and entered into partnership with third persons, took a lease for his firm of one part of the property which as an infant he had conveyed, from the person to whom he had so conveyed that part with other parts, the lease is proper to go to the jury, on a suit by the infant for these other parts alone, to show an affirmance of his deed for the whole; and with such evidence before the jury a court rightly refused to charge that the evidence showed *no* affirmance. Whether it did show an affirmance or not was, with this lease before them, matter for the jury to decide.
7. A court properly declines to give instructions on a hypothetical state of facts.

ERROR to the Circuit Court for the District of Minnesota. The case was thus:

Benjamin Irvine brought ejectment against his brother John Irvine, to recover from the said John possession of certain lots. He put in evidence a patent (founded on a preemption certificate) from the United States to him, dated 8th *October*, 1849, and embracing the lots in controversy. The patent recited full payment by the said Benjamin, "according to the provisions of an act of Congress of the 24th of April, 1820."

The defendant then offered in evidence a deed of conveyance from the plaintiff to him, dated 8th *May*, 1849, of the same premises as were described in the patent. To this evidence the plaintiff objected, because the deed, having been executed before the patent was issued, did not convey the estate which the plaintiff acquired by the patent.

[To understand the ground of the plaintiff's objection here, and particularly his first request, hereafter mentioned, for instructions to the jury, it is necessary to state that the 12th

section of an act of Congress, of September 4th, 1841,* referring to pre-emptive rights conferred upon actual settlers (and which apparently re-enacted one of May 29th, 1830,† which had been modified by one of January 23d, 1832‡), thus prescribed:

"That prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, . . . and all assignments and transfers of right hereby secured prior to the issuing of the patent shall be null and void."]

The court overruled the objection of the plaintiff, and admitted the deed offered; the plaintiff's counsel excepting.

The defendant having further put in evidence, under objection from the plaintiff's counsel, the certificate of the register of the contents of the records of his office, rested his case.

The plaintiff was then himself examined as a witness, and stated that when he executed the deed of May 8th, 1849, he was under 21 years of age, and that he was really *forced* by his brother, the defendant, who was 16 years his senior, to execute the instrument. There was no doubt as to the plaintiff's infancy at the time when he executed this deed. It appeared that the plaintiff had made pre-emption of the land; that he paid for it on the 21st of February, 1849, and took an informal receipt for it of that date, which was subsequently replaced by a formal duplicate, but of what date did not appear.

The plaintiff then rested, and the defendant put in evidence certain evidence, which tended to show that he had employed the plaintiff as his agent to enter the land for him, and that he, the plaintiff, had paid for it with money of the defendant intrusted to him for that purpose, entering it in his own name, and promising to convey it to the defendant.

* 5 Stat. at Large, 456. † 4 Id. 420. ‡ Ib. 496.

He also put in evidence a written lease, dated 8th day of May, 1854, from him, defendant, John Irvine, to the plaintiff himself and two other persons doing business as a firm, of *a certain warehouse*, situated on a parcel of the land described in the patent, and in the deed of the 8th May, 1849, but *not on any part of the premises described in the declaration.* There was also evidence of the plaintiff's having been in the neighborhood of the property when valuable improvements were put on a portion of it, though not the part for which this suit was brought; and also some other evidence set up to show affirmance.

The defendant then rested.

Upon the case already stated, and with the statute of September 4th, 1841, presented to the court, the plaintiff requested the court to give to the jury the instructions as hereinafter numbered, to wit:

1st. That the deed in evidence from the plaintiff to the defendant, dated 8th May, 1849, did not pass the estate acquired subsequently under the patent from the government to the plaintiff, even assuming the majority of the plaintiff at the time of its execution.

But the court declined so to instruct the jury.

2d. If the jury find that the said deed was executed by the plaintiff while under age (and the evidence is uncontroverted on this point), the said deed is void.

But the court declined so to instruct the jury.

4th. A deed of land executed by an infant may be avoided by the infant after he becomes of age, at any time within the period of the statute of limitations, which in this State is twenty years; that is, he may in such case in this State avoid his deed at any time within twenty years after he becomes of age.

And the court instructed the jury that such was the law, unless the infant had previously ratified the deed.

5th. Such avoidance may be by another deed of same land to

another grantee after the infant becomes of age, or it may be by suit, or by other similar unequivocal act.

And the court so instructed the jury.

6th. In case of sale or deed of real estate by an infant, there must be some act of affirmance by him after he becomes of age, as solemn in character as the original act itself; otherwise the deed may be avoided by him at any time before the statute of limitations bars him. Mere acquiescence, however long, if short of the statute of limitations, is not sufficient. The act of confirmation must be of such solemn and undoubted nature as to establish a clear intention to confirm the deed after a full knowledge that it was avoidable.

The court declined to instruct the jury that the act of affirmance must be as solemn in character as the original deed itself; but stated that mere acquiescence was not of itself sufficient evidence of affirmance, and that the ratification or affirmance must be of a clear and unequivocal character, showing the intention of the infant to confirm his deed.

7th. There is no evidence whatever of any affirmance or confirmation of the deed in this case by the plaintiff after he became of age, of the nature and character required. The evidence in this case shows no affirmance of this deed by the plaintiff after he became of age.

But the court declined so to instruct the jury.

8th. No agency or trust binding on the plaintiff has been shown to have been created or to have existed between the plaintiff and defendant during the infancy of the former. No contract is binding on the infant made during his infancy except for necessaries.

The court instructed the jury that the latter portion of this request was true, and that although an agency or trust could not be created binding upon the infant, still if there was subsequent ratification by the infant of acts done during his infancy he would be bound by them.

9th. Even had the plaintiff been of full age when the defendant gave him the money to enter the land, as the defendant testifies, and directed him, as the defendant testifies, to enter the land for defendant, and the said plaintiff had entered the land in his own name, still the defendant could not have compelled in law or equity the plaintiff to convey the property to said defendant.

The court declined to so instruct the jury upon the ground that it was admitted by the defendant that the plaintiff was not of full age when the money to enter land was given him, and consequently that this request had no application to the case in hand.

10th. No trust has been shown in this case between the parties to this suit by which the defendant could have enforced a conveyance of the land from the plaintiff to him.

The court declined to instruct the jury as above requested, but said that there had been evidence on the part of the defendant going to show that the plaintiff was employed to enter the land in question, and although an infant, as he afterwards affirmed, his acts would be bound by it.

11th. Even if the plaintiff had entered the land as agent of the defendant, and had entered it in his own name contrary to instructions of his principal, yet if the defendant afterwards approved of such entry, such approval was a ratification of said entry.

The court instructed the jury that this might be true, but that the evidence showed that the infant had conveyed the land after entry by him, and that it was for the jury to say whether he had ratified his deed.

12th. No acts of affirmance by the plaintiff have any bearing in this case, except they relate to the property described in the declaration, and all evidence on this point, except as to the lots described in the declaration, must be excluded and disregarded by the jury.

But the court declined so to instruct the jury.

To these refusals and instructions the plaintiff excepted.

Statement of the case.

The court then further instructed the jury as to the 4th, 5th, and 6th of the said instructions so prayed by the plaintiff as aforesaid:

The question here is not whether there has been an avoidance. The defence is that the deed has been ratified by the plaintiff. I am of the opinion that the ratification should be, if not equally solemn, of a clear and unequivocal character, showing the intention of the party to confirm the deed. An avoidance may be by a deed to a third party, or, as held in this country, in other ways. But the deed from the plaintiff to the defendant was not void; it was simply voidable, and passed the title absolutely, until by some adequate act he affirmed it. The question is, Has it been disaffirmed or ratified by the plaintiff since he came of age? All the facts in proof, such as leasing part of the property, remaining in the vicinity a long time without asserting his claim while valuable improvements were being put on the property, are to be considered by the jury in deciding whether there has been a ratification by the plaintiff; but mere acquiescence does not amount to a ratification. The authorities are somewhat conflicting as to what is necessary to constitute an avoidance. Lord Lyndhurst was of opinion that a deed was necessary to avoid a deed given while under age. I think that this doctrine is perhaps sound, and ought to have been held in this country; but it has been held in this country that an infant may avoid his deed by going upon the land, or by bringing suit, &c. And with the foregoing qualification the 6th instruction asked by the plaintiff's counsel is correct, with the exception that the counsel has reversed the application of the law in his proposition. The act of avoidance and not the ratification is what the law requires to be equally solemn with the conveyance.

To which instructions, in so far as they differed from, or changed or qualified the instructions prayed for by the plaintiff, the plaintiff excepted.

And the court further instructed the jury that there had been evidence on the part of the defendant going to show that the plaintiff was employed as an agent to enter the land in question, and although an infant, if he afterwards affirmed his agency, he would be bound by the terms of such agency. To which instruction the plaintiff's counsel excepted.

Verdict and judgment having gone for the defendant, the plaintiff brought the case here on error.

Mr. Allis, for the plaintiff in error:

The court erred in admitting the deed from plaintiff to defendant of 8th May, 1849. It could not convey the estate and title subsequently acquired by the plaintiff under the patent. If it be regarded as an attempt to convey or assign the right secured to the plaintiff by his pre-emption of this land, it was *void* under the 12th section of the act of Congress of September 4th, 1841, by virtue of which the pre-emption was made. If thus void as coming within the prohibition of this section 12, the covenants in it would be inoperative for any purpose. A deed *void* in its granting part cannot certainly be operative as a conveyance by virtue of its covenants.

The only view in which the lease and other similar evidence could have been offered, was that it tended to prove the confirmation of the deed of the 8th May, 1849, by the plaintiff after he became of age. But it is no evidence of such confirmation, because—

1st. It does not affect the property described in the declaration.

2d. In the case of sale or deed of real estate by an infant, the sale is void, and the act of affirmance by him after he becomes of age must be as solemn in character as the original act itself.

The learned counsel then took up each of the requests to the court, and each of the instructions refused; observing, in conclusion, that the whole case resolved itself into two questions.

"1. Was the deed of 8th May, 1849, void, by reason of its contravening the 12th section of the act of Congress, of September 4th, 1841; OR, ineffectual to pass the subsequently acquired title and estate of the plaintiff under the patent of 8th October, 1849?

"2. If the deed was merely *voidable*, by reason of the infancy of the grantor, did he, after he came of age, *affirm* the deed?"

And he conceived that he had shown that the first question should be answered in the affirmative, and the second in the negative.

No opposing counsel.

Mr. Justice STRONG delivered the opinion of the court.

Though the exceptions found in this record are numerous, the questions which they present are few. If the answers given to the requests of the plaintiff for instructions to the jury were correct, it is certain that the objections made by him to the admission of evidence were unfounded. Those objections were all based upon the assumption that the evidence offered was immaterial and irrelevant to the issue. Whether the assumption was well grounded will be seen when we consider the law of the case as expounded in the charge to the jury.

The plaintiff submitted twelve propositions, which he asked should be given to the jury as instructions. The first was in substance that the deed of May 8th, 1849, from the plaintiff to the defendant, did not pass the estate acquired by the plaintiff under the patent from the United States made subsequently, to wit, on the 8th of October, A.D. 1849, and that it would not have passed the estate had the plaintiff attained his majority before the deed was made. It is a general rule, that when one makes a deed of land, covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition enures to the benefit of his grantee, on the principle of estoppel. As the deed of the plaintiff in this case contained an assertion that he was well seized in fee, and had good right to sell and convey in fee, it would not be difficult, were it necessary, to show that in taking the patent he was in law acting for his grantee. But it is not necessary to rely upon that principle. The evidence in the case was, that prior to his deed to the defendant, to wit, on the 21st of February, 1849, he had bought the land from the government, and had paid all the purchase-money. The patent subsequently given to him

was, therefore, not a new acquisition of title. It was only a confirmation of the right which he had acquired before the deed was made.

But it is argued, on behalf of the plaintiff, that the deed was inoperative, because it was forbidden by the 12th section of the act of Congress of September 4th, 1841, which granted pre-emption rights, and enacted that any grant or conveyance made before the entry of the land shall be null and void, except in the hands of *bonâ fide* purchasers for a valuable consideration. To this it may be answered, that neither that act nor the acts of May 29th, 1830, and January 23d, 1832, have any application to the present case. They relate to pre-emptive rights conferred upon actual settlers. The plaintiff did not enter the land in dispute under either of these, and no act of Congress deprived him of the power to sell and convey *after* he had made an entry and paid all the purchase-money, though before he had received his patent. The court could not then have affirmed the proposition which the plaintiff submitted.

His second point was that the deed was void because made by the plaintiff during his minority. This the court refused to affirm. Whatever may have been the doubts once entertained, it has long been settled that the deed of an infant, being an executed contract, is only voidable at his election; that it is not void. It operates to transmit the title. And there are some cases, of which the present, in one aspect of it, may possibly have been one, in which such a deed is held to be not even voidable. They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do.* Whether this was such a deed need not be considered, for conceding that it was not, clearly it was not void.

The third proposition of the plaintiff does not appear in the record.

The fourth and fifth were affirmed, and the sixth was answered correctly.

* See Zouch *v.* Parsons, 3 Burrow, 1794.

Opinion of the court.

The minority of the plaintiff at the time when he made his deed to the defendant was an admitted fact, and this suit was an attempt to avoid the deed. The evidence disclosed nothing that could amount to an avoidance of the deed before the suit was brought; nothing which the law recognizes as an act of avoidance. The struggle at the trial was over the question, whether the plaintiff had not *confirmed* the deed after he came of age? He contended, and he asked the court so to instruct the jury, that an act of affirmance must be of as solemn a character as the deed itself. This instruction the court declined in terms, stating, however, that mere acquiescence, however long, if short of the statutory period of limitations, is not sufficient, and that an act of confirmation, if not equally solemn with the deed, must be of such a solemn and undoubted nature, of such a clear and unequivocal character, as to establish a clear intention to confirm the deed after a full knowledge that it was voidable. Certainly this was all that the plaintiff had a right to demand. There is a well-recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those that are sufficient to confirm it. The authorities frequently assert that such a deed cannot be avoided except by some act equally solemn with the deed itself. Some assert that it cannot be done by anything short of an entry; and this whether the deed operates by livery of seisin, or transmits the title by virtue of the statute of uses. Others hold that it may be avoided, without a previous entry, by another deed made to a different grantee. But all the authorities recognize the doctrine, that acts which would be insufficient to avoid such a deed may amount to an affirmance of it. While generally it has been held that mere acquiescence, though long continued, will not suffice; yet even that, in connection with other circumstances, may establish a ratification.* And, where an infant had sold land, and

* Cresinger *v.* The Lessee of Welch, 15 Ohio, 193; Drake *v.* Ramsey, 5 Ohio, 251; Ferguson *v.* Bell, 17 Missouri, 347; Bostwick *v.* Atkins, 3 Comstock, 53.

after coming of age saw the purchaser making large expenditures in valuable improvements upon the land sold, and said nothing in disaffirmance for four years (facts very like those appearing in this case), it was held that the circumstances were not such as to excuse this long silence, and there being evidence that after he had reached twenty-one years of age he had said that he had sold the land, had been paid for it, and was satisfied, and had authorized an offer to purchase it, it was ruled, as a legal conclusion, that he had confirmed his deed.* So in *Wallace's Lessee* v. *Servis*,† it was adjudged that an infant's acquiescence in his deed for four years after he came of age, in view of extensive improvements made upon the property, amounted to a confirmation.

There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to his grantee. Now, if the deed be avoided the ownership of the land is retransferred. The seisin is changed. There is fitness in a rule that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand a confirmation passes no title; it effects no change of property; it disturbs no seisin. It is therefore itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner.

By the seventh proposition the court was asked to instruct the jury that there was no evidence of any confirmation of the deed by the plaintiff after he came of age, and that the evidence showed no affirmance. Whether the evidence showed an affirmance or not was a question for the jury and not for the court, if there was any tending to show it; and that there was is beyond doubt. Had there been nothing more than the lease of a part of the land conveyed, a lease made by the defendant to the plaintiff, with others, on the

* Wheaton *v.* East, 5 Yerger, 41–62.

† 4 Harrington, 75; see also Hartman *v.* Kendall, 4 Indiana, 405.

8th of May, 1854, it would have been impossible for the court to have withheld from the jury the inquiry whether the plaintiff had not confirmed his deed, or to have declared there was no evidence of confirmation. True the lease was not for the particular parts of the land conveyed by the deed which are the subjects of the present suit, but it was still very significant. The defendant held the part demised by the same title by which he claims the lots now in dispute, to wit, under the plaintiff's deed. He held by no other right. If the deed was effective to assure to him the premises demised, it was equally so to protect him in the ownership of the lots, for it conveyed the whole property, the lots and the demised premises. When, therefore, the plaintiff signed and sealed the lease, he acknowledged by a solemn act that the defendant rightfully held under the deed. It might well have been inferred from this that he intended to assent to the conveyance he had made. There was other evidence of ratification, but this suffices to show that the plaintiff's proposition was inadmissible.

The eighth and tenth points relate to some evidence that had been given, tending to show an employment of the plaintiff by the defendant to enter the land for him, and that the plaintiff paid for it with the defendant's money, furnished to him for that purpose. The court was asked to instruct the jury that no trust or agency had been shown which could have been enforced. We do not perceive how the court could rightfully have affirmed what was asked. An infant may undoubtedly be a trustee, and be compelled to execute his trust. Especially, if after he came of age, he affirms the trust, and ratifies the acts which he did in accordance with the trust, will it be out of his power to deny that any trust ever existed. But we need not discuss this subject; it is of small importance to the case. It is enough that, in our opinion, it was not for the court to deny that there had been a resulting trust, and had they denied it the plaintiff would have gained nothing. The controlling question, the one submitted to the jury, was whether he had conveyed his interest, whatever it might have been, to the de-

fendant, and whether he had confirmed his conveyance after he attained his majority.

The ninth request for instruction presented an abstract question not raised by anything in the case. The court did well to decline answering it. Certainly it should not have been affirmed.

The eleventh proposition was affirmed, and the twelfth was correctly answered, as we have shown in our remarks upon the seventh.

We have thus reviewed the entire record and have found no error. If anything has been left unnoticed it is because we consider it unimportant. The plaintiff has himself well summed up the case by stating that there are but two questions presented by it: "First, was the deed of May 8th, 1849, void by reason of its contravening the act of Congress of September 4th, 1841, or ineffectual to pass the subsequently acquired title and estate of the plaintiff under the patent of October 8th, 1849? Second, if the deed was merely voidable by reason of the infancy of the grantor, did he, after he came of age, affirm it?" The first we have answered in the negative, and the second was properly submitted to the jury.

The judgment of the Circuit Court is

AFFIRMED, WITH COSTS.

THE CORSICA.

1. Where two vessels, moving under steam, are crossing so as to involve a risk of collision, if the ship which has the other on her starboard does keep out of the way of the other, as a ship in that position is directed to do by the Rules of Navigation adopted by Congress, by the act of April 29th, 1864, and a collision occurs, from the other vessel's not having kept on her course—as under the said rules, it is impliedly her duty in such a state of movements to do—the obligation rests on this last vessel to show sufficient causes existing in the particular case which rendered a *departure* from the rule necessary to avoid an immediate danger.

Statement of the case in the opinion.

2. A steam vessel sailing in a harbor like that of New York, where there are vessels at anchor and in motion, is bound to move at no headway not entirely controllable.

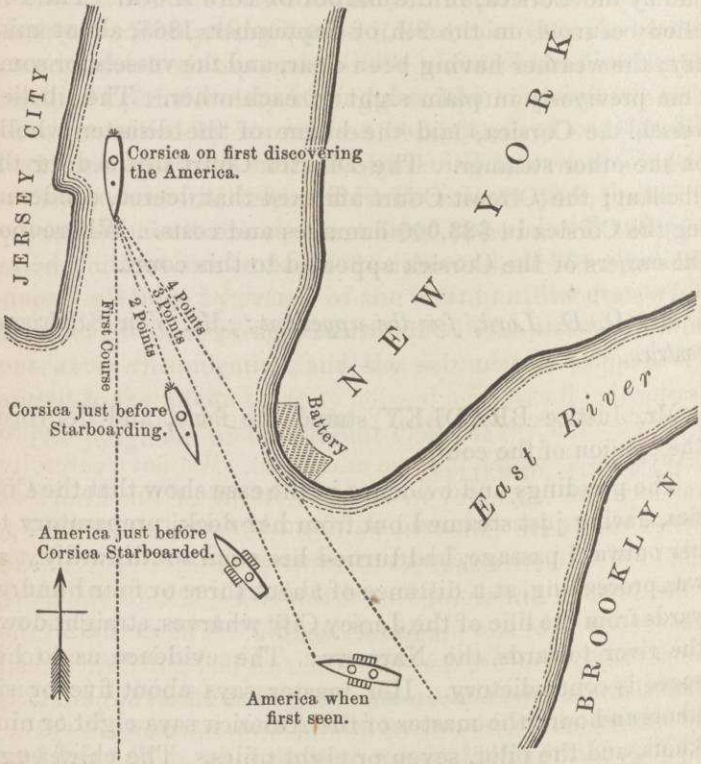
APPEAL from the Circuit Court for the Southern District of New York, affirming a decree of the District Court of said district; in which latter court Samuel Schuyler, owner of the steamer America, had libelled the steam-propeller Corsica, one of the steamers of the Cunard line, for damages which his vessel had suffered by being, as he alleged, run into by the Corsica, in the harbor of New York. The collision occurred on the 9th of September, 1865, about midday; the weather having been clear, and the vessels for some time previously in plain sight of each other. The libelled vessel, the Corsica, laid the blame of the disaster wholly on the other steamer. The District Court decreed for the libellant; the Circuit Court affirmed that decree, condemning the Corsica in $33,000 damages and costs. Whereupon the owners of the Corsica appealed to this court.

Mr. D. D. Lord, for the appellant; Mr. Van Sandvoord, contra.

Mr. Justice BRADLEY stated the facts, and delivered the opinion of the court.

The pleadings and evidence in the case show that the Corsica, having just steamed out from her dock, preparatory to her outward passage, had turned her stem southwardly, and was proceeding, at a distance of about three or four hundred yards from the line of the Jersey City wharves, straight down the river towards the Narrows. The evidence as to her speed is contradictory. Her master says about five or six knots an hour; the master of the America says eight or nine knots, and the pilot, seven or eight miles. The chief engineer of the Corsica says she was gradually increasing her speed, and had got up to fifteen revolutions per minute; that at full speed she made twenty-five revolutions and ten knots an hour. Fifteen revolutions would therefore make about six knots, which is equivalent to seven miles an hour. A

number of vessels were at anchor on the westerly side of the river, and some to the east; amongst others two ships nearly opposite the Battery, one a little southerly of the other. Whilst the Corsica was thus starting on her course, the America came around the Battery from the East River, at a speed of about six miles an hour, passed between the two ships above mentioned, and directed her course across the river in a diagonal line, making for her wharf in Jersey City, where she was accustomed to take in coal and water. Her



course lay across that of the Corsica, and the men on the two vessels each saw the approach of the other when they were about four hundred or five hundred yards apart. From the course the vessels were respectively pursuing, the one southerly, nearly in line with the river, and the other north-

westerly, in a diagonal line, the Corsica was off the starboard bow of the America, and the latter was off the larboard bow of the Corsica. Both being steamers, and standing on an equal footing, they were subject to the following rule, adopted by Congress in the act of April 29th, 1864:*

"If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

This rule made it the duty of the America to keep out of the way of the Corsica; and, by implication, the corresponding and reciprocal duty of the Corsica to keep on her course. It can hardly be doubted from the evidence, taken together, that had the Corsica kept on her course, the collision would not have occurred. The diagrams furnished by the counsel for the appellants render this fact very clear and demonstrable. But, instead of doing this, the persons in charge of the Corsica, just before the collision occurred, ordered her helm hard a-starboard, and thus turned her right upon the America, which, as in duty bound, was backing out of her way. It is so apparent that this was the immediate cause of the disaster that it casts the burden of proof upon the appellants to show a sufficient cause in the conduct of the America to justify such a sudden change of course. We have carefully examined the testimony to see if anything of the kind was elicited, and have failed to find it. It is admitted by the pilot of the America that his first intention was to pass ahead of the Corsica; but seeing that it was risky, he took the more prudent course of stopping and backing. The master of the Corsica says, in effect, that the America had got right ahead of him, in his way, and he was obliged to turn to the left as the best means of avoiding or diminishing the danger. Now, the diagram of the courses of the two vessels shows that this could not have been so, until the Corsica had herself changed her course. And the master of the Corsica admits that instead of keeping her course, her helm was starboarded, and

* 13 Stat. at Large, 60.

Statement of the case.

her course was altered two points, for the purpose of passing under the stern of the America, soon after the latter vessel was discovered. This, if so, was the first error. It was the business of the Corsica, as we have seen, to have kept on her course. After this, perceiving the danger she had brought upon herself, her helm was again starboarded, and the collision ensued. According to the master of the Corsica's own account, therefore, the accident occurred in consequence of her assuming to perform the duty which devolved on the America under the Congressional rule above quoted.

It is also evident that the Corsica was under considerable headway when the collision occurred. The force of the blow proves this. The America did not contribute to the effect of the blow, for the weight of the evidence is, that she was backing away from the Corsica at the time. The fact is, that the latter vessel was under too much speed for the place she was in—a crowded harbor, spotted with vessels at anchor and in motion. This made her headway uncontrollable, and accounts for the fact that, although her officers tried to check her speed, they were only very partially successful.

We are satisfied that the decree of the Circuit Court was right, and ought to be

AFFIRMED.

CITY OF PARIS.

1. The rule declared in the preceding case as to the obligation of large steam vessels moving in a crowded harbor, like New York, to move slowly and to keep themselves under such entire control as to be able to stop on short notice, declared anew.
2. Such steamers should keep a vigilant lookout, and if they enter narrow passages, between other vessels, do so only when they plainly see that they can proceed through them without danger to other vessels. If notwithstanding all their caution and vigilance they see any vessel approaching, so as to make a danger of collision, they should stop and reverse their engine as soon as is possible.

THIS was an appeal in admiralty from the decree of the Circuit Court of the United States for the Southern District

Statement of the case in the opinion.

of New York; affirming a decree of the District Court on a libel in admiralty; the waters where the collision took place having been the very same as in the collision in the last case; those, namely, between Jersey City and the Battery at New York.

Mr. Justice SWAYNE stated the facts and delivered the opinion of the court.

The cause was one of collision. The vessels concerned were the schooner Percy Heilmar and the steamer City of Paris. The schooner was 78 feet in length; her tonnage, new measurement, was 107 tons; her carrying capacity was about 170 tons. The City of Paris was an iron screw steamer. She was 375 feet long, and 40 feet beam. Her register was 1669 tons, English measurement. Her engines were 600 horse power. The schooner was laden with coal, and was on a voyage from Philadelphia to Pawtucket, Rhode Island, by way of Long Island Sound.

The steamer was engaged in running between the ports of New York and Liverpool. The collision occurred on the morning of the 14th of April, 1866, below the Battery, in the North River. The schooner had arrived at the port of New York that morning. The tide being unfavorable for ascending the East River, she stood over towards Jersey City to find a suitable place to anchor, intending to wait there until the tide in the East River should be favorable. While proceeding to carry out this purpose, heading about west by north, with the wind free, the steamer ran into her, striking her on the starboard side, about the main chains. The blow was of such violence as to prostrate her mainmast and cut her nearly in two. As soon as she was struck the steamer put on steam and carried her forward to avoid raking, or being raked by other vessels, which the pilot of the steamer says "would have done more damage than sinking a dozen schooners." The schooner hung for a time on the steamer's bow. The pilot says: "As soon as we got below, a little out of danger, a little room, then we stopped the steamer, backed on her hard, backed out from the schooner, and she

went down." All this happened so quickly that those on board had difficulty in escaping with their lives. They lost everything else. The captain was knocked overboard and rescued by a small boat which happened to be present.

The course of the schooner was nearly at right angles with the course of the steamer. It lay between a brig and a ship—both with their heads to the eastward, and one a little astern of the other. They were about three hundred feet apart. The brig was on the starboard and the ship was on the port side of the schooner. The course of the steamer was between the same vessels, with the ship on the starboard and the brig on her larboard side. The pilot says he picked out this course, though it was "pretty narrow." The subject was talked over. His plan was to go under the stern of the brig and ahead of the ship.

As almost invariably happens in this class of cases, each vessel has a theory which vindicates itself and condemns its adversary; and, as usual, each theory is earnestly supported by those on board the vessel which propounds it. In this case it is clear there is fault and responsibility somewhere. Our duty is to find where they belong and to pronounce accordingly. The District Court adjudged against the steamer, and the Circuit Court affirmed the decree.

The theory of the schooner is, that she was keeping her course, as she had a right to do, and that the steamer was wholly in fault. The steamer maintains that as soon as the schooner had passed under the stern of the brig, she descried the steamer for the first time and luffed, intending to pass between the brig and the steamer; that the steamer backed hard to enable her to do so, and that the schooner thereupon immediately fell off into the line of the steamer's course, and thus brought about the catastrophe. The steamer insists that if the schooner had kept her course, without luffing, the steamer would have passed under her stern; that if the schooner had continued her course after luffing, she would have passed between the steamer and the brig, and that her subsequent change of course was a gross fault, the sole cause of the collision, and deprives her of all

claim to damages for the consequences. These conflicting views define the sphere of our inquiries in the case.

The morning was clear. The river was crowded with vessels sailing and at anchor. The condition of things required the greatest circumspection on the part of the steamer. Her rate of speed was probably from seven to eight miles an hour. The combined speed of both vessels was not less than ten miles an hour. The schooner was first seen by Mathewson, who was then, and had been from the time the steamer left the wharf, on her forecastle head as a lookout. He says that when first seen the schooner was from three to four points off the port bow of the steamer, and, he thinks, was distant about four hundred yards. Captain Kennedy, of the steamer, thinks she was a quarter of a mile off. Estimates of distance, under such circumstances, are little to be relied upon. It is to be presumed the witnesses in this instance made it large enough. Conceding that the distance to be passed by both vessels, to the point of collision, was a full quarter of a mile, the combined speed of ten miles an hour would have brought them together in a minute and a half. Mathewson reported the schooner as soon as he saw her. The orders that were given show the perturbation which existed. Captain Kennedy says: "When the schooner was reported, the pilot and myself both ordered the helm hard a-starboard. I said, along with the pilot, hard a-starboard, and at the same time reduced the engines dead slow. . . . The next order was to stop the engines and reverse full speed. I worked the indicator myself." The orders to slow, to stop, and to reverse the engines came too late. The steamer had but a little way to go. The headway she was under could not be arrested at once. It carried her forward with such force that her impact was necessarily fatal to the schooner. Her starboarding did no good. She could not go to the port side more than two points without colliding with the brig. She passed within an ordinary ship's length of the stern of that vessel.

We think that if there had been due care and vigilance the schooner would have been seen at an earlier period.

There was nothing to prevent it. The result evinces gross negligence. As soon as it was seen that the schooner was approaching the track of the steamer, the steamer should at once have stopped or reversed her engines, and have done all in her power to avert the impending peril.* She ought not to have entered upon the narrow track between the ship and the brig, without being very careful first to see that her passage would involve no danger to any approaching vessel in its transit.

The results proved that the speed of the steamer was higher than was consistent with the safety of other vessels in so crowded a thoroughfare, and hence higher than she was warranted to assume.

For these faults she must be condemned.

Was the schooner in fault?

When she passed the brig and reached the steamer's track she was pursuing her regular course. This she had a right to do, and the duty rested upon the steamer to see her and keep out of her way.† At this point blame is imputed to her. Locman, the pilot on the brig, says, "she luffed a little, and then kept off immediately after she luffed." The pilot on the steamer says she luffed "a very little while. It seemed to me about long enough to get his wheel down and then hove it up again. He appeared to be in a confused state; got frightened, and did not know exactly what to do." The conduct of the schooner must be considered in the light of the facts. They were enough to produce consternation. As she passed the stern of the brig the peril of her position became apparent. A steamer of immense power was bearing down directly upon her, and rapidly approaching. Escape seemed impossible and destruction inevitable. There was no time for reflection or precaution. The vessel and the lives of all on board were at stake. The acts complained of were done in the excitement of the moment, and *in extremis*. Whether they were wise it is not material to inquire. If

* Acts of Congress, April 29th, 1864, 13 Stat., 61, art. 16.

† Act of 1864, art. 15.

unwise, they were errors and not faults. In such cases the law in its wisdom gives absolution.* It is by no means clear to our minds that if the schooner had failed to luff the results would not have been still more disastrous. It is quite probable that the steamer would have struck her midship, have passed over her, and destroyed the lives of all on board. Her conduct neither caused nor aggravated the catastrophe. After reaching the steamer's track she had no power to avoid it. We find in the record no ground upon which we can hold her responsible in any degree for the casualty.

The fact that both the courts below concurred in condemning the steamer and in exonerating the schooner is entitled to our respectful consideration.†

DECREE AFFIRMED.

UNITED STATES v. ROCHA.

1. The eleventh section of the act of March 3d, 1851, to ascertain and settle private land claims in California (9 Stat. at Large, 631), provides that the commissioners created under the act, and the District and Supreme Courts, "in deciding on the validity of any claim brought before them under the provisions of the act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable." An appeal from a decree of the commissioners rejecting a claim having been made to the District Court, and there dismissed for want of prosecution, leave to file a bill of review upon newly discovered evidence was granted by that court: *Held*, that though the provision of the eleventh section refers to the rules to be observed by the courts in passing upon the merits of the claimant's right, or title to the land, the liberal and equitable principles there enjoined as a duty in the decision of cases, cannot be fully or fairly carried out without giving to them application and effect in conducting the proceedings before the courts as well as in passing upon the merits; and that to this end the court possessed the power to open a case for the purpose of hearing newly discovered evidence upon the title of the claimant.

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* The Grace Girdler, 7 Wallace, 201. † Ib.

Statement of the case.

2. In 1828 certain parties petitioned the authorities of the pueblo of Los Angeles, in California, for a grant of a tract of land, erroneously supposed, at the time, to be within the limits of the pueblo; the grant was made, and under it the grantees took possession of the premises, and they, or their representatives, continued to occupy them until the presentation of the claim to the board of land commissioners, under the act of Congress of March 3d, 1851. In 1840 the widow of one of the grantees presented a petition to the prefect of the district soliciting the land, and reciting that the land had been ceded provisionally to her deceased husband. The prefect referred the petition to a justice of the peace, at Los Angeles, for information in respect to the petition and the petitioner; the justice reported that there was no objection to a concession of the land to her; and the prefect then communicated to the governor of the department the petition of the widow, and advised him that there was no objection to the granting of the petition. The governor thereupon decreed that all the places ceded for ranchos in that jurisdiction should remain as provisional grants until the ejidos (common lands) of the city should be regulated. *Held*, that under this decree of the governor the widow and her children took the title provisionally, that is, if the tract fell within the limits of the town-land, when they were ascertained, it should be inoperative; but if outside these limits, the title should become absolute.

APPEAL from the District Court of the United States for the Southern District of California.

This case involved the right to one league of land in the county of Los Angeles, California, claimed by the children and grandchildren of Antonio José Rocha, an early settler in the pueblo of Los Angeles, where he long exercised the art of smithing. The land was called *La Brea*, which is the Spanish word for pitch or bitumen, and this name was given the rancho because it contained a large asphaltum spring, which added much to its value. From this fact the rancho was easily identified, and it had been well known by one name for more than forty years.

On the 6th of January, A.D. 1828, Rocha and one Dominguez petitioned the ayuntamiento or town council of the pueblo of Los Angeles for a grant of this place, called Ranch De La Brea. On the 8th of April, 1828, the petition was granted by the ayuntamiento, and the title was issued in the following form, indorsed upon the petition:

"The parties interested in this petition can build their cor-

rals, place their stock, make their fields in the lands which they have signified, on the same terms, conditions, and circumstances as the other citizens have done who have received such a favor, being responsible for care, and only to report any crime which they may notice within their boundaries.

"CARILLO."

This is the usual form of a municipal grant for the *ejidos* and *proprios* of a town.

It was not now asserted that this concession vested a valid title in the petitioners, although they at the time believed it did. The land proved to be outside of the limits of this pueblo. For many years it was supposed by the inhabitants and municipal authorities of the pueblos of California that each town was entitled to sixteen square leagues, or four leagues square, of land. The quantity of land to which a pueblo was actually entitled under the laws of Spain and Mexico was four square leagues, and no more.*

In an order of Pedro Nava, dated June 21st, 1791, at Chihuahua, reference was made to the foregoing laws as to the quantity of land which a pueblo should take, and the law is ambiguously stated as follows:

"The extent of four leagues, measured from the centre of the plaza (square) of the presidio (garrison), in each direction."

The mistake of Nava was subsequently followed in several orders and decrees of the governors of California, issued in relation to the pueblo lands. Hence the general impression that a town was entitled to sixteen square leagues. Carillo, the president of the ayuntamiento, who signed the grant under consideration, testified that the land was considered at the time as belonging to the town, and that before the grant *it was occupied by the town.* The city of Los Angeles, in its petition to the late board of land commissioners, claimed sixteen square leagues, and prayed confirmation for

* Decree of Philip II, Laws of the Indies, book 4, title 5, law 6, ordinance Philip II; Recopilacion, law 10, book 4, title 5; Opinion of Galindo Navarro, Assessor-General, June 21st, 1786.

that quantity. Much proof was taken to support that theory, but it was subsequently ascertained that the true quantity was four square leagues, for which a decree was entered and a patent subsequently issued. Indeed, even now the inhabitants of Los Angeles were in the habit of speaking of the old pueblo lines and the new pueblo lines. The land in question was situated within the sixteen square leagues claimed, but without the four leagues patented.

On the 13th of April, A.D. 1840, Maria Josefa, the widow of Rocha, who in the meantime had died, petitioned the prefect of the second district, reciting that the place called "La Brea" was ceded provisionally to her husband in 1828, from which time it had been occupied by his family, and praying for a definitive grant of the same. On the next day the prefect referred this petition to the justice of the peace for information, and on the 28th of the same month the justice reported favorably to the grant, stating that he had gone with two witnesses to examine the land, found the diseño or map to be in conformity with the petition, and that the petitioner had the proper quantity of stock to occupy the land. On the 2d of May, 1840, the prefect of the second district recommended to the governor that the prayer of the petitioner be granted, assigning as a cause that the petitioner was a widow having charge of a family; and on the 10th of May the prefect issued and delivered to the petitioner a certificate, as follows, countersigned by his secretary:

"In conformity with the disposition of his excellency the senor governor, communicated to this prefecture in a note of the 27th of April last, with respect to that resolution of the excellent departmental junta, all of the places ceded for ranchos of this jurisdiction will remain of the character of provisional until the ejidos of the city shall be regulated. I have made known the said superior disposition to the interested party to this petition, and she remains informed."

The expediente of these proceedings was found in the archives, "Departmental State Papers, Angeles, Miscellaneous," vol. xii.

Statement of the case.

From some cause or other doubt arose in the mind of the widow of Rocha as to whether the title issued to her husband by the city of Los Angeles was sufficient. This appeared from the fact that she terms it "provisional," though it was not more so than other municipal grants. She therefore instituted the proceedings stated above before the prefect for a more formal concession. Usually, proceedings for a grant of land under the colonization laws were begun by presenting a petition to the governor, who referred the petition to some of the local authorities for information. Sometimes, however, when the lands were situated and the parties lived at a great distance from the seat of government,* the preliminary proceedings were begun before a prefect, who made the usual reference for report, received the same, and then transmitted all the papers to the governor for his action. That was the course pursued in this case, and was in strict conformity to the following decree, the original of which was on file in the office of the surveyor-general of the United States at San Francisco:

"Juan Bautista Alvarado, governor, *ad interim*, of the department of the California, to the inhabitants thereof: Know ye, That it being important that the public business of the department may be promptly dispatched, I have thought proper to decree as follows:

"1st. All those who make petitions in relation to lands, or others of this nature, will direct the same to the prefects of the respective districts, who will make reports on said petitions.

"2d. These expedientes shall be directed to the Secretary of State by the prefects. And that this may reach the notice of all, I order that this be published as a decree, and circulated in all the places of the department.

"Given in Monterey, at the governor's house, on the 7th of March, 1839.

"J. B. ALVARADO.

"MANUEL JIMENO,

"Secretary."

* Monterey, the seat of government, was over four hundred miles from Los Angeles.

"OFFICE OF THE SECRETARY OF STATE.

"His Excellency, the governor, has ordered me to inform your honor, that at this date, there was issued to the subordinate authorities of the district under the charge of your honor, copies of the orders referred to; one of them being in relation to the division of the department into districts, in accordance with the resolution of the most excellent departmental junta; and others, that petitions for lands, and others of this class, shall be directed to the corresponding prefecturas; communicating them separately, and at the same rate, to the subaltern authorities, which, in the future, shall be attended to directly by the officers referred to in the decree regulating the affairs of the department, of the date of March, 1837. God and Liberty.

"MANUEL JIMENO.

"To the Prefect of the First District, Don José Castro.

"MONTEREY, March 11, 1839."

The governor, when he received the petition of the widow and the report of the prefect, was uncertain whether or not the land solicited was included within the limits of the town-lands or ejidos of Los Angeles; and for this reason he issued his decree in the form he did, that this, as well as all other places ceded for ranches within the jurisdiction of the second district, should remain as provisional grants until the ejidos of the city of Los Angeles should be regulated. The records showed that the city had made numerous grants in the form of the one issued to Rocha and Dominguez on the 8th of April, 1828. The ejidos of Los Angeles were not marked out under the Mexican authorities, nor were they in fact ever defined, until surveyed by the surveyor-general of the United States, under the decree confirming four square leagues of land to the city.

The claimants relied, for confirmation of their claims before the board of land commissioners, upon the grant issued by the ayuntamiento (town council) of Los Angeles, and the long-continued possession of the grantees or their legal representatives thereunder, which was from the date of the grant. The commissioners rejected the claim solely on the ground of the want of a sufficient description of the tract.

The board expressed no doubt as to the genuineness of the papers or the effect of them in the conveyance of a right to the tract. The decision was made in March, 1855. The parties appealed to the District Court, where an issue was made up in January, 1858, and in August, 1860, the appeal was dismissed for want of prosecution.

In February, 1861, a notice was given to the United States attorney of a motion to the court for a bill of review on newly discovered evidence, which was heard and granted in October, 1862. The newly discovered evidence was found among the Spanish or Mexican archives of the executive department, in the surveyor-general's office of California, where they were kept, according to law, upon a diligent search in September, 1860. Search had previously been made, but failed, as there was no indices to the volumes of these records. These documents consisted of the petition of the widow to the prefect, and the proceedings thereon, including the decree of the governor, which are set forth above.

On the 4th October, 1862, leave to file the bill of review was granted. It was subsequently filed, and an answer put in to the same, and leave granted to take further testimony. Four witnesses were examined on the part of the appellant, in addition to those examined before the commissioners; and, on 8th of December, 1864, the decree of dismissal was set aside, and the decision of the commissioners reversed, and the claim of the appellants confirmed. The testimony produced by the claimants showed that their ancestor entered into possession of the land claimed as early as April, 1828; and that the possession by the claimants and their ancestors had been continuous and uninterrupted from that time to the present, under claim of title from the government.

Messrs. Brent and Wills, for the United States; Mr. C. Cole, contra.

Mr. Justice NELSON delivered the opinion of the court. Several objections are taken to the decree of the court be-

low. The first is, that this court had no power to grant the relief prayed for by a bill or petition of review. As we have seen, the cause was dismissed the 8th of August, 1860, for want of prosecution; and, on the 22d of February, 1861, some five months afterwards, notice was given for leave to file this petition, which was granted on the 4th of October, 1862, at a special term of the court, sitting at Los Angeles. There was no great delay, therefore, in making the application for relief, founded on the newly discovered evidence. The ninth section of the act of March 3d, 1851,* for the settlement of California land claims, provides that the claimant, if he fails before the commissioners, may present a petition to the United States District Court praying the court to review the decision; and the tenth section, that the court shall proceed to render judgment upon the pleadings and evidence in the case, before the commissioners, and, upon such further evidence as may be taken by order of the court; the eleventh section, that the District Courts, and the Supreme Court on appeal, shall, "in deciding on the validity of any claim brought before them under the provisions of the act, be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

This provision, doubtless, refers to the rules to be observed by the courts in passing upon the merits of the claimant's right or title to the land; but no one can avoid seeing, that the liberal and equitable principles thus enjoined as a duty in the decision of the cases, cannot be fully or fairly carried out, without giving to them a reasonable application and effect in conducting the proceedings before the courts as well as in passing upon the merits. And, regarding these principles in this light, we cannot agree that the court possessed no power to open the case for the purpose of hearing the newly discovered evidence. It is not important what

* 9 Stat. at Large, 631.

the proceedings are called, petition of review, or motion to set aside the decree dismissing the case for want of prosecution, for the purpose of letting in the new evidence. There had been no decree on the merits. The confusion and disorder that existed, in respect to the Spanish and Mexican archives at the close of the war, when the Mexican authorities hastily left the country, has been shown in several cases before this court; and some indulgence is due to an honest claimant as to the order and time in which to produce his evidence.

The next question, and the only remaining one, that it is material to notice, is whether the case presented to the court below justified the confirmation of the claim.

Antonio José Rocha and his legal representatives had been in the possession and occupation of the land in question, claiming title to the same, for a period of twenty-four years, when, in 1852, the petition was presented to the commissioners for confirmation. The representatives have since been in the possession and occupation, and in continued litigation to defend their rights, for the period of eighteen years, making an uninterrupted possession of forty-two years. The present appellees are the children and grandchildren of the original occupant of the tract as early as 1828. He was then a blacksmith by trade, and one of the most respectable and substantial settlers in the pueblo of Los Angeles. The first claim of title under which he took possession was a grant of the president of the ayuntamiento of this pueblo, dated April 8th, 1828. The document is in the usual form by which grants were made of pueblo lands. Carillo, the president, still living in Los Angeles, was examined before the commissioners, and verified the document as original and signed by him. The rancho La Brea was then, and long afterwards, supposed to belong to the pueblo, and, if so, the council of the city had the right to dispose of it. This right is recognized in the act of 1851 for settling these titles. Section fourteen enacts "that the provisions of this act shall not extend to any town-lot, farm-lot, or pasture-lot held under a grant from any corporation or town to which

lands may have been granted for the establishment of a town by the Spanish or Mexican governments." The section then provides that the claim for land embraced within the limits of the town may be presented to the commissioners by the corporate authorities.

It appears from the evidence that it was the general understanding and belief of the authorities of the city of Los Angeles, at the time, that the Rancho La Brea was situated within the limits of the city, and which was founded on an idea, which was prevalent, that a pueblo, according to Mexican laws, was entitled from the government to sixteen square leagues, whereas it was ultimately determined that it was entitled only to four, which left this ranch outside of the city limits. But this was not settled till after the cession to this government. The city of Los Angeles presented their petition before the commissioners for the confirmation of sixteen square leagues. Four only were confirmed.

Then, as to the second claim, founded on this newly discovered evidence. This is obtained from Governor Alvarado, in the year 1840. It is true that the formal papers were before Tiburcio Tapia, the prefect of the district, but authority had been conferred upon him by the governor. The authority was issued March 7th, 1839. It states, 1st, that persons presenting petitions for land shall direct the same to the prefects of the district, who will make report on them; 2d, these expedientes shall be directed to the Secretary of the State by the prefects.

The reason assigned was for the convenience of the people, most of whom resided at great distances from Monterey, the residence of the governor. The city of Los Angeles was over four hundred miles distant. The papers in the case conform strictly to this regulation. Objection is made that there was no proof of the signatures of the officials to the expediente; but the answer is, that no objection was made to it upon this ground in the court below; nor, indeed, does it appear that any objection was made to it as it respected the genuineness of the papers. The objection seems to have been founded on the legal effect of the instrument as a concession

of any title to the premises. The prefect had expressed his opinion to the governor that there was no objection to the grant of the land to the petitioner; but the governor, it would seem, being uncertain whether or not the tract might not lie within the limits of the town-lands, or ejidos of the city of Los Angeles, issued his decree that this as well as other neighboring tracts theretofore ceded for ranchos within the jurisdiction of the prefect of this district, should remain as provisional grants until the ejidos of the city should be ascertained. The prefect was directed to make this communication to the petitioner, which he did.

We think it clear, that the fair import and effect of this instrument, reading it in connection with the petition of the widow, that she and her children should take the titles provisionally, that is, if the tract fell within the limits of the town-land, when they were ascertained, it should be inoperative; but if outside these limits, the title should become absolute.

The petitioner had stated in her petition that she was the widow of Antonio Rocha; that the tract had been ceded to her husband, in 1828, provisionally; that it was about two leagues from the city of Los Angeles; that it was covered with cattle and horses, and that she desired it for the subsistence of her numerous family.

The ejidos were not ascertained during the existence of the Mexican government, as the disturbances broke out soon after this grant, which resulted in the war with this country and the cession of the lands. Since the peace, the limits belonging to the city have been defined under the direction of the surveyor-general of the United States, and the premises in question are not included within them. If this had taken place under the former government, it cannot, we think, be doubted but that under the Mexican laws and usages this title would have become perfect, and hence, under the treaty and act of Congress, it is the duty of this court so to hold. As we have seen, that treaty and act of Congress make it our duty to decide these cases "according to the law of nations, the laws, usages, and customs of the

government from which the claim is derived, the principles of equity, and the decisions of this court as far as applicable." Here the claimants and their ancestors have been in the uninterrupted possession and occupation approaching the period of half a century, having entered first under a pueblo grant, which at the time was supposed to be in pursuance of authority; and, second, was confirmed by a provisional grant from the Mexican governor, who possessed full authority, which, we think, fairly enough brings the case within the principles governing these cases.

DECREE AFFIRMED.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice DAVIS, dissenting.

I dissent from the opinion and decree of the court in this case, for the following reasons:

1. Because the ayuntamiento of Los Angeles never possessed any authority to make such a grant, and it follows of course that the document purporting to be signed by the alcalde is null and void. Argument upon that topic is unnecessary, as the claimants admit that the proposition is correct.

2. Because the additional documents exhibited by the claimants in the District Court show conclusively, not only that those under whom the appellees claim never had any grant from the governor under the colonization laws, but that the governor, when the application was made to him for that purpose, peremptorily refused to make the grant; and that they never had any grant or concession of any kind from the governor of the department.

3. Because possession before the treaty, of the public lands held by the former government, without any title, is not sufficient evidence to warrant a confirmation of such a claim. Authorities to support that proposition are not neccessary, as they are very numerous in the decisions of this court published within the last ten years.

Statement of the case.

THE SUFFOLK COUNTY.

1. Where the defence in a libel for collision is that the injured vessel suddenly, and without notice, attempted to sheer across the one libelled, at a time when the two were so near that no exertion of those in charge of the latter could prevent the collision, the fact that the pilot of the injured vessel swears that he had not changed his course at all, while the libel, in giving an account of the matter, has said that the vessel was pursuing the course of the channel, which gradually rounded, does not make out the case of the libelled vessel; there being no proof of such a sheer as *she* set up, and as was necessary to absolve her.
2. It is not fatal to the libellant's case that he has not stated quite correctly the place of the collision, unless the question of exact place is material to the question of who was in fault.

APPEAL from the Circuit Court of the Southern District of New York; the case being thus:

The owners of the tugboat Joseph Baker filed a libel in the District Court at New York against the steam ferryboat Suffolk County, for a collision which had occurred in the East River, between New York and Brooklyn, and in which the tugboat was injured.

The tug was a small boat of about seventy tons burden. The ferryboat was a large steamboat, capable of carrying a thousand passengers, and a much faster sailer than the tug. They were going in the same general direction up the East River, about two hundred feet from the New York shore, the tug ahead and the ferryboat astern, as they passed Jackson Street. Somewhat higher up, the ferryboat endeavoring to pass between the tug and the shore, the collision took place. There was no signal by whistle or otherwise given by the ferryboat to warn the tug of the danger, and the pilot of the tug seemed to have had no apprehension of danger until the other vessel was within two or three feet of his boat. There was room enough for the ferryboat to have passed outside or inside, and as she was behind the other, and could easily have kept out of the way, the ferryboat, unless the collision could be clearly traced to some fault on the part of those in charge of the tug, was obviously to be

held responsible. Such a fault was alleged in the answer of claimants, in this, to wit, that the tug attempted suddenly and without notice to sheer across the course of the ferryboat at a time when they were so near each other that no exertion of those in charge of the ferryboat could prevent the collision. The pilot of the ferryboat swore positively that such a sheer had been made. The pilot of the tug swore as positively that she *had not changed her course at all for some time, and that the courses of the two vessels were the same.* The truth seemed to be about as stated by the pilot of another ferryboat, who stopped his vessel to look at the two which came into collision, because they were so near that he expected it. He said that they were going in one direction, and that both were slightly curving towards the New York shore, and the tug a little more on the turn than the other boat.

The allegation of the libel itself was, "that after passing the foot of Jackson Street, the channel rounds a little towards the north, and that the tug, pursuing the regular channel, *gradually rounded with it, so that she was steering, at the time of the collision, upon a course not precisely parallel with that of the ferryboat, but at a slight angle therewith.*"

The production of a map of the East River, and the testimony as to the wharves which were opposite to the place of collision seemed to show that the vessels had not fully arrived at the place where the curve in the channel required a change of course.

The District Court decreed in favor of the libellant, and the Circuit Court affirmed the decree. The case was now here for review.

Mr. Donohue, for the appellants, having endeavored to show that the pilot of the ferryboat had stated the real facts, and that the cause of the collision was a rank and unnecessary sheer by the tug, next argued the matter somewhat independently of that testimony.

Having remarked that the case was to be heard upon the issue raised by the pleadings; that the parties come into

court prepared to meet the issues raised, and to make the proof necessary to meet the case, as made in the pleadings, and that any other rule would be to simply make pleadings a snare to the parties, and render them worse than useless, he argued two propositions:

1st. That the pilot, in swearing that he was pursuing a direct course, in which he had made no change for some time previous to the collision, contradicted the libel; that his testimony could not be received to do this; and that the libel, which alleged that a *change of course had been made*, was to be held to be true; that the testimony of the libellant's pilot being thus false, and the allegation of the libel stating a change which would to some extent bring the tug across the course of the ferryboat, the evidence of the pilot of that boat, thus far corroborated by the libel, must be taken as true, when he swears that the tug made a sudden and unexpected sheer across his course, which rendered the collision unavoidable.

2d. That the evidence of witnesses compared with authentic maps showing, as it did, that the collision occurred before the boats had got to the place alleged in the libel, there was a variance between the proofs and allegation; that the pleadings were for a collision after the Baker had taken a sheer, while, in fact, the case showed that she had not arrived at the rounding point. The pleadings admitting such a rounding or sheer, and the evidence showing no necessity for it, the defence was made out. The evidence failed to show necessity for what the Baker did, and her case failed.

Mr. Carter, contra.

Mr. Justice MILLER delivered the opinion of the court.

The defence is that the tug attempted suddenly, and without notice, to sheer across the course of the ferryboat, when they were so near that no effort of the persons in charge of the ferryboat could prevent the collision. But we do not think that the defence is made out by the evidence. We cannot go minutely into all the testimony on this point. It

is sufficient to say that we think that the fair result of it does not relieve the ferryboat from responsibility.

The counsel for appellants has made a very ingenious argument in favor of two propositions growing out of the allegation of the libel in regard to the manner and the place of the collision.

But as respects the first one, conceding that the pilot of the tug, in his desire to make clear his freedom from all blame, did not state the course of the vessel with accuracy, the statement of the other pilot is liable to the same suspicious influence, and is equally at variance with the allegation of the libel, and with all the other testimony in the case. The libel does not state a rank or sudden sheer, or any change of course which would bring the tug across the bow of the other vessel. It says she was gradually rounding with the channel, which brought her on a course not precisely parallel with that of the ferryboat, but at a slight angle therewith. And as we have already stated, the weight of the testimony supports this allegation, so far as the relative course of the two vessels, and any change in that course is in question.

The other proposition is, that on the production of a map of the locality of the accident, including the channel of the East River, it is shown conclusively that the collision occurred before the vessels reached the point where this curve in the channel required a change in the course of the boats. And it is maintained that as the testimony shows that the collision did not occur at the place alleged, the whole case of libellants must fail; that it was so material to their case to show that the reason for the gradual curve of the boat was the change in the course of the channel, that if there was no such change in the channel before the collision, the change in the course of the vessel was without excuse, and was the cause of the collision.

It surely cannot be necessary to say that the libellant is not bound, at the hazard of losing his case, to state with perfect accuracy, within two or three hundred feet, the point of the collision or curve of the channel, except so far as they

may be material to the question of who was in fault. Now the case here requires of the claimants to show that by a sudden and unexpected change in the course of the tugboat she was brought so directly across the course of the ferry-boat that the latter could not avoid the collision. The relative positions of the boats to each other and their relative courses were correctly stated in the libel, and such change in the course of the tugboat as was made, was correctly stated. We cannot see that it was material whether this slight and gradual change was made a little before arriving at the corresponding curve in the channel or not, nor whether the collision occurred at that precise point of the river or a little before it was reached.

We concur with the decree rendered in favor of libellants, both by the District Court and the Circuit Court, and it is accordingly

AFFIRMED.

GREEN *v.* UNITED STATES.

The act of July 2d, 1864, which enacts that in courts of the United States, there shall be no exclusion of any witness in civil actions, "because he is a party to or interested in the issue tried;" and the amendatory act of March 3d, 1865, making certain exceptions to the rule, apply to civil actions in which the United States are a party as well as to those between private parties.

IN error to the Circuit Court for the Southern District of Ohio.

This was an action of debt brought by the United States against one Green, and the sureties on his official bond, as agent for paying pensions at Cincinnati. Seven sureties were named in the bond, all of whom executed it. The defendants charged as sureties, besides filing a joint plea of *non est factum*, each filed separate special pleas, first, to the effect that they signed the writing whilst the same was in blank, as to the names of the obligors, at the request of the principal, Green, upon the assurance and agreement that it should also

be signed and sealed by other parties (named in the plea), as joint obligors with the defendants, and should not be delivered as a bond until signed and sealed by said persons; that those other persons never did sign the same; and that the defendants never would have executed the bond except upon the condition that they should sign it. A second plea averred that the bond was signed whilst it was in blank, as to the names of the obligors, on the conditions above-named, and being thus signed was left with Green as an escrow, to be by him delivered to the plaintiff in case it should be executed by the other persons named, and not otherwise; but that those other persons never did sign the bond, and it never was delivered as a valid bond of the defendants, and thereby became wholly annulled and vacated.

To these special pleas the plaintiff demurred, but the demurrers were overruled, to which overruling the district attorney excepted, and the exception was entered of record; and thereupon replications were filed and issue joined on the pleas. The replications denied that the bonds were signed in blank as pleaded; denied any legal subsisting agreement whereby Green was to obtain the signatures of the persons named in the pleas; and averred that the defendants delivered the bond without giving the plaintiffs any notice that it was imperfect, but on the contrary delivered it as a full and complete obligation.

Upon these issues the parties went to trial, and a verdict was found for the plaintiffs of several thousand dollars. On the trial the defendants offered one or more of their number to prove the facts set up in their special pleas; but the court rejected the witnesses, on the ground that they were parties defendant to the action, and, the government being plaintiff, could not testify. To this ruling a bill of exceptions was taken, and a writ of error brought to this court.

By the third section of the act of Congress, passed July 2d, 1864,* it is provided that:

"In the courts of the United States, there shall be no exclu-

* 13 Stat. at Large, 351.

sion of any witness on account of color, nor, in civil actions, because he is a party to, or interested in, the issue tried."

This section was amended by an act passed March 3d, 1865,* by the addition of the following proviso:

"Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

The trial in this case took place in June, 1866, after the passage of the above acts.

Mr. Fox, for the plaintiff in error, citing *Attorney-General* v. *Radloff*,† contended that the evidence had been improperly rejected; that the government was as much bound by the language of a statute, regulating the admission of evidence in civil suits where it was a party, as were individuals; and that the statutes themselves not having excepted it, this court could not do so.

Mr. Hoar, Attorney-General, and Mr. W. A. Field, Assistant Attorney-General, submitted, contra, that the statutes were meant to give both parties an equal standing in court in respect to evidence; that the United States not being able to testify, a party opposed to them should not be allowed to do so either; and that independently of this, it was a rule of construction that "the king is not bound by any act of Parliament, unless he be named therein by special and particular words."‡

Mr. Justice BRADLEY having stated the case, as already given, delivered the opinion of the court.

We see no reason why these acts should not be applied to trials in which the United States are a party, as well as those

* 13 Stat. at Large, 533. † 10 Exchequer, 84.

‡ See Jones *v.* United States, 1 Nott & Huntingdon, 384.

between private persons. The express exception of executors, administrators, and guardians would seem, by necessary inference, to leave all other suitors under the operation of the law. It is urged that the government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. The very fact that it is confined to *civil* actions would seem to show that Congress intended it to apply to actions in which the government is a party, as well as those between private persons. For the United States is a necessary party in all criminal actions, which are excluded *ex vi termini;* and if it had been the intent to exclude all other actions in which the government is a party, it would have been more natural and more accurate to have expressly confined the law to actions in which the government is not a party, instead of confining it to *civil* actions. It would then have corresponded precisely with such intent. Expressed as it is, the intent seems to embrace, instead of excluding, civil actions in which the government is a party. Nothing adverse to this view can be gathered from the exceptions made in the amendment passed in 1865. These exceptions only relate to evidence of transactions with, or statements by, a deceased party (who cannot testify), or by a party under guardianship. In this case no transactions with, or statements of, the agents of the United States were attempted to be proved by the defendants who were called as witnesses;—nothing but conversations between the defendants themselves. We think the witnesses were competent under the act, and that the court erred in rejecting them.

For this reason the judgment must be REVERSED AND A NEW TRIAL AWARDED.

The court, however, deem it proper to say that they have grave doubts whether the facts set up in the special pleas, and offered to be proved by the witnesses, constitute a valid defence to the action. But as this point was not discussed by counsel, we refrain from expressing any opinion upon it.

Statement of the case.

DOWNHAM *v.* ALEXANDRIA.

1. The act of the Virginia legislature of February 27th, 1867, by which it was enacted that appeals to the Supreme Court of Appeals of the State from the State District Courts should not be allowed when these last fully affirmed the judgments of the County Courts, unless the matter in controversy exceeded $1000, is not inconsistent with the provision in the Constitution of 1864, which excluded appeals from the said District Courts to the Supreme Court, except in certain cases specified, unless the matter in controversy amounted to $500.
2. Where the State court in which a judgment in a suit is given is the highest court of law or equity in the State in which a decision in that suit can be had, a right of review exists here under the 25th section of the Judiciary Act (if the case be otherwise one for review here under that section), although that court may not be actually the highest court of law or equity in the State.

ON motion to dismiss. The case was this:

The city of Alexandria, in Virginia, on a suit brought by it, in one of the county courts of the State, against a certain Downham, a dealer in liquors, had obtained a judgment for *two* hundred dollars; the amount of a tax imposed by the city on dealers of his class. Downham took the case by appeal to the Fourth Judicial District Court of the State, in which the judgment of the county court was "wholly affirmed." He then brought the case from *that* court directly here, conceiving that he had a right so to bring it here, under the 25th section of the Judiciary Act, which gives a writ of error from this court (in a certain class of cases within which the present suit was assumed to come), when a judgment has been given in the highest court of law or equity of the State "in which a decision in the suit can be had."

There was confessedly a higher court of law and equity in the State than the court last-named, to wit, the Supreme Court of Appeals; but Downham did not take the case to *it;* assuming that by the constitution and laws of Virginia he could not properly do so; and that being thus unable to take it there, he had a right to come directly from the inferior court.

The questions, therefore, were:

1. The chief one — whether under the constitution and laws of Virginia he was correct in assuming that he had no right to go to a higher court than that of the Fourth Judicial District? And if he was correct in this,

2. The question — one not much disputed — whether he could bring the case here from it, there being a higher court of law and equity in the State?

At the time when the writ of error was allowed and issued, and service of citation acknowledged, the constitution in force in Virginia was that of 1864. That constitution excluded from the appellate jurisdiction, in civil cases, of the Supreme Court of Appeals, all suits where the matter in controversy, exclusive of costs, was less than *five* hundred dollars, except certain specified controversies, among which were distinctly mentioned controversies concerning the right of a corporation to levy tolls or taxes. The case before the court being a controversy concerning the right of the corporation of Alexandria to impose and collect a tax upon plaintiffs in error, and, therefore, a controversy within the very terms of the exception, might have been taken to the Supreme Court of Appeals if nothing else had interposed. An act of the legislature of Virginia, however, passed February 27th, 1867, provided that no appeal to the Supreme Court should be allowed in any case from a judgment of the District Court wholly affirming the judgment of the Circuit Court, and where the matter in controversy did not exceed *one thousand dollars.*

Mr. D. L. Smoot, in support of the motion to dismiss, contended that the act in question was unconstitutional. *Messrs. G. W. Brent and C. W. Wattles, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

The act of February, 1867, extends the limitation upon appeals to all cases where original judgments of the Circuit Court are fully sustained by the judgment of the District Court, and where the amount in controversy does not exceed

the legislative limit. And the case before us, though not excluded from the appellate jurisdiction of the Court of Appeals by the Constitution, seems to be excluded by this act. The only question, then, is whether this act of the legislature is in conflict with the constitution of the State. And we perceive no conflict. The legislature, then, having thought fit to make the judgment of the District Court in this case final and without appeal, that court is, for this case, the highest court in which the decision could be made; and the writ of error is, therefore, warranted by the act of Congress, and regular. Motion to dismiss must be

DENIED.

UNITED STATES v. ADAMS.

1. *Certiorari*, being a writ properly used to bring up to the Court of Error, on an allegation of diminution, outbranches of the record, or other documents and writings in the court below which have not been previously certified or sent, is not a proper thing to be asked for where it is desired to have the Court of Claims supply certain supposed defects in its *conclusions* deducible from the evidence before it.
2. The proper method of obtaining such a finding is an order of this court, on motion duly made, directed to the Court of Claims, requiring it to make return as to the existence or non-existence of such facts. But this court cannot give the Court of Claims any directions as to what finding it shall make, or how it shall proceed to make up its finding on the points sought to have certified.

ON motion for *certiorari*.

In this suit, which was an appeal from the Court of Claims, that court, in accordance with the rules adopted by this court to regulate appeals from the latter court, had sent up a finding of the facts and their conclusions of law on the said facts, on which they founded their decree.

Mr. Talbot, on behalf of the United States, now applied for a *certiorari* to require the said court to certify as to the existence or proof of certain other facts which were not contained in their original finding and return.

The suit had been brought in the Court of Claims by the United States to recover certain deductions made from vouchers issued to them by quartermasters at St. Louis, which deductions had been made in 1861–2, by direction of a commission, composed of the Hon. David Davis, Joseph Holt, and Hugh Campbell, after an examination of the claims for which the vouchers were issued. Since the decision in this court of the case of *United States* v. *Adams*,* it had become material for the government, in cases of this sort, to show the fact that the claimants voluntarily presented their claims to the said commission. This fact, though proof of it was alleged to have been offered in the court below, was not stated in the finding of facts sent to this court, probably not having been deemed material at the time the finding was made. What the solicitor for the United States now particularly desired to be certified was:

First. Whether or not, before the seizure of the books and papers of the claimants, as found by the said court, the claims of the claimants had been submitted or presented to the said commission by the said claimants.

Second. Whether or not the said claims were so submitted or presented after such seizure.

Third. Whether or not the said claimants appeared before the said commission with witnesses to support their said claims; and, if they did so appear, whether or not it was before or after the seizure of their books and papers by the provost guard of St. Louis.

And he further asked that the Court of Claims might be directed, in making the findings of facts herein called for, to use and regard the deposition of E. W. Fox, one of the claimants, as an admission on the part of the appellees.

Mr. Hughes opposed the motion.

Mr. Justice BRADLEY delivered the opinion of the court.

Whilst we are of opinion that the appellants are entitled

* 7 Wallace, 463; *supra*, 555.

to have the finding made complete on the points indicated by the interrogatories, either affirmatively or negatively, we do not regard a *certiorari* as the proper mode of effecting the object. This writ is properly used to bring up to the court of error, on an allegation of diminution, outbranches of the record, or other documents and writings in the court below which have not been previously certified or sent. The facts asked for in this case are not documents or writings, but *conclusions* to be deduced from the evidence before the Court of Claims. The proper method of obtaining a finding in reference to these alleged facts is an order of this court, to be directed to the court below, on motion duly made, requiring that court to make return as to the existence or non-existence of such facts. Such an order it will be proper to make, for the same reason that renders a *certiorari* proper on an allegation of diminution of the record. But we cannot give the Court of Claims any directions as to what finding it shall make, or how it shall proceed to make up its finding on the points in question. If that court should refuse, with the proper evidence before it, to find a material fact desired by either of the parties, the proper remedy would be to make a request that such finding be made, and to except in case of refusal. Perhaps an additional rule on the subject would make the rights of parties and the duty of the court less ambiguous than they now are. The following order will be made in the case:

ORDERED: That the record in this case be remanded to the Court of Claims, and that said court be instructed to find and certify to this court, as matters of fact, in addition to the facts found and certified in said record—

First. Whether or not, before the seizure of the books and papers of the claimants, as found by the said court, the claims of the claimants had been submitted or presented by them to the commission, consisting of Hon. David Davis, Joseph Holt, and Hugh Campbell, referred to in the record.

Second. Whether or not the said claims were so submitted or presented after such seizure.

Third. Whether or not the said claimants appeared before

the said commission with witnesses to support their said claims; and, if they did so appear, whether or not it was before or after the seizure of their books and papers by the provost guard of St. Louis.

And it is further ordered that the said record, with the said additional findings of fact, be returned to this court with

ALL CONVENIENT SPEED.

HERNDON *v.* HOWARD.

Where an appellant in this court becomes bankrupt after his appeal taken, his assignee in bankruptcy upon the production of the deed of assignment of the register in bankruptcy, duly certified by the clerk of the proper court, may, on motion, be substituted as appellant in the case.

IN this case Herndon had taken an appeal from the Circuit Court for the Western District of Texas; and after doing so had become bankrupt. His assignee in bankruptcy—one Masterson—now moved to be admitted as a party appellant in the cause with the original appellant, Herndon.

His motion was supported by the production of the deed of assignment of the register in bankruptcy of the District Court of the United States for the Eastern District of Texas, in the matter of his bankruptcy to Masterson, duly attested by the clerk of the court. The motion was founded upon the fourteenth section of the Bankrupt Law, which provides that the assignee in bankruptcy may prosecute and defend in his own name all suits at law and in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, in the same manner and with the like effect as they might have been prosecuted or defended by the bankrupt, and which makes a copy of the register's assignment, duly certified by the clerk of the proper court, conclusive evidence of the right of the assignee to sue.

Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

The section of the Bankrupt Law relied on, we think, governs the present case. It seems to require that Masterson, the assignee, be substituted as appellant for Herndon, the bankrupt, who may be said to be *civiliter mortuus*, precisely as an executor or administrator would be made party instead of an appellant actually deceased; and an order will be

MADE ACCORDINGLY.

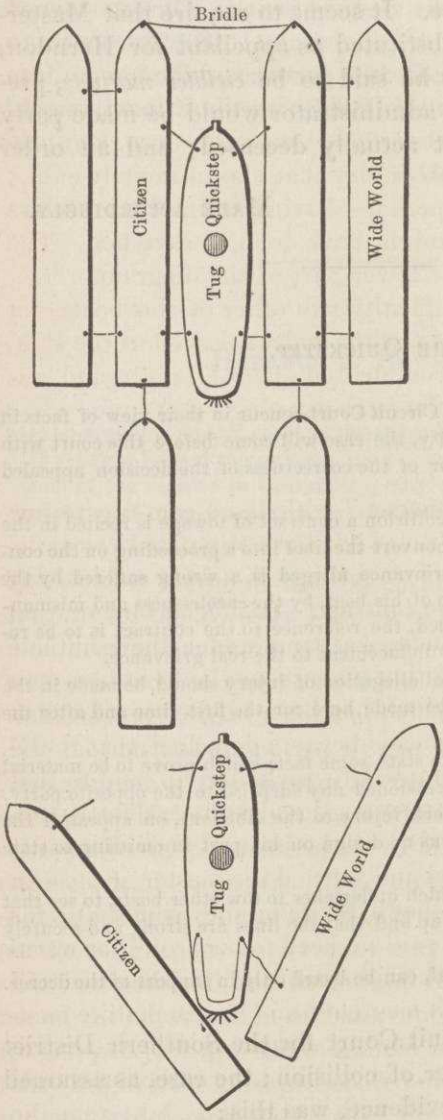
THE QUICKSTEP.

1. Where the District and the Circuit Court concur in their view of facts in a collision case in admiralty, the case will come before this court with every presumption in favor of the correctness of the decision appealed from.
2. The fact that in a libel for collision a contract of towage is recited in the libel, does not necessarily convert the libel into a proceeding on the contract. Where the real grievance alleged is a wrong suffered by the libellant in the destruction of his boat, by the carelessness and mismanagement of the boat libelled, the reference to the contract is to be regarded as made by way of inducement to the real grievance.
3. An objection of a too general allegation of injury should be made in the court below. It cannot be made here for the first time and after the case has been heard below.
4. In admiralty, an omission to state some facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work injury to the libellant, on appeal, if the court can see that there was no design on his part in omitting to state them.
5. It is the duty of a vessel which undertakes to tow other boats, to see that the tow is properly made up and that the lines are strong and securely fastened.
6. A party who does not appeal, can be heard only in support of the decree.

APPEAL from the Circuit Court for the Southern District of New York in a matter of collision; the case, as assumed by this court upon the evidence, was this:

One Byrne, the captain and owner of the canal-boat Citizen, laden with wheat, contracted with the captain of the

tug Quickstep to tow the canal-boat from New York to New Brunswick. Byrne did not know how many boats the captain of the tug would take. The tow, however, when completed, consisted of six boats, —two abreast, on each side of the tug, and one directly in the rear of each of the two boats, as shown in the upper part of the drawing. The Citizen was on the port side, and nearest the tug, and the Wide World was in the same position on the starboard side. The stern of the boats, abreast of the tug, were about even with the stern of the tug, but their bows extended further than the bow of the tug, and the bows of the Citizen and Wide World were coupled by what is called a "bridle line;" the line having been furnished by the towing tug.



This fleet proceeded on their voyage with safety until they approached a point in the harbor of New York, known as Robbins' Reef lighthouse, when the boat in the rear of the boats on the port

side of the tug became detached. The weather, which was fair when the boat set off from New York, was now somewhat rough, with a certain amount of wind. The tug stopped as soon as the boat broke loose, and then proceeded to back. In backing the bridle-line parted, and the tug got into the trough of the sea, and collided with the Citizen, knocking two holes in her starboard side near the stern, and producing so considerable an injury that she ultimately sunk; her crew, however, not perhaps having exerted themselves as perseveringly as they might have done, to save her. The matter is exhibited in the lower part of the diagram.

In the course of the difficulty two other of the boats got loose. One of them cast anchor and was saved at the spot. The other, loaded with iron, drifted about all night and was picked up uninjured on the next morning.

The owner of the Citizen libelled the Quickstep in the District Court of New York.

The libel alleged "a contract" with the steam-tug to tow the canal-boat to New Brunswick for a stipulated price, deviation to another dock before setting off, unreasonable delay in the performance of the contract. It alleged further, that the canal-boat was staunch, &c., and under the complete control of the steam-tug; that when near the light-house on Robbins' Reef, the boat which had been hitched to "the boat of the libellant by some means became detached, that thereupon the steam-tug attempted to pick her up, and to that end commenced to back in so negligent and careless a manner as to endanger the safety of the boat of your libellant; that the libellant protested and warned the master or those in charge of said steam-tug that by so doing they would sink his boat, but the said parties paid no heed to his protest or warning, but continued to back said steam-tug, and handled and managed the same in such a careless and unseamanlike manner that the same said steam-tug struck against the canal-boat with great force and violence, breaking in her starboard side, and causing her to fill with water and sink; that the libellant did all in his power to prevent the said loss; that the same was without fault on his part, and occurred entirely

through the carelessness and mismanagement of the master and mariners on board of the steam-tug." In conclusion, the libel prayed damages.

The answer substantially denied these allegations and set up the plea of inevitable accident. The evidence upon the trial was quite conflicting, but the case, as above given, was the case which this court considered as established by it.

The District Court, giving no opinion and finding no facts whatever, held that the libellant and claimant were both in fault, and divided the damages. On appeal, the Circuit Court gave an opinion of a few words, in which, however, no facts were found—and affirmed the decree. The owners of the steam-tug appealed.

Mr. Donohue, for the appellant:

The circumstance that the decrees in both courts below were against us, will perhaps be relied on as a reason why the decree here should be against us also. But the object of an admiralty appeal is to bring up the facts in the cause, and to have a rehearing on them; and while the court may, from time to time, speak of not reviewing the facts, it is submitted that both on principle they are bound to do it, and in precedents have done it.* Only where the evidence is balanced will they refuse to reverse.

But here the case comes to this court free from all question of a prior disposition of any fact. It is open for judgment upon the evidence; for we know not on what grounds either court below adjudged the case, whether on fact or on law.

The libel is too general in its terms. Alleging negligence and misconduct generally, it wholly omits to state what particular acts of the tug produced the catastrophe. We cannot reply to such allegations. Moreover, it sets up a *contract* made to tow direct, and a deviation; that we took too many boats; that in backing to pick up another boat we injured this boat and sunk her. But the case shows that proof as to

* Schooner Catharine, ad. Dickinson, 17 Howard, 170; Sturgis *v.* The R. L. Mabey, 21 Id. 451.

the contract to go direct failed. No such contract is in the least established.

The accident is readily accounted for by a *vis major*. It occurred in a storm. The line parted, without our fault, and the only mode left for us was to back. On our side, although not called on to do anything but to wait until the opposite side have made out a case, we yet fully proved an entire want of negligence. Having started with fair weather, and with reason to suppose we could tow through, we met with a severe storm, which broke this line, and the vessel being deeply loaded, and not protected, sunk.

But whatever view is to be taken of the case, the decree must be reversed. A decree which finds no fact or facts, but a simple legal conclusion, cannot be examined.

Mr. Carter, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The difficulty of discovering the truth in collision cases, which are mainly trials of fact, grows out of the character of the evidence, which is always more or less conflicting. The court that can see the witnesses, hear their statements, observe their demeanor, and compare their degree of intelligence, is better able than an appellate tribunal to reconcile differences in testimony, or, if that be not possible, to ascertain the real nature of the transaction. The District Court that tries the case in the first instance enjoys this advantage, and the finding of facts by it, if followed by the concurrent judgment of the Circuit Court, is entitled to so much weight in this court, that it will be presumed a correct conclusion was reached, and before the decision will be disturbed it must manifestly appear that it was wrong. The testimony in this case was heard by the district judge, who decided that the damages should be divided, and the Circuit Court, on appeal, affirmed his judgment, and the case, therefore, comes before us with every presumption strongly in favor of the correctness of the decision of the lower courts.

It is unnecessary to travel through the evidence, to a great

extent contradictory, in order to vindicate our views concerning it. It would serve no useful purpose to do so, and we shall content ourselves with applying the law to a state of facts which we consider the evidence establishes, without any attempt to discuss it. The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep. It is objected that the libel is too general in its terms, and is defective because it does not state the particular acts of negligence and misconduct on the part of the tug which produced the injury; but if this were necessary, the objection should have been interposed at an earlier stage of the proceedings, and cannot be taken, for the first time, after the cause has reached this court. It is always better to describe the particular circumstances attending the transaction; but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the court can see there was no design on his part in omitting to state them.*

We now pass to the facts of the case.

The inquiry is, who is to blame for what has happened? Clearly not the Citizen, for it does not appear that her conduct in any way contributed to the accident. If the tug, in constructing the tow, used the lines furnished by the different boats, yet as each boat was independent of the other, no responsibility can attach to either for the breaking of the line, which she did not provide, and had nothing to do with making fast. In this case neither the bridle-line nor the line that first parted were supplied by the Citizen, and she ought not to suffer for their insufficiency. It is well settled that canal-boats and barges in tow are considered as being

* The Clement, 2 Curtis, 363.

under the control of the tug, and the latter is liable for this collision, unless she can show it was not occasioned by her fault.*

It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened. This was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault. The parting of the line connecting the boat in the rear on the port side with the fleet, was the commencement of the difficulty that led to this accident. In the effort to recover this boat the consequences followed which produced the collision. If it was good seamanship on the part of the captain of the tug to back in such an emergency, he was required, before undertaking it, at least to know that his bridle-line would hold. And if the sea was in the condition the captain of the tug says it was, it was bad management to back at all. Whether this be so or not, he was bound, in executing a manœuvre to recover the detached boat, to look to it that no other boat in the fleet suffered in consequence of it.

But the claimants of the tug deny that their vessel was in fault, and insist that the disaster occurred by the violence of the storm and gale of wind which prevailed at the time. If this be so, how did it happen that two of the canal-boats that got loose from the fleet survived the perils of that night? One of these boats anchored, and was saved without difficulty; the other, loaded with iron, drifted about and was picked up the next morning without having sustained any damage. The fact that these boats did not experience any bad effects from the severity of this storm explodes the theory advanced by the claimants on the subject.

* The Express, 1 Blatchford, 365; Steamboat New York *v.* Rea, 18 Howard, 223.

Statement of the case in the opinion.

In our opinion the tug was clearly in fault, and the courts below, in dividing the damages, doubtless came to the conclusion that the men on board the Citizen were also to blame for deserting their boat sooner than good seamanship under the circumstances required. As the libellant did not appeal, and can, therefore, only be heard in support of the decree, we are not required to consider whether the evidence convicts the canal-boat of fault.* The appellants have no right to complain, for in any aspect of the case they cannot escape without paying at least half the loss.

JUDGMENT AFFIRMED.

THE SYRACUSE.

A large steamer, without tows or other incumbrance, approaching near to smaller ones with tows, under circumstances where collision is liable to occur, is bound to move with caution. She is mistress of her course and motions, and stands in a position of advantage over the others. These have not full power over themselves. Seventeen miles an hour, in such a situation, is too great a rate of speed for the larger and freer vessel to be moving at among vessels having tows.

THIS was an appeal in admiralty from the decree of the Circuit Court for the Southern District of New York, which, on a libel filed by the owners of the steamer Rip Van Winkle, against the steam tow-boat Syracuse, for a collision, had held the complaining boat itself in fault, and the tug-boat not liable.

Messrs. McMahon and Hoar, for the appellant; Mr. Benedict, contra.

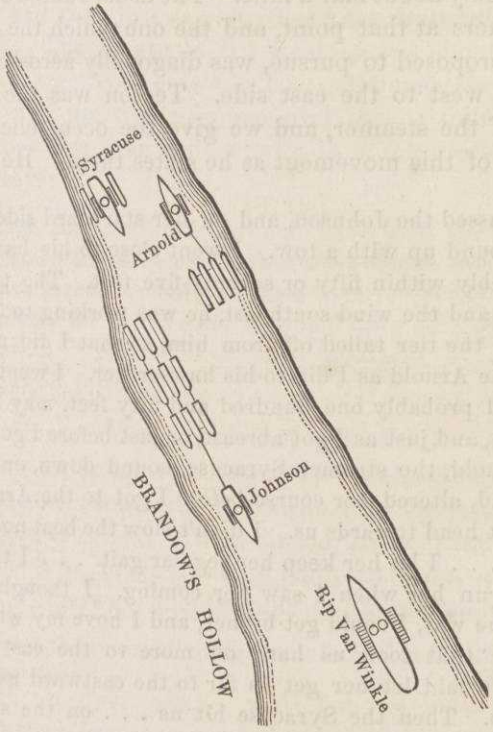
Mr. Justice SWAYNE stated the facts and delivered the opinion of the court. Both will be better understood by reference to a diagram by the reporter on the next page.

The steamer Rip Van Winkle, a freight and passenger

* The William Bagaley, 5 Wallace, 412.

Statement of the case in the opinion.

boat, left New York for Troy, heavily laden, on the evening of the 15th of May, 1866. About 2 o'clock the next morning she reached a point in the river opposite to Brandow's Hollow. There, three boats above were plainly in view to her, and she was as plainly in view to them. They were all tow-boats with barges attached, and were the Johnson, the Arnold, and the Syracuse. The Arnold was on the east side of the river, and going up. The Johnson was on the west



side, going down, and was as near to the flats as it was safe for her to go. The Syracuse was on the west side, and also descending. She had in tow, lashed to her, on the port side, the heavy ice barge Colgate. The Roberts, a light barge, was attached to her in like manner on the starboard side. The speed of the Johnson was less than that of the Syracuse. The Johnson had nine tows, attached by a hawser about

four hundred and fifty feet long. The Syracuse made a sheer and passed the hawser-tier of the Johnson, and lapped her about fifteen feet on the east side. About this time the Rip Van Winkle blew a long whistle as a signal that she intended to pass them to the eastward. They blew their whistles in response and assent. The speed of the steamer was seventeen miles an hour. The distance of the Syracuse and the steamer from each other when their whistles blew was probably about half a mile. The usual course of ascending steamers at that point, and the one which the Rip Van Winkle proposed to pursue, was diagonally across the river from the west to the east side. Teason was the pilot in charge of the steamer, and we give the occurrences which grew out of this movement as he states them. He says:

"We passed the Johnson, and on her starboard side was the Arnold, bound up with a tow. I went close to his hawser-tier, and probably within fifty or seventy-five feet. The tide being flood-tide, and the wind southeast, he was working to the windward, and the tier tailed off from him, so that I did not go as close to the Arnold as I did to his hawser-tier. I went off from the Arnold probably one hundred and fifty feet, may be not as far as that, and just as I got abreast, or just before I got abreast of the Arnold, the steamer Syracuse, bound down, on our larboard hand, altered her course before I got to the Arnold, and came right head towards us. I didn't slow the boat nor I didn't stop her. . . . I let her keep her regular gait. . . . I thought I could outrun her when I saw her coming. I thought, in the position she was, I could get by her, and I hove my wheel over aport, and that took us hard off more to the eastward. I thought I would let her get as far to the eastward as I could, and did so. Then the Syracuse hit us . . . on the starboard side, just aft of the forward gangway. . . . It was the barge that she had alongside that hit us—hit us with the bluff of her bow, right on the turn of her bow. We were heading to the east, and she struck us right aft of the forward gangway, and forward of the paddle-box, and after she struck us it carried away our deck-beams, and side-house, and water-wheel, and the like of that; that disabled our engine, and then we drifted, till in time we drifted ashore, or we let our anchor go before we got

ashore, but our anchor would not hold us, and we drifted ashore; we drifted about twenty minutes or half an hour after she struck us before we went ashore."

This witness further states that the width of the channel between the Arnold and the Johnson was at least five hundred feet; that there was a space between the Johnson and the steamer for the Syracuse to pass of three hundred and fifty feet; that the steamer had passed the Johnson and the Arnold, and that just as she passed the latter the disaster occurred. The length of the steamer was about two hundred and seventy-five feet. The combined speed of the steamer and the Syracuse was over twenty miles an hour. It was not less than half a mile in a minute and a half. Teason says:

"Further, that the Syracuse could have kept her course and followed down the same course that the Johnson was going, and would have given us plenty of room to have gone by. All that was necessary for her to clear us would have been to have kept her course. . . . She sheered right off—took a very sudden sheer right off towards us."

This witness is mainly relied upon by the libellant. Conceding his testimony to be correct it inculpates the tug, but by no means exonerates the steamer. The channel was narrow and crowded. The Johnson, Arnold, and Syracuse, with their tows, made a fleet of eighteen vessels of different kinds. Witherwax, another pilot on the steamer, says:

"We seen the river full of lights; it looked to be all light away across the river."

He warned Teason several times that the steamer would approach the Syracuse. His warnings show that he was alarmed. They produced no effect. A tug with vessels in tow is in a very different condition from one unincumbered. She is not mistress of her motions. She cannot advance, recede, or turn either way at discretion. She is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril. For

many purposes they may be regarded as a part of herself. They have the benefit of her traction and she the burden of their inertia. The character of the fleet could not be mistaken. The attempt of the steamer, under such circumstances, to pass the other vessels, and in such close proximity to the Syracuse, at a speed of seventeen miles an hour, was gross and wanton recklessness. Before turning her head to the eastward she should have slowed her engine. If the prospect of danger darkened she should have stopped, and, if need be, have reversed it. She had no right thus to hurl herself like a projectile into the midst of the vessels before her, taking the hazard of the consequences and thus imperilling herself and them with all the lives and property on board. "The Rule of the Road" gives no warrant for such conduct. The maxim applies, "*Sic utere tuo ut alienum non lædas.*" The steamer is condemnable alike upon reason and authority.*

The alleged fault of the Syracuse lies in the sudden sheer to the eastward which is imputed to her. As soon as her whistle was blown she stopped her engine, and did not put it in motion again until after the collision occurred. This is conclusively proven, and is not denied. It is an important fact in her favor. That she voluntarily and unnecessarily sheered, and put herself in the way of the steamer, as charged, is very improbable. The fact is proven by no one but Teason. It was several times denied expressly by Witherwax when his deposition was first taken. He was recalled the next day, and then stated that he saw the sheer and supposed it was to enable the Syracuse to pass the tow of the Johnson, and that she kept her course afterwards until she struck the steamer. The denials in his former examination detract from the weight of this testimony. The captain and pilot of the Syracuse contradict positively the statement of Teason. The pilot thinks she did not sheer either way after the steamer came in sight. He says she might have headed a

* The New Jersey, Olcott, 444; The Rose, 2 W. Robinson, 3; Holt's Rule of the Road, 227, 247.

little to the westward. The captain of the Colgate saw her sheer to the westward as soon as her engine was stopped. He says the Colgate had a tendency to pull her in that direction. The wind and tide both contributed to that result. The testimony of these officers outweighs that of Teason, which has no support from any other witness. The stem of the Colgate was twenty feet aft of the stem of the Syracuse. The steamer in crossing headed to the eastward. If, as is alleged, the sudden sheer of the Syracuse brought her into the track of the steamer, and thus produced the collision, the blow must necessarily have been given by the stem of one steamer or the other. Such was not the result. The stem of neither touched the other. The steamer struck her port forward gangway against the bluff of the bow of the Colgate, ten feet aft the stem of the latter. This is entirely irreconcilable with the testimony of Teason, and is fatal to the theory which it is relied upon to support. That theory is the sole ground of imputation against the Syracuse. Other views vindicating the Syracuse with more or less of cogency might be presented, but we deem it unnecessary to pursue the subject further. In our judgment the Syracuse is not shown to have been in fault.

DECREE AFFIRMED.

INSURANCE COMPANY *v.* WEIDE.

1. Whether or not on the transfer of a case from a State court to a Federal court, under the 12th section of the Judiciary Act, a new declaration should be filed, is a question of practice and not a subject for error.
2. In a suit against an insurance company for the value of goods lost in the burning of a store, day-books and ledgers, whose correctness as showing the amount and value of the goods is testified to by the person proving them, are, in connection with his testimony, competent evidence, though they would not be so by themselves, to show such value.
3. Where a witness in such a suit, when examined in chief, testifies apparently to the correctness of an abstract made from papers burnt in the fire, and is cross-examined upon the subject of that correctness, the party cross-examining cannot, where he has not caused the cross-examination to be brought up on the bill of exception, object, on a question, on error,

as to the admissibility of the abstract, that the witness has not testified sufficiently to the correctness. He should have caused the cross-examination to appear on the bill if he wish to show this.

4. Its correctness being assumed, the abstract is good as secondary evidence.

ERROR to the Circuit Court for the District of Minnesota.

Charles Weide and Joseph Weide, of Minnesota, brought suit in one of the State courts of Minnesota against the Ætna Insurance Company, on a policy of insurance, to recover $10,000 insured upon a stock of goods lost by fire within the conditions of the policy. The suit was removed to the Federal court under the 12th section of the Judiciary Act, which enacts that suits such as the present was may be transferred, and that copies of the process being filed in the Circuit Court, "the cause shall proceed there *in the same manner as if it had been brought there by original process.*"

A copy of the process, and of the complaint in the State court, were filed in the Circuit, and the company, the defendant, appeared there and put in its answer to the complaint; but no new declaration was filed.

On the trial, the counsel for the defendant moved to dismiss the cause from the docket, on the ground that a new complaint or declaration, properly entitled, had not been filed in the Circuit; but the motion was denied.

The principal question in the case, however, was as to the admissibility of evidence. Both the plaintiffs in the court below were witnesses to prove the value of the goods in the store lost by the fire. All the books of account were burnt, except two day-books and a ledger. The day-books covered entries of sales and purchases in the store from 1865 down to the day of the fire, which was on the 22d of February, 1867. The ledger began the 1st of October, 1866, and contained a merchandise account, posted from the day-books, also coming down to the time of the fire. Joseph Weide, one of the plaintiffs, testified that the value of the goods at the time of the fire, according to the books, was $45,564.64, and with profits added, would amount to $70,000; that the cash inventory of the goods, the last of February, 1866, amounted to $75,500; that he got the amount from the fly-

leaf of the ledger, upon which, in July, 1866, he made an abstract from the inventories for several years before the fire; and that these inventories were destroyed by it. The witness identified the day-books and ledger, and testified that these books were kept by him and his partner, as they had no clerk; that they were the books kept in their business, and *that they were correct;* that the entries in the day-books were the original entries of purchases and sales; that he could not state from recollection the amount or value of the stock on hand at the time of the fire, nor at the time of taking the last inventory, in February, 1866, nor by the purchases and sales after that inventory. This witness was cross-examined, among other things, as to the entries in the ledger, and as to the entries on the fly-leaf, and as to the correctness of these entries, and of the amounts therein stated. The evidence on the cross-examination is not stated in the bill of exceptions.

Charles Weide, the other member of the firm, was also examined, and, as the record stated, gave, in substance, the same testimony as Joseph.

Other witnesses were called, and gave evidence as to the value of the goods in the store at the time of the fire.

The plaintiffs then offered in evidence the fly-leaf of the ledger, a copy of which was in the record. The defendant objected to the same as incompetent and immaterial, and not made at the date of the transaction. The court admitted it. They also offered in evidence the two day-books and ledger, which were objected to, but admitted.

Verdict and judgment having been given for the plaintiff, the insurance company brought the case here.

Messrs. Brisbin and Lamprey, for the plaintiff in error:

1. Upon the transfer the action should have proceeded as if then originally commenced in the Circuit Court. A new complaint or declaration should have been filed. This was not done. As there was thus no declaration for the defendant to answer, there was no jurisdiction, and the action should have been dismissed on the defendant's motion.

2. The fly-leaf of the ledger purported to contain an abstract of inventories for several years. The witness, Joseph Weide, who made the abstract, stated that the entries on the fly-leaf were all made July, 1866, and were an abstract from inventories for several years prior to the fire. The witness did not state that he made these inventories nor that he knew them to be correct. It follows, therefore, that this fly-leaf was a mere abstract from inventories for several years, not produced and not known to be correct, and only a partial copy of such inventories, and not made at the date of the transaction. They were but the declarations of a party in his own behalf; incompetent and immaterial, and we urge the same objections to the admission of the day-books and ledger.

Messrs. Peckham and Allis, contra.

Mr. Justice NELSON delivered the opinion of the court.

As the first question raised. If there was any irregularity in not filing a new complaint or declaration, it was too late, after the defendant had taken issue upon the complaint, to take advantage of it. The question, however, whether a new complaint, or declaration, should have been filed on a removal of the cause from a State court, is one of practice, and not the subject for which error will lie.

As to the second question, the admissibility of the evidence received by the court. There can be no doubt but the day-books and ledger, the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence, *per se*, but with the testimony accompanying them all objections were removed.*

So, in respect to the memorandum on the fly-leaf of the ledger. It was made by one of the witnesses, taken from inventories, present at the time it was made, but which had been subsequently destroyed by the fire. Those inventories, if they had been in existence, would have been the best evi-

* Wood *v.* Ambler, 4 Selden, 170.

dence, and, unless their loss was accounted for, must have been produced. But, being lost, parol evidence of their contents was admissible, as secondary evidence, and so was the memorandum taken from them, for the like reason. As we understand the evidence in the case, the correctness of the entry was testified to. The witness was cross-examined, among other things, as to the correctness of it. The testimony is not given, but, if the evidence of the witness had not been satisfactory, it should have been placed upon the record.

In *Merrill* v. *The Ithaca and Owego Railroad Company*,* it was held that when original entries are produced, and the person who made them, and knew them at the time to be true, testified that he made the entries, and that he believed them to be true, although at the time of testifying he had no recollection of the facts set forth in the entries, such evidence is admissible, as *primâ facie* evidence for the jury. In this case, Mr. Justice Cowan, who delivered the opinion of the court, examined most of the authorities, English and American, on the subject. The same doctrine is also sustained by the case of *Guy* v. *Mead*.†

The learned counsel for the plaintiff in error is mistaken in supposing that the witness Joseph Weide did not testify to the correctness of the facts stated in the memorandum. As already stated, this very point was made the subject of cross-examination, and, if the witness failed to testify to it, the fact should have been set forth in the record, as it was most material for the defendant. The witness had stated on his examination-in-chief, that he made the abstract in July, 1866, from the inventories for several years previous to the fire. Nothing else being shown, the inference is that it was correctly made: hence the cross-examination on this point to show the contrary. We think that the memorandum was properly admitted, and that the judgment should be

AFFIRMED.

* 16 Wendell, 586.

† 22 New York, 465–6.

THE PORTSMOUTH.

1. A captain who, in the night and in a fog, enters a port, supposing it to be his port of destination, enters at his peril of its being so, unless there have been some necessity for his seeking a port. If there have been proper ground to doubt whether the port was the one which he supposed it to be, and he could safely wait outside till morning, or could signal a tug-boat to pilot him in, he should not proceed till he can see or know where he is going.
2. A loss of a part of the cargo by a jettison resorted to in order to lighten the boat after she had run aground in consequence of violating such a dictate of prudence, is not a loss "by dangers of the navigation" within the meaning of a bill of lading having an exception in those terms.
3. A vessel proceeding in the night and in a fog into port, is bound to proceed at a low rate of speed.
4. If a vessel is stranded, it is the duty of the captain to take all possible care of the cargo. If the vessel must be lightened before she can get off, he should get lighters, if possible, and land it, not make a jettison of it.

APPEAL from the Circuit Court for the Northern District of Illinois; the case was this:

The Salt Company of Onondaga shipped at Buffalo, on the propeller Portsmouth, a large quantity of salt for Chicago, under a bill of lading in the usual form, but containing an exception of the dangers of the navigation.

On the 9th of October, 1866, the propeller, with the salt on board, reached Fox Island, in Lake Michigan, and about seven o'clock in the evening of the same day left it, bound directly for Chicago, using both sail and steam. The weather was foggy, and the wind was blowing from the northeast, with a considerable sea. The fog continued during that night and all the next day, and the wind blew freshly, though not so as to prevent the propeller's carrying her foresail. Nothing particular occurred until about sunset of the evening of the 10th, when, as described by the master, the fog lifted for a minute, and a loom of the land on the west side of the lake was discovered, and the master, mate, and engineer "could just see a church-steeple and a house, as near as they could

Statement of the case.

calculate." The master did not know the distance from Fox Island to Racine, but consulting with the engineer as to the quantity of steam carried, and referring to his own expectation of the time when he expected to be that far on his course, which he had fixed at six o'clock in the evening, he concluded that the place was Racine, in Wisconsin. Acting upon that conclusion the propeller was continued on a course generally south by east half-east, and southeast, then south by west, and southwest, and finally west, until a whistle was heard, which the master took to be that of a propeller at the Chicago pier. This must have been at about three o'clock in the morning of the 11th. Soon after a white light was discovered, and this was assumed to be the Chicago light; the light at port being a white one, though not the only white one on the west coast of the lake. The sound of cars running, and of car-whistles was also heard, which the master inferred to be caused by making up trains at Chicago. Accordingly he attempted to enter the port, but when the propeller came very near the pier it was discovered not to be the pier of Chicago, and the vessel was immediately backed. It was, however, too late. She grounded and held fast. According to the testimony of the second engineer, who was in the engine-room managing the steamer, the vessel, until three minutes before his getting the bell to stop, had been running at full speed, which was between eight and nine miles an hour. The captain and first engineer—this last, until three minutes before the bell to stop was rung having been on deck with the captain—testified that they were not running so fast, that she was "under check," the captain stating that she was not running more than from three to four miles an hour. The master testified that although the weather was rough, he might safely have remained out in the lake till daylight, or might have signalled for a tug to take them in, and that he would not have gone in had he not, in common with the other officers, certainly believed that the place was Chicago. After the boat was found to be aground and fast the clerk was at once sent ashore and dispatched to Chicago for a tug. Meanwhile the

propeller remained at the place where she had taken the bottom, which proved to be Waukegan, some thirty or forty miles from Chicago, until the tug arrived late in the afternoon of the 11th. No lighter was sent for, and no efforts were made to save the cargo, but after the arrival of the tug about one thousand barrels of the salt were thrown overboard to lighten the propeller, though the wind had then subsided, and she was apparently in no danger. The next morning she was got off, and she proceeded to her port of destination, where the residue of the salt was landed. The Salt Company now filed a libel in the District Court for the Northern District of Illinois, for the salt that had been thrown overboard and was undelivered. The propeller set up that it had been lost in the perils of navigation—thrown over to save the vessel and residue—and was so a case for general average. The District Court decided otherwise, and the Circuit Court affirmed its decree. The owners of the propeller now brought the case here.

Mr. Comstock, for the plaintiff in error. No opposing counsel.

Mr. Justice STRONG delivered the opinion of the court.

The contract of the appellant was to deliver the two thousand barrels of salt at Chicago to the consignee named, "the dangers of lake navigation only excepted," and whether the failure to deliver was caused by the excepted dangers is now the only question. A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present, and enter into the case.* This is a principle alike applicable to exceptions in bills of lading and in policies of insurance.† Though the peril of the sea may be nearer in time to the

* Lawrence et al. *v.* Minturn, 17 Howard, 100.

† General Mutual Insurance Co. *v.* Sherwood, 14 Id. 365.

disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss. And there is, perhaps, greater reason for applying the rule to exceptions in contracts of common carriers than to those in policies of insurance, for in general, negligence of the insured does not relieve an underwriter, while a common carrier may not, even by stipulation, relieve himself from the consequences of his own fault.*

In view of this recognized construction given to such clauses in bills of lading as "perils of the sea excepted," or, as in this case, "the dangers of lake navigation only excepted," it is plain that the appellant has shown no sufficient excuse for the failure to deliver the salt to the consignee of the libellant.

It is manifest that the master was first at fault in mistaking the land which he dimly saw on the evening of the 10th for Racine. He was, in fact, then from thirty to forty miles farther from Chicago than he supposed he was. His supposition was unwarranted by the evidence he had. He thought the place was Racine, not because of its appearance when he saw the steeple and the house. His view of those objects was very indistinct. His language is, "We could just see a church-steeple and a house, as near as we could calculate." The outline of the shore he does not pretend to have seen, or anything which, by its appearance, justified his conclusion that he was opposite Racine. His sole reasons for assuming that such was his position are to be found in his having consulted with his engineer about the quantity of steam carried, and in his own estimate of the time when he expected to reach that place. At best, therefore, his conclusion was based upon a conjecture. Considering that the voyage from Fox Island had been through a thick fog, and in a heavy sea; that the wind had not been quite steady; that the speed of the propeller had not been measured by the log, or by observations; and considering also another fact, to which the master testifies, that he did not know the

* Vide Propeller Niagara *v.* Cordes et al., 21 Howard, 29.

distance from Fox Island to Racine, it seems to us his conjecture that the propeller was opposite Racine at sunset of the 10th was no reliable guide to the subsequent conduct of the voyage. It was, however, accepted as a guide, and it led directly to the disastrous fault afterwards committed of mistaking Waukegan for Chicago. The master, judging that he had steamed far enough from Racine, readily concluded that the light he saw, and the whistle and running cars he heard were at the place of his ultimate destination, and without any careful verification of his opinion he attempted to enter the port. The light he saw, it is true, was a white light, like that at Chicago. But there were other white lights on the west shore of the lake. Waukegan had one. The whistle and the running cars were not peculiarities at Chicago. There was enough in his situation to awaken doubt, and to induce caution. We think that, in his circumstances, the attempt he made to enter the port was inexcusably rash. It was not a necessity. His duty to the owners, and still more to the freighters, was to exercise the highest prudence, as well as skill, to guard against loss. According to his testimony he might safely have remained out in the lake until morning, or he might have signalled for a tug to take the propeller in. It was his duty to do one or the other. He did neither. He testifies he would have gone out into the lake and waited until daylight had he not supposed he had found a harbor. He had no right to act upon such a supposition, which at best was no more than a careless conjecture. He admits, what must be evident, that he could have seen plainer had he waited till daylight before attempting to enter, and that he might have known the pier was Waukegan pier. He thinks a tug could have found the propeller had he signalled, but he neglected to signal. The second engineer also testifies that the propeller attempted to enter the port at her usual speed of eight and a half or nine miles an hour, which, if the statement be correct, was much too great. It is true, his statement varies from the account given by the master and chief engineer; but the chief engineer and the master were both upon deck, and

the second engineer was in immediate charge of the engine until within three minutes of the time when the signal was given to stop, and even during those three minutes the chief engineer was outside of the engine-room. The second engineer must, therefore, have best known at what rate of speed the propeller was moving. In view of all this, we have no hesitation in coming to the conclusion, that the loss sustained by the libellants is to be attributed to the fault of the carrier, and not to the excepted dangers of lake navigation.

Were it necessary, it would be easy to show that the conduct of the master *after* the vessel was stranded was entirely unjustifiable. It was his duty even then to take all possible care of the cargo. He was bound to the utmost exertion to save it. Losses arising from dangers of navigation, within the meaning of the exception in the bill of lading, are such only as happen in spite of the best human exertions, which cannot be prevented by human skill and prudence.* But in this case no effort was made to save the cargo. The salt was not thrown overboard until after the arrival of the tug. The fog had then lifted. The wind and the sea had subsided. It is evident the salt might then have been saved, if it could not have been removed before.

DECREE AFFIRMED WITH COSTS.

THE PROTECTOR.

1 The doctrine declared in *Hanger* v. *Abbott* (6 Wallace, 532), that statutes of limitations do not run during the rebellion against a party residing out of the rebellious States, so as to preclude his remedy for a debt against a person residing in one of them, held applicable to the Judiciary Acts of 1789 and 1803, limiting the right of appeal from the inferior Federal courts to this court, to five years from the time when the decree complained of was rendered.

* Propeller Niagara *v.* Cordes et al., cited *supra*, 685.

Statement of the case.

2. The act of March, 1867, allowing appeals from Federal courts, in districts where the regular sessions of such courts subsequently to the rendering of the judgment had been suspended by rebellion, to be brought within one year from the date of the passage of the act, is an enabling act, not a restraining one.

THIS was a motion by *Mr. P. Phillips* to dismiss an appeal, on the ground that it was not brought within the time allowed by law. The case was this:

Freeborn, *a resident of New York*, had filed a libel against the ship Protector, in the District Court for the Southern District of *Alabama*, January 25th, 1859, for the price of certain necessary supplies and materials previously furnished to the ship in the port of New York. A decree dismissing the libel was pronounced in December, 1859. This decree was affirmed by Mr. Justice Campbell, in the Circuit Court, on the 5*th of April*, 1861. The rebellion broke out soon after, lasting about four years. The appeal from the Circuit Court to this court was taken on the 28th day of July, 1869, more than eight years after the date of the decree appealed from.

By the twenty-second section of the Judiciary Act of 1789, it was enacted that writs of error should not be brought but within five years after rendering, or passing, the judgment or decree complained of, or, in case the person entitled to such writ be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years, as aforesaid, exclusive of the time of such disability. By an act of March 3d, 1803, appeals were given, instead of writs of error, in cases of equity and admiralty jurisdiction, and it was provided that they should be subject to the same rules, regulations, and restrictions as were prescribed in law in cases of writs of error, and the same limitation applied, of course, to appeals as to writs of error.

The case, it was admitted, by Mr. Phillips, might, under certain views of what was decided in *Hanger* v. *Abbott*,* be supposed to be taken out of the operation of these acts;

* 6 Wallace, 532.

the rebellion having broken out so soon after the decree was affirmed in the Circuit Court. But he argued that the doctrine of *Hanger* v. *Abbott* was not rightly applicable to this special matter of practice, fixed, as it was, by positive statutes. Whichever way, however, that might be, the provisions made by an act of March 2d, 1867,* on the very subject of appeals during the rebellion, concluded, as he argued, the matter. That statute ran thus:

"Where any appeal or writ of error has been brought to the Supreme Court from any final judgment or decree of an inferior court of the United States for any judicial district in which, subsequently to the rendition of such judgment or decree, the regular sessions of such court have been suspended or interrupted by insurrection or rebellion, such appeal or writ of error shall be valid and effectual, notwithstanding the time limited by law for bringing the same may have previously expired; and in cases where no appeal or writ of error has been brought from any such judgment or decree, such appeal or writ of error *may be brought within* ONE YEAR *from the passage of this act.*"

Mr. Phillips contended that this statute had prescribed in a positive way, a limitation of one year from its enactment within which to bring up appeals situated as this one had been. The time given by the act was abundant, and there was no reason, since its passage, for resorting to the privileges—doubtful as applied to cases like this—of *Hanger* v. *Abbott*.

Mr. F. S. Blount, contra.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

It is plain that by the literal terms of the act of 1789 the period of limitation had expired more than three years prior to the taking of this appeal. But this court has decided, in the case of *Hanger* v. *Abbott*, that a statute of limitations did not run, during the rebellion, against a party residing in

* 14 Stat. at Large, 545.

New Hampshire, so as to preclude his remedy for a debt against a person residing in Arkansas, one of the insurrectionary States. It is unnecessary to go over again the ground which was examined in that case. We are of opinion that the same law applies to this. And by throwing out of the eight years which elapsed between the decree and the appeal the four years and more during which the war continued, the time is reduced to a period of less than five years.

But it is urged that the act of March 2d, 1867, has regulated this subject, and has prescribed a limitation of one year from the passage of that act within which to bring all appeals and writs of error which were suspended or interrupted by the rebellion. We are of opinion that this statute is an enabling and not a restraining one; that it was not intended to take away any right of appeal, but to continue the right in cases where it had been lost. "Where the common law and a statute differ," says Blackstone, "the common law gives place to the statute; and an old statute gives place to a new one. . . But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative."* Such repugnancy does not exist here. Many cases may be supposed, in which the right of appeal would be saved by the statute of 1867, which would not be saved by the act of 1789 and the operation of the common law rule followed in *Hanger* v. *Abbott*. If four years of the five elapsed before the war, the right of appeal would be saved by the act of 1867, but would be gone under the operation of the act of 1789, unless the appeal were brought before the passage of the former act. If Congress had intended to limit all appeals from courts in the insurrectionary States to one year from the passage of the law, it should have been so expressed in the act.

MOTION DENIED.

* 1 Commentaries, 89.

Syllabus.

MEADE *v.* UNITED STATES.

1. The claims of American citizens against Spain, for which by the convention (subsequently becoming the treaty) of February 22d, 1819, the United States undertook to make satisfaction to an amount not exceeding $5,000,000 were such claims as, at the date of the convention, were *unliquidated*, and statements of which had been presented to the Department of State, or to the minister of the United States. And within this class, on the said 22d of February, were the claims of the late Richard W. Meade. And this was the only class that the commissioners appointed subsequently, on the ratification of the treaty, to pass upon claims, had power to pass upon.
2. The convention, as signed February 22d, 1819, subject to ratification within six months, though it was not ratified within the time stipulated, was never abandoned, though some expressions in the notification of August 21st, 1819, by the United States to Spain (notifying to that government that after the next day, "as the ratifications of the convention will not have been exchanged," all the claims and pretensions of the United States will stand in the same situation as if that convention had never been made), indicated that the United States might be induced to refuse to carry it into effect.
3. This notification did not, by the non-ratification within the six months, make revocable the power which citizens of the United States, by filing their claims with it, had given their government to make reclamations against Spain in their behalf, nor did Mr. Meade in point of fact revoke the power which he had so given his government.
4. Mr. Meade having subsequently to the appointment of commissioners presented to them his claims, not in an unliquidated form, but in the shape of a debt acknowledged by Spain in a judgment against it given by a royal junta, or special judicial tribunal of that country, made after the above-mentioned notification by the United States, the commissioners properly rejected the claims as thus made. They did not reject his claims in their unliquidated form, and as filed previously to the convention, in the Department of State and with the American minister.
5. The fact that before the said commission rejected the claim of Mr. Meade in the form in which he had presented it—the form, namely, of an award or judgment by a Spanish tribunal for a sum certain—he requested the government of the United States to procure from the Spanish government his original vouchers and evidences of debt, under a clause of the treaty which obliged the Spanish government to furnish, at the instance of the said commissioners, all such documents and elucidations as might be in their possession for the adjustment of the unliquidated claims provided for by the treaty, does not, even assuming that it shows that he meant to present his claims in an unliquidated form, show any cause of action against the United States over which the Court of Claims could exercise jurisdiction.

Statement of the case.

6. The award of the tribunal of the Spanish government in favor of Mr. Meade, made on the 19th May, 1820, was not, in that form, included by the 5th article of the convention of February 22d, 1819, renouncing certain unliquidated claims then existing.
7. There having been no evidence in a finding of the Court of Claims that an assurance, which that court found as matter of fact had been given by the minister of the United States at the court of Madrid, to the government of Spain, that a debt due by the last-named government to Mr. Meade would certainly be paid, if a treaty whose ratification had been suspended was ratified, and which treaty was afterwards ratified, was given in pursuance of any instructions from the President or by virtue of any authority from the United States, the said assurance is to be regarded as having been given without authority, and therefore to be held void.
8. This court does not agree with the Court of Claims in its opinion that, on the facts found by it, the United States, by the acceptance of the treaty of Spain of February 22d, 1819, and the cession of the Floridas, unincumbered by certain private grants, to a recognition of which as valid our government had objected, appropriated the property of Mr. Meade, and that he acquired a good claim against them for $373,879.88, for which they were not liable legally and judicially except by and through the investigation, allowance, and award of the commissioners appointed under the treaty. But they do agree with that court in the opinion that the decision of the commissioners, dismissing the claim in the form in which it was presented to them, barred a recovery in the Court of Claims on merits. And that the joint resolution of Congress of July 25th, 1866, referring the case back to the Court of Claims after it had been once decided adversely to the claimant, was not a waiver of the bar, and did not allow that court to consider it upon merits irrespectively of the dismissal by the commissioners.
9. This court, in conclusion, expresses its regret, that entitled as Mr. Meade clearly was to prove his unliquidated claims before the commissioners he did not do so, and they observe that now the only remedy of his representatives is by "an appeal to the equity of Congress."

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

Richard W. Meade, of Philadelphia, a native-born citizen of the United States, went to Spain towards the beginning of this century, and became engaged extensively in commerce with that country. He was there during the invasion of the French under Napoleon, and continued to reside there until the year 1821. While so resident he entered into numerous contracts with the Spanish government after the year 1802, and before the year 1819, which involved large

amounts of money, and his resources contributed to the support of that government during its contests with the French. By this means Spain became largely his debtor. After the restoration of the King of Spain to the throne, Mr. Meade was seized and imprisoned by order of the government, confined for a long period of time, and finally released only by reason of the active interposition of the government of the United States in his behalf. About the time of his release our government and Spain were in negotiations in regard to claims which citizens of the United States were making upon Spain for wrongs done to them; in which negotiations a cession of the region known as the Floridas to the United States had been proposed. And on the 6th June, 1818, Mr. Meade being then in Spain, addressed a letter to Mr. Adams, our then Secretary of State, informing him of a hint which he had received, that his just claims against the government of Spain, and such further sum as he might advance, might be satisfied by a cession of lands in that region, and desiring to know whether this would interfere with the designs of the United States. In reply to this letter he was informed that no such cession would be recognized if made after a certain date, to be fixed by the contracting parties. Mr. Meade thereupon abandoned the idea of getting satisfaction of his claim by a grant of land, and there being now a prospect that a treaty would be made in which all claims, including his own, would be provided for, he submitted, January 17th, 1819, the claim to the Department of State "for that protection which his government might think proper to grant." The claim, as sent by Mr. Meade to the United States, showed an aggregate of near $400,000.

On the 22d of February, 1819, a treaty was *signed** between the United States and Spain, by which the Floridas were agreed to be ceded to the United States, we contracting that all grants made therein by Spain, before January 24th, 1818 (the date when the proposal for cession was made), should be

* 8 Stat. at Large, 258, 260.

confirmed to the persons in the possession; and both parties agreeing that all grants made subsequently to that date should be void. By the 9th article the two governments reciprocally renounced

"All claims for damages or injuries which they themselves, as well as their respective citizens and subjects, may have suffered *until the time* of signing this treaty."

In the same article (one which brought Mr. Meade's notices within the treaty), it was specified (Specification 5) that this renunciation extended

"To all claims of citizens of the United States upon the Spanish government, statements of which, soliciting the interposition of the government of the United States, have been presented to the Department of State, or to the minister of the United States in Spain, since the date of the convention of 1802, and until the signature of this treaty."

The 11th article of the treaty opened as follows:

"The United States, exonerating Spain from all demands in future on account of the claims of their citizens to which the *renunciations herein contained extend*, and considering them entirely cancelled, undertake to make satisfaction for the same *to an amount not exceeding five millions of dollars.*"

It was agreed that there should be a commission "to ascertain the full amount and validity of those claims;" such commission to "hear, examine, and decide upon the same within three years from the time of their first meeting." And it was agreed further, that "the Spanish government shall furnish all such documents and elucidations as may be in their possession, for the adjustment of the said claims; the said documents to be specified, when demanded, *at the instance of said commissioners.*"

The final ratification of this treaty was limited by its terms to the 22d of August, 1819.

On the 10th of March, 1819, after the treaty had been ratified by the United States, but before it was ratified by

Statement of the case.

Spain, the government of the United States notified to the government of Spain that the article in the treaty which provided that all grants of lands made by Spain in the Floridas after the 24th of January, 1818, should be declared null and void, "had been agreed to on the part of the United States, with a clear understanding that it included certain grants alleged to have been made, in the course of the preceding winter, by the King to the Duke of Alagon, the Count Rostro, and a certain Mr. Vargas," and that the exchange of ratifications must be "with a full and clear understanding" that these were "among the grants thus declared null and void." In point of fact the grants which the United States insisted were by the treaty declared null and void, had been made prior to the 24th day of January, 1818 (the date when the cession was proposed). And upon the notification given by our government, the government of Spain refused to exchange ratifications, alleging that such declaration or understanding, with regard to the intent and meaning of the treaty, would "annul one of its most clear, precise, and conclusive articles." And that government continued to refuse to ratify the treaty until the 22d of August (the limit of time provided for the ratification) had passed.

On the 21st of August, 1819, the United States notified to Spain, that "*after the 22d day of the present month*, as the ratifications of the convention of the 22d of February will not have been exchanged, *all the claims and pretensions of the United States*, which, with the spirit of moderation, the love of peace, and *the delusive expectation* that all causes of difference and dispute with Spain would be thereby adjusted and settled, they consented to modify or waive, *will stand in the same situation as if that convention had never been made.*"

After the notices above-mentioned had been given by the United States to Spain, and *after* the time for exchanging ratifications of the treaty of 22d of February, 1819, had expired, Mr. Meade proceeded to prosecute his several claims before a royal junta of Spain,* which had been appointed to

* A special tribunal or commission, invested with judicial powers, under the laws of Spain.

hear and determine his claims by the government of Spain, *at the solicitation and with the approval of the government of the United States*, expressed before the signing of the treaty of 22d of February, 1819. While the ratifications of the treaty were held in abeyance, as already stated, Mr. Meade refrained from prosecuting his claims before this junta; but after the notices given by the United States to Spain, to wit, on the 31st of August, 1819, and at various times thereafter, he appeared before the junta, and produced, under and in presence of a decision thereof, all his original documents, vouchers, and evidences of debt, and also evidence as to his alleged personal injuries. And on the 19th day of May, 1820, the junta, with the approval of the King of Spain, made a decree, by which it was adjudged that the government of Spain was indebted to him upon his claims and accounts, and for interest on them down to the time of the award, and for his personal injuries, in a sum in gross, given in Spanish money, and equivalent, in the currency of the United States, to $373,879.88. The King of Spain at the same time approved, transmitted, and delivered to Mr. Meade the formal certificate or evidence of such award, which was, by the laws and customs of Spain, final and conclusive upon the respective parties, and possessed all the solemnity and verity of a judgment, and the record thereof, in courts of the common law. Mr. Meade was, however, at the same time, by the junta, *required to*, and did surrender to the government of Spain all his original documents, vouchers, and evidences of debt establishing his claims. These were received by the Spanish government, "cancelled," and carried, in its fiscal department, to the various accounts to which they respectively belonged, and were considered and treated by that government as forever *discharged and merged*. They were never restored to Mr. Meade, nor to his representatives. Immediately after the decree was rendered, the government of Spain and Mr. Meade each duly notified it to the government of the United States, *which government raised no objection to it, but, on the contrary, expressed its approval to both the government of Spain and to Mr. Meade.*

In addition to what immediately precedes (the first four findings, in substance, of the Court of Claims), that court went on to find, in terms, as follows:

Fifth.—After the award rendered by the junta, to wit, in August, 1820, the government of Spain *resumed* the consideration of the treaty of 22d February, 1819, and of the demand made by the United States, that the three certain private grants of lands in the Floridas, made by Spain to her own citizens, not included in the terms of the treaty, should be annulled. And the Cortes of Spain, in which body was vested the sole constitutional power to annul such private grants or cessions, refused to annul the same until the United States should agree to pay and discharge in full the indebtedness of Spain to the said Meade, upon the award of the royal junta. And thereupon the United States, by their minister at the Court of Madrid, gave to Spain "a clear and distinct assurance that the debt due to Richard W. Meade would certainly be paid to him by the United States, if the treaty were ratified by the Spanish government, and the cessions (to the Duke of Alagon, and the Count Rastro, and Mr. Vargas) totally annulled." And upon the faith of these assurances the Spanish government annulled such three private cessions, and duly ratified the said treaty, whereby the Floridas, free of, and unincumbered by, these private grants, passed to the United States. And the said Meade duly notified the government of the United States of the assurances given by their minister, and that the Spanish government had acted upon the faith thereof when annulling the private grants and ratifying the treaty, which notice was duly received by the President, and by him transmitted to the Senate while that body was considering the acceptance or re-ratification of the treaty. And the United States, with full notice and knowledge of all the facts and circumstances set forth in this finding, did, on the 19th of February, 1821, accept and assent to the treaty, as ratified by Spain, and became seized and possessed of the Floridas thereby.

Sixth.—And the said Meade, at the time the acceptance of the treaty, as ratified by Spain, was under consideration in the Senate, notified the United States that the award of the royal junta was a good and valid certificate or evidence of indebtedness, and that he protested against the same being appropriated by the United States, unless express provision should at the

same time be made for the full payment thereof by them exclusive of any provision which might be made for American claimants, by the terms of the treaty. And he also requested that such award held by him be expressly excepted and excluded from any operation of the treaty, and that he be allowed to seek the payment thereof from Spain. But the United States, on the contrary, against the will and consent of said Meade, did take and appropriate such indebtedness of the Spanish government, and did *relinquish* the same to Spain, and *discharge and release Spain from the payment thereof. And such claim, demand, or award belonging to the said Meade, so taken and appropriated, constituted and was in fact a part of the consideration paid by the United States to Spain for the cession of the Floridas, and the sole consideration paid to Spain by the United States for an annulment of the three private grants.*

The treaty being thus finally ratified, commissioners were appointed in accordance with its terms. The findings of the Court of Claims give the subsequent history of the case thus:

Seventh.—The said Meade, after the taking or appropriation of his property or award by the defendants, as set forth in the sixth finding, did demand payment therefor from the defendants, but was not paid; and, on the contrary, he was *required* to present his demand to the commissioners appointed under and by virtue of the terms of the treaty of 22d of February, 1819. And the commissioners, *upon such award or decree of the royal junta being presented to them,* did refuse to allow *the same;* and, on the contrary, did determine and decide that the only claims against Spain which they had authority to investigate and allow were claims existing prior to the date of the treaty of 22d of February, 1819, and that inasmuch as the award or decree of the royal junta was subsequent to the date of the treaty, they had no authority to investigate or allow it; and the commissioners accordingly did, on the 29th day of May, 1824, reject and dismiss the same.

The next finding had reference to a matter which made another topic in the case. It was thus:

Eighth.—As soon as the commissioners notified the said Meade of their determination to reject his demand for the payment of

his award by the royal junta, but before their final decision or rejection of the same, he duly requested, to wit, on the 17th of April, 1823, the defendants to procure from the Spanish government his original vouchers and evidences of indebtedness described in the fourth finding; and the defendants accordingly did request the Spanish government to furnish and transmit the same to them. But the Spanish government did positively refuse to produce and deliver up such vouchers and evidences of indebtedness, upon the ground that the award of the royal junta was a judicial decree, and final and conclusive upon the parties by the laws and customs of Spain, and that the said vouchers were merged therein, and had been given up to and duly filed and credited in the department of finance. And the Spanish government did subsequently assure the defendants that such cancelled vouchers would be given up as requested; but the same never were so produced and given up, and have ever since been and are still held by the government of Spain. And by reason of such refusal and neglect on the part of Spain to deliver up and surrender such vouchers, the commission never considered or allowed the same, nor any portion of the demand of the said Meade. And, on the contrary, the commission allowed the claims of other persons existing prior to the date of the treaty, to an amount in the aggregate of $5,454,545.13. And the defendants thereupon paid away upon such allowed claims pro rata the sum of $5,000,000, being the whole of the amount provided by said treaty and the acts of Congress in furtherance for the liquidation thereof. And on the 8th of June, 1824, after making such awards, the said commission expired.

Being thus unable to proceed further in any way before the commission, Mr. Meade brought the matter before Congress. It was steadily kept before the attention of that body until the establishment of the Court of Claims. After the establishment of the Court of Claims, 11th of February, 1856, the Senate, by resolution, referred the case to that court for adjudication, and on the 17th of October, 1859, a decision was given (by a divided court) adverse to the claim.

At that time the decisions of the court were reported to Congress, and the claim went back and received the further

consideration of Congress. In 1863 the Court of Claims was reorganized by an act of Congress,* which gave it jurisdiction over private claims against the government, "founded upon any law of Congress, or upon any regulation of an executive department, or upon *any contract*, express *or implied*, with the government of the United States;" and subsequently to this, Congress by a joint resolution reciting that doubts were entertained whether the claim of the estate of Mr. Meade was within a section of the said act, resolved "that the said claim be and the same hereby is referred to the Court of Claims for adjudication thereof, pursuant to authority conferred upon said court by any existing law to examine and decide claims against the United States." The court then heard the case anew, and in accordance with the rules laid down by this court regulating appeals from the Court of Claims,† made a finding which was meant to be a finding of facts, and reported also the conclusions in law of the court upon them. The "finding of facts" is given in what precedes. It purported to be made in accordance with the rule of this court which should govern such finding, a rule in these words:

"The facts so found are to be the *ultimate facts* or propositions which the evidence shall establish in the nature of a special verdict, and *not the evidence on which these ultimate facts are founded.*"

Upon the findings of fact as made by it the Court of Claims, as a conclusion of law, decided:

1. That, by the acceptance of the treaty with Spain of 22d February, 1819, and the cession of the Floridas, free of, and unincumbered by, the three private grants, the United States took and appropriated the property of Mr. Meade, and that he thereby, on the 19th of February, 1821, acquired a good and valid claim against them for $373,879.88.

2. That the United States were not liable legally and judicially for such appropriation so taken for the public use,

* 12 Stat. at Large, 765.

† 3 Wallace, 7.

except by and through the investigation, allowance, and award of the commission appointed by the United States, under and in pursuance of the treaty with Spain of 22d of February, 1819, and that the decision of such commission dismissing the same was final and conclusive upon the claimant, and bars a recovery upon the merits in this court.

3. That the joint resolution, 25th July, 1866, referring back this case after the same had been once decided by the former Court of Claims adversely to the claimant, was not a waiver of the said bar, and did not allow this court to adjudge and decide the case upon the merits irrespective of the decision and dismissal by the said commission.

And that judgment should be rendered herein for the defendants, and the petition be dismissed.

From this decree the representative of Mr. Meade took an appeal here.

Messrs. Bradley and Cushing, for the appellant:

I. Mr. Meade's submission of his claims upon Spain, to the Department of State, on *the prospect of a treaty's being concluded*, was not an absolute surrender by him to the government of those claims, nor when both the government of Spain and the United States announced, in effect, that the treaty proposed would never be ratified—in other words, that there would be *no* treaty—was he bound forever from prosecuting his claims against Spain. When, therefore (1st), a treaty was signed but provisionally—the power to ratify being limited in point of time—and when (2d) Spain by refusing to ratify within the time declared that she would not agree to the treaty, and when (3d and finally), on the 21st August the United States notified to her that the expectation of a treaty had proved a "delusive expectation," and that from the next day "all the claims and pretensions of the United States will stand in the same situation as if that convention had never been made,"—a notification which she made operative by an acceptance of the situation—it cannot be doubted that whatever authority had theretofore been given by Mr. Meade to the United States, by filing his claims, became re-

vocable by him. He now had a right, if he pleased, to prosecute his own claims in his own way.

The fact that new negotiations were entered upon afterwards, and that the treaty with a *new* construction of it, in virtue of *new* considerations received by Spain—this being in fact tantamount to a new treaty—was finally and years afterwards concluded, does not affect our position; nor in view of the complete vacation of proceedings at the 23d of August, would our position be affected even if the treaty had been re-ratified, in its first sense. Mr. Meade's submission we assume, therefore, became revocable.

II. It was actually revoked. Mr. Meade's act in submitting his claims to the tribunal created by Spain on his petition, and *at the instance of the United States*,—a submission made after the expiration of the time limited in the convention for the ratification thereof, and when there was no negotiation between Spain and the United States for the resumption of that convention,—when in point of fact, as is known,—though this is no part of the findings and, therefore, not properly spoken of, Spain had recalled her minister—and when, so far as anything appeared, there was no probability that the treaty would be ratified by Spain—was an actual and complete revocation.

Mr. Meade accordingly accepted this condition of things. And to a tribunal appointed by the Spanish government "at the solicitation and with the approval of the United States, expressed before the signing of the treaty," actually organized before the signature of the treaty was known in Spain, invested with judicial powers under the laws of Spain, and which had been appointed to hear and determine his claims on Spain, he submitted his claims, and by that tribunal the amount was adjudicated on the 19th of May, 1820. When thus passed on and liquidated they were no longer within the jurisdiction of the commissioners. Our Secretary of State, Mr. Adams, has said: "If anything in human intention can be made clear by human language, it is that the claims provided for by the above stipulation, were in the condition as they had been exhibited *at the time of the treaty;*

that the authority and the trust of examining, ascertaining, and deciding their amount and validity, was solely and exclusively committed to the *commissioners*." He affirms that Mr. Meade's claim, *if comprised at all within the provisions of the treaty*, was as an unsettled claim. But it was not unsettled in any sense whatever, as he himself argued, and the commissioners had no jurisdiction over that subject-matter. The claims which Mr. Meade had at the signing of the treaty, diverse in character, uncertain in validity, and unsettled as to amount, had been merged in the final judgment of a court of competent jurisdiction. Mr. Meade, in fact, came before the commissioners, as the findings show, only because he was "*required*" to present his demand to them. He sought, as is plain by the findings, to make the government pay irrespectively of that commission. The fact that when thus "*required*" to present his claim to the commissioners, he followed up his petition, and got from them an order or call on Spain, under the treaty, to produce the vouchers he had surrendered and which were cancelled, cannot be availed of to support their jurisdiction. No consent of Mr. Meade could give it. The agreement of both parties could not. The answer of Spain to that demand, as set out in the eighth finding, was conclusive "that the award of the royal junta was a judicial decree, and final and conclusive on the parties by the laws and customs of Spain, and that the vouchers were merged therein, and had been given up to be duly filed and credited in the department of finance." The commissioners decided that they had no authority to investigate or allow *such* a claim. They did not decide that the petitioner had no case against Spain, or upon the fund which they were to distribute under the treaty, but that they had no power or authority to investigate or allow *that* claim; that is to say, that they had no jurisdiction over the subject-matter, and they were right.

In this state of things, the claim being formally established at the instance of our government, by the judicial tribunals of Spain, and admitted under the most solemn act as a debt due from Spain, but with no board constituted to

act upon it, the United States, "against the will and consent of said Meade, did take and appropriate such indebtedness of the Spanish government, and did relinquish the same to Spain, and discharge and release Spain from the payment thereof," they, by their minister at the court of Madrid having given to Spain "a clear and distinct assurance that the debt due to Richard W. Meade would certainly be paid to him by the United States, if the treaty were ratified by the Spanish government, and the three private cessions annulled;" and upon the faith of these assurances the Spanish government having annulled these grants, ratified the treaty, and ceded the Floridas to the United States, with an unincumbered title. All this was duly notified to the United States; and "with full notice and knowledge of all these facts and circumstances," on the 19th February, 1821, she accepted and assented to the treaty as ratified by Spain, and received the Floridas.

Did not this transaction take Mr. Meade's case out of the operation of the treaty, even assuming that after the notice of the United States to Spain, of the 21st of August, 1819, and the award of the junta, it was not already outside of it?

And was not this appropriation of his debt so known and admitted, made under an implied, if not an express contract to make compensation therefor?

But if the claim, in any form, after having passed into judgment of the Spanish tribunal, was still within the class of claims that the commissioners had a right to entertain, how stands the case? That Mr. Meade had a just original claim against Spain no one denies. By the approval of his own government he had turned it into *res judicata*, and in doing so had been "required" by Spain to give up to her all the evidences of it. "Required" now by our own government to present his claim to our commissioners, and they having no power to consider it otherwise than independently of and anterior to the judgment of the junta, he calls on our government to request from Spain, as in pursuance of the treaty it secured a right to do, his original vouchers. His purpose was plainly to present it in an unliquidated shape.

It was only for the "adjustment" of claims under the commission that the treaty gave a right to ask for these vouchers. The request to have the vouchers, was in substance a presentation of it in this form. Our government does so call on Spain for these vouchers, but from want of promptness, or want of efficiency, or from her having made the term of the commission too short, or from some other cause connected with *her* own management or mismanagement of this part of the thing, the commission expires before the vouchers are obtained. The government had undertaken to act as agent or attorney for Mr. Meade; to manage the whole matter; and the time to prove the claim in the unliquidated form, having, as that time was limited by the government, been too short for her to do her duty in the premises, surely a claim exists here for reimbursement in some other form. The case falls within what is said by Lord Chancellor Truro in *De Bode* v. *The Queen.** "It is admitted law that if the subject of a country is spoliated by a foreign government he is entitled to redress through the means of his own government. But if through weakness, timidity, or any other cause on the part of his own government, no redress can be obtained, then he has a claim against his own country." And what is there unjust in this? The whole sum allowed by the government ($5,000,000) has been absorbed by other claims confessedly just. If Mr. Meade had another claim, and a just one also, then it is plain that Congress, in appropriating but $5,000,000, appropriated a sum insufficient to satisfy the just claims of American citizens, and should in some way pay more.

III. Assuming, as the Court of Claims decides it was, that independently of the joint resolution of July 25th, 1866, the decision of the commissioners dismissing Mr. Meade's claim was a bar to recovery upon merits in the Court of Claims, that joint resolution was a waiver of the bar. Had the case been referred in ordinary routine it would have probably been no bar. But it went back by the special action of Con-

* 3 Clarke, House of Lords, 465.

gress, to whose members it was known as fully as to the members of this court. There never was a case of which Congress had so thorough a knowledge. Nay, Congress had before them the decision of the Court of Claims dismissing the case on this very ground. Must we say that that body which established the Court of Claims for the ends of a great, beneficent, and liberal justice, has specially waived the former judgment of the Court of Claims and specially re-referred the case, only that the court may report its former decision and dismiss it upon a technical ground? This would be to interpose for the United States a defence which it has itself withdrawn.

Mr. Hoar, Attorney-General, and Mr. Talbot, special counsel for the United States, contra:

I. The case assumed by the other side, even if it were admitted to be true, does not establish the existence of an act of Congress, a regulation of an executive department of the United States, or a contract of the United States, express or implied, calling for the payment, by the United States, of the sum here claimed. Yet one of these three things must be shown in order to the recovery of a judgment against the government before the Court of Claims.

1. The treaty contains no such contract; its positive provisions exclude such. For, in the first place, the undertaking of the United States to make satisfaction for claims extended only "to an amount not exceeding $5,000,000," and claims to that amount have been paid.

2. The same article which bound the United States to payment also provided for the ascertainment of what should be paid. Those claims were to be paid which the stipulated commission should, within the stipulated term, determine to be valid. Those, and no others; for the treaty was the ultimate source, the first foundation, of the authority of the commission, which was not the creature of mere statute. Its term of office was not a statute term; it was a treaty term. Not its term only, but also its determinations, derived their authority from the treaty. This ends the whole case, so far as obligations to pay are imposed by the treaty.

3. Nor can a judgment of the Court of Claims find lawful basis in the facts stated, as found by that court in the fifth finding. The basis of this finding lies among public National acts—treaties between sovereigns—the construction of which is conclusion of law, and not finding of fact, as in transactions personal, and pertinent to the capacity of private parties. [The learned counsel then went into certain public documents, particularly an official letter of Mr. Adams, our Secretary of State, and some depositions to show that the finding of the Court of Claims, as a finding of fact, was not warranted.]

4. Nor does a taking of private property for public use raise an implied contract for compensation which can be enforced in the Court of Claims. The obligation to compensate for such property, until expressly delegated, rests upon the sovereign, upon Congress, and is not to be assumed by any subordinate branch of the government.

II. The validity of the claim is urged on the ground that the United States neglected to demand or to obtain in season the evidence from Spain, and the right to recover seems to be placed on the ground, that in respect to any claim which the United States undertakes to conduct, they stand in the relation of attorney to the client in the prosecution of that claim, and are responsible for laches under precisely all the stringent rules of common law applicable to the personal relations of client and counsel. But the responsibility of an attorney to his client is founded on the fact that the attorney "undertakes to conduct" the business of his client for pay and compensation, a method in which the United States never undertakes to conduct, with foreign governments, the claims of its citizens. The United States, then, never undertakes to conduct a case in the manner implied by this proposition, and it falls to the ground for want of facts to which it will apply.

Independently of all which the government is not responsible for the laches of its officers or agents.*

* Gibbons *v.* United States, 8 Wallace, 269.

Reply in support of the jurisdiction.

Reply.—I. The government, it turns out, cannot stand upon the findings of fact by the Court of Claims; especially not upon the fifth one. It is compelled to attack them, and to say that that court when professing to find facts really made conclusions of law; and then it goes behind the findings to show error in them. The weakness of the government case is disclosed at once. We deny that the fifth finding is not a finding of facts. Every finding which reports "ultimate facts," instead of reporting by *prouts* and *in his verbis*, the evidence on which those facts rest, might be attacked as not being a finding of fact.* Yet it is precisely this sort of facts, "ultimate facts," that this court, by its general rules, requires the Court of Claims to find and send up to it, and for not finding and sending up which, but for finding and sending up instead the *evidence* of those facts—the sort of thing which the government here argues should be sent up—that in *United States* v. *Johnson*† this court returned the record to the Court of Claims, in order to send things in a cleaner form. This court wants a case, not the evidence from which a case is made up. It has confidence in the ability of the Court of Claims to find the facts; "a tribunal which," as it declared in *United States* v. *Adams*,‡ "must, of necessity, inquire into them fully, and which having ample time, and being otherwise every way competent, may be relied on to state them truly." Certainly it will be conceded that every one of the findings in the fifth finding *may* be a fact. And when the Court of Claims finds each as a fact—finding afterwards, conclusions of law upon them all, as facts—those findings must, now and here, and while the case is a hearing upon the present record, be received as facts. If the government had any objection to the form of the finding, it should have asked the court below to alter the form; or should now ask this court to send it back, as was done in *United States* v. *Johnson*,§ for a better shape. Unreformed it stands as a finding of facts. And a rule of court makes such a finding equivalent to a special verdict, the place of which it supplies.

* See what is said in United States *v.* Johnson, 6 Wallace, 111.

† 6 Wallace, 111. ‡ Ib. 110. § Ib. 112.

If the finding here were a special verdict in fact, would it be tolerated that counsel should go behind it, and by letters of Mr. Adams or Mr. Meade, or depositions, or diplomatic notes, show that the jury had come to a wrong verdict? Standing in the place of a special verdict it stands above attack, and even above criticism.

II. The United States received a valuable consideration from Mr. Meade specifically, for all its engagements, including the one about vouchers. The surrender by Spain of what it regarded as one of "the most precise, clear, and conclusive articles," and the acquisition by the United States of three large tracts of land, whose acquisition was a *sine qua non* of a treaty, was this consideration. It was bound by the highest obligations, therefore, to transact its business efficiently.

The position that the United States, after having received the price of great treaties stipulated for by its plenipotentiaries in dealing with foreign courts, may, with this price unreturned, disregard the engagement of those its high agents, and say that because such officers had no direction to make such stipulations, therefore that they, the government, will not pay for what they have received, and are now enjoying, is one that cannot have been well considered.

Mr. Justice CLIFFORD delivered the opinion of the court.

Private claims against the government of the United States, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government, are within the jurisdiction of the Court of Claims, as appears by the second section of the act passed to amend the act establishing that court.*

Comprehensive as that provision is, still doubts were entertained whether the claim of the appellant was not excluded from the jurisdiction of the court by the ninth section of the amendatory act, but all doubt upon the subject was removed by the joint resolution subsequently passed, by which Con-

* 12 Stat. at Large, 765.

gress, in express terms, referred the claim to that court for adjudication, to be examined and decided in the same manner as other claims against the United States under existing laws.*

I. Pursuant to that authority the appellant, as the representative of the deceased claimant, presented his petition to the Court of Claims, setting forth very fully the nature of his alleged cause of action and the ground upon which he claims to recover in this case. His ancestor, the decedent, was a native-born citizen of the United States. Early in the present century he went to Spain, and while resident there became extensively engaged in commerce with that country. He was there during the invasion of the French under Napoleon, and continued to reside there until the treaty of amity, settlement and limits between Spain and the United States was ratified by both parties. Throughout that period he was constantly engaged in mercantile pursuits, and he also entered into numerous contracts with the government of that country, prior to the date of the treaty, by means of which Spain became very largely his debtor.

Part of his claims consisted of fourteen unliquidated accounts for goods sold and delivered, and it also appears that he was illegally arrested during that period, and that he was imprisoned by the order of the government, for which wrongs and personal injuries he also held large unliquidated claims. Unable to regain his freedom from the unjust imprisonment he sought the aid of the United States, and it appears that it was not until our government interfered that he was released from his confinement. Both before and after the date of the treaty he invoked the aid of the government of the United States in collecting his claims, as well those arising from contracts as those arising from unjust imprisonment and personal injuries.

Prior to the date of the treaty the claimant filed in the office of the Secretary of State a notice of his claims against that government, amounting, as he alleged, to four hundred

* 14 Stat. at Large, 611.

thousand dollars, and the finding of the court below shows that the notice so filed was one of the notices referred to and included in the treaty between the two countries. Reclamations were also made by many other citizens of the United States upon Spain for wrongs and injuries suffered by them through the acts or official orders of that government, notices of which were either filed in the State Department or had been presented to the minister of the United States resident in that country. Questions of great magnitude also touching treaty obligations previously contracted, the settlement of disputed territorial limits, and the cession of new territorial possessions, were under diplomatic discussion between the plenipotentiaries of the two governments.

Pending these reclamations, and at a moment when the state of the negotiations presented strong hopes that they might terminate successfully, the claimant informed the Secretary of State that it had been intimated to him that if he would advance a further sum of money to that government he might procure a grant of lands in Florida sufficient to cover the whole amount of his claims. Evidently his purpose was to ascertain whether such a grant, if made, would be sanctioned and respected by the United States in case the then pending negotiations should be successful and Florida should be ceded to our jurisdiction.

II. Equal and exact justice to all the claimants was what our government was endeavoring to secure by the negotiations, and of course the suggestion received no encouragement whatever, as it contemplated a separate provision for one, to the exclusion of the rest. On the contrary, the reply of the Secretary was to the effect that if the treaty of cession was concluded it would contain a provision that all grants made after a given date, to be fixed by the contracting parties, should be null and of no effect. Influenced by that reply he abandoned any further attempt to collect his claims by procuring a grant of land and submitted the same to the State Department "for that protection which his government may think proper to grant."

On the twenty-second of February, 1819, the treaty of

amity, settlement and limits was signed by the respective plenipotentiaries of the two countries, and the Senate of the United States ratified the same on the twenty-fourth of the same month.*

All the territories which belonged to Spain, situated to the eastward of the Mississippi, known by the name of East and West Florida, were agreed to be ceded to the United States in full property and sovereignty, the United States contracting that all the grants of land made therein by Spain, or by her lawful authorities, before the twenty-fourth of January, 1818, the date when the first proposal for the cession was made, shall be ratified and confirmed to the persons in the possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of the former sovereign, but the contracting parties also stipulated, in the same article of the treaty, that all grants made subsequent to that date "are hereby declared and agreed to be null and void."

Animated with a desire of conciliation and with the object of putting an end to all differences existing between them, the contracting parties reciprocally renounced all claims for damages which they themselves or their respective citizens and subjects "have suffered until the time of signing this treaty." Such claims for damages so renounced by the respective parties, on the one side or the other, were classified in the ninth article of the treaty under different heads, but it will not be necessary to refer to any of the classifications with much particularity except to the fifth class renounced by the United States, which releases all claims of our citizens "until the signature of this treaty," statements of which soliciting the interposition of the government of the United States have been presented to the Department of State or to the minister of the United States subsequent to the antecedent convention between the two countries.

Claims to which the described renunciation extends were declared by the eleventh article of the treaty to be entirely cancelled, and the United States contracted, not only to

* 8 Stat. at Large, 264; 3 Executive Journal, 177.

exonerate Spain from all demands in future on account of such claims, but also "to make satisfaction to their citizens for the same to an amount not exceeding five millions of dollars." Subsequent demand by the United States for any such claim was entirely prohibited, and the United States also contracted to appoint three commissioners to ascertain and adjudicate the full amount of all such claims, and the stipulation was that the commisioners should receive, examine, and decide upon the amount and validity of all the claims of citizens of the United States so renounced and cancelled. They were also authorized to hear and examine on oath every question relative to the said claims, and to receive all suitable authentic testimony concerning the same, and the sovereign of Spain contracted to furnish all such documents and elucidations as were in the possession of that government for the adjustment of the claims according to the principles of justice, the law of nations, and the stipulations of the prior treaty between the contracting parties.

III. Viewed in the light of these several suggestions nothing can be more certain than the conclusion that the claims in question, at the time the treaty was signed, were included in its provisions, and "that the authority and the trust of examining, ascertaining, and deciding upon their amount and validity were solely and exclusively committed to the commissioners" to be appointed under the treaty. Beyond question they were at that date unliquidated claims of a citizen of the United States, statements of which, soliciting the interposition of our government, had not only been presented to the Department of State, but also to the minister of the United States, showing to a demonstration that the claims of the ancestor of the appellant were within the very words of the treaty.

Prompt action by the United States in ratifying the treaty did not, however, have the effect to secure corresponding promptitude on the part of the other contracting party. Delay ensued, which for a time was wholly unexplained; but it soon came to be understood that it arose from the fact, that pending the negotiations three grants of large tracts of

land, situated in the ceded territories, had been made, which our government regarded as null and void under the closing provision of the eighth article of the treaty. Determined not to protect those grants, the Secretary of State instructed our minister to explain and declare, upon the exchange of ratifications, that the exchange was made "with a full and clear understanding between the plenipotentiaries of both the high contracting parties that these grants were among the grants thus declared null and void."

On the receipt of that despatch Spain refused to ratify the treaty, and, through her minister sent here for that purpose, objected to that requirement as inconsistent with the treaty, and he insisted that such a declaration, if made, would "tend directly to annul one of its most clear, precise, and conclusive articles." Pending this discussion, the period fixed by the treaty for the exchange of the ratifications expired; but the United States notified the Spanish government the day previous, that if the six months expired without such ratification they should hold themselves free to press and enforce their claims and pretensions in any and every mode consistent with honor that their interests may require.

Confessedly, some of the expressions of that despatch indicated that the United States might, under some circumstances, be induced to refuse to carry the treaty into effect; but they never made any such decision, and never did any act or uttered a sentiment which authorized the claimants interested in its provisions to assume that they had come to any such conclusion. Nothing of the kind was ever intimated by the minister sent here from Spain, and the correspondence which ensued shows conclusively that neither party contemplated any such result. He came for explanations; but he was told, before any reply was given to that part of his communication, that the President wished to be informed whether he was the bearer of the ratifications of the treaty previously signed and committed to the charge of our minister for that purpose. Obliged to answer that inquiry in the negative, he found it necessary to give explanations in behalf of his own government before requiring

any from the United States. Reference is made to that correspondence to show that the treaty as signed was never abandoned by either party, and nothing was ever given or promised by the United States except what is therein stipulated to secure its ratification.

New articles to the treaty were not required by the new minister, and he was emphatically told by the Secretary of State that the United States could not, consistently with what was due to themselves, stipulate any new engagements as the price of obtaining the ratification of the old; that the declaration which our minister was instructed to deliver at the exchange of the ratifications of the treaty with regard to the eighth article, was not intended to annul or in the slightest degree to alter or impair the stipulations of that article; that the only object in view was to guard his government, and all persons interested in any of the annulled grants, against the possible expectation or pretence that those grants would be made valid by the treaty.

Although the Secretary of State informed the minister sent here for explanations that the question of ratification on the part of the United States must be again submitted to the Senate, because the six months had expired, still he insisted that it should be ratified by the other contracting party without delay and without any alterations, showing conclusively that the consummation of the arrangement was both contemplated and desired.*

IV. Power to annul the grants in question, or to declare them null and void, as required by our government, it was insisted by the Spanish negotiators, did not reside in the King alone, that the consent of the Cortes must first be had before the required declaration could be made; and it does not appear that any attempt was made on the part of our government to controvert that proposition. Further delay necessarily ensued, but the consent of the Cortes was given on the fifth of October, 1820, and on the twenty-fourth of the same month Spain ratified the treaty without alteration or amendment.

* 4 American State Papers, 683.

Occurring, as these matters did, in the recess of the Senate, further action was necessarily deferred until the meeting of Congress. By special message the President, on the thirteenth of February, 1821, informed the Senate that the minister of Spain had given notice that he was ready to exchange the ratifications of the treaty, and it appears that the Senate, on the nineteenth of the same month, again consented to and advised the President to ratify it, without making any amendment to the same, or suggesting any qualification whatever to any of its provisions.*

Application had been made by the deceased claimant to the government of Spain, before his claims were transmitted to the State Department, requesting that the King would appoint a commission to liquidate his claims; but, on the seventeenth of January, 1819, when the prospect brightened that a treaty would be concluded, he submitted his claims to the Department of State "for that protection which his government may think proper to grant."

No such commission was appointed until after the minister who signed the treaty had been recalled, and the United States had been informed by his successor that his government regarded the declaration which our minister was instructed to exact, when the ratifications of the treaty should be exchanged, as tending "directly to annul one of its most clear, precise, and conclusive articles." Reluctant to make the required declaration, Spain recalled her minister and "suspended the ratification of the treaty;" and on the seventh of May, 1819, she appointed the commission previously requested by the claimant, and it appears that the commission in eleven days afterwards informed the claimant that they were prepared to receive his proofs and hear his explanations.†

They, the commissioners, proceeded promptly to the discharge of their duties, and on the thirty-first of August following they notified the claimant to produce the documentary evidences to support his claims, and it appears that he,

* 3 Executive Journal, 244.

† Meade *v.* United States, 2 Nott & Huntingdon, 256.

in the course of a few weeks, transmitted the originals to the commission. Perfect success attended his efforts, as the commission, with the express and formal approval of the King, on the nineteenth of May, 1820, made an award in his favor for the sum of three hundred and seventy-three thousand eight hundred and seventy-nine dollars and eighty-eight cents, in our currency, which included his fourteen unliquidated contract claims, with interest to the time of such liquidation; and also a sum in gross on account of his claims for personal injuries.

Justice had been denied him for years, but it was now promptly accorded in the award, and the finding of the court below shows that the King at the same time approved a certificate of the award, in accordance with the laws and customs of the country, and delivered the same to the claimant as conclusive evidence of the verity of the award. By the fourth finding of the court below it also appears that the United States was notified of that result, both by the government of Spain and by the claimant, and that the Secretary of State expressed his approval of it to both parties. Five days before the treaty was, the second time, submitted to the Senate for their advice, the claimant addressed a memorial to the President, making known for the first time what his pretensions were in the new aspect of his claim.

V. Briefly stated, they were to the effect that the Senate, if the treaty should be submitted for ratification, should either annex a new article recognizing his claim as expressed in the award made after the treaty was signed, or, if that could not be conceded, that the fifth renunciation should be explicitly excepted from the ratification and expunged from the treaty. Unless he could have a distinct recognition of his claim, he asked, as an act of justice, that the alternative request might be granted, that he might "be left free to prosecute the claim where it is unquestionably due, unembarrassed with the imposing renunciation of my country." Stronger language to express his convictions that his claim, as it existed when the treaty was signed, was included in the fifth renunciation of the same, could not well be chosen than he

employed in that memorial, where he says that it is his "decided election to abide the issue of an appeal to the moral sense and good faith of that nation rather than the chances of that contingent and long-deferred indemnity provided for the other claims into whose company mine has been introduced by the treaty."

Addressed, as the memorial was, to the President, he referred it to the Secretary of State for his opinion, and nothing can be more conclusive as to the views of the Executive than the report of the head of the State Department. By the statement of the memorial itself, said Mr. Adams, it was questionable to the Cortes and to the Minister of Finance whether or not the claim was included in the renunciation of the ninth article. If it was, said the secretary, the claimant will be entitled to the immunities stipulated by the treaty and *in the form provided by the same instrument;* if it was not, his resort is, as it originally was, exclusively to the Spanish government, and the Cortes, in recognizing his claim, have given directions for his payment. Both the memorial and the report of the Secretary of State were communicated to the Senate the next day after the treaty was transmitted for the consideration of that body.

Authority to appoint commissioners was conferred upon the President, as stipulated in the eleventh article of the treaty, by the fourth section of the act of the third of March, 1821, and it is well known that they were duly appointed and commissioned as therein required.*

They were duly organized, as required, and exercised the functions of their office for the period of three years. During that time the claimant, as the finding of the subordinate court shows, presented his claim to the commissioners as expressed in the award made by the Spanish commission, and it appears that the commissioners of the United States refused to allow the claim in that form. He was fully heard, but they ruled and decided that the only claims which they had authority to investigate and allow were claims existing prior

* 3 Stat. at Large, 639.

to the date of the treaty, and that inasmuch as the award presented was subsequent to the date of the treaty, they had no authority to investigate or allow it; and it appears that they accordingly rejected and dismissed the petition upon the ground that the evidence produced was not sufficient to establish the claim.

Plain as the decree of the commissioners is, it is not possible to misunderstand their views. They held that all unliquidated claims of our citizens upon that government, statements of which, soliciting the interposition of our government, had been presented to the Department of State, or to the minister of the United States in Spain, since the former convention and prior to the signature of the treaty, were within their jurisdiction, but that liquidated claims or claims of a subsequent date were not within their jurisdiction. Such also were the views of the Secretary of State in his very able despatch of the twenty-ninth of April, 1823, addressed to the chargé d'affaires from Spain.*

He shows to a demonstration that the time of the signature, and not that of the ratification of either of the parties, nor that of the exchange of ratifications, is expressly agreed upon as the time, until which the claims and the statements of them to the Department of State, or to the minister of the United States in Spain, had been received, which claims were, on the part of the United States, renounced by the fifth renunciation.

His reasoning is, that it could not have been the intention of the parties that they should renounce claims, or admit statements of them, not known to the party assuming the obligation at the time of contracting it; and the court here entirely concurs in that construction of the article. Whatever claims, therefore, might arise, or whatever statements of them might be made after the signature of the treaty, were not within that provision, because they could not, with propriety, be provided for in any such stipulation.

Beyond all doubt it was unliquidated claims for which pro-

* Senate Document, Second Session, 18th Congress, 248.

vision was made, and neither party contracted that the other should determine their amount or validity, but the stipulation on the part of the United States was, that three commissioners should be appointed by the President, by and with the advice and consent of the Senate, and that the commissioners should determine the amount and validity of all such claims of our citizens.

Examined in the light of these suggestions we concur in the views of Mr. Adams, as expressed in that despatch, that "if anything in human intention can be made clear by human language, it is, that the claims provided for by the above stipulation were in the condition, as they had been exhibited, at the time of the treaty."*

VI. Transactions between the claimant and the government of Spain, subsequent to the signature of the treaty, could not be evidence to the commissioners of the condition of the claim at the time of that signature, and for that reason the court is of the opinion that the decision of the commissioners rejecting the claim, as expressed in that award, was correct. They did not reject the unliquidated claims of the appellant, as filed in the State Department, nor as presented to our minister in Madrid before the treaty was signed.†

Unambiguous as the decision of the commissioners is, there is no reason to suppose that the claimant was misled even for a moment. He knew that he had a right to present his claims to the commissioners as they existed at the time the treaty was signed, but he elected to stand upon the claim as it was expressed in the award, and he must abide the result, as in the opinion of this court the decision of the commissioners that the award was not within the stipulations of the treaty is correct.

Suppose all the preceding suggestions are correct, still the claimant insists that the judgment must be reversed on account of what appears in the fifth finding of the court. Unexplained the court below there find as follows: (1.) That the Cortes refused to annul the three grants in question until

* 1 Senate Documents, Second Session, 18th Congress, 250.

† 1 Rep. Com., First Session, 20th Congress, No. 58.

the United States should agree to pay and discharge in full the indebtedness of Spain to the deceased claimant, as recognized in the award of the Spanish commission. (2.) That the United States, by their minister at the court of Madrid, gave to Spain "a clear and distinct assurance that the debt due to the claimant would certainly be paid to him by the United States if the treaty was ratified, and the said grants were totally annulled." (3.) That the Spanish government, upon the faith of those assurances, annulled the grants and ratified the treaty. (4.) That the claimant duly notified the government of the United States of these facts, and of the assurances so given by our minister, and that the notice was duly received by the President, and was by him communicated to the Senate, at the same time that the advice of that body was asked, the second time, as to the ratification of the treaty. (5.) That the United States, with full notice and knowledge of all the facts and circumstances set forth in that finding, did accept and assent to the treaty as ratified by Spain, and became seized and possessed of the ceded territories.

Without stopping to show that the findings are contradicted by the testimony of our minister, or that they are improbable in themselves, or that they are unsupported by any satisfactory evidence, we proceed at once to remark that the claimant is entitled to the full benefit of the rule that the facts found in the court below are to be regarded as in the nature of a special verdict. Grant all that, still the findings are subject to many criticisms.

By what means did the court become judicially informed that the Cortes refused to annul the grants in question until the United States should agree to pay and discharge in full the award held by the claimant? Oral proof to that effect could hardly be obtained which would be of a satisfactory character, and if proof of that kind was not introduced, then the inquiry arises: Upon what evidence does the finding rest?

Legislative bodies usually act by decree, resolution, order, or vote, but nothing of the kind is referred to as existing in this case. Depositions of two witnesses were introduced to show that our minister gave the assurances specified in the

finding, but he states in his deposition that he does not remember that he ever gave any such assurances, and there is no reason to conclude that he ever intended to enter into any contract upon that subject. Who knows that the government of Spain in deciding to annul those grants acted upon the faith of the assurances given by our minister that the claims of the ancestor of the appellant would be paid in full, as expressed in the award made long after the treaty was signed; and if no one is able to give testimony to that effect, by what means was the conclusion formed? Tested by these or any similar considerations it is easy to see that the several conclusions embraced in the fifth finding are conclusions of law rather than conclusions of fact, as they depend mainly, if not entirely, upon the construction of public acts, diplomatic despatches, and treaty stipulations.

Regarded in that light the finding of the court below may be re-examined here on appeal, but it is not necessary to rest the decision in this case upon that ground, as by the very terms of the finding it appears that the assurances which it is supposed misled the Cortes were given by our minister, and there is no evidence whatever that in giving the assurances he acted in pursuance of any instructions from the President or by virtue of any authority from the United States. Negotiations are usually conducted under instructions from the President, and the provision of the Constitution is that "he (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

Such an assurance as that supposed could not be given by any minister of the United States, except upon the condition that it should become a treaty stipulation, and as such be subject to the approval of the President and be ratified by the Senate, as required by the Constitution.

Even if the finding had any foundation in fact, it is clear that the act of our minister in giving the assurances was wholly without authority, and that the act was null and void, which must have been known to the Spanish government and to the claimant.

VII. Examination will next be made of certain other complaints made by the appellant, as exhibited in the eighth finding of the court below. The substance of that finding is as follows: (1.) That the claimant, on the seventh of April, 1823, and before the commissioners under the treaty rejected his claim as founded upon the award, requested the United States to procure from the Spanish government his original vouchers and evidences of indebtedness; that the United States made the demand as requested, but that the Spanish government positively refused to comply with the request, upon the ground that the award was a judicial decree and was final and conclusive. (2.) That the Spanish government did subsequently assure the United States that the vouchers and documents would be given up, but that the same never were produced, and have ever since been, and still are, withheld. (3.) That by reason of such refusal and neglect on the part of Spain, the commissioners never considered or allowed his claim; that they allowed the claims of other persons, existing prior to the treaty, to an amount greater in the aggregate than the five million dollars provided by the treaty, and that the commission, after making those awards, expired.

Regarded in the most favorable light, the facts stated in the finding do not show any ground of action against the United States: (1.) Because it appears that the claimant never presented to the commissioners his unliquidated claims as they were filed in the State Department, or as they existed at the time the treaty was signed. (2.) Because the finding does not show that he ever intended to present his claims in that form to the commissioners, nor that he was prevented from so doing by the neglect and refusal of that government to produce his original vouchers and documents. (3.) That even if the finding did show that he intended to present his claims in that form, and that he was injured by the alleged neglect and refusal, still the admission would not benefit the appellant, as the finding, with that admission superadded, would not show any cause of action against the United States within the acts of Congress conferring jurisdiction upon the

Court of Claims, as it would not show a claim founded upon any law of Congress or upon any regulation of an executive department, nor any claim founded upon any contract, express or implied, with the government of the United States.

VIII. Some consideration must also be given to certain general propositions submitted by the appellant as tending to bring his case within the scope of an implied contract.

1. He contends that the United States had no power to release Spain from her obligations due to the ancestor of the appellant, without his assent, except upon the condition of making him just compensation for his claims.

Special examination of that topic or of its conditions and qualifications is not necessary, as the case before the court comes within the rule, as conceded by the appellant, as his ancestor did submit his claims to the Department of State for that protection which his government might think proper to grant; and the finding of the court below is that the claimant, both before and after the date of the treaty, did invoke the aid of the United States in collecting his claims, both those arising on contracts and those arising from personal injuries.*

2. Attempt is also made to maintain the proposition that the power which the claimant gave to the United States to make reclamations in his behalf became revokable by him after the six months fixed by the treaty for the exchange of the ratifications had expired, but the proposition is wholly inadmissible, as the effect would be that whenever any such misunderstanding should arise between the contracting parties, the negotiations might be controlled by a single claimant having some pecuniary interest in the treaty.

3. Next suggestion is that the act of the claimant in submitting his claims to the Spanish commission operated as a full and complete revocation of the power he previously granted to the United States to adjust his claims, but the proposition is even less defensible than the preceding one,

* 2 Rep. Com., 1st Session, 22d Congress, No. 316; 3 Senate Documents, 1st Session, 19th Congress, p. 66; De Bode *v.* The Queen, 3 House of Lords Cases, 449.

as it would enable one of the contracting parties, by making terms with a citizen of the other party, to avoid the obligation of fulfilling a treaty stipulation.

4. Remark upon the sixth finding of the court does not seem to be necessary, as what has been said in response to the fifth finding furnishes a full answer to every deduction made from it by the claimant. This award was made long after the treaty was signed, and the claim in that form never was included in the fifth renunciation. In his memorial he requested that a new article might be added to the treaty, making provision for the payment of his claim as expressed in the award, or that the fifth renunciation might be expunged, but the request was not granted, nor could it have been in the alternative form without defeating, in all probability, the whole arrangement.

Entitled as the claimant clearly was to prove his unliquidated claims before the commissioners, it is much to be regretted that he did not seasonably come to the conclusion to adopt that course and avail himself of the plain right secured to him by the treaty. His error in that behalf increased the equation to other claimants, and now his only remedy is by an appeal to the equity of Congress.

Under the circumstances one or two observations upon the conclusions of law certified by the court below will be sufficient. We do not concur in the first nor the second finding, except that part of it where the court say that the decision of the commissioners appointed by the United States dismissing the claim was final and conclusive, and bars a recovery upon the merits in that court. We concur also in the third conclusion of law, and direct that the judgment be

AFFIRMED.

Mr. Justice BRADLEY had not taken his seat upon the Bench when this judgment was given; and the case was argued February 28th and March 1st, 1870, before Mr. Justice STRONG had taken his seat.

CHICAGO *v.* GREER.

1. The court expresses its dissatisfaction at the manner in which a plaintiff in error sends a case here, without argument, either oral or printed, thus leaving the court to search the entire record to find out whether error had been committed; increasing the trouble moreover by a general exception to the charge instead of specific exceptions to parts complained of; this, in violation of the Rules of Court.
2. Where a party had contracted for a large quantity of a thing in a manufactured state, and refused afterwards to take it, evidence is properly given that material in a raw state had been so far prepared to manufacture the thing contracted for as that it was injured for anything else; and that there was no sale in the market for the thing contracted for and refused.
3. An admission by the authorized agent of a city, authorized to contract for a thing for the city's use, that he *thought* the city liable, to a certain extent, for a thing which was furnished to it in professed discharge of a contract, *because the city had used the thing*, may go to the jury as an admission of the fact of use, in suit against the city by the party furnishing the thing, and where the city sets up as a defence that the thing furnished was not the thing agreed to be furnished.
4. A person having had sufficient experience to be an expert in testing the strength of hose, may state that a particular test applied *ex parte*, was not a fair one.
5. At what rates other persons offered or undertook at another time to make a particular thing for a defendant, is not evidence in a suit by a plaintiff on the defendant's *contract* to pay him a greater sum if he would make the same thing, at the time contracted for.
6. The testimony of a person, not an expert, that fire-hose of a peculiar size which the city had contracted for, would "not answer the city's purpose," is inadmissible on a suit by the manufacturer against the city for the contract price; inadmissible both because the witness is not an expert, and because in such a suit the only questions are what did the contract call for, and what did the manufacturer furnish.
7. Exceptions to a charge dismissed, the jury having, as this court considered, been rightly charged as to law, and the facts having been fairly left to them.

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

In July, 1867, the city of Chicago published an advertisement inviting bids for the manufacture of 13,000 feet of leather fire-hose, containing specifications as to the quality of material and manufacture, and providing that the hose

should be *warranted to stand a pressure of* 200 *lbs. to the square inch.* The hose was to be deliverable and to be tested in Chicago, on the 1st September. One Greer, a manufacturer of hose in Philadelphia, in response, made a bid in writing for the contract, the hose "*to be tested in a fair and impartial manner, and to be made to stand* 200 *lbs. pressure to the square inch,*" &c. This bid or proposal was accepted and awarded to Greer, who immediately began to make the hose. By the end of August he had made and sent to Chicago 2150 feet of it. At that date he had also made 1000 feet more, which was on the way to Chicago when he received a telegram to send no more hose; the telegram stated that it did not stand the contract test, would not bear the stipulated pressure, and would not be accepted; and also that the hose which had been received was subject to his order. Greer had, at this time, also procured and prepared the material for, and was engaged in the manufacture of the remainder of the hose contracted for. Greer, upon receiving the telegram, went to Chicago, saw the city agents, and informed them that he declined to waive his rights under the contract; that he desired a public trial in the city of Chicago, and asked that an engine might be placed at his disposal, for the purpose of testing the hose. The board informed him that it had been tested and had burst, refused to allow him the use of an engine, and told him that they had entered into a contract with another party, one Gates, for 10,000 feet of hose, and that they could not do anything with regard to his hose. After some discussions between the parties—the city still declining to keep the hose which they had received, or to receive any new—Greer sued them in *assumpsit* to recover damages for an alleged breach of contract. The principal questions mooted at the trial were whether the contract set forth in the declaration was proved, whether the plaintiff had complied with the obligations assumed by him (the chief question here being as to whether the hose came up to the test), and what damages, if any, had been sustained by the plaintiff in consequence of the refusal of the city to receive the hose and pay for it according to the contract.

The jury found a verdict for the plaintiff for $11,093.50, and a motion for new trial having been made and refused, judgment was entered against the city. It now sued out this writ of error.

The plaintiff, Greer, on the trial, sought to prove that his hose had been subjected to two public tests in Philadelphia, in November and December, 1867, and at each of such tests sustained without injury a pressure of more than 200 pounds per square inch. The city, on the other hand, proved two tests in Chicago, prior to the rejection of the hose, which, as they considered, showed a different result. The hose had in fact from some cause, burst. Greer, in answer to what was thus set up, sought to show that these last tests were made without notice to him, in his absence, and that they were not made "in a fair and impartial manner." On the case coming here it appeared that the plaintiff had taken exceptions to evidence, and had excepted *generally* to the charge, no particular parts in which it was alleged to be erroneous being mentioned.

I. *The exceptions to evidence* were:

First. Because the court allowed Greer to show that about 700 sides of leather were cut, making 7000 feet of 10½ inch hose; that it was impossible to use that leather for any other than that size of hose called 10½ inch hose. Also, that 10½ inch hose was a remarkable size in the United States, and not made except on special order; that he could not use such hose except for Chicago; that to cut it down to 9 inch hose would be a loss both of material and labor.

Second. Because it allowed a statement of one of the fire commissioners of the city, which he had made in conversation with an agent of Greer, after a question about the hose had arisen, to go to the jury. This commissioner was one of a committee who made the contract, and the statement was that "to a certain extent he thought the city liable for damages on the contract, *on account of using the hose for fires.*" The court, in allowing the statement to go to the jury, told them that what was stated "by the authorized

agent of the board as a fact, and not as an opinion," would be competent.

Third. Because one Edward Smidt (who had testified that he was a machinist for fifteen years, and manufacturer of steam-gauges for eleven, that he had tested leather fire-hose *several* times, though he had not had *much* experience in doing so), was allowed to state "whether, in order to make a fair and accurate test of such hose by water pressure," it would be necessary to do certain things specified.

Fourth and Fifth. Because the court refused to allow the city to show the rate at which they had contracted for hose with Gates, on the difficulty occurring with the plaintiff, Greer, and how offers made by other persons compared with Greer's when *he* took the contract.

Sixth.—The point of this exception is revealed by the bill, giving the testimony on cross-examination by Greer's counsel of one Richards, a witness of the city, and for twenty years a tanner and currier, and who had given his opinion as an expert as to the proper mode of testing fire-hose. The bill ran thus:

Q. What is the best leather for making leather fire-hose?

A. Leather made from slaughtered hides.

By Mr. Davis, counsel of the city. I submit that this is immaterial; the witness was not examined in regard to it. The contract calls for a specific kind of leather.

(Objection overruled by the court; to which ruling the defendant's counsel then and there excepted.)

Q. What kind of leather was the hose you saw tested?

A. It was a superior grade of leather; I call it the "Union tanned."

Seventh.—Because the court refused to let the city put in evidence a copy of a letter written by the city to Greer, after the hose sent by him to the city had been tested by such a process as they professed to consider a fair one; no notice having been given by him to produce the original.

Eighth and Ninth.—Because the court refused to allow one of the fire commissioners of the city, whose business it was

to assist in investigating the origin of fires, but who, on a question by the court, stated that he did not profess to be an expert in hose, to state whether *he* considered that Greer's hose would answer the city's purpose; whether it could be safely used at fires, and whether it was of any value to the city.

Tenth.—Because the court refused to allow a witness to testify how the quality of the hose which they had got from Gates compared with the quality of the hose sent by Greer.

II. *Exceptions as to the charge.*—The court charged on the subject generally; charging,

1st. *In respect to the time when the hose was to be delivered,* substantially; that Greer's agreement was to furnish the hose by the 1st of September, 1867; and that unless the delivery, at that time, was waived by the city; or unless the city had rendered the delivery, or offer to deliver, by that time, an unnecessary act, Greer was bound to furnish the hose by that day.

2d. *In respect to the failure to put the contract in writing.*—After observing that one of the city commissioners had testified that this contract was in the usual way, and that if this was the usual way in which contracts with the city were made, it was to be regretted that a practice of thus making them had grown up; that the true way for the protection of the interests of all parties was, when an advertisement was made for proposals, and they were presented and accepted, that a written contract should be entered into by the city with the party proposing, setting forth specifically the terms of the contract—the court charged that if the advertisement was clear and distinct, and if the proposals were also clear, and they were accepted in the terms in which they were made, simply and absolutely, that *that* contained the contract between the parties.

3d. *As to the testing of the hose.*—This part left to the jury the question of fact, viz.: whether the hose was made to stand, when tested in a fair and impartial manner, a pressure of 200 pounds to the square inch; whether the tests, at Chicago, when the hose burst, had been applied in a fair and

impartial manner, and in a way to do justice to the rights of both parties, plaintiff and defendant?

The court further said:

"You will bear in mind, of course, in connection with this, the testimony as to the test that is generally applied in other cities, as compared with what was applied here. And also the testimony bearing upon this point: that it could hardly be expected that every foot of hose that might be made would stand such a pressure; that there might be some latent defects in the leather, which in testing might not stand such a pressure. Of course, as I understand the testimony, if there should be a defect in some instances in that respect, that would not absolutely defeat the liability of the city. Because it would be fair that the contract should be understood in the manner in which men who are skilled in the business would understand it. And as I apprehend the testimony, it might well happen that in so large a quantity of hose as the plaintiff agreed to furnish, there might be occasionally a defect in the leather which would be unknown, and which no skill could entirely guard against. I think that, under such circumstances, it is only fair that the party should have an opportunity to remedy the defect up to a certain limit. If you think there is such a deficiency in this respect, so many defects as to satisfy you the hose did not come up to the quality designated in the contract, then, of course, the party has not complied with the contract in that particular."

The city excepted generally to so much of the charge as related to the three matters above presented.

No person appeared as counsel for the city and neither was any brief filed for it; the case being submitted by it on a record of a hundred and forty-one pages.

Mr. Goudy for the defendant in error.

Mr. Justice STRONG delivered the opinion of the court.

Precisely what questions are intended to be raised here we are not informed. No oral argument has been submitted on behalf of the plaintiff in error. No brief of points has been filed, nor has any assignment of errors been made.

We are left to search the entire record to discover, if possible, some fault in the pleadings, or in the rulings of the Circuit Court, and this without any intimation that any error is alleged to have been committed, other than is given by the fact that a writ of error has been sued out. We find, indeed, that ten exceptions were taken at the trial to the admission or rejection of evidence, the effects of which were to bring upon the record the rulings of the court, but we are not informed that it is even claimed those rulings were erroneous. Three exceptions, most indefinite, were also taken to the charge of the court delivered to the jury, but it is not now alleged that any portion of the charge was not in strict accordance with the law. In view of this state of facts the judgment might, with great propriety, be affirmed without further remarks. We have, however, examined all the exceptions taken in the court below, and discovered nothing of which the plaintiff in error has any right to complain.

The first exception was to the admission of evidence tending to show what progress the plaintiff had made toward the performance of his part of the contract when the city gave him notice that the hose would not be received. Subject to the exception it was proved that the plaintiff then had on hand a large quantity of leather, which he had cut down for seven thousand feet of ten-and-a-half-inch hose, such as was required by the contract; that there was no sale in the market for such hose; that consequently, on the refusal of the defendant to take it, he was compelled to cut it down again for nine-inch hose, which could be sold, and that this involved a large loss of leather, as well as of labor. It is plain the evidence has a direct bearing upon the question what amount of damages the plaintiff was entitled to recover, if entitled to recover at all. The loss resulting from the waste of leather and of labor was an immediate and necessary consequence of the refusal of the city to comply with its contract. The evidence was, therefore, properly received.

The second exception was, that the court permitted the plaintiff to give in evidence the declaration of one of the board of fire commissioners of the city, who were authorized

to purchase hose, to the effect that he thought the city was liable on the contract, to a certain extent, on account of its having used the hose for fires. It may be admitted that the witness's expression of opinion, had it stood alone, would not have been admissible; but it was connected with the admission of the fact that the city had used a portion of the hose, not simply in testing it, but for the extinguishment of fires. The fact was a material one, bearing upon the questions whether there had been a contract, and whether the hose delivered was such as the contract demanded. The admission of the fact was by an authorized agent of the city, one who had participated in making the contract. There was, therefore, no error in receiving the evidence.

We discover no error in admitting the testimony of Edward Smidt, to which exception was taken. He was proved to have been an expert, sufficiently to justify his being permitted to state what is, and what is not, a proper mode of testing the strength of leather fire-hose. He was a manufacturer of steam-gauges, and he had repeatedly tested hose. It having been claimed by the defendant that the hose offered would not bear the required test, it was certainly competent for the plaintiff to prove that the *ex parte* test applied by the city was not a fair one, and, of course, to prove what constitutes "a fair and satisfactory test," such as was provided for in the contract.

The fourth and fifth exceptions present the question whether the defendant should have been permitted to prove at what rates it had made a contract for hose with another party, and what bids were offered when that other contract was made. It is impossible to see how this could have had any legitimate bearing upon the questions presented by the case. If the city was liable at all to the plaintiff, clearly its liability can be measured only by the contract made with him. The extent of its obligation is not to be found in another contract made with another party. The evidence offered was, therefore, rightly excluded.

The sixth exception is to an answer given by one of the defendant's witnesses to a question propounded to him on

cross-examination. He was asked, "What is the best leather for making leather fire-hose?" to which he answered, "Leather made from slaughtered hides." To this the defendant objected, and took an exception because the court admitted it. We are not informed, and we do not perceive how he could have been prejudiced by the answer. Let it be, it was immaterial; still it was not hurtful. It was, however, admissible, if for no other reason, because it tended to furnish a test of the value of the opinions the witness had expressed in his testimony in chief.

The next exception is that the court refused to permit a copy of a letter to the plaintiff to be given in evidence, when no notice had been given to produce the original. It needs no argument to show that the decision of the court was correct.

The eighth and ninth exceptions are that the court would not allow a witness, not an expert, to give his opinion that the plaintiff's hose would not answer the purpose of the city, that it could not be safely used at fires, and that it was of no value to the city. We see no error in this. To say nothing of the medium of proof (the opinion of a witness not an expert), the subject was objectionable. It is obviously quite immaterial whether the expectations of the city from the contract were realized, or whether it had made an injudicious bargain. The real question was, whether the plaintiff had fulfilled, or offered to fulfil, his part of the contract. It is observable, however, that the witness did afterwards substantially answer the questions proposed, and that the defendant had the benefit of his answers.

The tenth exception is that a witness, after having testified he had not examined the quality of the plaintiff's hose at all, was not permitted to answer the question how it compared with hose the city had bought from another person. How he could have answered the question it is not easy to see, but, if he could, the hose purchased from that other person was not the standard by which that of the plaintiff was agreed to be measured. The parties had fixed their own standard. The only legitimate rule was that which the contract provided.

We pass now to the exceptions taken to the charge of the court. They are to so much of the charge as relates to the time within which the contract was to be performed, and also to so much as relates to the testing of the hose, and also to so much as relates to the failure to put the contract in writing. In regard to these it may be observed that they are not taken conformably with the fourth rule of the court, which requires an exceptant to state distinctly the several matters of law in the charge to which he excepts, and declares that such matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court. But we have examined the entire charge and found nothing of which the plaintiff in error has any just reason to complain. It was fairly submitted to the jury to find what the contract was, whether it had been concluded, what the parties had agreed respecting the time for performance by the plaintiff, whether the plaintiff was in any default, whether the hose offered came up to the required standard, and whether the tests applied had been made, as the contract required, "in a fair and impartial manner." In regard to the failure to put the contract in writing the court said little more than to express regret that the city usually made such contracts (as it had been proved), without reducing them to a written form, adding only, "that if the advertisement" (for proposals), "is clear and distinct, and if the proposals are also clear, and they are accepted in the terms in which they are made, simply and absolutely, that contains the contract between the parties." Surely this was unexceptionable. We add only, that a motion for a new trial, being an appeal to the discretion of the court in which the trial has taken place, the action of that court in overruling it is not reviewable in error.

JUDGMENT AFFIRMED WITH COSTS.

SUPERVISORS *v.* DURANT.

An amendment by allowing, *nunc pro tunc*, an entry, omitted at the proper time by inadvertence, in the journal record of the clerk, of the issue of a writ of peremptory mandamus; and an amendment by the marshal to his return, so as to show that he had exhibited the original writ to the party served, allowed as matters of common practice.

ERROR to the Circuit Court for the District of Iowa.

The writ of error in this case, which was a proceeding of the United States *ex relatione* Durant against the Board of Supervisors of Poweshiek County, Iowa, brought up a petition, on the part of the relator, for an alternative writ of mandamus to the supervisors of the county just named, commanding them to levy a tax sufficient to pay a certain judgment which he held against the county, or show cause for not so doing; the order for an alternative mandamus, and the issuing of the same; a return demurrer to the return, and an order for peremptory mandamus; application for attachment against the supervisors for not obeying the peremptory writ, and an order for attachment.

Several objections were taken to the proceedings on the part of the supervisors, but no brief was filed in the case in support of them, nor was there an appearance of counsel.

One of the objections was, that the writ of peremptory mandamus was issued without any order of the court having been entered upon the journal record of the clerk. The order was made by the court, and a note of it had been entered upon the clerk's docket, and also upon the judge's. The court, on motion, allowed the entry to be made in the journal *nunc pro tunc*.

Objection was also taken to the return of the marshal, that it did not appear that the original writ of the peremptory mandamus was exhibited at the time of the service of same upon the supervisors. The court allowed the return of the marshal to be amended by adding the words: "I also exhibited the original writ to each of the foregoing

named persons so served, and I finally left it with said Snow," who was chairman of the board.

Mr. Grant, for the relator, having submitted the case with a few remarks—

Mr. Justice NELSON subsequently delivered the opinion of the court, to the effect, that as to the entry which the court on motion allowed to be made in the journal *nunc pro tunc*, as the matter was one which arose from the inadvertence of the clerk, the entry was but common practice and matter of course, and that the amendment to the marshal's return was of daily practice also.

The judgment for the writ of attachment was accordingly

AFFIRMED.

WISE *v.* ALLIS.

1. In giving notice, under the 15th section of the Patent Act of July 4th, 1836, of the names and places of residence of those by whom he intends to prove a previous use or knowledge of the thing, and where the same had been used, the party giving notice is not bound to be so specific as to relieve the other from all inquiry or effort to investigate the facts. If he fairly puts his adversary in the way that he may ascertain all that is necessary to his defence or answer, it is all that can be required, and he is not bound by his notice to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts.
2. *Held*, therefore, in a suit for infringing a patent for balancing millstones, that when, in addition to the particular town or city in which such large objects as millstones are used, the name and residence of the witness by whom that use was to be proved was also given, there was sufficient precision and certainty in the notice.

ON certificate of division of opinion between the judges of the Circuit Court for the District of Wisconsin.

The Patent Act of July 4th, 1836, referring to suits for the infringement of patents, enacts by its 15th section 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.*"

This section being in force, Wise sued Allis in the court below for infringement of a patent for an improvement in balancing millstones. The defendant pleaded the general issue, and also gave notice that the invention claimed was well known and in general use before the patentee professed to have invented it, and he specified Utica, Rochester, Buffalo, Albany, *New York City, and Brooklyn*, in the State of New York, as the places where it had so been used, and gave the names of witnesses in each of those places by whom he expected to prove that fact; but he did not specify the mills in which the supposed prior use had been made.

On the trial the judges of the Circuit Court differed in opinion as to whether the notice was sufficiently specific in its reference to the places where the prior use was had, and certified that difference to this court in the shape of two questions, in substance, to wit, this, whether the evidence of use, taken under that notice, was admissible. In form, the questions were:

1st. Is the defendant entitled, under his notice, to give evidence of the use of said invention or millstone balance by any person or persons prior to the alleged invention by the patentee thereof?

2d. Should evidence of such prior use of said invention or millstone balance be excluded on the ground that the notice aforesaid is defective and insufficient for the purpose of such evidence?

Mr. Walker, for the defendant, contended,

That the notice did not specify place: that Utica, Rochester, Buffalo, Albany, New York City, or Brooklyn, were indeed each *a place*. So was England, India, France, Spain, or Wisconsin, each *a place*. To refer the plaintiff to New York City, with her population of 1,300,000, and her mills, numbering 916, as the place where prior use was made of his invention, was mockery. Reference to the whole State

of Wisconsin, Iowa, Minnesota, or Kansas, would have been to a less number of people or mills; and to a place where search could have been made with far less of danger. Under this notice, after plaintiff had travelled from Wisconsin to New York City; had gone the rounds of nine hundred and fifteen of her mills, and returned after incurring onerous expenses, and finding nothing like his invention, and all this within thirty days; he might still be defeated on the trial, by having the fact sprung upon him in evidence, that it was the very nine hundred and *sixteenth* mill in which his cherished invention had been used. Then why not have told him so at first, *in the notice?* He could then have gone to that mill at once. If he had found the notice true, he could have abandoned an unjust suit. If false, could have prepared to repel a pirate's unjust defence. Yet, New York was but one of six large cities named in the notice to be searched by the plaintiff within thirty days, and a thousand miles away.

Mr. M. H. Carpenter, contra.

Mr. Justice MILLER delivered the opinion of the court.

The degree of particularity or certainty necessary in pleas and notices is an ever-recurring question in judicial proceedings, and can never be effectually disposed of so long as new and varying circumstances may present the question in new aspects.

The object of the rule is undoubtedly to enable the other party to make such answer or response to the matter set up in the plea or notice, either by way of pleading or of evidence, or such cross-examination of the witness of the party setting up the plea or notice as the facts of his case may enable him to do. In other words, to apprise him fairly of what he may expect to meet under the plea or notice.*

In the case before us, in addition to the common law rules, Congress has, for the protection of patentees, made an enactment on the subject. With the requirements of this statute the defendant has complied, so far as the names and

* Teese *v.* Huntingdon, 23 Howard, 10.

residence of the witnesses are concerned; but it is denied that he has been sufficiently specific as to the places where the use was to be shown. It is said that it is not sufficient to name the city, but that the particular mill in which the invention had been used must be pointed out. But we cannot take judicial notice how many, or how few, mills using stones may be in any particular locality. In some town there may be but one. Nor do we think that the party giving notice is bound to be so specific as to relieve the other from all inquiry or effort to investigate the facts. If he fairly puts his adversary in the way that he may ascertain all that is necessary to his defence or answer, it is all that can be required, and he is not bound by his notice to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts. We are all, therefore, of opinion, that when, in addition to the particular town or city in which such large objects as millstones are used, the name and residence of the witness by whom that use is to be proved is also given, there is sufficient precision and certainty in the notice.*

The questions propounded are accordingly answered: the first in the affirmative, and the second in the negative.

WILKINS *v.* ELLETT, ADMINISTRATOR.

A voluntary payment of a debt to a foreign administrator held good as against the claim of an administrator duly appointed at the domicile of the debtor, in which last place the debt was paid; there having been no creditors of the intestate in this last place, nor any persons there entitled as distributees.

ERROR to the Circuit Court for the Western District of Tennessee; the case was this:

Quarles being domiciled in the State of *Alabama*, died there, and letters of administration were there taken out by

* Phillips *v.* Page, 24 Howard, 164.

one Goodloe, of that State. Wilkins, a resident of Memphis, *Tennessee*, owed the estate $3455, and being called upon at Memphis by Goodloe, the administrator, paid the debt and took a receipt. Goodloe duly accounted before the Probate Court in Alabama for the sum thus received. Afterwards, Ellett, a citizen of the State of Virginia, and who professed to be next of kin to the deceased, took out letters of administration in Tennessee, and brought this suit against Wilkins to recover the same debt. There were no creditors or persons entitled as distributees of the intestate in the State of Tennessee. The court below, holding that the voluntary payment by Wilkins to the Alabama administrator was in his own wrong, gave judgment for the plaintiff. Wilkins, the debtor, now brought the case to this court; the question, of course, being whether voluntary payment to the foreign administrator had discharged the home one.

Mr. D. K. McRae, in support of the judgment below:

The identical question in this case has been presented and settled in Tennessee.* It is there taken for granted as settled doctrine in England and America, that an administrator appointed in one country is not by virtue of such appointment entitled to sue, in his official capacity, in any other country. He is a *stranger* to the debt, without authority to receive or give acquittance.

Judge Story, who, in *Trecothick* v. *Austin*,† uttered a dictum to a contrary effect, directly controverts the position of the dictum in his Conflict of Laws,‡ where the question is properly presented with its qualifications.

Messrs. Humes and Poston, contra.

Mr. Justice NELSON delivered the opinion of the court.

It has long been settled, and is a principle of universal jurisprudence, in all civilized nations, that the personal

* Young, Administrator *v.* O'Neal, 3 Sneed, 55.

† 4 Mason, 16–33.

‡ Conflict of Laws, §§ 514, 514 *a*, 514 *b*, 515.

estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and, if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated.* The original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place, or directions of the will, as the case may be.

It is true, if any portion of the estate is situated in another country, he cannot recover possession by suit without taking out letters of administration from the proper tribunal in that country, as the original letters can confer upon him no extra-territorial authority. The difficulty does not lie in any defect of title to the possession, but in a limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interests of its home creditors. These letters are regarded as merely ancillary to the original letters, as to the collection and distribution of the effects; and generally are simply made subservient to the claims of the domestic creditors, the *residuum* being transmitted to the probate court of the country of the domicile, for the final settlement of the estate. It is upon this qualification of the law of comity and consequent inability of the original administrator to sue in the foreign country, upon which the objection is founded to the validity of the voluntary payment by the foreign debtor to him.

There is doubtless some plausibility in it, growing out of the interest of the home creditors. But it has not been regarded of sufficient weight to carry with it the judicial mind of the country. With the exception of the case in the State

* 2 Kent's Commentaries, 429; Story's Conflict of Laws, § 379.

of Tennessee, none have been referred to, nor have our own researches found any, maintaining the invalidity of the payment. The question has been directly and indirectly before several of the courts of the States, and the opinions have all been in one direction—in favor of the validity.*

Mr. Justice Story, in his Conflict of Laws,† has expressed a doubt as it respects the soundness of the doctrine upon principles of international law, and which *is mainly* relied on in the present case by the defendant in error. He had affirmed it in *Trecothick* v. *Austin*, and he admits in a note,‡ that if a debtor be found in a foreign country where the creditor died, and where he had his domicile, and was sued by the administrator, he could not protect himself by a plea that he was liable to pay only to an administrator appointed at the place of his (the creditor's) domicile. All debts follow the person, not of the debtor in respect of the right or property, but of the creditor, to whom due.§

JUDGMENT REVERSED.

WALKER *v.* WALKER'S EXECUTOR.

1. A covenant by a husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, must now be regarded on authority as valid, notwithstanding the serious objections to such deeds. It will accordingly be enforced in equity, if it appear that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this especially if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more

* Williams *v.* Storrs, 6 Johnson's Chancery, 353; Doolittle *v.* Lewis, 7 Ib. 51; Vroom *v.* Van Horne, 10 Paige, 549, 557; Schultz *v.* Pulver, 11 Wendell, 361; Trecothick *v.* Austin, 4 Mason, 33; Stevens *v.* Gaylord, 11 Massachusetts, 256; Nisbet *v.* Stewart, 2 Devereux & Battle, 24; Parsons *v.* Lyman, 20 New York, 108.

† § 515 *a*. ‡ Ib. 432. § Thorne *v.* Watkins, 2 Vesey, Sr., 35.

than a court before which she was entitled to carry her grievances would have decreed to her as alimony.

2. The validity of such a covenant is not impaired by the fact that the deed contains a provision that if the parties should afterwards come together, the trust should remain and be executed in like manner, as if they should remain separate.
3. A husband may be chargeable as trustee with the income of his wife's separate property, and if he have received it from her to invest it for her, and have not invested it, he will be so charged at her suit, whether the income be of property which he has settled upon her, or be income from some other separate property of hers.
4. The Federal courts where they have jurisdiction will enforce, for the furtherance of justice, the same rules in the adjustment of claims against ancillary executors, that the local courts would do in favor of their own citizens.
5. A widow, by being a mere formal party to a deed of compromise between the heirs-at-law of a decedent and his residuary devisees, by which a specific sum is given to the former and the residue of the estate to the latter, does not estop herself from coming upon the estate with a claim for separate moneys of hers, received by her husband to invest for her, but which he did not so invest; she having done nothing to conceal her claim from the residuary devisees, and the "residue" which the heirs surrendered having been a residue after the proper settlement of the estate.
6. Nor does she estop herself from asserting such a claim against her husband's executors, by her acceptance of a provision under his will which makes a limited provision for her, to be received, with income under a certain trust deed, in satisfaction of dower.
7. The view of the court below upon an ancient item of account, somewhat obscure, and where there was but little evidence, not disturbed.
8. The estate of a husband, who had maltreated his wife, and obtained from her the income of her separate property under a promise to invest it for her, but who did not so invest it, charged after his death with interest, compounded annually, through a long term of years, and deprived of all commissions for services as trustee.

APPEAL from the Circuit Court for the District of Massachusetts; the case was this:

In September, 1845, Dr. William Walker, then a citizen of Charlestown, Massachusetts, without cause, compelled his wife and two of their children to leave his house. Before this time he had treated his wife with great harshness and cruelty, proceeding so far as to inflict personal violence on her. This conduct entitled his wife, by the laws of Massachusetts, to a decree of divorce from bed and board, and for

a proper allowance of alimony; and, with a view to obtain these, she applied to counsel to take legal proceedings against her husband. On learning this Dr. Walker sought the advice of his friend, Uriel Crocker, and requested him to confer with a lawyer on the subject. This friendly service was performed by Mr. Crocker, and the conference resulted in recommending the husband to settle on his wife $50,000, and that articles of separation between them be executed. It was considered that the sum agreed on was a suitable settlement under the circumstances, as nearly the same amount had been obtained by Dr. Walker from the estate of his wife's father, and as Dr. Walker was, independently of this, a person of fortune; his estate at the time having been between three and four hundred thousand dollars.

The parties adopted the recommendation of Mr. Crocker and his conferee, and on that basis the articles of separation were drawn and executed. By these articles Dr. Walker transferred to trustees, in trust for his wife, the amount of property agreed upon, and directed the income to be paid to her during her life. This transfer was, however, on the express condition that Mrs. Walker should release her possibility of dower, when asked to do so, to all the real estate which he should sell during his lifetime, and if she survived him, that she should release her right of dower to his entire estate. The trustees on their part covenanted to indemnify the husband from all payment of alimony thereafter, and the deed contained a stipulation that if the parties should afterwards come together the trust should remain, and be executed in like manner, as if they should live separate.

The parties continued to live apart, after the execution of these articles, until the month of April, 1846, when Mrs. Walker returned to her husband at his request, and again for a certain time lived with him.

The main controversy in this case grew out of transactions which occurred after Mrs. Walker thus returned to her husband's house.

The money was admitted to have been always paid by the trustees into Mrs. Walker's own hands. And that in

September, 1846, when the first payment after her return to her husband's house was due under the deed of trust, Dr. Walker went to Mr. Crocker, the managing trustee, with an order for the money from his wife, and stated that she had agreed that he should invest the amount for her, with the sum of one thousand dollars previously paid to her at Crocker's request.

As to the rest of this part of the case—assuming that the testimony of a daughter, Miss Emily Walker (by whose testimony the facts in regard to it were in a considerable degree sought to be established), could be relied on—the facts were these:

On the occasion of a second payment, which was made to the wife in person, as were the rest, Miss Walker testified that her father wished her mother to give him the money unconditionally, saying that she had no need of it, now that she was in the house with him, and that all her wants were supplied; but the request was declined. The subject was discussed between the parties for several days, and finally Mrs. Walker surrendered the checks for the money, on the promise of her husband to invest them for her at the time he received them. The same discussion ensued when the next payment was made, and the same struggle occurred on the part of the husband to get the money from the wife without any promise, and with the same result—on agreement by him to invest it for her. The discussion and struggle were renewed on the occasion of the receipt by the wife of the third payment, and was ended by the husband promising the wife to invest the check then on hand, and all future checks which he should receive from her, for her benefit. After this there was quiet in the family, and Mrs. Walker, relying on her husband's promise, paid to him, while she remained in his house, the successive checks as they were received from the trustee. In 1855, Dr. Walker was taken ill. His daughter, already named, testified as to what took place during this illness as follows:

"He said that he was very ill; that he could not live many

weeks, perhaps not many days; that there were some things which he had neglected to attend to; that this neglect troubled him a great deal. He had neglected, he said, to invest the money which he had received from my mother, which she had received from the trustee, Mr. Crocker; that he had intended to invest it; that the difficulty with him had been to find a safe investment; that it was her money, and all she had; that it would not do to risk anything with it. This he said to me, not once but many times."

The witness was sharply cross-examined, and otherwise attempted to be discredited; but nothing was said by her, or shown by others, to bring into doubt her original statement.

At another time—having previously requested Crocker to defer the payment of a sum of money then due to his wife, on account of his apprehension that she would be unwilling to have it invested for her, as he wished to do—he desired Crocker to go to his house and pay his wife the money, as he had a good chance to invest it. In fact the whole evidence made it clear that Dr. Walker received the income of his wife's estate from her hands on the condition that he would invest it, as received, for her benefit, and that he agreed to this condition.

Mrs. Walker lived with her husband until June, 1860, when she again abandoned his house on account of his cruel treatment of herself and their daughters, and remained away from him during the residue of his life.

After the separation in June, 1860, Dr. Walker went to reside in *Newport, R. I., and died there* in 1865, leaving more than a million of dollars of estate, and a will, which, after setting aside $180,000 in trust, to secure from the income to his wife, with the rents of the $50,000, settled in 1846, an annual income of $3000; and to his children the remaining income; and after various legacies, including that of most of his silver plate between his wife and daughters, left the residue of his estate to literary and scientific institutions. The provision made by his will for his wife was declared by the will to be "in full and in lieu of her dower."

Statement of the case.

Letters testamentary were granted on Dr. Walker's estate in Rhode Island; but letters ancillary were also granted in Massachusetts, where he had a large amount of personal property as well as in Rhode Island.

The granting of letters testamentary upon Dr. Walker's estate was opposed by his heirs-at-law, and after the grant of the letters, they threatening to seek to have them vacated, a compromise was effected, and a deed executed accordingly, between the heirs and the residuary devisees, by which the former released to the latter, after the payment to themselves of a considerable sum of money, the residue of the estate, after payment of all debts and just claims upon it. Mrs. Walker was a formal party to this deed.

Mrs. Walker now, October Term, 1865, filed a bill against her husband's executors, alleging a trust or investment as respected the moneys which she had paid into his hands, and calling for an account.

The executors, either by the answer or in the argument, set up as defences to the bill,

1. That the original article of separation, having been a *voluntary agreement* of husband and wife to live separately, was invalid; and the trust created by it of course invalid also; that this especially was so as the instrument was construed by the other side, for that this construction made it his interest to oppose his wife's return to his house, since he would have then both to support her and to let her have the separate income also.

2. That as to the sums received from his wife, equity would not make Dr. Walker a trustee for her; that if he could properly be a trustee at any time, yet that during the cohabitation of the parties the trust was suspended; moreover that the evidence was insufficient to show any intention to make himself such trustee in fact; the bill not being filed until twenty years after the alleged promises were made, and the evidence to support it being chiefly that of the daughter, a witness naturally inclined to the mother's side, and whose statements were largely colored by her opinions and feelings.

3. That Dr. Walker having died in Rhode Island, and his will having been proved there, this suit should have been brought there and not in Massachusetts, where it was brought.

4. That Mrs. Walker, having been a party to the deed of compromise, was estopped from bringing this suit.

5. That by accepting the provisions of her husband's will she had waived all right to maintain a suit like the present one.

The court below sustained the bill; held Dr. Walker a trustee to invest for his wife the income of the settled property received by him from her; and referred the case to a master for an account. The master charged Dr. Walker's estate accordingly, charging him also interest compounded annually, but allowed him commissions as trustee, $1682.38. He also allowed his estate a credit of $2400, which was claimed by it in virtue of a receipt of his wife's, thus:

"Out of the sum of 2087 dollars and 97 cents, which I have received of the trustees, as specified in their two first accounts, I have refunded to my husband $1500, fifteen hundred dollars, being part payment of 24 hundred dollars, which he gave, at my request and on my account, in equal proportion to my two sons; and I agree that the like sum of 12 hundred dollars shall be given successively to my other children, Frances, Kate, and Abby, in such manner as may be agreed upon between me and my husband, as far as the income or the trust property will allow, reserving to myself the right to use as much of said income as I may need for private expenses and any charitable objects I may wish to favor.

"ELIZA WALKER.

"BOSTON, March 27, 1847."

The Circuit Court affirmed this report, giving Mrs. Walker a decree for $81,750.85; and Mrs. Walker appealed, asserting among other things that not only was Dr. Walker entitled to no commissions as trustee, but that his conduct was such as deserved severe treatment, and that interest ought to have been compounded semi-annually.

The case was elaborately and ably argued by *Messrs. Sidney Bartlett and B. R. Curtis, for the appellant; and by Messrs. Thomas and Hutchins, contra;* the additional point being made in this court in behalf of Dr. Walker's estate, that under the General Laws of Massachusetts, ch. 97, section 16, the executors were not liable to this suit, because it was begun within one year after they gave bonds.

Mr. Justice DAVIS delivered the opinion of the court.

The bill here seeks to charge the estate of Dr. Walker, in the hands of his executors, with a trust in favor of his widow. The court below found that the trust existed and was valid, and this appeal seeks to review that decision as erroneous.

Two principal questions are presented for consideration:

1st. Is the trust created by the articles of separation in this case valid, and will a court of equity enforce it?

2d. Can a husband be a trustee for his wife; and if so, did Dr. Walker constitute himself such a trustee or not?

It is contended that deeds of separation between husband and wife cannot be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled.*

* Compton *v.* Collinson, 2 Brown's Chancery, 377; Worrall *v.* Jacob, 3 Merivale, 266; Jee *v.* Thurlow, 2 Barnewall & Creswell, 546; Webster *v.* Webster, 1 Smale & Gif. 489; S. C. 23 English Law and Equity, 216; 17 Id. 278; Randle *v.* Gould, 8 Ellis & Blackburne, 457; Carson *v.* Murray, 3 Paige, 483; Nichols *v.* Palmer, 5 Day, 47; Hutton *v.* Duey, 3 Barr, 100; Bettle *v.* Wilson, 14 Ohio, 257; Chapman *v.* Gray, 8 Georgia, 341; Reed *v.*

It is true that different judges, in discussing the question, have struggled against maintaining the principle; but while doing so they have not felt themselves at liberty to disregard it, on account of the great weight of authority with which it was supported, and have, therefore, uniformly adhered to it. It is unnecessary to consider whether the extent to which the doctrine has been carried meets our approbation, nor are we required to discuss the subject in any aspect which this case does not present. It is enough for the purposes of this suit to say that a covenant by the husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this is especially true if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more than a court, before which she was entitled to carry her grievances, would have decreed to her as alimony. In this state of the law on the subject, it is clear the deed of settlement in controversy was unobjectionable. It is equally clear that the separation accomplished by it was the best thing for the parties at the time, and that it ultimately led to a reunion which lasted over fourteen years. The evidence shows that the bad conduct of Dr. Walker to his wife justified her in leaving him, and entitled her to a legal separation at the hands of a court, with alimony in proportion to the value of his estate. For many reasons, which are apparent without stating them, it was desirable, if possible, to avoid a judicial investigation, and accordingly negotiations to this end were commenced on the part of the husband, which resulted in

Beazley, 1 Blackford, 97; Wells *v.* Stout, 9 California, 494; Dellinger's Appeal, 35 Pennsylvania, 357; Gaines *v.* Poor, 3 Metcalf (Ky.) 503; Hunt *v.* Hunt, judgment by Lord Westbury in 5 Law Times Rep. 778.

securing to the wife a suitable provision for her support. This settlement was made by him, and accepted by her, not only in lieu of alimony, which she could have obtained, but also in place of dower; and the covenant of the trustees against any future claim of alimony, and their agreement that the wife's debts should be paid out of the property conveyed to them, furnished the security to the husband for the permanent arrangement contemplated by the parties. If we consider that the value of the property transferred to the trustees for the benefit of the wife was but little more than the husband received in her right from her father's estate, and that, at the time, he was worth between three and four hundred thousand dollars, it would seem the provision for the wife's maintenance was less than she had a right to demand and ought to have received. If the law authorizes a wife to leave her husband on account of cruel treatment, and to get from him a competent support, it cannot withhold its sanction to the articles of separation concluded between these parties under the circumstances disclosed by the evidence in this case. It is insisted the obligation of the trust was discharged when the wife returned to her husband's house, but this is a mistaken view of the effect of the instrument. It was the intention of the parties that the arrangement should be permanent, and to accomplish that purpose the agreement was framed so that the wife should enjoy her separate estate during life, although she should subsequently become reconciled to her husband, and cohabit with him. We can see no valid objection to such a provision, and it is certainly supported by authority.* The husband had a right to make a settlement upon his wife without any view to separation, and the insertion of this provision shows that he did not intend the settlement to cease on the return of the wife to cohabitation. There is no good reason why effect should not be given to the intention of the parties on the subject. If, on grounds of public policy, it is desirable that

* Wilson *v.* Mushett, 3 Barnewall & Adolphus, 743; Bell on Husband and Wife, 525–541.

the parties should be reconciled, whatever tends to promote such a result will receive the favorable consideration of a court of equity. Without this provision there was no inducement for Mrs. Walker to return to her husband; with it she could try to live with him again, and if his previous bad treatment was repeated she was fortified against the contingency of being turned away another time penniless. There was nothing in his previous conduct to inspire her with confidence in his subsequent good behavior, and but for the fact that the means of support were secured to her in case her life became intolerable with him, it is reasonable to infer that she would never have ventured to cohabit with him after the separation. It is clear, then, that this trust was operative during the life of the wife, and that a court of equity will enforce it.

The next inquiry relates to transactions which occurred after the wife returned to her husband at his request, and on which the claim for relief in this case is based. That a husband may be a trustee for his wife, and can be compelled in equity to account for any money or property belonging to her which he has received, in the same manner that a stranger would be held to account, is a doctrine so well settled that it hardly requires a citation of authorities to sustain it.*

It makes no difference whether the property which he has received was settled by him upon his wife, or came to her through other sources. If the property was her own separate and exclusive estate and he has agreed to become her trustee respecting it, his liability attaches, and he will be charged with the trust. The property settled upon Mrs. Walker by the articles of separation was her separate estate, and to be enjoyed by her in the same manner as if it had been conveyed to trustees for her benefit, by settlement before marriage. The income secured to her was not suspended by her returning to live with her husband, on his

* 2 Kent, 163, and cases cited; 2 Story's Equity, § 1380; Neves v. Scott, 9 Howard, 212; Woodward v. Woodward, 8 Law Times Rep., N. S. 749; Grant v. Grant, 12 Id. 721.

solicitation, nor had he any right to retain it by way of set-off against the expense of her living. If for any cause he desired the state of separation to cease, and invited his wife to return, it was his duty, as it should have been his pleasure, out of his abundant means, to have given her a decent support. What is the evidence touching the question whether Dr. Walker constituted himself the trustee for his wife in respect to the income derived from her separate estate?

It is clear and uncontradicted, that Dr. Walker received the rents and incomes of his wife's estate, *from her*, on the condition to which he agreed, that he would invest them for her benefit as they were received, and this agreement imposed on him the character of a trustee as to this property. To hold otherwise would be to sanction the grossest fraud. It is not necessary to create the trust that the husband should use any particular form of words, nor need those words be in writing. All that is required is that language should have been employed equivalent to a declaration of trust. That the words which Dr. Walker used constituted him the trustee of his wife, cannot admit of controversy. An attempt is made to discredit the principal witness, by whom the important facts in this case are proved, but it has wholly failed. Her narrative of the occurrences which led to the separation, and of the transactions out of which the trust arises, is intelligently given, does not vary on cross-examination, and bears the impress of truth.

It is insisted that this suit should have been brought in Rhode Island, because Dr. Walker had his domicile in that State when he died, and his will is proved there. But the will was also proved in Massachusetts, where ancillary administration was obtained; and if, as is conceded in such a case, the assets received and inventoried by the executors there are liable to the claims of the citizens of Massachusetts, the citizens of other States will be placed on the same footing in this respect, in the Federal courts sitting in Massachusetts, where there is no suggestion of insolvency. The Circuit Courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where

the parties are citizens of different States, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens.*

It is urged that Mrs. Walker is estopped from setting up this claim because she was a party to the indenture of compromise. But if so, she was only a formal party to it, received nothing under it, and was not concerned with the residue of the estate, which it proposed to adjust only after the debts, legacies, and liabilities were paid. Having done nothing to conceal her claim, nor imposed upon the parties to the compromise respecting it, she cannot be considered as having waived her right to prosecute it.

But if this defence is overruled, it is nevertheless contended that Mrs. Walker, by accepting the provisions of her husband's will, waived her right to institute this suit; but this is giving an effect to the acceptance not warranted by the terms of the will, or anything connected with the case. Dr. Walker in his will saw fit to make a limited provision for his wife, and to declare that it was to be received, with the income under the trust deed, in full satisfaction of dower in his estate. Nothing is said about the other trust under which he received the separate property of his wife to be invested, and it is hard to see how his estate can be released from accounting for it, or the status of the complainant affected, because she consents to take under the will what is given her in satisfaction of dower.

It is objected that the executors are not liable to this suit because it was commenced within one year after they gave bonds for the discharge of their trust.† But this defence is not now open to the respondents. To have availed themselves of it, it was necessary that it should have been presented at the earliest stage of the proceedings. In not doing so, they will be considered as having waived their right to insist that the suit was brought too soon.

* Green's Admr. *v.* Creighton, 23 Howard, 90; Harvey *v.* Richards, 1 Mason, 381.

† See Gen. Statutes of Mass., c. xcvii, § 16.

Opinion of the court.

The remaining questions in this case relate to the exceptions of the parties to the master's report. In dealing with these exceptions, it seems to us that all we are required to notice are embraced in three different points of inquiry:

1st. Did the master err in allowing Dr. Walker $2400, as a deduction from the income of the trust property?

2d. Should the interest charged against the trustee be compounded annually, or semi-annually?

3d. Was the trustee entitled to any compensation for his services?

The solution of the first inquiry depends on the effect to be given to the receipt or memorandum signed by the complainant, dated March 27th, 1847. The complainant insists in the adjustment of the account the master mistook the effect of the instrument, and that he should have allowed as a credit against her $1500, instead of $2400. It is not easy, after this lapse of time, to tell the exact basis on which the accounts should be settled with reference to this receipt. It was a memorandum made when the parties were living in harmony, and after Dr. Walker had undertaken to invest for his wife the first check delivered to him by her, and after her purpose was manifest that the entire income of her estate should be invested to provide against the contingencies of the future. And yet this memorandum shows that she so far modified this purpose as to authorize her husband to give for her $1200 to each of her two sons, and expressed the intention of making an equal donation to her other children. The matter was probably adjusted between the parties, and, although there is no proof on the subject, the Circuit Court, doubtless, in approving this part of the master's report, acted on the idea that by long acquiescence it should be treated as having been settled. We cannot say that this view of the subject is wrong, and the exception is, therefore, overruled.

2d. The next exception relates to the manner of computing interest. That Dr. Walker acted in utter disregard of his trust, is too plain for controversy. He treated the money as his own; neither kept nor rendered any account of his

trust; and his conduct throughout is irreconcilable with the intention to perform his agreement. There is not a shadow of excuse for his neglect. The reason assigned for it to his daughter, when on his sick-bed, that he had not been able to find safe investments for the money, was the merest pretence. It could not be otherwise, as he was an intelligent man, of large wealth, and well informed on the subject of investing moneys. The condition of his estate shows that he had abundant opportunities for profitable investment on his own account; and if so, how can it truthfully be said he could not find safe investments for the small sums in his hands belonging to his wife? A court of equity, the especial guardian of trusts, will not tolerate excuses of this sort on the part of a trustee, for omitting to discharge his duty to his *cestui que trust*. There is, therefore, no hesitation in the court to allow, in the adjustment of the trustee's account, the interest to be compounded annually. It has been argued with earnestness that this is a case for severe treatment, and that the master should have allowed semi-annual rests; but we are not at liberty to discuss the subject, as the court are equally divided in opinion upon the question which it presents.

3d. The master was wrong in allowing any compensation to the trustee for his services, and the exception taken to that part of his report is, therefore, sustained. To hold that, in a case like this, the trustee should be allowed compensation, when he literally did nothing towards executing his trust, but on the contrary was guilty of the grossest abuses concerning it, would be a departure from correct principle. The sustaining this exception renders a modification of the decree in the Circuit Court necessary. That court passed a decree in favor of the complainant for $81,750.85. It should have been increased by the addition of $1682.38, which sum was deducted, in the account stated, for the trustee's services. The decree of the Circuit Court is, therefore, modified, on the basis that the complainant, at the time it was rendered, was entitled to recover from the respondents the sum of $83,433.23.

Statement of the case.

Interest will follow from the date of the decree, at the rate allowed on judgments and decrees in Massachusetts.

THE GUY.

1. The principles laid down in *The Grapeshot* (*supra*, 129), so far as relates to liens upon foreign vessels for repairs, affirmed.
2. The fact that the person calling himself owner and agent of the vessel gave acceptances for the amount charged for the repairs held not to affect the case, the acceptor having been insolvent and unworthy of credit, and the credit having in fact been given to the boat.

APPEAL from the Circuit Court for the Eastern District of New York.

Tall filed a libel, in the District Court at New York, against the steamer Guy, claiming a lien on the boat for repairs made upon her in Baltimore, Maryland, and alleged by the libel to have been necessary to fit her for the prosecution of her then employment, which was, in connection with several other boats, the transportation of the government mails, and of passengers and freight, between Norfolk, Virginia, and Newbern, North Carolina. It was admitted that Baltimore was not the home-port of the Guy, and indeed that she did not belong to Maryland at all. The repairs were ordered by one Olney, who called himself proprietor and agent of the line, and seemed to have been the owner of the Guy; and they were reasonably fit and necessary. There was proof that the libellant received from Olney acceptances for the amount of the repairs; but none that they were taken in absolute payment. On the contrary, it appeared that the acceptor was insolvent and unworthy of credit, and that, in fact, the credit was given to the boat.

The boat having subsequently arrived in New York, was arrested on this libel. One Healy now appeared as claimant, setting up a transfer to him subsequent to the date of the repairs made, and resisted a condemnation.

Statement of the case.

The District Court decreed in favor of the libellant, and the Circuit Court having affirmed the decree, the case was brought here.

After argument by *Mr. Evarts, for the appellant, and Messrs. W. W. Goodrich and O. Horwitz, contra,*

The CHIEF JUSTICE delivered the judgment of the court, to the effect, that upon the facts established it was apparent that the case was to be governed by the principles settled at this term in the case of *The Grapeshot*,* and that the decree of the Circuit Court having been in accordance with those principles, must be

AFFIRMED.

WATKINS *v.* UNITED STATES.

1. Pleading over without reservation to a declaration adjudged good on demurrer, is a waiver of the demurrer.
2. On a suit by the United States upon a marshal's official bond, the government may properly rest in the first instance, after having introduced evidence, in the form of duly certified transcripts of the adjustment of his accounts by the accounting officers of the Treasury. It need not show that the marshal had notice of the adjustment of his accounts or of the balance found against him in the transcript.
3. In order to allow a marshal in such a suit to set off a credit, it must be shown that the claim for credit has been legally presented to the accounting officers of the Treasury for their examination and been by them (except in certain cases) disallowed. And to be legally presented the claim should be presented by items, and with the proper vouchers.

THE United States brought suit in the Circuit Court for Maryland against Watkins, late marshal of the United States, and his sureties, on the official bond of the said marshal. Judgment was given for the United States; and Watkins took a writ of error.

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* *Supra*, 129.

Statement of the case in the opinion.

Mr. W. M. Addison, for the plaintiff in error; Mr. W. A. Field, Assistant Attorney-General, contra.

Mr. Justice CLIFFORD stated the case and delivered the opinion of the court.

Persons accountable for public money, if they neglect or refuse to pay the sum or balance reported to be due to the United States, upon the adjustment of their accounts, are liable for the amount; and it is made the duty of the comptroller to institute suit for the recovery of the same, adding to the sum stated to be due the commissions of the delinquent and interest at the rate of six per cent. per annum from the time the officer received the money until it shall be repaid.* Transcripts from the books and proceedings of the treasury, certified by the register and authenticated under the seal of the department, are expressly declared to be competent evidence in every such case of delinquency, and all copies of bonds, contracts, or other papers relating to or connected with the settlement of any such account, when certified by the register to be true copies of the original on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court.† Judgment is required to be rendered in such cases at the return term, unless the defendant shall, in open court, make oath that he is equitably entitled to credits which had been submitted to the consideration of the accounting officers of the treasury, and been rejected previous to the commencement of the suit, specifying each particular claim so rejected, in the affidavit, and stating to the effect that he cannot safely go to trial without that evidence. Such an affidavit being filed, the court may grant a continuance to the next term, but not otherwise; and the fourth section of the act provides that, *in suits between the United States and individuals, no claim for a credit* shall be admitted upon trial, but such as shall

* 1 Stat. at Large, 512.

† Ib. 513.

appear to have been presented to the accounting officers of the treasury for their examination, and which have been by them disallowed in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in the possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident.*

Pursuant to law the first-named defendant was, on the twenty-eighth of March, 1857, commissioned as marshal of the United States for the district of Maryland, to hold the office for the term of four years from the first day of April following, unless sooner removed by the President. On the seventh of April of that year he gave his official bond for the faithful performance of all the duties of his office, and the other two defendants named in the declaration were the sureties in that bond.

The present suit is an action of debt upon that bond, and the breaches assigned are as follows: (1.) That the marshal did not make true returns of all public moneys which came to his hands during the term of his office. (2.) That he did not render his accounts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to a correct and prompt settlement thereof, within three months after each successive quarter. (3.) That he did not pay into the treasury all the sums and balances of the public moneys reported to be due upon the adjustment of his accounts at the Treasury Department. (4.) That he did not pay into the treasury, or deposit to the credit thereof, all the surplus and emoluments of his office, which his half-yearly returns showed to exist, beyond the allowances which he was authorized to retain. Verdict and judgment were for the plaintiffs, and the defendants excepted to two of the rulings of the court, which give rise to the only questions of any considerable importance presented for decision in the record.

Apart from those questions, however, it is insisted by the

* 1 Stat. at Large, 515.

defendants that the court erred in overruling their demurrer to the declaration. They demurred specially to the several assignments of breaches in the condition of the bond, and the court overruled the demurrer as to the first three breaches, and sustained it as to the fourth, and both parties acquiesced in the ruling and decision of the court. Subsequently the defendants pleaded performance, concluding with a verification, and the plaintiffs replied, tendering an issue, which was joined, and upon that issue the parties went to trial.

Pleading over to a declaration adjudged good on demurrer, without any reservation, is a waiver of the demurrer, as held by the repeated decisions of this court.*

II. Evidence was then introduced by the plaintiffs to show that there was a balance due from the marshal under his official bond, and the amount of the same, which evidence consisted of the duly certified transcript of the adjustment of his accounts by the accounting officers of the treasury. Having introduced that proof the plaintiffs rested, and the defendants moved the court to instruct the jury that the plaintiffs were not entitled to recover upon that evidence, because it is not averred or proved that the marshal had any notice of the adjustment of his accounts, nor of the balance found against him in the certified transcript; but the court refused to instruct the jury as requested, and the defendants then and there excepted to the ruling of the court.

Officers and agents of the United States who receive public money, which they are not authorized to retain as salary, pay, or emolument, are required by law to send their accounts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to the correct and prompt settlement thereof, within three months at least after the expiration of each successive quarter, if resident within the United States, or within six months if resident within a foreign country.†

* Aurora City *v.* West, 7 Wallace, 92; United States *v.* Boyd, 5 Howard, 29; Clearwater *v.* Meredith, 1 Wallace, 42; Jones *v.* Thompson, 6 Hill, 621.

† 3 Stat. at Large, 723.

Statement of the case in the opinion.

Provision is also made that every officer or agent who shall offend against that enactment shall be promptly reported to the President, and that he shall be dismissed from the public service. Notice to the person required to account is not necessary, as the whole subject is regulated by law. Such officers and agents are required to render their accounts quarter-yearly, and when they do so they are charged with what they have received, and credited with what they have lawfully paid out or disbursed. Regulated as the whole matter is by law, they are presumed to have, and in general actually do have, full knowledge of the proceedings and of the result, and it is believed that no case of hardship arising from any surprise has ever occurred in the history of the department.*

III. By the evidence set forth in the second exception, it appears that the defendants claimed at the trial that a credit should be allowed, in the adjustment exhibited by the plaintiffs of the marshal's accounts, of four thousand three hundred and seventy-five dollars and seventy cents, for advances alleged to have been made by him in payment for work done and expenses incurred by him in taking the census, in pursuance of orders from the Secretary of the Interior. They offered the paper called the statement of differences, exhibited in the bill of exceptions, to show that the claim had been duly presented at the treasury and disallowed, and they also offered to prove that the disbursements were made as charged in the account. Objection was made by the district attorney to the admissibility of the evidence, because no account of the particulars of the claim was ever presented to the accounting officers of the treasury; and in making the objection he introduced the three accounts current set forth in the bill of exceptions. Both parties being heard, the court excluded the evidence, because it did not appear that the claim had been duly presented and disallowed, and the defendants excepted.

* Walton *v.* United States, 9 Wheaton, 651; Smith *v.* United States, 5 Peters, 292.

Marshals, like other officers, are required to render their accounts quarter-yearly to the accounting officers, with the vouchers necessary to the correct and prompt settlement thereof, within the time prescribed by law. In the case before the court it is not stated in the bill of exceptions, nor is it shown in the record, that any statement of items was furnished, nor that any vouchers were submitted to the accounting officers in support of the claim for credit now under consideration. Vouchers are required by the very words of the act of Congress, and it is very clear that the presentment of an account without items or vouchers would be a useless act. Without such evidences before the accounting officers there could not be any intelligent scrutiny of the claim, nor any decision which would be satisfactory to the claimant or to the public.

No evidence to prove a claim for credit can be admitted at the trial, "in suits between the United States and individuals," unless it be shown that the claim has been legally presented to the accounting officers of the treasury for their examination, and that it has been by them disallowed, except under certain special circumstances, which do not exist in this case. Independently of the express words of the act of Congress, the question has repeatedly been before this court, and has on every occasion been decided in the same way.

The right of set-off did not exist at common law, but is founded on the statute of 2 George II, c. 24, s. 4, which in substance and effect provided that where there were mutual debts between the plaintiff and the defendant, ... one debt may be set against the other, and such matter may be given in evidence under the general issue. Set-offs might, ever after the passage of that act, be made, in a proper case, between plaintiff and defendant, but it never extended to suits between the government and individuals, and since the decision in the case of *United States* v. *Giles*,* it has never been pretended that, in suits "between the United States

* 9 Cranch, 236.

and individuals," any claim for credit can be admitted at the trial, unless it appears that the claim had previously been presented and disallowed, or was otherwise brought within the fourth section of the before-mentioned act of Congress. Whether the claim for credit is a legal or equitable claim, if it has been duly presented to the accounting officers and has been by them disallowed, it is the proper subject of set-off under that act, but it cannot be adjudicated in a Federal court unless it has been so presented and disallowed.* The rejection of such a claim by the accounting officers constitutes no objection to it as a claim for set-off, as it cannot be admitted in evidence unless it has been presented and disallowed, as required by the act of Congress.† Such claims as fall within that act are not specifically defined, and in view of that fact this court has held that the act intended to allow the defendant the full benefit at the trial of any credit, whether it arises out of the particular transaction for which he was sued or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt for which he is sued, subject of course to the requirement of the act that the claim must have been presented to the proper accounting officers and have been by them disallowed.‡

Questions of set-off in the Federal courts arise exclusively under the acts of Congress, and no local law or usage can have any influence in their determination.§ Claims for credit cannot be admitted in suits between the United States and individuals unless they have been duly presented to the accounting officers of the treasury and have been by them disallowed, because it is so provided by an act of Congress.‖

* United States *v.* Wilkins, 6 Wheaton, 143.

† United States *v.* McDaniel, 7 Peters, 11; United States *v.* Ripley, 7 Id. 25.

‡ United States *v.* Fillebrown, 7 Id. 48.

§ United States *v.* Robeson, 9 Peters, 324; Gratiot *v.* United States, 15 Id. 370.

‖ United States *v.* Eckford, 6 Wallace, 488; United States *v.* Gilmore, 7 Id. 492.

Supported as the ruling of the court is by an act of Congress and by a course of decision extending through a period of three-quarters of a century, it can hardly be expected that it will be disapproved.

JUDGMENT AFFIRMED.

BUTLER *v.* MAPLES.

1. An authority to an agent to buy cotton in a certain region and its vicinity, and to buy generally from whomsoever the agent, not his principals, might determine—one having in view not merely a single transaction or a number of specified transactions, but a class of purchasers and a department of business—makes a general agency to buy the cotton there, and if the agent, holding himself out as the general agent, purchase there under his power, he may bind his principal in violation of special instructions not communicated to his vendors, and of which they had neither knowledge nor reason to suspect the existence.
2. Where evidence showed that a region in the South which had been previously in possession of the rebel army, was evacuated by them, and that the citizens generally had taken the oath of allegiance or obtained protection papers, the grant of a permit by a proper treasury agent to purchase cotton authorized by treasury regulations, to be granted only in cases where the country was within the occupation of the military lines of the United States, raises at least a *primâ facie* presumption of the country's being within such occupation.
3. Where such permits were always in the same form, a printed one, and on a suit against a party to whom one has been granted, the permit granted to him has not been produced on call, the treasury agent who granted it may properly state its contents from his knowledge and recollection of them.
4. A treasury permit to a firm, to buy cotton, authorized them to buy through their agent.

ERROR to the Circuit Court for the Western District of Tennessee; the case was thus:

During the late rebellion, cotton having been an object whose acquisition was desired by the people of the North, its purchase within the Confederate lines was resorted to not unfrequently by a certain class of traders from the loyal States. Such trading was unlawful as trading with an enemy,

and was moreover made void by statute. But trading in a prescribed form, under certain conditions, within the insurrectionary region, if the same had been brought within the lines of the National military occupation, was made lawful by treasury regulation, if the trading was carried on under a permit from certain officers of the Treasury Department.

In this state of things one Shepherd, living in Desha County, Arkansas, a county in the east of that State and situate on the Mississippi, some distance below Memphis, Tennessee, made a purchase of 144 bales of cotton from a person named Maples, living not far from him; Shepherd *professing* in what he did to act in the name of a firm known as Bridge & Co., whose members were living and trading at Memphis, and which was composed of Butler and Hicox, with other persons.

At the time of this purchase Memphis was and had been for a long term in the quiet occupation of the Federal troops. "The Confederate forces had evacuated Little Rock, the capital of Arkansas, and all the country south of the Arkansas River, and had fallen back through the southwestern portion of the State to the Red River and into Texas. There was not an organized force of Confederates near the village of Red Fork, in Desha County, nor a Confederate post or force nearer than one hundred and fifty or two hundred miles from Red Fork. There were very few, if any, straggling soldiers in that portion of Arkansas on which Red Fork is situated. The citizens generally took the oath of allegiance to the United States, and many, if not most of them, procured what were called protection papers from the United States."

The cotton bought by Shepherd was bought by him as it lay, he agreeing to pay for it forty cents a pound as soon as it could be weighed. Having been weighed he removed fifty-four bales of it, but ninety bales were burned before it could be placed in a boat to be carried up the river. The fifty-four bales removed were got on board and sent to Bridge & Co., and Maples, the vendor, went to Memphis to see them. He saw Hicox, who wholly denied Shepherd's

agency, refused to pay anything for the cotton that was lost, but agreed to pay fifty cents a pound for these fifty-four bales that had arrived. Maples took this sum, supposing, as he alleged, that the assertions about Shepherd's want of authority were true, and only on that account. Seeing Shepherd afterwards, Shepherd informed him that they were not true, and Butler and Hicox still denying wholly Shepherd's authority to make the contract and to bind the firm, and still refusing to pay for the cotton that was burnt, Maples sued them in the court below to recover the price.*

On the trial it was testified to by one Carleton (under objection), that at this time he was the treasury agent, and that he had issued to the firm of Bridge & Co. a "permit" to purchase and transmit to market one thousand five hundred bales of cotton within the lines of Federal military occupation, first special agency. [The admission of his testimony was excepted to, both because the witness should have produced his official books, and because a permit to Bridge & Co. was none to Shepherd.] This agency included so much of the States of Alabama, Mississippi, Arkansas, and Louisiana, as was occupied by the National forces operating from the north. There was a printed form, as it appeared, invariably used. The defendant below did not produce this permit, though served with a notice to do so.

The evidence of Shepherd's authority to make the contract for the defendants and bind them to its performance, so far as it was direct, was of two kinds. The first and principal was an article of agreement, made on the 16th day of October, A.D. 1863, between Bridge & Co. and Shepherd, describing him as of Desha County, Arkansas. The agreement declared its purpose to be "purchasing R. C. Stone's and such other cotton as said Shepherd may be able to purchase in said county and vicinity, under the conditions and restrictions hereinafter set forth." Having thus declared its purpose, it recited that Bridge & Co. had furnished to Shep-

* The writ issued against others in addition to the two defendants named, but the others were not served with process and the issue was joined but between the plaintiff and Maples and Hicox.

herd $4000, and stipulated that they would furnish him such other money from time to time as might be necessary to purchase said cotton. By the instrument it was further agreed that Shepherd should buy the cotton, if it could be bought at the price set forth therein, and as much more as he could on the best possible terms, not paying *an average of more than thirty cents per pound* for middling cotton, and lower in proportion to the grade, to be delivered at such times and places of shipment as might be agreed upon. It was further agreed that Shepherd should pay as little as possible on the cotton until it should be delivered on a boat, or within protection of a gunboat, and that when thus delivered on the boat and paid for, the property and ownership thereof should vest exclusively in the said Bridge & Co., except as in the agreement was provided for his share of the profits. The instrument then stipulated that Bridge & Co. should ship the cotton to Memphis, sell it to the best possible advantage, and, after reimbursing themselves the purchase-money, the cost of hauling, shipping, drayage, commissions, &c., should pay Shepherd one-eighth part of the net profits. It also provided that contracts, shipments, permits, &c., necessary to purchase and get the cotton to Memphis, should be in Shepherd's name, and that Bridge & Co. might thus use his name when necessary.

The other direct evidence of the agency was supplied by the testimony of one Martin, a witness for the defendants. He was sent by them to Arkansas with money and instructions for Shepherd, the instructions being that he should purchase cotton for the firm, but was not to agree to pay more than from thirty to thirty-five cents per pound for it. He might make small advances, but he was instructed not to pay the balance of the purchase-money, or make it payable, until the firm should be able to send a boat up the Arkansas River for the cotton, and until it was in their possession, weighed, and placed on the boat. He was directed to take no risk for the firm of the destruction of the cotton by incendiaries, or in any other way, except to the extent of the money advanced. There was other indirect evidence of

Shepherd's agency, to which it is not necessary now to refer. Clothed with such powers, and under such instructions, he bought cotton of divers persons (including the one hundred and forty-four bales bought of Maples) representing himself to be the agent of Bridge & Co., though not speaking of his written authority, or of any particular instructions.

The evidence being closed, the court charged the jury, and among other things said as follows:

"What is military occupation, is a question of law, to be decided by the court; and I instruct you, that if you believe the testimony in the case as to the location of Federal forces and garrisons in the region of country where the contract was made, and (as to the desire of the inhabitants) submitting to the authority of the government to restore their relations with the government, as manifested by their taking the oath of allegiance, and applying for and receiving 'protection papers,' then there was such a military occupation as is contemplated by the laws of Congress referred to.

"But in addition to this, the special agent of the Treasury Department, who was authorized to grant permits, exercised judicial functions in deciding what country was within the lines of military occupation; and when he granted a permit to buy cotton in a designated region, the permit itself was a decision by him that the region so designated was so occupied. When an officer of the government, thus clothed with judicial functions, grants a permit in the exercise of those functions, it would be very unjust to hold the party receiving the permit and acting under it responsible for that decision.

"These questions disposed of, the case is resolved into a question of agency. Now, did Shepherd have authority to bind defendants by that contract?

"A principal is bound by all that a general agent does within the scope of the business in which he is employed as such general agent; and even if such general agent should violate special or secret instructions given him by his principal and not disclosed to the party with whom the agent deals, the principal would still be bound if the agent's acts

were within the scope of the business in which he was employed, and of his general agency.

"However, a party dealing with a general agent, who seeks to hold the principal bound for the agent's acts or contracts, must show, in order to recover, that the agent held himself out as general agent, and that in fact he was such general agent.

"If Shepherd held himself out as the general agent of Bridge & Co., then the defendant is bound by the contract which he made with the plaintiff for the cotton, notwithstanding Shepherd may have agreed to pay more for the cotton than his principal had authorized; and if, as general agent for Bridge & Co., to buy cotton in Desha County, Shepherd was not authorized by Bridge & Co. to buy cotton except to be delivered on board the boat, and in violation of their instructions he did buy the plaintiff's cotton, and agreed to receive and accept delivery of it elsewhere than on the boat, unless the plaintiff knew of these instructions, the defendants are bound by the contract which Shepherd made, because it was within the scope of his general agency just as much as was the agreement to give for the cotton a larger price than that to which he was limited by the instructions of Bridge & Co.

"But it is said that the plaintiff agreed to rescind and abandon the contract made with Shepherd, and made a new contract with the defendant Hicox, by which he sold to Hicox the fifty-four bales of cotton not burned, at fifty cents per pound, and that this discharges the former contract made with Shepherd. The effect of the new contract must depend on the circumstances. If the plaintiff and Hicox came together, and made a contract about the fifty-four bales, when all the facts were known to the plaintiff; that is, if the plaintiff knew that Shepherd had exceeded his authority, and then made the new contract as proven, this new contract would discharge the defendant from the former contract between the plaintiff and Shepherd. But in order that the new contract might have this effect, the plaintiff must have known all the facts, all about Shepherd's authority; and if

not thus advised—if anything known to Hicox, which the plaintiff was entitled to know, was not disclosed to him—he was not bound by the new contract, and the defendant was not discharged from the old one."

The defendant excepted to the charge upon the following points:

1. That the written agreement or power of attorney introduced in evidence by plaintiff, established that Shepherd was the general agent of Bridge & Co.

2. That in granting the permit proved by Carleton, the treasury officer exercised judicial functions, and decided conclusively that the region of country to which the permit relates was within the lines of military occupation, and that as a matter of law, upon the proof in the case as to the condition of the country, and upon the permit granted to Bridge & Co., that Desha County was, at the date of contract, in November, 1863, within the lines of military occupation of National forces operating from the north.

That the court erred,

3. In the instruction given as to general and special agency, because the same was not applicable to the proof in the case, was irrelevant therefore, and calculated to mislead the jury; and also because, as abstract propositions of law, the instruction upon this point is erroneous.

4. In that part of the charge which relates to the new contract between Hicox and the plaintiff, by which Hicox bought the fifty-four bales of cotton at fifty cents per pound, and which stated to the jury the effect of the new contract.

Verdict and judgment having gone for the plaintiff, the defendants brought the case here on the exceptions to the evidence and to the charge.

Mr. Palmer, for the plaintiff in error; Messrs. P. Phillips and D. McRae, contra.

Mr. Justice STRONG delivered the opinion of the court.

At the trial it was, of course, incumbent upon the plaintiff to prove not only the contract of sale, but also that Shep-

herd, with whom the contract had been made, had authority to act for and bind the defendants. Accordingly evidence was submitted to show that the cotton was purchased by Shepherd when professing to act as an agent for the defendants. There was hardly any controversy about this fact, and no questions are now raised respecting the competency or sufficiency of the proof, or the manner in which it was submitted to the jury. But the authority of Shepherd to make the contract for the defendants and bind them to its performance was stoutly denied, and it is now strenuously insisted that the court erred in the instructions given to the jury respecting the evidence of his agency. The defendants insist the court erred in charging that the written agreement between him and Bridge & Co. constituted him their general agent. We do not find that the court did thus instruct the jury, though it must be admitted the charge may have been thus understood. The jury was instructed that if Shepherd held himself out as the general agent of Bridge & Co., the defendants were bound by the contract he made with the plaintiff for the cotton, though in making the contract he transgressed the instructions he had received, and secret limitations of his authority, which instructions and limitations were not revealed to the plaintiff. It is true, as has been noticed, there was other evidence of a general agency beyond that which the agreement furnished, but as it was parol evidence, its force and effect were for the jury, and hence the court could not rightly have charged that the defendants were bound by the contract unless the agreement did itself constitute Shepherd a general agent. But did it not? The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any

persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise. Looking to the agreement between Bridge & Co. and Shepherd, it cannot be doubted that it created a general agency. It was a delegation of authority to buy cotton in Desha County and its vicinity, to buy generally, from whomsoever the agent, not his principals, might determine. It had in view not merely a single transaction, or a number of specified transactions, which were in the mind of the principals when the agent was appointed, but a class of purchases, a department of business. It is true that it contained guards and restrictions which were intended as regulations between the parties, but they were secret instructions rather than limitations. They were not intended to be communicated to the parties with whom the agent should deal, and they never were communicated. It was, therefore, not error to instruct the jury as the court did, that the agency was a general one, and that the defendants were bound by the contract, if Shepherd held himself out as authorized to buy cotton, and if the plaintiff had no knowledge of the instructions respecting the mode in which the agent was required to act.

It may be remarked here that the reasons urged by the plaintiffs in error in support of their denial of liability for the engagements made by Shepherd are that he agreed to

pay forty cents per pound for the plaintiff's cotton; that he bought the cotton where it lay instead of requiring delivery on board a steamboat, or within the protection of a gunboat; and that he did not obtain a permit from the government to make the purchase. The argument is that in the first two particulars he transcended his powers, and that his authority to buy at all was conditioned upon his obtaining a permit from the government. All this, however, is immaterial, if it was within the scope of his authority that he acted. The mode of buying, the price agreed to be paid, and the antecedent qualifications required of him, were matters between him and his principals. They are not matters in regard to which one dealing with him was bound to inquire. But even as between Bridge & Co. and Shepherd a purchase at forty cents per pound was not beyond his authority. He was authorized to buy "on the best possible terms, not paying an *average* of more than thirty cents per pound." This contemplated his agreeing to pay in some cases above thirty cents. The average was regulated, but no maximum was fixed. Nor is there anything in the agreement that forbade his purchasing cotton deliverable at once where it lay, though not on a boat or in the protection of a gunboat. He was authorized to purchase deliverable at such times and places of shipment as might be agreed upon; that is, deliverable when and where it might be stipulated between him and the seller. True, he was to pay as little as possible until the cotton was delivered on a boat, or within the protection of a gunboat; and when thus delivered the property in the goods was to vest in the principals, excepting his share of the profits, but he was not prohibited from paying the whole price, or agreeing to pay the whole price, if insisted on by the vendor. The stipulation respecting the vesting of ownership was nothing more than a definition of right between him and his principals, as is manifested by the exception. Nor was Shepherd bound to procure a permit in his own name. He might have been had it been necessary, but if under the permit granted by Bridge & Co. he could purchase as their agent, it was all the agreement required.

It is further objected to the charge given to the jury respecting general and special agency, that it was not applicable to the proof in the case, and was therefore irrelevant and calculated to mislead the jury, and because, as stating abstract questions of law, the instruction was erroneous. If, in truth, it was irrelevant, it was not on that account necessarily erroneous and calculated to mislead the jury. We are not shown, nor do we perceive, how the jury could have been misled by it. They were instructed that, in cases of special agency, one who deals with the agent must inquire into the extent of his authority, but that a principal is bound by all that his general agent has done within the scope of the business in which he was employed, and this, though the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals. Surely this was correct, and it was applicable to the evidence in the case. It has been intimated during the argument that the court should have added that no such liability can exist to one dealing with an agent with notice that the particular act of the agent was without authority from the principal. To this several answers may be made. The exception to the general rule, which it is said the court should have recognized, is implied in what the court did say. Again, there was no request for any such instruction; and still again, the evidence in the case did not demand it. There was no pretence that the plaintiff had any notice of secret instructions given to Shepherd, or of any limitations upon his authority. Nor was there anything that imposed upon him the duty of making inquiry for secret instructions or for restrictions. There were no circumstances that should have awakened suspicion. The plaintiff was not apprised that the authority was in writing. The argument is very far-fetched that infers a duty to inquire whether the agent had private instruction from the fact that the contract was made in a region that had been in a state of insurrection.

It is next insisted that the court erred in instructing the jury that in granting the permit to Bridge & Co. to buy cotton, the special agent of the treasury, who was author-

ized to grant permits, exercised judicial functions, and decided conclusively that the district of country to which the permit extended was within the lines of Federal military occupation. This is not, however, quite an accurate statement of what the court did charge. The judge said, in effect, that the treasury agent, in granting the permit, exercised judicial functions, and that granting it was a decision by him that the region designated in it was within the lines of military occupation, but he did not say it was a conclusive decision. He did charge, as a matter of law, that "upon the proof in the case as to the condition of the country, and upon the permit granted to Bridge & Co., Desha County, Arkansas, was, at the date of the contract, in November, 1863, within the lines of the National forces operating from the north, and that the plaintiff and Shepherd had a right to make the contract for the sale and purchase of the cotton." The instruction was not based upon the grant of the permit alone. There was uncontradicted evidence in the case that, before the permit was granted, the part of the State in which Desha County is situated had been evacuated by the Confederate forces, who had retreated toward the Red River, and into Texas; that there were no such forces within from one hundred and fifty to two hundred miles from Red Fork, in Desha County, and that the military occupation of the National forces extended over the region. It was also proved that the citizens generally had taken the oath of allegiance, or obtained protection papers. Coupling these facts, about which there was no dispute, with the other fact that the treasury agent had granted a permit to Bridge & Co. to buy cotton there, the judge was not in error when he gave the instruction to which exception is now taken. It may be that the grant of the permit was not technically a judicial act, but it was an exercise of the treasury agent's judgment, and a deduction from the facts known by him, that the region over which the permit extended was within the military lines. It is to be presumed that he acted rightly, and as he could not lawfully grant the permit in the absence of such military occupation, his grant of it raised a presumption that

the occupation existed. It established at least a *primâ facie* case. In *United States* v. *Weed*,* this court said, "The fact that the proper officers issued these permits for certain parishes, must be taken as evidence that they were properly issued until the contrary is established." But a *primâ facie* case, with nothing to rebut it, is a case made out. If, then, what amounts to military occupation, the facts being ascertained, is necessarily a question of law, as must be conceded; and if there was nothing to rebut the presumption of fact arising from the grant of the permit, and no contradiction or impeachment of the direct testimony, the court was justified in declaring, as matter of law, that Desha County was within the lines of military occupation from the north, and that the contract was not illegal.

The next objection to the charge may be disposed of in a word. Indeed, it has not been seriously urged here. That the defendants cannot set up a new contract, obtained by one of them from the plaintiff for a sale of part of the cotton, as a discharge from the contract made for them by Shepherd, if the new contract was obtained by their own misrepresentations, or by their denial of Shepherd's agency, is too plain to need discussion. And yet, that they may, must be maintained by them in order to convict the court below of error in the instructions given respecting the new contract.

A single exception remains to be considered. It is to the admission of the testimony of Carleton. He was introduced to prove that he, as special treasury agent, had issued a permit to Bridge & Co., and to prove its contents, notice having been given to the defendants to produce the permit itself, and they having failed to do so. It is objected, first, that his official books should have been produced, and that it was incompetent to prove the permit in any other way. The permit itself would have been the best evidence; but it was not produced on call, and therefore secondary evidence was admissible. There are no degrees of such evidence, and the official books of the treasury agent, had there been any in

* 5 Wallace, 73.

existence, would have been at best but secondary proof, of no higher order than was the testimony of a witness. There was, also, no proof that any such books had been kept, and consequently nothing to show that there was any better evidence than that which was offered. Another objection was made against its subject-matter. It was, that the permit, of which the proof was offered, was to Bridge & Co., and not to Shepherd. We do not perceive any merit in this objection. We have already said that, in the agreement between him and his principals, Shepherd did not undertake to procure a permit unless it should be necessary to buy cotton and get it to Memphis, and we do not perceive why a permit to Bridge & Co. did not enable them to buy through an agent, and render any permit to their agent unnecessary. For these reasons, the objections urged against the admission of the testimony of Carleton cannot be sustained.

JUDGMENT AFFIRMED.

GLEASON *v.* FLORIDA.

1. No writ of error to a State court can issue without allowance, either by the proper judge of the State court or by a judge of this court, after examination of the record, in order to see whether any question cognizable here on appeal was made and decided in the proper court of the State, and whether the case, upon the face of the record, will justify the allowance of the writ; and this is to be considered as the settled construction of the Judiciary Act on this subject. Writ dismissed accordingly.
2. *Doubted.* Whether in any case the affidavit of a party to the record can be used as evidence of the fact of such allowance. And the affidavit of such a party refused in a case where the court thought it highly probable that he was mistaken in his recollection.

MOTION *by Mr. Howe* to dismiss a writ of error to the Supreme Court of Florida, which had been taken under the twenty-fifth section of the Judiciary Act; but which that counsel conceived did not come within that act.

The record showed an information, in the nature of a writ of quo warranto, in the Supreme Court of the State of

Florida, in the name of the State, by the attorney-general of the State, against William H. Gleason, charging him with exercising the office of lieutenant governor in violation of the State constitution, and demanding an answer by what warrant or authority he claimed to hold that office.

To this information Gleason filed an answer denying the jurisdiction of the court, and the lawfulness of the proceeding against him, on several distinct grounds, all of which were overruled by the court, and he was required to answer upon the merits.

Thereupon he put in a demurrer, and subsequently, before argument on the demurrer, filed a petition for the removal of the cause into the Circuit Court of the United States for the Northern District of Florida, in the exercise, as he asserted, of his right under certain acts of Congress particularly specified, and generally under the laws of the United States.

The petition was denied, and the demurrer was overruled, and leave was given to him to plead to the information or show cause why judgment of ouster should not be entered against him.

In pursuance of the leave thus given, Gleason showed cause, and, among other things, alleged that he was eligible, and was elected to the office held by him under the acts of Congress known as the reconstruction acts, and was, therefore, entitled to the office, though not qualified by three years' residence in the State, according to the provision of the State constitution.

But the defence, as well as all other defences set up by him, was overruled by the court, and judgment of ouster was rendered against him, to reverse which he presented this writ of error.

The motion to dismiss as not within the twenty-fifth section coming on to be heard, it was observed that the record before this court contained no allowance of the writ of error, and thereupon a suggestion of diminution of record was made by *Mr. B. F. Butler for the plaintiff in error*, and time given to procure a complete copy. The case coming up

again the complete copy expected was not produced; but an affidavit of the plaintiff in error, Gleason, was relied on to excuse the want of it. The affidavit stated that after the judgment below, Gleason petitioned the chief justice of the Supreme Court of Florida to allow a writ of error to be sued out, &c.; but that the said chief justice refused his signature upon the ground that the State court had decided no question cognizable here upon writ of error; that thereupon the deponent went with his counsel to Mr. Justice Miller, of *this* court, with a petition similar to that which he had presented to the chief justice of the Supreme Court of Florida, and also a form of citation and a form of bond, and that he and his counsel presented to the said Mr. Justice Miller those three papers, and stated the case, and that thereupon *that* judge made an indorsement upon the petition for the allowance of the writ of error, of the allowance of said petition, and dated it with his own hand and signed the citation and also approved the bond. The affidavit went on to say, "that, not being acquainted with legal forms, the deponent was not curious to observe the precise form in which the judge made an entry upon the petition, but he does remember that he made an entry thereon, which he understood and believed and now understands and believes was an allowance and approval thereof." The affidavit then further stated that the deponent "thereupon took the three papers, and immediately went to Tallahassee, Florida, arrived there, and filed the three papers. Whereupon the writ of error was issued by the clerk of the Circuit Court." The affidavit stated further that the deponent subsequently went to the clerk's office in Tallahassee, and could find neither the petition nor bond, which this deponent is certain he did file at the same time with the citation, but that he found the citation with the indorsement thereon. [This paper was produced in this court, but not the petition.]

The deposition concluded with an allegation that the deponent verily believed that the bond and the petition for the writ of error, and the allowance which this deponent was certain he filed in the said court, had been taken from

the files thereof by some person, and for some purpose unknown.

Upon this affidavit and the matter of diminution, the case was again subsequently spoken to.

Mr. Howe, in support of his motion to dismiss, argued:

1. That the affidavit, assuming that the deponent's memory was to be trusted, could not supply the place of the record. But that his memory was not to be trusted, and that he had mistaken one paper for another.

2. That if it was received, the case was still not within the jurisdiction of this court under the twenty-fifth section; for that the record presented no question except such as arose wholly under the constitution and laws of Florida, and not under the Constitution or laws of the United States.

Mr. B. F. Butler, contra, relying on the affidavit as sufficient to show an allowance, argued that one of the chief points in controversy in the State court was, whether eligibility to office at the first election under the constitution framed under the acts of Congress known as the reconstruction acts, was determined by these acts, or by the constitution submitted to the people and adopted at that election. The plaintiff in error, he contended, claimed that under these acts he was eligible, was elected, and was entitled to hold his office, which claim was denied by the Supreme Court of Florida, and the jurisdiction of this court depended not upon the actual validity of his claim, but on the fact that it was specially set up and asserted by him under the laws of the United States, and that the decision of the State court was against its validity.

The CHIEF JUSTICE delivered the opinion of the court.

The court has considered the affidavit of the plaintiff in error, submitted by his counsel as evidence of the allowance of a writ of error in this case by one of the justices of this court; and without determining now whether, in any case, the affidavit of a party to the record can be used as evidence

of that fact, we are obliged to say that the affidavit submitted to us has failed to satisfy us that such an allowance was in fact made. The affidavit states that three papers, namely, a petition for the writ of error, the form of a bond, and a citation, were presented to the associate justice, and lays some stress upon the fact that the papers were three in number. It omits to mention that any copy of the record of the State court was presented to the judge, without which it is obvious there could be no allowance of a writ of error. It seems to us highly probable, therefore, that the plaintiff in error is mistaken in his recollection. A copy of the record was probably one of the three papers of which he speaks. In the absence of any affidavit from the clerk who prepared the papers, and of any showing of the loss of the petition by the clerk of the Supreme Court of Florida, with whom the allowance supposed to have been indorsed on it must, in regular course, have been filed, we cannot regard the evidence of allowance as sufficient, and must proceed to dispose of this cause as if no such allowance were claimed to have been made.

As respects jurisdiction under the twenty-fifth section of the Judiciary Act, it seems to us that, considered under the view presented with much force by the counsel for the plaintiff in error, a writ of error might have been properly enough allowed under that section. But, on looking into the record, we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this court of revisory jurisdiction over final judgments or decrees by the courts of the States. In the case of *Twitchell* v. *The Commonwealth*,* the rule which governs the allowance, by National courts and judges, of writs of error to State courts, was thus stated: "Writs of error to State courts have never been allowed as of right. It has always been the practice to submit the record of the State court to a judge of this court, whose duty has been to ascertain whether any question cognizable here on appeal was made and decided in the proper court

* 7 Wallace, 321.

of the State, and whether the case, upon the face of the record, will justify the allowance of the writ." And this may now be considered as the settled construction of the Judiciary Act on this subject. The foundation of the jurisdiction of this court over the judgments of State courts is the writ of error; and no writ of error to a State court can issue without allowance, either by the proper judge of the State court or by a judge of this court, after examination as just stated.

In this case the plaintiff in error has evidently acted under the impression that a writ of error to a State court is a matter of right. Under this impression he applied to the Chief Justice of the Supreme Court of Florida for his signature to a citation; but that magistrate, who had presided in the court where the proceeding for ouster had taken place, refused his signature, upon the ground that the State court had decided no question cognizable here upon writ of error. Application was then made to a judge of this court, by whom a citation was signed; but there was no allowance of a writ of error by him.

Under these circumstance the issuing of the writ of error was unauthorized, and the writ, not having been allowed, gives no jurisdiction to this court. It must, therefore, be

DISMISSED.

NOTE.

Soon after this decision, came up a *motion by Mr. Peck for a supersedeas* in the case of *The Hartford Fire Insurance Company* v. *Van Duzer*, in error to the Supreme Court of Illinois. *Mr. T. L. Dickey, opposing.* Here, too, on looking into the record, the court could find no allowance of the writ of error to the court below. The writ of error was accordingly dismissed; the CHIEF JUSTICE delivering the opinion of the court that such allowance was indispensable to the jurisdiction of the court in error to revise the judgment of the highest court of a State. He observed that this has been repeatedly decided, and very recently at this term in the case of *Gleason* v. *Florida*, and that the motion for a writ of supersedeas, therefore, could not be considered.

CARPENTER *v.* WILLIAMS.

1. A question of Federal jurisdiction under the twenty-fifth section of the Judiciary Act is not necessarily raised by every suit for real estate in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title.
2. And when the issue turns solely upon the personal identity of the individual to whom the recorder of land titles confirmed, or meant to confirm, a lot of ground—as *ex. gr.*, whether when he confirmed the land in the name of *Louis* Lacroix he meant *Louis* Lacroix, or whether he really meant *Joseph* Lacroix—a matter to be determined by the rules of common law—this court has no jurisdiction, even though the parties claimed under the Federal government.

ERROR to the Supreme Court of Missouri.

Williams filed a petition, afterwards amended, in the St. Louis Land Court, against Carpenter, to determine the title to a lot of ground, once belonging to the common field lots of St. Louis.

The amended petition stated in substance that the land in dispute was proved (confirmed) in the name of *Louis* Lacroix, when in fact *Joseph* Lacroix was the person intended; that the recorder of land titles at St. Louis took proof of *Joseph's* right, and made a mistake in the name of the claimant, or by accident wrote *Louis* instead of *Joseph*. The object of the suit as amended was to reform this confirmation, correct this supposed mistake, and obtain a decree in favor of the persons claiming under *Joseph* Lacroix for the title which the defendant, Carpenter, had procured from the heirs of Louis Lacroix. The St. Louis Land Court gave judgment in favor of the plaintiff; and the Supreme Court of Missouri having affirmed the judgment, the other side brought the case here.

Mr. Britton Hill moved to dismiss the case for want of jurisdiction, assuming, as the defendant claimed under the government of the United States, and as his title had been decided against, that the case came within the twenty-fifth section of the Judiciary Act.

Statement of the case.

Messrs. Glover and Shepley opposed the motion.

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that the record presents no case for the jurisdiction of this court. The case turns solely on the personal identity of the individual to whom the recorder confirmed, or intended to confirm, the lot in question. It involves the construction of no act of Congress. The decision of the court below denies the validity of no act under the authority of the United States. It recognizes to its fullest extent the title confirmed by the act of Congress and the act of confirmation, and only determines to whom that confirmation was made.

It is a mistake to suppose that every suit for real estate, in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of Federal cognizance.

If this were so, the title to all the vast domain, once vested in the United States, could be brought from the State courts to this tribunal.

In the case before us, the rules which must determine the question at issue are common law rules, and the result cannot be varied by the application of any principle of Federal law or Federal authority.*

WRIT DISMISSED.

PIERCE *v.* COX.

1. An appellant cannot ask to have an appeal dismissed for want of a citation when the appellee is in court represented by counsel, and makes no objection to the want of one.
2. But an appellee may ask the dismissal when the appeal has not been allowed, or when the case comes from the District of Columbia, and the amount in controversy is less than $1000.

THIS was the case of two motions to dismiss an appeal from the Supreme Court of the District of Columbia; one

* Ryan *v.* Thomas, 4 Wallace, 604.

of the motions being made by the appellant on the ground that no citation had been issued according to law, and the other by the appellee, because the amount in controversy was not of the value of $1000. Moreover, there was no evidence in the record of an allowance of the appeal. As to the value of the amount in controversy, it appeared that it was a life interest in $1200 of six per cent. stock of the corporation of Washington, and not worth $1000.

Mr. Brent, for the appellant; Mr. Davidge, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The motion on the part of the appellant to dismiss the appeal, on the ground that no citation was issued according to law, cannot be sustained. The appellee is in court represented by counsel, and makes no objection to the want of citation. By this appearance the citation is waived so far as the appellee is concerned, and the appellant cannot be heard to object the want of citation occasioned by her own negligence, and cured by voluntary appearance.

But the motion of the appellee must be granted on both the grounds presented.

The law does not give to this court jurisdiction of appeals from the Supreme Court of the District of Columbia when the amount in controversy is less than $1000.

There is, moreover, no evidence in the record of any allowance of appeal; and without an allowance this court cannot acquire jurisdiction.

WRIT DISMISSED.

Syllabus.

RUBBER COMPANY *v.* GOODYEAR.

1. Where a patentee dies, the surrogate of the place where the decedent was domiciled properly has jurisdiction to take probate of his will and issue letters testamentary.
2. Where several executors are appointed by the will of a patentee decedent—provision being made, however, for one alone acting—and but one proves the will and receives the letters of administration, he alone can maintain an action for infringement of the letters patent at common law.
3. Under the laws of the United States, where a patent is granted by the government to C. G. as executor, he can maintain a suit on the patent in all respects as if he had been designated in the patent as trustee instead of executor.
4. An objection to the authority of an executor to maintain a suit on letters patent should be taken by a plea in abatement.
5. The novelty of the Charles Goodyear patent for vulcanized rubber sustained.
6. A patentee or his representative in a reissue may enlarge or restrict the claim, so as to give it validity and secure the invention.
7. A process and the product of a process may be both new and patentable, and are wholly disconnected and independent of each other.
8. Extended letters patent cannot be abrogated in any collateral proceeding for fraud.
9. A license to use an invention by a person only at "*his own establishment*," does not authorize a use at an establishment owned by himself and others.
10. In taking an account, the master is not limited to the date of entering the decree; he can extend it down to the time of the hearing before him.
11. An objection that the word "patented" was not affixed by the complainant, under section 13 of act of March 2d, 1861, must be taken in the answer, if it is intended to be raised at the hearing or before the master.
12. A decree "for all the profits made in violation of the rights of the complainants under the patents aforesaid, by respondents, by the manufacture, use, or sale of any of the articles named in the bill of complaint," is correct in form.
13. Profits are rightly estimated by the master by finding the difference between cost and sales.
14. In estimating this cost, the elements of cost of materials, interest, expense of manufacture and sale, and bad debts, considered by a manufacturer in finding his profits, are to be taken into account, and no others.

15. Interest on capital stock and "manufacturer's profits" were properly disallowed by the master.
16. Profits due to elements not patented, which entered into the composition of the patented article, may sometimes be allowed. They were, however, properly disallowed in this particular case.
17. Extraordinary salaries were properly disallowed by the master, on the ground that they were dividends of profit under another name.

APPEAL from the Circuit Court for Rhode Island.

The case is so largely stated in different parts of the opinion which follows, that a statement of the same in the preliminary, full, and consecutive way in which the reporter endeavors usually to state the case, would make much of what follows essentially repetition. The reader is, therefore, referred to different parts of what follows for the case, as well as for the opinion of the court on it.

The cause was argued with learning and ability. But as arguments without a preceding case would not be intelligible, they are omitted.

Messrs. Payne, Cushing, Parsons, and Black, for the appellants; Messrs. Stoughton, Ackerman, and Evarts, contra.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States of the District of Rhode Island. The appellees were the complainants in the court below. The defendants were the appellants, and William W. Brown, Edwin M. Chaffee, and Augustus O'Bourne. The bill alleges that a patent for "a new and useful improvement in India-rubber fabrics" was originally granted to Charles Goodyear, deceased, on the 15th of June, 1844; that this patent was surrendered, and that on the 15th of June, 1849, a patent was reissued to the original patentee, "for a new and useful improvement in processes for the manufacture of India-rubber;" that it was extended by the Commissioner of Patents on the 14th of June, 1858; that this patent was surrendered by Charles Goodyear, Jr., executor of Charles Goodyear, deceased, and reissued to him as executor on the

Statement of the case.

20th of November, 1860, in two patents, one entitled, "for improvement in the manufacture of caoutchouc," and the other, "for improvement in the art of preparing caoutchouc;" that the complainants, other than Charles Goodyear, Jr., are the assignees of licensees of Charles Goodyear, deceased; that the complainants have the exclusive right to manufacture and sell army and navy equipments made of vulcanized India-rubber, including vulcanized India-rubber blankets, coats, cloaks, cloth, clothing, ponchos for army, navy, and other purposes, and also of vulcanized India-rubber bulbs, to be used in the manufacture of syringes; and that the defendants have infringed the patents by the manufacture and sale of these articles.

The prayer of the bill is for an injunction and an account.

The answer denies that Goodyear was the original and first inventor of the improvement described in the original patent. It denies also the infringement alleged in the bill. It sets up as special defences that only one of the persons named in the will of Charles Goodyear, deceased, as executors, is made a party complainant; that the original patent is invalid; that all the reissues are void, even if the original patent were valid, because the claims are broader than the claim in the original patent; and that they are not, nor is either of them, in fact, for the same invention as that for which the original patent was granted; and that the extension of the patent in June, 1858, by the Commissioner of Patents, was procured "by fraud and collusion, by fraudulent suppressions and concealments from, and by false and fraudulent representations to," that officer. The answer also claims that the defendants are not infringers, because they have manufactured their goods under a license from the original patentee to E. M. Chaffee, dated June 25th, 1848, which they insist is valid and outstanding, and a complete defence to this suit.

A large mass of testimony was taken by the parties. The record covers nearly one thousand two hundred printed pages. The court decreed in favor of the complainants. The defendants have brought the case here for review.

It has been argued in this court on both sides with great learning and ability. The propositions to which our attention has been called as grounds for the reversal of the decree are not numerous, and the scope of our remarks will not be extended beyond them.

Charles Goodyear, deceased, by his will appointed his son, Charles Goodyear, Jr., his wife, Fanny Goodyear, and James A. Dorr, his executors. The will provided that a majority of the executors should decide all questions that might arise; that the acts of a majority should be as binding as the acts of all; that if at any time there should be but two, they might appoint a third; and that if there should be but one, he might appoint another. The manner of appointment in both cases was specified.

It is insisted that Charles Goodyear, Jr., alone, as executor, cannot maintain this suit, and that his co-executors named in the will are necessary parties. The evidence in the record shows that the testator was domiciled and had property in the city of New York. This gave the surrogate there jurisdiction to take the probate of the will, and to issue letters testamentary. Charles Goodyear, Jr., alone proved the will, and received such letters. The other persons named as co-executors have taken no step in that direction. They have never at any time assumed to do any act or claimed any right by virtue of their nomination in the will.

At the place where the letters testamentary were issued the common law relied upon by the appellants was in conflict with the statutory provisions of the State, and was therefore abrogated. It could no more be recognized in the Federal than in the State tribunals. Nor is the rule in courts of equity different from the rule in the courts of law. Neither can recognize the authority of an executor any more than that of administrator, and neither will aid him to obtain possession and control of the estate, until he has fulfilled the conditions and given the guarantees of fidelity and solvency prescribed by the local law. A different rule could hardly fail to be followed by the most mischievous consequences.

If, however, the question were to be settled by the rules

of the common law, we should be of opinion, upon the facts of the case as disclosed in the record, that the suit was well brought by Charles Goodyear, Jr., alone. But there are other considerations bearing upon the subject which are still more satisfactory to our minds.

The patent law of the United States authorizes an executor to surrender a patent and take a reissue.* In this case the patent was surrendered by Charles Goodyear, Jr., as executor, and the reissues were to him in the same character. This was a specific grant by the government, and vested in him exclusively the legal title. The suffix of *executor* signified the trustee character in which he assumed to act, and in which he was recognized and dealt with by the commissioner. The designation, and the trust which it implied, did not prevent the passage of the legal title or qualify the estate which accompanied it. It follows from this view of the subject that the grantee can sustain a suit on the patent in all respects, as if he had been designated in it as *trustee* instead of executor.

But, conceding for the purposes of the argument, that he occupies the same relation to the patents reissued to him as to the one reissued to the testator, and which he surrendered, then he was a foreign executor in the forum where the suit was instituted.

The bill alleges that he was the executor of Charles Goodyear, deceased. His rights as such in that forum depended upon the local law of Rhode Island. If his authority to sue there in his representative character was intended to be questioned, it should have been done by plea or by the answer. Not having been done in that way, the defendants are concluded, and the question is no longer open in the case. The answer is silent upon this point. Its averments touching the jurisdiction of the surrogate of the city of New York are effectually disposed of by the complainants' proofs.

In any view which can be taken of the subject the objection is untenable.

* Act of July 4th, 1836, § 13.

Opinion of the court.

The proposition that the patent is fatally defective, because it is impossible to make merchantable goods according to the directions contained in the specifications, cannot be entertained. The answer contains no averment upon the subject. No such issue was tendered to the complainants, and they have had no notice that such a defence was intended to be relied upon. In equity, the proofs and allegations must correspond. The examination of the case by the court is confined to the issues made by the pleadings. Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them.*

It is alleged in the answer that the testator was not the original and first inventor of the process described in his patents.

The original patent was issued in 1844. The invention has since been covered by a succession of patents, the last of which, the reissues in question, are still unexpired, and are the foundation of this litigation. The discovery was one of very great value. It is a mine of wealth to the possessors. Since the first patent was issued there have been numerous cases of litigation involving its validity. They were earnestly contested. In every instance the patent was sustained. This litigation was remarked upon by the counsel for the appellants, and it was added that this question is now, for the first time, presented to this court for consideration. It is a just commentary to say that such a litigation is always to be expected in cases like this. There are always those who are ready to gather where they have not sown. The number and ardor of the conflicts is usually in proportion to the value of the prize at stake. The validity of the claim of the testator was never shaken by any adjudication. It has been uniformly affirmed and sustained. If the subject was never brought here before, it was doubtless because those who were defeated elsewhere saw no ground for the hope of a more favorable result in this court. These considerations

* Foster *v.* Goddard, 1 Black, 518; Tripp *v.* Vincent, 3 Barbour's Chancery, 613; Boone *v.* Chiles, 10 Peters, 178; Harrison et al. *v.* Nixon, 9 Id. 483.

are very persuasive to the presumption that the claim of Charles Goodyear, the elder, that he was the original and first inventor, is impregnable. If it were not so, we cannot doubt that it would have been overthrown in the numerous and severe assaults which have been made upon it. We have, however, examined the question by the light of the evidence found in the record, and in the absence of the adjudications referred to should have had no difficulty in coming to the same conclusion. We entertain no doubt upon the subject. The point was not very earnestly pressed upon our attention in the argument at the bar. We deem what we have said in regard to it sufficient.

The patents reissued to the executor upon the surrender of the patent reissued to the testator were numbered respectively 1084 and 1085. The one numbered 1085 is for the process by which vulcanized India-rubber is manufactured. The other one is for the result of the process in the form of the article produced.

It is contended by the appellants that both these patents are invalid, for two reasons—1st, because they are broader than the claims of the patent surrendered by the executor; and, 2d, because one is for a process, and the other for the product of that process. The court below held the objection to the patent for the process—that it is too broad—fatal to its validity, because the claim embraced "other vulcanizable gums" besides India-rubber as articles to which the process was to be applied. From this part of the decree below no appeal was taken by the complainants. It is, therefore, final and conclusive in its effect, and the patent to which it relates must be laid out of view. It remains, therefore, to consider only the patent No. 1084, which is for the product.

The claims of the patent reissued to Charles Goodyear, deceased, in 1849, are as follows:

"What I claim as my invention and desire to secure by letters patent is the curing of caoutchouc, or India-rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described, and for the purposes specified.

"And I also claim the preparing and curing the compound

of India-rubber, sulphur, and a carbonate or other salt, or oxide of lead, by subjugating the same to the action of artificial heat, substantially as herein described."

The claim of the patent for the product is thus expressed:

"What is claimed as the invention of Charles Goodyear, deceased, is the new manufacture of vulcanized India-rubber (whether with or without other ingredients), chemically altered by the application of heat, substantially as described."

The specification, among other things, contains these clauses:

"For many purposes the manufacture is improved by the addition of other substances than sulphur, among which white lead is one of the best, and which, when used, may be combined in the mixture above described, in the proportion of seven parts by weight, thereby forming a triple compound. Other salts of lead may be used with advantage, and coloring matter may be also incorporated with the mixture for the purpose of imparting colors to the product.

"And other materials, such as cotton, silk, wool, or leather, may be incorporated or combined with the India-rubber and sulphur, thereby modifying the strength, elasticity, or other qualities of the new manufacture for particular purposes; as it is found that the new substance or product will be produced whenever the essential elements of rubber, sulphur, and heat are used, whether such other materials are incorporated or not."

A patent should be construed in a liberal spirit, to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and his labors.* The surrender was made by the executor, for the reason that the specification was defective and required amendment. This the law permitted, if the facts brought

* Corning *v.* Burden, 15 Howard, 269; Battin *v.* Taggert, 17 Id. 74.

the case within the provisions of the statute. The commissioner was charged with the duty of examining the facts and deciding upon the application. His judgment is shown in the results. Upon comparing the context of the specifications of the surrendered and of the reissued patent, and giving to each a reasonable interpretation, we are satisfied that the decision was correct, and we see no reason to reverse it. It is the right of the patentee and his representatives to enlarge or restrict the claim, so as to give it validity and secure the invention.*

Patentable subjects, as defined by the patent law,† are "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter." A machine may be new, and the product or manufacture proceeding from it may be old. In that case the former would be patentable and the latter not. The machine may be substantially old and the product new. In that event the latter, and not the former, would be patentable. Both may be new, or both may be old. In the former case, both would be patentable; in the latter neither. The same remarks apply to processes and their results. Patentability may exist as to either, neither, or both, according to the fact of novelty, or the opposite. The patentability, or the issuing of a patent as to one, in nowise affects the rights of the inventor or discoverer in respect to the other. They are wholly disconnected and independent facts. Such is the sound and necessary construction of the statute.

This objection to the patent, we think, is also not well taken.

Can we go behind the action of the commissioner in extending the patent and inquire into the frauds by which it is alleged that the extension was procured? The fifth section of the act of 1790‡ provided for the repeal of patents under the circumstances and in the manner specified. This act was

* Battin *v.* Taggert, 17 Id. 84.

† Act of 1836, § 6.

‡ 1 Stat. at Large, 109.

repealed by the act of 1793.* The tenth section of that act re-enacted the fifth section of the act of 1790. The fifth section of the latter act authorized substantially the same defences in suits upon patents which are allowed by the 15th section of the act of 1836, with the further provision, that if the facts touching either defence were established, "judgment shall be rendered for the defendant with costs, and the patent shall be declared void." This act continued in force until it was repealed by the act of 1836. These provisions were not then, and they have not since been, re-enacted. The 16th section of the act of 1836 authorizes a court of equity, in cases of interference, to take jurisdiction and annul the patent issued to the party in the wrong. Beyond this the patent laws are silent upon the subject of the exercise of such authority. This review furnishes a strong implication that is was the intention of Congress not to allow a patent to be abrogated in any collateral proceeding, except in the particular instance mentioned, but to leave the remedy in all other cases to be regulated by the principles of general jurisprudence. To those principles we must look for the solution of the question before us. The subject was examined by Chancellor Kent with his accustomed fulness of research and ability, in *Jackson* v. *Lawton*.† He there said: "Unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity, or mistake is regularly put in issue. The principle has been frequently admitted, that the fraud must appear on the face of the patent to render it void in a court of law, and that when the fraud or other defect arises on circumstances, *dehors* the grant, the grant is voidable only by suit.‡ The regular tribunal is chancery, founded on a proceeding by *scire facias* or by bill or information." The patent in that case was for land, but, as regards the point here under consideration,

* 1 Stat. at Large, 318. † 10 Johnson, 23.

‡ 1 Hening & Munford, 19, 187; 1 Munford, 134.

there is no distinction between such a patent and one for an invention or discovery. If there be, the case is stronger as to the latter. In the case of *Field* v. *Seabury*,* the patent was also for land. This court ruled the point in like manner, and the same remarks apply. Viewing the subject in the light of the principle involved, we can see no defect in the parallelism between that case and the one before us.

The extension was granted by the commissioner pursuant to the first section of the act of 1848 and the eighteenth section of the act of 1836. The latter declares that upon the making and recording of the certificate of extension "the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years." The law made it the duty of the commissioner to examine and decide. He had full jurisdiction. The function he performed was judicial in its character. No provision is made for appeal or review.† His decision must be held conclusive until the patent is impeached in a proceeding had directly for that purpose according to the rules which define the remedy, as shown by the precedents and authorities upon the subject. We are not, therefore, at liberty to enter upon the examination of the evidences of fraud to which we have been invited by the counsel for the appellants. The door to that inquiry in this case is closed upon us by the hand of the law. The rule which we have thus laid down is intended to be limited to the class of cases to which, as respects the point in question, the one before us belongs. We decide nothing beyond this.

The proof of infringement makes a case so clear for the appellees, in our judgment, that it is deemed unnecessary to extend this opinion by discussing the subject.

It is unnecessary to consider the respective rights of the several corporation complainants in this litigation, because it is clear that such as do not belong to them are vested in Charles Goodyear, the executor, by virtue of his holding the entire legal title of the patent.

* 19 Howard, 332.

† Foley v. Harrison, 15 Howard, 448.

The appellants meet the case in the aspect of infringement, by setting up a license from Charles Goodyear, deceased, to E. M. Chaffee, bearing date on the 25th of June, 1846, which they insist is a complete bar to the relief sought by the bill. This instrument gives to Chaffee, "his executors, administrators, and assigns, a free license to use the said Goodyear's gum-elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear; . . . . . the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being intended to convey any right to make any contract with the government of the United States."

There are several objections to the view taken of this license by the counsel for the appellant. It authorizes Chaffee to use it himself. It gave him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, which is not shown, and not to be presumed. It was to be used at his own establishment, and not at one occupied by himself and others. Looking at the terms of the instrument, and the testimony in the record, we are satisfied that its true meaning and purpose were to authorize the licensee to make and sell India-rubber cloth, to be used in the place, and for the purposes, of patent or japanned leather. In our judgment it conveyed authority to this extent and nothing more. The practical construction which the parties themselves have given to a contract by their own conduct is, in cases of doubt, always entitled to great weight. That this practical construction, in the case before us, was in accordance with that which we have given to the instrument, is clearly shown by the following facts: The defendants, Chaffee, Bourne, and Brown, were hostile to the extension, and collected evidence to defeat it. If they had understood the license then, as they construe it now, their interest would have prompted an opposite line of conduct. In 1856, Goodyear the elder, and others, sued Brown,

Bourne, and Chaffee for an infringement of the patent reissued to Goodyear—by manufacturing India-rubber shoes. In September of that year, they filed their answer. The license, as they now construe it, would have been conclusive against the complainants. The answer is long and elaborate. It makes no allusion to the license. An absolute injunction was decreed. The Chaffee license bears date in 1846. In 1858, the same defendants procured a license to manufacture rubber shoes, from Haywood. The terms were stringent and onerous. This license would have been useless, if their present construction of the license to Chaffee is correct. It is not clear that any interest was conveyed by Chaffee to the other parties, if ever, until since the commencement of this suit. The claim was not heard of before the conflict began. The license sets forth in express terms, that it was not intended to give any authority to contract with the United States. All the articles to which this controversy relates, were manufactured for the United States, under contracts with the quartermaster-general. This defence cannot avail the defendants.

Upon looking further into the record we find that the complainants took seven exceptions, and the defendants twenty-eight, to the master's report in the court below, all of which, on both sides, were overruled. The complainants not having appealed, their exceptions are not open to examination. Our attention, therefore, will be confined to those taken by the defendants, who have brought them before us by this appeal. Many of them relate to the findings of the master upon questions of fact. Others are predicated of facts which, upon examination, are not found to be as the exceptions assume. In all these cases we are satisfied with the master's conclusions, and do not propose to review them. We shall dispose of such other points arising upon the report, as we deem it proper to remark upon, without adverting particularly to the exceptions by which they are raised.

In taking the account the master was not limited to the date of the decree. In such cases, it is proper to extend the

account down to the time of the hearing before him, unless the infringement ceased prior to that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. The practice saves a multiplicity of suits, time, and expense, and promotes the ends of justice. We see no well-founded objection to it.

The thirteenth section of the act of March 2d, 1861, requires "that every article made or sold under the protection of a patent shall have fixed upon it the word 'patented,' and the day and year when the patent was granted; and when, from the character of the article, that may be impracticable, a label on which a notice to the same effect is printed shall be attached;" and if this be not done it is declared "that in case of suit for infringement, brought by the person failing so to mark the articles, no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make and vend the articles patented," &c. It is said that the bill contains no averment on this subject, and that the record is equally barren of proof that any such notice was ever given to the defendants, except by the service of process, upon the filing of the bill. Hence, it is insisted that the master should have commenced his account at that time, instead of the earlier period of the beginning of the infringement. His refusal to do so was made the subject of an exception. The answer of the defendants is as silent upon the subject as the bill of the complainants. No such issue was made by the pleadings. It was too late for the defendants to raise the point before the master. They were concluded by their previous silence, and must be held to have waived it. It cannot be considered here. We refer to the authorities cited in an earlier part of this opinion, in support of the rule upon this subject.

The Circuit Court decreed that the Providence Company was liable "for all the profits made in violation of the rights of the complainants, under the patent aforesaid, by respondents, by the manufacture, use, or sale of any of the articles

named in said bill." This was in accordance with the rule in equity cases established by this court.* It was not objected to in the argument here, but it was strenuously insisted that the master had erred in his application of the rule, and the court in confirming his conclusions. We have examined the report and are satisfied that he discharged his duty with exemplary care and diligence. The report is characterized by unusual ability. He has stated two accounts: one against the Providence Company and the other against the Columbian Company, which he finds to be the Providence Company under another name.

The Providence Company manufactured articles covered and articles not covered by the patent in question. No separate account was kept as to their respective cost and profit. The business as to both was so intermingled and confused that approximate results only were possible, and these were attainable by but one process. He applied the principle of apportionment as follows:

The gross amount of sales of articles of both classes was $2,648,131.49. The gross amount of sales of articles covered by the patent, $1,899,696.78. Gross amount of profits, $349,520.02. Proportion of profits due to articles covered by the patent, $250,757.72. The master reports that this result approaches exactness, and that it is favorable to the defendants. The Columbian Company manufactured only patented articles. Its books were properly kept. The data were clear and certain, and he had no difficulty in reaching a satisfactory conclusion. He found the amount of profits to be $60,000.

Profits of the Providence Company, . . .	$250,759 72
Profits of the Columbian Company, . . .	60,000 00
Total for which the defendants are liable, .	$310,757 72

In making up the account the master allowed deductions from profits, for bad debts, for rents, and interest paid—debiting rents and interest received; he allowed for the

* Livingston *v.* Woodworth, 15 Howard, 546; Dean *v.* Mason, 20 Id. 198.

market value of the materials on hand when the infringement began, for the cost of those acquired afterwards to carry on the business, and for the usual salaries of the managing officers. In this connection we take the following paragraph from the report:

"Large amounts appear by the books to have been expended in repairs of building and machinery, and in the purchase of new machinery, tools, and fixtures. No further allowance is made by the master for wear, and tear, and depreciation."

He refused to allow the extraordinary salaries which it appeared by the books had been paid, being satisfied they were dividends of profit under another name, and put in that guise for concealment and delusion. The allowance for repairs and other items mentioned in this connection doubtless exceeded the wear and tear which could have occurred during the time of the infringement. He refused to allow the value, at the time they were used, of materials bought for the purposes of the infringement. The market was a rising one. The defendants had the benefit of it as to those which were untainted by dishonesty. Those bought later stand upon a different footing. The claim is entitled to no especial favor. There must be a fixed rule. There can be none better than the cost as to those to which that principle was applied. The articles might have fallen in value instead of rising. The defendants cannot complain, as they are held liable only for the ultimate profits of the piracy.

He refused to allow the profits due to elements not patented, which entered into the composition of the patented articles. There may be cases in which such an allowance would be proper. This is not one of them. The manner in which the books of the Providence Company were kept renders such an account impossible as to the business done in their name.

The conduct of the defendants in this respect has not been such as to commend them to the favor of a court of equity. Under the circumstances, every doubt and difficulty should

be resolved against them.* The allowance was properly denied.

He refused to allow manufacturer's profits and interest on the capital stock. This was correct. "The profits made in violation of the rights of the complainants" in this class of cases, within the meaning of the law, are to be computed and ascertained by finding the difference between cost and yield. In estimating the cost, the elements of price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and bad debts, are to be taken into the account, and usually nothing else. The calculation is to be made as a manufacturer calculates the profits of his business. "Profit" is the gain made upon any business or investment, when both the receipts and payments are taken into the account.† The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is, that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty, and invite to aggression.

The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume; and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender. We find no error in the record, and the decree of the Circuit Court is

AFFIRMED.

NOTE.—BRADLEY and STRONG, JJ., had not taken their seats upon the bench when the preceding case was argued and decided.

* Lupton *v.* White, 15 Vesey, 432; Copeland *v.* Crane, 9 Pickering, 79; Dexter *v.* Arnold, 2 Sumner, 109; Miller *v.* Whittier, 36 Maine, 585.

† People *v.* Super. Niag., 4 Hill, 23.

Statement of the case in the opinion.

SAME *v.* SAME.

A bill of review will not be granted either where the party could by an attentive examination of the exhibits, attached to the bill in the original case, have discovered what he relies on as newly discovered matter, and has thus been guilty of laches; or where the court is satisfied that upon the case offered to be made out, the decree ought to be the same as has been already given.

ON motion of *Mr. Cushing, for the appellant*, to stay the mandate and for leave to file a bill of review; *Mr. W. E. Curtis opposing the application.*

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

The appellants have submitted a motion that the mandate in this case be stayed, and that they have leave to file a bill of review. The ground of the application is the alleged fact that George B. Dorr and William Judson, both deceased, were largely interested in the patent which lies at the foundation of this litigation, and that their legal representatives should have been made parties to the suit. It is shown that a suit has been recently instituted by Louisa Judson, widow and executrix of William Judson, against the appellants for the same infringements of the patent which are charged in the bill in this case. Affidavits are on file—taken to show the interest of Judson—and that the appellants had no knowledge of the fact until since the determination of the case in this court. They are silent as to the interest of Dorr. Upon looking into the record, we find that the subpœna in this case bears date on the 30th of October, 1862. The litigation was in progress from that time until it was determined here by the opinion of this court, delivered on the 7th of February last, affirming the decree of the Circuit Court in favor of the complainants.

Exhibit "B," annexed to the complainants' bill in the record, is the opinion of Mr. Justice Grier in the case of *Goodyear* v. *Day*, involving the same patent.

That opinion was delivered at the May Term, 1852, of the

Circuit Court of the United States for the District of New Jersey. It appears by this opinion that the point was made in that case by the defendant, that William Judson and James A. Dorr were parties in interest, and should be made parties complainant. The assignment by Goodyear to Judson and Dorr was before the learned judge, and the question made was fully considered. They were not made parties. Exhibit "C," annexed to the bill, is the opinion of the same justice in the case of Goodyear and the New England Car Spring Company against the Central Railroad of New Jersey, argued in the Circuit Court of that State on the 24th of March, 1853. The suit in that case also was founded upon the Goodyear patent. The objection that Judson and Dorr should have been co-complainants was set up. The assignment to them by Goodyear was analyzed and considered. The learned judge arrived at the conclusion that they were not necessary parties, and overruled the point. These exhibits were as much a part of the bill in this case as anything which it contained. The appellants are estopped from denying knowledge of its contents. They were sufficient to show the existence of the assignment to Judson and Dorr, and the general scope and character of its contents. If not satisfied with the views of Mr. Justice Grier upon the subject they should have made the defence by plea or answer. Not having spoken at the proper time in that way, they cannot be permitted to speak with effect now, in this way. They have slept upon knowledge which, if material, should have awakened them to activity more than seven years ago. Their laches is fatal to their application. It is a settled rule in this class of cases "that the matter must not only be new, but such as the party, by the use of reasonable diligence, could not have known; for, if there be any laches or negligence in this respect, that destroys the title to the relief."* Whether such an application shall be granted or refused, rests in the sound discretion of the court. The requisite leave is never a matter of right.† The affidavits have failed to satisfy us,

* Story's Equity Pleadings, § 414.

† Id. § 417.

Statement of the case in the opinion.

that if a bill of review were filed the result would affect the decree which has been rendered.

We are all of the opinion, that under the circumstances it would not be proper to withhold longer from the appellees the fruits of the relief to which we have found them entitled. It is not probable that the appellants will be injured by any litigation which the representatives of Judson or Dorr may institute. If their interests, as claimed, shall be established, the Circuit Court which tries the case will doubtless so exercise its flexible jurisdiction in equity as to protect all rights and do justice to all concerned. The motion for leave to file a bill of review is

DENIED.

SAME *v.* SAME.

1. Where, on a bill by several persons for the infringement of a patent and for an account (the defences being invalidity of the patent and a license), the court sustain the patent, and decree damages, a bill cannot be regarded as a cross-bill, which sets up a judgment in another suit against one of the complainants, and asks that the conjoined defendants in the principal suit set forth and discover what share of the damages they claim *respectively*, so that the defendant in that suit may set off his judgment as respects the one against whom it is.
2. As an original bill it cannot be sustained, if it have either been filed before the decree for damages was rendered in the principal suit, or have been a judgment in *attachment* only, and where there was no service on the person of the defendant.
3. A bill which is in no wise auxiliary to an original suit, nor in continuation of that proceeding, does not present a case proper for substituted service.

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

Messrs. Payne, Cushing, and Parsons, for the appellant; and Mr. W. E. Curtis and Mr. Stoughton, contra.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

After the interlocutory decree was entered in the case of Charles Goodyear, executor of Charles Goodyear, deceased,

and others, against The Providence Rubber Company and others, in the Circuit Court of the United States for the District of Rhode Island, and while the case was before the master to whom it had been referred, the complainants filed this bill. It alleges that they hold a judgment against the estate of Charles Goodyear, deceased, in favor of E. M. Chaffee & Co. for the sum of $48,215.20, amounting, with interest thereon, to $72,215.20, or thereabout, which they insist ought, in equity and good conscience, to be offset against such portion of the damages to be recovered in the suit first mentioned, as may be due and payable to Charles Goodyear, the executor. An exhibit is annexed to the bill and made a part of it, by which it appears that the judgment was recovered against Charles Goodyear, deceased, in his lifetime, by attachment; that process was not served upon him; that he did not appear; that he made no defence; that the cause of action was the alleged breach of a contract; and that the court assessed the damages for which the judgment was rendered.

It further appears by this exhibit that the firm of E. M. Chaffee & Co. consisted of Edwin M. Chaffee, George O'Bourne, and William W. Brown. The sheriff's return upon the writ of attachment is as follows:

"For want of the body of the within-named defendant to be by me found in my precinct, I have this day, at eleven o'clock, A.M., made service of this writ by attaching two pieces grass cloth, one piece red fitting, six rolls cotton batting, one piece of perforated rubber cloth, one roll grass cloth, one roll sheeting, covered with cotton batting, two bundles wadding, one piece bagging, set forth to me by the plaintiffs as the property of the defendant, and have left a true and attested copy of this writ, with my doings hereon, with Messrs. Bourne and Brown, in whose hands or possession I found said goods and chattels, the defendants having no last and usual place of abode within my precinct whereat to leave a copy."

The bill further sets forth that the Union India-Rubber Company claims to be a corporation of the State of New

York, having its principal place of business in the city of New York, and that the Phenix Rubber Company claims to be a corporation of the State of Connecticut, having its principal place of business also in the city of New York.

The prayer of the bill is, that the defendants set forth and discover what share of the damages to be recovered in the prior suit they respectively claim; that the judgment may be set off against that portion which shall belong to Charles Goodyear, as executor of Charles Goodyear, deceased; and for other and proper relief. There is a further prayer that service of process may be made upon the corporation defendants, by serving it upon their solicitor of record, and that service may be made upon Charles Goodyear, the executor, by some disinterested person in the State of New York. Substituted service was made upon the corporations accordingly, pursuant to an order of the court. Charles Goodyear entered his appearance, and demurred. The corporations appeared specially, and moved to dismiss the bill. The demurrer and the motion were both sustained, and the bill was dismissed. The complainants thereupon appealed to this court.

In the argument here, the counsel for the appellants have endeavored to support the bill, upon the ground that it is a cross-bill, having for its object to enforce an offset arising under such circumstances as give a court of equity jurisdiction of the case, and authority to give the relief for which the bill specifically prays. A cross-bill is brought to obtain a discovery in aid of a defence to the original suit, or to obtain complete relief to all the parties as to the matters charged in the original bill. It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject.* Here the original suit was for the infringement of a patent. The defences were

* Mitford's Pleading, 80, 81; Ayres *v.* Carver, 17 Howard, 591; Cross *v.* De Valle, 1 Wallace, 5.

invalidity of the patent and a license. Neither the case made by the bill nor the defences set up in the answer had the slightest relation to the judgment in question. It is entirely foreign to the grounds of the controversy. Its only connection with the parties was that it belonged to the defendants, and was against the testator of one of the complainants. Any discovery in relation to it could not give or help any defence to the original suit. It was simply a fact affecting personally a portion of the parties, but no more affecting the litigation than would any other controversy between them as to lands, stocks, or other property. We, therefore, hold the bill to be an original and not a cross-bill.

Can it be sustained as such? When it was filed, no decree had passed in the original suit for the payment of damages. *Non constat* that such a decree would ever be made. It was possible that the court might annul the interlocutory order, decree for the defendants, and dismiss the bill. The bill before us was therefore prematurely filed. The judgment which it seeks to enforce was recovered in a proceeding by attachment. It did not affect the defendant personally, and bound no property but that upon which the grasp of the court was fixed by the service of the writ of attachment. Beyond that it was ineffectual for any purpose. An execution could not be issued upon it to reach other property, and it would not be *primâ facie* evidence against the defendant in another suit upon the same cause of action. To enforce the contract against the testator while living, or his executor after his decease, it was necessary to sue, procure personal service, and make the same proofs as if the judgment in attachment had not been rendered. Such a judgment has no more efficacy and can no more be enforced in equity than at law. The demurrer of the executor was well taken and properly sustained.*

The motion to dismiss was made by the foreign corporations. The bill, being in no wise auxiliary to the original suit

* D'Arcy *v.* Ketchum, 11 Howard, 165; McVicker *v.* Beeby, 31 Maine, 314; Story's Conflict of Laws, § 314.

nor in continuation of that proceeding, the case was not one proper for substituted service.* They were not bound to appear. They entered their appearance specially, and appeared only to object to the jurisdiction of the court.

The learned judge who heard the case below was correct in ordering the bill to be dismissed.

DECREE AFFIRMED.

BOURNE *v.* GOODYEAR.

A proceeding to vacate the extension of a patent, of which the extension has expired before the proceeding was begun, has no equity to support it, and cannot be sustained on demurrer.

APPEAL from the Circuit Court for the Southern District of New York, in which court, on the 15th of June, 1865, a proceeding was begun, in the name of the United States, *ex relatione* Bourne, against the executor of Goodyear, to vacate an extension of a patent. The bill showed that the extension of the patent sought to be vacated by the proceeding expired on the 14th of June, 1865; before the suit was commenced, and the defendant demurred to it on that ground among others. The court below dismissed the bill, and the relator brought the case here.

Messrs. T. H. Parsons, A. Payne, and C. Cushing, for the appellant; Messrs. E. W. Stoughton and W. E. Curtis, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The extension having expired before the bill was filed, there is no equity to support the application to set it aside. The extension has ceased to be of any effect, and there remains nothing which can be the subject of a suit. The demurrer to the bill, therefore, must be sustained, and the decree of the Circuit Court by which the bill was dismissed must be

AFFIRMED.

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* Dunn *v.* Clarke, 8 Peters, 1.

BISCHOFF *v.* WETHERED.

1. A judgment recovered in the Common Pleas, at Westminster, England, against a person in the United States, without any service of process on him, or any notice of the suit other than a personal one served on him in this country, has no validity here, even of a *primâ facie* character.
2. On a suit at law, involving a question of priority of invention, where a patent under consideration is attempted to be invalidated by a prior patent, counsel cannot require the court to compare the two specifications, and to instruct the jury, as matter of law, whether the inventions therein described are or are not identical. The rule on the subject stated.

ERROR to the Circuit Court for the District of Maryland.

Bischoff and others brought an action, in the court below, against Wethered, to recover damages for breach of covenant in the assignment of one-fortieth part of an English patent granted to one Newton. The covenant was that the patent was in all respects valid and unimpeachable. The breach complained of was that it was null and void. The declaration contained certain other counts, namely, the ordinary money counts, and a count on a judgment recovered in the Common Pleas, at Westminster Hall, in England. To the latter count the defendant pleaded *nul tiel record.* The only evidence adduced in its support was an exemplified copy of a judgment recovered against the defendant in the said Common Pleas, without any service of process on him, or any notice of the suit, other than a personal notice served in the city of Baltimore, and as no evidence was adduced to sustain the common counts, the chief question in the case arose under the count on the alleged covenant, that the patent in question was valid and unimpeachable.

This patent was granted to Newton on the 25th of May, 1853, and was for certain improvements in the generation of steam, consisting of an accessory steam-pipe carried from the boiler through the fire or chimney, so as to cause the steam conveyed therein to become superheated; and from thence carried to the steam-chest, or to an intermediate pipe, there to connect with the ordinary steam-pipe which conveys the steam from the boiler to the engine, so as to mix the su-

perheated steam with the ordinary steam as it comes from the boiler. The effect of this mixture is described to be that the superheated steam converts into steam all the remaining watery particles, froth and foam, contained in the ordinary steam, and thus dries and rarefies the whole mass, and makes it more effective.

The plaintiff having put in evidence the assignment containing the covenant declared on, and the letters patent granted to Newton, in order to show the breach of covenant, put in evidence a prior English patent, granted to one Poole, in 1844, for an invention which the plaintiff claimed was identical with that patented to Newton. The plaintiff then called upon the court to compare the two specifications, and to instruct the jury that the patent to Newton was not a valid and unimpeachable patent, inasmuch as the invention therein described was not novel, but was already substantially described in the specification of Poole; and that under the covenants contained in the assignment, the plaintiffs were entitled to recover £500, the amount of purchase-money paid, with interest. This the court refused to do, and the plaintiffs excepted.

The defendant then prayed the court to instruct the jury, amongst other things, that there is not on the face of the respective patents of Newton and Poole such an identity as authorizes the court to pronounce that they are for one and the same invention, and that for that reason the patent granted to Newton is invalid; and such invalidity being necessary to support the plaintiffs' claim, and being wanting, the verdict must be for the defendant. The court granted this prayer, and instructed the jury accordingly, and a verdict was found for the defendant. The plaintiffs excepted to this instruction. The case being brought here, the questions were—

1st (one not pressed). What effect had the proceeding in the Common Pleas in England?

2d. The principal one—whether the court below was bound to compare the two specifications, and to instruct the jury, as matter of law, whether the inventions therein described were, or were not, identical?

Mr. W. M. Addison, for the plaintiff in error; Mr. J. B. Latrobe, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

As to the first point raised—to wit, the effect of the proceeding in the Common Pleas at Westminster Hall—it is enough to say that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a *primâ facie* character. It is simply null.

The second and principal question in the case raises an important question of practice under the patent law, and deserves to be seriously considered by this court.

It is undoubtedly the common practice of the United States Circuit Courts, in actions at law, on questions of priority of invention, where a patent under consideration is attempted to be invalidated by a prior patent, to take the evidence of experts as to the nature of the various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them; and to submit all the evidence to the jury under general instructions as to the rules by which they are to consider the evidence. A case may sometimes be so clear that the court may feel no need of an expert to explain the terms of art or the descriptions contained in the respective patents, and may, therefore, feel authorized to leave the question of identity to the jury, under such general instructions as the nature of the documents seems to require. And in such plain cases the court would probably feel authorized to set aside a verdict unsatisfactory to itself, as against the weight of evidence. But in all such cases the question would still be treated as a question of fact for the jury, and not as a question of law for the court. And under this rule of practice, counsel would not have the right to require the court, as matter of law, to pronounce upon the identity or diversity of the several inventions described in the patents produced. Such, we think, has been the prevailing rule in this country, and we see no sufficient reason

for changing it. The control which the courts can always exercise over unsatisfactory verdicts will enable them to prevent any wrong or injustice arising from the action of juries; whereas, if the courts themselves were compellable to decide on these often recondite and difficult questions, without the aid of scientific persons familiar with the subjects of the inventions in question, they might be led into irremediable errors, which would produce great injustice to suitors. We are disposed to think that the practice adopted by our courts is, on the whole, the safest and most conducive to justice.

It may be objected to this view that it is the province of the court, and not the jury, to construe the meaning of documentary evidence. This is true. But the specifications of patents for inventions are documents of a peculiar kind. They profess to describe mechanisms and complicated machinery, chemical compositions and other manufactured products, which have their existence *in pais*, outside of the documents themselves; and which are commonly described by terms of the art or mystery to which they respectively belong; and these descriptions and terms of art often require peculiar knowledge and education to understand them aright; and slight verbal variations, scarcely noticeable to a common reader, would be detected by an expert in the art, as indicating an important variation in the invention. Indeed, the whole subject-matter of a patent is an embodied conception outside of the patent itself, which, to the mind of those expert in the art, stands out in clear and distinct relief, whilst it is often unperceived, or but dimly perceived, by the uninitiated. This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence *in pais*.

We are, therefore, of opinion that the Circuit Court was justified in refusing to give the instructions demanded by the plaintiffs, and in giving that which was asked by the defendant.

The precise question has recently undergone considerable

discussion in England, and has finally resulted in the same conclusion to which we have arrived. The cases will be found collected in the last edition of Curtis on Patents.* It was at first decided in the cases of *Bovill* v. *Pimm*,† *Betts* v. *Menzies*,‡ and *Bush* v. *Fox*,§ that it was the province and duty of the court to compare the documents and decide on the identity or diversity of the inventions. But in 1862, Lord Westbury, in two very elaborate judgments, one of which was delivered in the House of Lords on occasion of overruling the decision in *Betts* v. *Menzies*, held that it belonged to the province of evidence, and not that of construction, to determine this question. "In all cases, therefore," he concludes, "where the two documents profess to describe an external thing, the identity of signification between the two documents containing the same description, must belong to the province of evidence, and not that of construction." Lord Westbury very justly remarks, that two documents using the same words, if of different dates, may intend very diverse things, as, indeed, was actually decided by this court in the case of *The Bridge Proprietors* v. *The Hoboken Company*.‖ The court, in that case, said: "It does not follow that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word." And the decision was that the word "bridge," in an old bridge law, passed in 1790, did not mean the same thing as the same word meant when applied to the modern structure of a railroad bridge.

This view of the case is not intended to, and does not, trench upon the doctrine that the *construction* of written instruments is the province of the court alone. It is not the *construction of the instrument*, but the *character of the thing invented*, which is sought in questions of identity and diversity of inventions.

JUDGMENT AFFIRMED.

* § 446.
† 36 English Law and Equity, 441.
‡ 1 Ellis & Ellis, Q. B. 999.
§ 38 English Law and Equity, 1.
‖ 1 Wallace, 116.

INDEX.

ABANDONED AND CAPTURED PROPERTY ACT. See *Rebellion*, 1.

1. Under it a party preferring his claim in the Court of Claims, need not, where he has purchased in good faith, prove the loyalty of the person from whom he bought the property whose proceeds he claims. *United States* v. *Anderson*, 56.
2. The vendor is a competent witness to support the claimant's case, if he never had any claim or right against the government, and is not interested in the suit. *Ib.*
3. In a claim under this act, the Court of Claims may render judgment for a specific sum as due to the claimant. *Ib.*
4. Claimants under the act are not deprived of its benefits because of aid and comfort *not* voluntarily given to the rebellion. *United States* v. *Padelford*, 531.
5. But voluntarily executing, even through motives of personal friendship, the official bonds of quartermasters or commissaries of the rebel army, was giving such aid and comfort. *Ib.*
6. The mere taking possession of a city by the government forces was not a "capture" of all cotton in it, within the meaning of the act. *Ib.*

ABANDONMENT. See *Insurance.*

ACCEPTANCE.

Of work not performed according to contract. What amounts to. *Swain* v. *Seamens*, 254.

ADMINISTRATOR. See *Foreign Administrator; Pleading*, 2, 3, 7.

ADMIRALTY. See *Average*, 3; *Barges; Bottomry; Commercial Law; Lien*, 1, 2; *Pleading*, 10, 11; *Practice*, 1, 9–11, 39, 40.

1. Where a lien exists by the maritime law of foreign jurisdictions, our admiralty has power to enforce it here, even though all parties be foreigners. *The Maggie Hammond*, 435.
2. The English "Admiralty Court Act" (24th and 25th Victoria), construed in reference to the English courts. *Ib.*
3. Liens for repairs and supplies, whether express or implied, how far and under what circumstances enforced in; and when a necessity for them is presumed or considered as proven. *The Grapeshot*, 129; *The Guy*, 758.
4. Steamers navigating crowded harbors or channels, or entering ports in the dark or in fogs, are bound to move with the greatest care, and to keep themselves under a headway at all times controllable, and sometimes to stop entirely, and where it is night or misty, to wait till they

ADMIRALTY (*continued*).

can see. In all such cases they must conform strictly to the rules of navigation. The rule applied in various cases. *The Corsica*, 630; *The Johnson*, 146; *City of Paris*, 634; *The Portsmouth*, 682; *The Syracuse*, 672; *The Suffolk County*, 651.

5. Those having no tows, bound to regard with care those having them. *The Alleghany*, 522; *The Syracuse*, 672.
6. If either one of two vessels colliding have departed from the rules of navigation established by Congress, *it* must show cause for such its departure. *The Corsica*, 630.
7. The case set up by a libelled vessel is not necessarily made out by the libellant's proving, as respects his own vessel, a case somewhat different from the one which his libel alleged. *The Suffolk County*, 651.
8. A neglect by one vessel, on approaching another in the night, to show proper lights, or her showing a wrong one, does not absolve such other vessel, under the act of Congress of April 29th, 1864, prescribing the lights which sailing vessels shall carry, from obligation to observe the usual laws of navigation, or such reasonable and practicable precautions generally as the circumstances allow. *The Gray Eagle*, 505.
9. A loss equally divided between two vessels, both being in fault. *Ib.*
10. Positive and direct oral testimony, in a collision case, not controlled by the shape of the wound on the injured vessel. *The Fairbanks*, 420.

AFFIRMANCE.

By a Superior Court of a judicial decree in a lower one, does not enlarge the operation of the latter. The effect of it considered. *In the matters of Howard*, 175.

AGENCY. See *Principal and Agent; Ratification*, 1, 2.

1. Where a partnership is in the habit of indorsing negotiable paper, having blanks left for the date, and gives the paper so indorsed to a person to use—he to fill the blank when he wishes to use it—the firm is liable on the paper with the date filled in, when, thus complete, it is held by innocent *bonâ fide* holders for value. *Michigan Bank* v. *Eldred*, 544.
2. The power to fill the blanks for dates implies, in favor of such holders, a power in the person trusted to change the date, after the note has been written, and before it is negotiated. *Ib.*
3. An authority to buy cotton, having in view not merely a single transaction, or a number of specified transactions, but a class of purchasers and a department of business—makes a general agency to buy cotton; and if the agent, holding himself out as the general agent, purchase there under his power, he may bind his principal in violation of special instructions not communicated to his vendors, and of which they had neither knowledge nor reason to suspect the existence. *Butler* v. *Maples*, 766.

APPEAL. See *Practice*, 1, 7, 11–14, 18, 19; *Court of Claims*, 4.

Where an act of Congress gives, as part of the general system of organization of a court, an appeal from *any* final judgment or decree which

APPEAL (*continued*).

may *thereafter* be rendered by it, an appeal lies from a judgment rendered under an act which gives the court jurisdiction to pass, in the usual way, and not by any special proceedings, upon a class of cases additional to those of which it already had jurisdiction, even though nothing be said in such act about an appeal. *Ex parte Zellner*, 244.

APPOINTMENT. See *Feme Covert.*

APPURTENANCE.

A right not connected with the enjoyment or use of a parcel of land cannot be annexed as an incident to that land so as to become appurtenant to it. *Linthicum* v. *Ray*, 241.

ARBITRATION AND AWARD. See *Pleading*, 8, 9.

1. A submission to two arbitrators named, and "an umpire if needful," is an authority to the arbitrators to appoint the umpire. *Smith* v. *Morse*, 76.
2. A submission to arbitration implies an agreement to submit to the award. *Ib.*

ARMY OFFICERS.

Under the Act of July 13th, 1866, amendatory of the 4th section of the Act of March 3d, 1865, an officer in the regular army, who during the rebellion accepted a commission of colonel of volunteers, is not entitled to the three months' pay given by those acts to officers of that grade on being honorably discharged under the terms of the act from "military service;" he resuming his duty and rank in the regular army, and being still in the said service. *United States* v. *Merrill*, 614.

ASSISTANT QUARTERMASTER. See *War Department.*

AVERAGE.

1. Where a ship has sustained injuries, owing to a voluntary stranding, and undergone repairs, her contributory value, in general average, is her worth before such repairs were made. In the absence of other proof on this point, her value in the policy of insurance at the port of departure is competent evidence; just deduction being made for deterioration. *Star of Hope*, 203.
2. Sacrifices of part of the cargo necessarily made to raise means to prosecute a voyage from a distant port, are the subject of general average. *Ib.*
3. The expenses of an *ex parte* adjustment made by charterers at the port of delivery are not chargeable in admiralty on the ship or freight, unless the results were adopted and used in the court below by the commissioner who stated the adjustment made under order of the court. *Ib.*

BANKRUPT. See *Practice*, 21.

BARGES.

The special obligation of the owners of, on our Western rivers, to keep them strong, in reference to the new modes of carrying grain,—that is to say, of carrying it in bulk instead of in sacks, a consequence of

BARGES (*continued*).
the use of elevators,—this set forth and explained. *The Northern Belle*, 526.

BILL OF EXCEPTION. See *Practice*, 16 (*b*, *c*, *d*).

BOTTOMRY.
To support hypothecation by, what evidence of necessity required. *The Grapeshot*, 130.

BOUNTY. See *Army Officers*.
The 3d section of the act of August 6th, 1861, and the 1st and 5th sections of the act of July 2d, 1861, construed in reference to one class of privates "honorably discharged." *United States* v. *Hosmer*, 432.

CALIFORNIA.
1. The Commissioner of the Land Office cannot grant a patent under the 7th section of the act of July 23d, 1866, "to quiet land titles in," unless the purchaser bring himself by affirmative proofs within the terms of the section. *The Secretary* v. *McGarrahan*, 298.
2. The Board created under the act of March 3d, 1851, "to ascertain and settle private land claims in," had jurisdiction of a claim made under a grant of a lot by a Mexican governor within the limits of the pueblo of San Francisco; and such claim was not required to be presented in the name of the corporate authorities of the *city*. *Lynch* v. *Bernal*, 315.
3. The meaning of the 8th and 14th sections of the last-named act explained. *Ib.*
4. The adjudications of the Board on claims within its jurisdiction, cannot be collaterally assailed for error or irregularity; and this position is not affected by the act of March 3d, 1851. *Ib.*
5. The titles granted under the Van Ness ordinance while the claim of the city to the land was pending, were subject to the final decision on the claim. *Ib.*
6. The exception made in the final decree of confirmation to the city of San Francisco was not limited to parcels of land claimed under perfect grants. *Ib.*
7. Under the 11th section of the above-mentioned act of March 3d, 1851, the District Court possesses the power to open an appeal from the Board of Land Commissioners, for the purpose of hearing newly-discovered evidence upon the title of the claimant. *United States* v. *Rocha*, 639.
8. In determining the effect of a judgment in ejectment in California, the same principles are applicable as in determining the effect of a judgment in any other common law action. *Merryman* v. *Bourne*, 592.
9. The Van Ness ordinance, effect of. The act of July 1st, 1864, was a confirmation of the title held under that ordinance, and took effect by relation. *Ib.*
10. Alcalde of San Francisco had authority to make grants of pueblo lands, subject to certain authorities. *Ib.*
11. A decree of one of the Spanish governors, that all the places ceded for ranchos within a particular jurisdiction should remain as provisional

CALIFORNIA (*continued*).
grants until the *egidos* (common lands) were set off, construed and determined. *United States* v. *Rocha*, 640.

CAPTAIN. See *Master*.

CAPTURE. See *Abandoned and Captured Property Act*, 6.

CAPTURED AND ABANDONED PROPERTY ACT. See *Abandoned and Captured Property Act*.

CHARTER-PARTY.
Performance of a contract of, the same being absolute in its terms and without provision for any contingency, to proceed to a distant port specified, made during a war and for the obvious purpose of furnishing articles to one of the parties to it, not dispensed with by the fact, learned in the course of the voyage, that the whole purpose of the voyage was defeated by the changed condition of military operations. *The Harriman*, 161.

CHICAGO.
Ordinance of May 23d, 1850, granting the North Chicago City Railway Company the right to construct a railway, construed as to its extent in obliging the company to keep the streets in a certain state. *Chicago* v. *Sheldon*, 50.

COLLISION. See *Admiralty*, 4–10.

COMITY, JUDICIAL. See *Constitutional Law*, 1, 5, 6.
The decision of the highest court of a State, that an act of the State is not in conflict with a provision of its constitution, is conclusive upon this court. *Gut* v. *The State*, 35.

COMMERCIAL LAW. See *Average; Charter-Party; Insurance; Jettison; Master*, 1, 2, 4; *Stranding*.
1. Where a master has neither money nor credit and cannot communicate with his owners, he may sell part of his cargo if he cannot make necessary repairs and prosecute his voyage except by doing so. *Star of Hope*, 203.
2. Obligations of the master of a ship to get cargo forward when his ship is disabled in the course of her voyage, stated. *The Maggie Hammond*, 435.

COMMON CARRIERS. See *Barges; Commercial Law; Master*, 1, 4.

"CONFEDERATE STATES OF AMERICA," THE. See *Rebellion*.

CONFISCATION. See *Rebellion*, 7–10, 13.

CONFLICT OF JURISDICTION. See *Comity, Judicial; Constitutional Law*, 7; *Lex Rei Situs*.

FEDERAL AND STATE COURTS.
Injunction from State courts cannot control mandamus from Federal courts to State officers to carry out the decrees of the latter courts. *The Mayor* v. *Lord*, 409.

CONSTITUTIONAL LAW. See *Comity, Judicial; Internal Revenue; National Banks.*

1. A decree in divorce, valid and effectual by the laws of the State in which it was obtained, is valid and effectual in all other States. *Cheever* v. *Wilson*, 108.
2. The President had power as commander-in-chief during the late rebellion, to establish Provisional Courts, within the portions of the insurgent territory occupied by the National forces, for adjudicating causes arising under the laws of the State or of the United States; and on the close of the war, and consequent dissolution of the court, Congress had power to transfer to the Circuit Court, judgments, orders, and decrees made by it, and which, under ordinary circumstances, would have been proper for its jurisdiction, and to give to them the quality of decrees of the said Circuit Court. *The Grapeshot*, 129.
3. A law changing the place of trial of an offence after its commission, is not an *ex post facto* law. *Gut* v. *The State*, 35.
4. The obligation of a contract, valid at the time of making by the laws of the State, or by judicial decision upon the laws, cannot be impaired by any decision of the courts of the State subsequently made. *Chicago* v. *Sheldon*, 50; *The City* v. *Lamson*, 478.
5. The provision in the 7th amendment of the Constitution, declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, applies to the facts tried by a jury in a cause in a State court. *The Justices* v. *Murray*, 274.
6. So much of the 5th section of the act of March 3d, 1863, relating to *habeas corpus*, &c., as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury, to the Federal court for a retrial on the facts and law, is unconstitutional. *Ib.*
7. The doctrine which exempts the instrumentalities of the Federal government from the influence of State legislation, is limited by the principle that State legislation which does not impair the usefulness or capability of such instruments to serve that government, is not within the rule of prohibition. *National Bank* v. *Commonwealth*, 353; *Thomson* v. *Pacific Railroad*, 579.

CONTRACT. See *Charter-Party; Equity*, 1–4; *Notice to Quit.*

1. How far acceptance of work done not according to the terms of a contract amounts to waiver of right to insist on performance according to terms; and what amounts to acceptance. *Swain* v. *Seamens*, 254.
2. Where a purchaser of real estate fails to comply with the contract under which he obtained possession, the vendor may treat the contract as rescinded, and regain the possession by ejectment. *Burnett* v. *Caldwell*, 290.
3. Where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter. The principle applied. *Noonan* v. *Bradley*, 395.

CONTRACT (*continued*).

4. A peculiar one, giving a lien on drafts to be drawn by the government for articles to be delivered to it, construed under special facts subsequently arising. *Bank of Washington* v. *Nock*, 373.

COUPONS. See *Pleading*, 6.

1. Suit may be brought on, by owner, when detached from the bond to which they once belonged, and though the owner of the coupon be no longer owner of the bond. *The City* v. *Lamson*, 478.
2. Are not barred, though cut from it, by a less time than would bar the bond to which they belonged. *Ib.*

COURT AND JURY.

Their respective provinces when any evidence is submitted tending to prove issue. See *Jury*.

COURT OF CLAIMS. See *Abandoned and Captured Property Act*, 1–3.

1. The term "appropriation" in the act of July 4, 1864, relating to the, includes all taking and use of property by the army and navy in the course of the rebellion not authorized by contract with the government. *Filor* v. *United States*, 45.
2. Has no jurisdiction of claims founded upon equitable considerations merely. *Bonner* v. *United States*, 156.
3. Proper mode of having that court supply supposed defects in its conclusions deducible from the evidence before it, stated. *United States* v. *Adams*, 661.
4. The mere making and pendency of a motion in, for a new trial, under the act of June 25th, 1868, § 2, is not a sufficient ground for dismissal of an appeal taken to this court prior to the making of such motion. But the granting of such motion, and the order for a new trial, vacating as it does the judgment appealed from, is. *United States* v. *Ayres*, 608.

CUSTOM DUTIES. See *Evidence*, 3.

DANGERS OF THE NAVIGATION. See *Jettison*.

DECREE OF DISTRIBUTION. See *Practice*, 31.

DEED. See *Infant; Principal and Agent.*

Where a person has bought land and paid for it, the deed subsequently made in consequence does not confer a new title on him; but confirms the right which he had acquired before the deed was made. *Irvine* v. *Irvine*, 617.

DEPARTMENTS. See *Mandamus*, 1, 2.

DISTRICT OF COLUMBIA.

Old statutes of Maryland on the subject of judgments against the administrators of a decedent, and proceedings to bind the decedent's realty under them construed; and the independence of the heir from judgments against the administrator set forth. *Ingle* v. *Jones*, 486.

DIVORCE. See *Domicile; Pleading*, 5; *Subrogation.*

A decree in, giving a husband one-third of his wife's rents, these being at the time of the decree subject to a paramount right of dower in her

DIVORCE (*continued*).

mother, does not carry a third of the third got by the wife on the mother's death and consequent falling in of her dower. *Cheever* v. *Wilson*, 109.

DOMICILE.

A wife may acquire a domicile different from her husband's whenever it is proper that she should have such a domicile, and on such a domicile, if the case otherwise allow it, may institute proceedings for divorce, though it be neither her husband's domicile nor have been the domicile of the parties at the time of the marriage or of the offence. *Ib.*

EQUITY. See *Court of Claims*, 2; *Estoppel; Marriage Settlement; Practice*, 28—38; *Trustee.*

1. Protects and will direct performance of a parol gift of land accompanied by possession, and where the donee has made valuable improvements. The principle applied to an antenuptial promise by a father to give a lady about to marry his son, a lot of ground. *Neale* v. *Neales*, 1.
2. Will not allow the statute of frauds to be set up where the contract has been largely performed on both sides. *Swain* v. *Seamens*, 254.
3. Has always jurisdiction of fraud, misrepresentation, and concealment, and this does not depend on discovery. *Jones* v. *Bolles*, 364.
4. Has jurisdiction of cases where an agreement which it would be a fraud to keep on foot, is perpetual in its nature, and where its cancellation is the only effectual relief against it. *Ib.*
5. What is a sufficient interest in a complainant to sustain such a bill. *Ib.*
6. How far a party may exercise legal rights after by his seeing and silence the other side have been encouraged to lay out money. *Swain* v. *Seamens*, 254; *Irvine* v. *Irvine*, 618.
7. Has no jurisdiction of a proceeding to vacate the extension of a patent, of which the extension has expired before the proceeding was begun. *Bourne* v. *Goodyear*, 811.

ESTOPPEL. See *Equity*, 1, 2, 6.

1. When one makes a deed of land covenanting that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition enures to the grantee on the principle of. *Irvine* v. *Irvine*, 617.
2. A widow held not estopped from a claim on her husband's estate for the proceeds of her separate estate, by her being a formal party to a compromise between heirs at law and residuary legatees, by which the former received a sum of money and the latter the residue of the estate after settlement of it; she having done nothing to conceal her claim. *Walker* v. *Walker*, 743.

EVICTION. See *Threat of Suit.*

EVIDENCE. See *Abandoned and Captured Property Act*, 2; *Admiralty*, 10; *Patents*, 13; *Practice*, 8, 16, 24; *Missouri*, 1.

1. In ejectment, where the plaintiff's title is that of a voluntary purchaser under an execution void because the lien of the judgment had expired, and the defendant's that of a *bonâ fide* purchaser from the

EVIDENCE (*continued*).

debtor during the continuance of the lien, it is not competent for the plaintiff to prove that the defendant promised the creditor, under whose execution the land was sold, to pay the judgment, and that he did not do so; in consequence of which the lien was suffered to expire. The fact, if proved, would not extend the lien of the judgment. *Norris* v. *Jackson*, 125.

2. The act of July 2d, 1864, enacting that in courts of the United States, there shall be no exclusion of any witness in civil actions, "because he is a party to or interested in the issue tried;" and the act of March 3d, 1865, making certain exceptions to the rule, apply to civil actions in which the United States are a party. *Green* v. *United States*, 655.
3. Whether certain imported goods were similar to certain other goods described in the revenue law, for the purposes of customs duties, is a mixed question of law and fact, and cannot, by the mere charge of the court, be wholly withdrawn from the jury. *Barney* v. *Schmeider*, 249.
4. Evidence may be given by a treasury agent of the contents of a permit to buy cotton; the permit not being produced by the other side on call. *Butler* v. *Maples*, 766.
5. In a suit against an insurance company for the value of goods lost in the burning of a store, books whose correctness as showing the amount and value of the goods is testified to by the person proving them, are, *in connection with his testimony*, competent evidence to show such value. *Insurance Company* v. *Weide*, 677.
6. An abstract made from papers burnt, if these are shown to present correct values, is good as secondary evidence. *Ib.*
7. Where a party had contracted for a thing in a manufactured state, and refused to take it, evidence may be given that material had been so far prepared to manufacture the thing contracted for as that it was injured for anything else; and that there was no sale in the market for the thing contracted for and refused. *Chicago* v. *Greer*, 726.
8. An admission by the agent of a city, authorized to contract for a thing for the city's use, that he *thought* the city liable, to a certain extent, for a thing which was furnished to it in professed discharge of a contract, *because the city had used the thing*, may go to the jury as an admission of the fact of use, in suit on the contract against the city by the party furnishing the thing, and where the city sets up as a defence that the thing furnished was not the thing agreed to be furnished. *Ib.*
9. A person having had sufficient experience to be an expert in testing the strength of hose, may on such a suit, state that a particular test applied *ex parte*, was not a fair one. *Ib.*
10. At what rates other persons offered or undertook at another time to make a particular thing for a defendant, is not evidence in a suit by a plaintiff on the defendant's *contract* to pay him a greater sum if he would make the same thing, at the time contracted for. *Ib.*
11. The testimony of a person, not an expert, that fire-hose of a peculiar size which the city had contracted for, would "not answer the city's

EVIDENCE (*continued*).
purpose," is inadmissible on a suit by the manufacturer against the city for the contract price. *Chicago* v. *Greer*, 726.

EXECUTOR. See *Administrator; Powers; Practice*, 26.

EX POST FACTO LAW. See *Constitutional Law*, 3.

FALSE RETURN.
Where a writ of monition issued upon a libel of information, filed by the United States against a promissory note, commanded the marshal "*to attach the note, and to detain the same in his custody until the further order of the court respecting the same;*" and the marshal returned that he had "*arrested the property within mentioned;*" *Held*, in an action against him for a false return, 1st, that service of the writ required him to take the note into his actual custody and control; and 2d, that the return signified that he had actually done so. *Pelham* v. *Rose*, 103.

FEME COVERT. See *Divorce; Domicile; Husband and Wife.*
A married woman has the same power as a *feme sole* to pledge rents settled in trust for her to receive, take and enjoy them to her sole and exclusive use and benefit. *Cheever* v. *Wilson*, 108.

FOREIGN ADMINISTRATOR. See *Pleading*, 2, 3, 7; *Practice*, 26.
1. Cannot prosecute a suit in another State, without first obtaining letters there. *Noonan* v. *Bradley*, 394.
2. But a voluntary payment of a debt to one held good as against the claim of an administrator duly appointed at the domicile of the debtor, in which last place the debt was paid; there having been no creditors of the intestate in this last place, nor any persons there entitled as distributees. *Wilkins* v. *Ellett, Administrator*, 740.

FOREIGN JUDGMENT.
A judgment recovered in England, against a person in the United States, without any notice of the suit other than a personal one served on him in this country, is null. *Bischoff* v. *Wethered*, 812.

FRAUDS, STATUTE OF. See *Equity*, 1, 2.

GENERAL AVERAGE. See *Average.*

GOVERNMENT CONTRACTS. See *Lien*, 3; *War Department.*

GOVERNMENT PAPERS.
Proper mode of proving. *Barney* v. *Schmeider*, 249.

HUSBAND AND WIFE. See *Divorce; Feme Covert; Marriage Settlement; Pleading*, 5; *Subrogation.*
1. Covenants for wife's separate maintenance, through trustees, valid; and not the less so because containing a provision looking to reunion. *Walker* v. *Walker*, 743.
2. Husband may be chargeable as trustee for his wife for her separate income received by him for investment and not invested. *Ib.*

ILLINOIS.
The statute of March 1, 1847, and those previous thereto, relating to the late Bank of, construed. *McGoon* v. *Scales*, 23.

INFANT.

His deed of lands, voidable only, and while not generally ratified by mere acquiescence may be ratified by any act showing clear intent to affirm. *Irvine* v. *Irvine*, 617.

INSURANCE.

Holding a vessel for an unreasonable time to make repairs, is a constructive acceptance of an abandonment, even though this have been unwarrantably made. *Copelin* v. *Insurance Company*, 461.

INTEREST.

The estate of a husband who had maltreated his wife charged, through a series of years, with, compounded annually, of moneys settled to her separate use, of which he had received the interest under a promise, not performed, to invest. *Walker* v. *Walker*, 743.

INTERNAL REVENUE.

The Internal Revenue Act of March 2, 1867, which makes it a misdemeanor, punishable by fine and imprisonment, to sell, &c., illuminating oil made of petroleum, inflammable at less than a certain temperature, is a police regulation, and accordingly can have no operation within State limits. *United States* v. *Dewitt*, 41.

INTERPRETATION.

General principle of, in construing ambiguous instruments. See *Contract*, 3.

IOWA.

The proviso in the act of May 15th, 1856, for aid in the construction of railroads in the State of Iowa, excludes the lands granted to that State, among others, by the act of September 28th, 1850, known as "the swamp-land grant." *Railroad Company* v. *Fremont County*, 89; *Railroad Company* v. *Smith*, 95.

JETTISON.

A loss of a part of the cargo by, resorted to in order to lighten the boat after she had run aground in consequence of violating a dictate of prudence, is not a loss "by dangers of the navigation" within the meaning of a bill of lading having an exception in those terms. *The Portsmouth*, 682.

JUDGMENT. See *Affirmance; Divorce; Comity, Judicial; Constitutional Law*, 1, 6; *Foreign Judgment.*

1. If the court rendering the judgment had jurisdiction, and the officer who sold had authority to sell, the sale, if made to one not a party to the suit, will not be void by reason of errors in the judgment or irregularities in the officer's proceedings, which do not reach the jurisdiction of the one or the authority of the other. It will be valid, though the judgment may afterwards be reversed. *McGoon* v. *Scales*, 23.

2. A divorce decreeing husband one-third of his wife's rents operates on the state of things existing at its date. *Cheever* v. *Wilson*, 109.

JURISDICTION. See *Court of Claims*, 2; *Foreign Judgment; Practice*, 1–16.

JURISDICTION (*continued*).

I. OF THE SUPREME COURT OF THE UNITED STATES.

(*a*) It HAS jurisdiction.

1. Under the 25th section of the Judiciary Act, where the State court in which a judgment in a suit is given is the highest court of law or equity in the State in which a decision in that suit could be had, although that court may not be actually the highest court of law or equity in the State. *Downham* v. *Alexandria*, 659.

(*b*) It has NOT jurisdiction.

2. Of a cause transferred here from the Circuit Court only by consent of parties. *The Nonesuch*, 504.
3. Nor of a case upon documents not in the cause below filed here by consent as if returned under a writ of diminution. *Hoe et al.* v. *Wilson*, 501.
4. Nor where a party claims below wholly in virtue of the laws of a State, and the highest court of a State decides that under these laws the claimant has no case. *Worthy* v. *The Commissioners*, 611.
5. Nor of a cause where, during the pendency of the same, a statute from which the jurisdiction was derived is repealed. *Assessors* v. *Osborne*, 567.
6. Nor (under the 25th section) of a cause where the issue turns solely on the personal identity of an individual, even though the parties claimed under the Federal government. *Carpenter* v. *Williams*, 785.

II. OF THE CIRCUIT COURTS OF THE UNITED STATES.

7. They have jurisdiction of cases transferred to them from State courts, under the 12th section of the Judiciary Act, though the plaintiffs may claim as assignees of parties who, owing to the restriction of the 11th section, would not themselves be capable of suing there. *Bushnell* v. *Kennedy*, 387.
8. The jurisdiction of suits between citizens of the same State, in internal revenue cases, conferred by the act of March 2d, 1833, "further to provide for the collection of duties on imports," and the act of June 30th, 1864, "to provide internal revenue," &c., was taken away by the act of July 13th, 1866, "to reduce internal taxation," &c. *Hornthall* v. *The Collector*, 560; *The Assessors* v. *Osbornes*, 567.

JURY. See *Evidence*, 3; *Patent*, 1.

1. Questions mixed of fact and law cannot be withdrawn wholly from them. *Barney* v. *Schmeider*, 248.
2. Where there is any evidence *tending* to prove the issue on either side, be the evidence weak or strong, it is error not to submit it to them. *Hickman* v. *Jones*, 197; *Barney* v. *Schmeider*, 248.

KENTUCKY.

Its act taxing shares in the National banks, and collecting the tax from the bank itself, held valid. *National Bank* v. *Commonwealth*, 353.

LACHES. See *Practice*, 33.

LEX REI SITUS.

The law of the State in which land is situated governs its transfer, and

LEX REI SITUS (*continued*).
the effect and construction of deeds conveying it. This principle applied to the statutes of Wisconsin subjecting lands of the late Bank of Illinois, in Wisconsin, to the proceedings of creditors. *McGoon* v. *Scales*, 23.

LIEN. See *Admiralty*, 1–3.
1. The fact that the owner of a vessel gave acceptances for the amount charged for repairs, held not to affect a lien in admiralty otherwise existing, the acceptor having been insolvent and unworthy of credit, and the credit having in fact been given to the boat. *The Guy*, 758.
2. A contract of affreightment and consequent maritime lien against a vessel, cannot be implied unless there be some kind of agreement to carry the goods made by parties in some way, express or implied, authorized to act for the owner of the vessel. *The Keokuk*, 517.
3. An agreement that advances by a bank shall be a lien on drafts to be given by the government for articles to be furnished to it, does not give a lien on a judgment against the government for violation of its contract; all drafts drawn by it having been paid. *Bank of Washington* v. *Nock*, 373.

LIMITATIONS, STATUTE OF. See *Coupons*, 2; *Rebellion*, 6.

LOUISIANA. See *Practice*, 17.
1. The Provisional Court of, established by the President's proclamation of October 20th, 1862, was constitutional. *The Grapeshot*, 129.
2. The mortgage implied by the general law of, from a father when guardian of his minor children, in their favor, does not make such a contract between the father and the children as that the legislature may not, by special statute, providing for proper reinvestment, authorize the father to sell his property divested of the mortgage. *Lobrano* v. *Nelligan*, 295.

MANDAMUS.
1. Judgment in, against an officer, as if yet in office, ordering the performance of an official duty, when in fact he had gone out after service of the writ, and before the judgment, is void, and cannot be executed against his successor. *The Secretary* v. *McGarrahan*, 298.
2. Cannot be sustained to compel either the Commissioner of the General Land Office, or the Secretary of the Interior, to issue a patent in cases where the exercise of judgment and discretion is necessary. *Ib.*; *Litchfield* v. *Register and Receiver*, 575.
3. Is rightly enough directed to the mayor and aldermen of a city, if they constitute the city council and have the government of the city, though the city be incorporated as "the city of ——." *Mayor* v. *Lord*, 409.
4. It is no defence to application for, to compel levy of a tax to pay judgment at law on city bonds, that the bonds were irregularly issued. *Ib.*
5. What amounts to a traverse to a recital in an alternative. *Ib.*
6. The duty of the inferior court receiving one, is to give effect to it in the fullest and most complete manner practicable. The principle illustrated by application to facts. *Ex parte Morris and Johnson*, 605.

MARRIAGE SETTLEMENT. See *Equity*, 1.

1. In case of antenuptial promises by a father to settle, on marriage, equity requires only reasonable certainty as to fact and terms of the promise. *Neale* v. *Neales*, 1.
2. Promises to settle in consideration of marriage, are, if practicable, to be specifically carried out rather than compensated for by damages. *Ib.*

MASTER.

1. Of vessel, his obligations stated as to carrying or getting forward his cargo when his vessel is disabled in the course of its voyage. *The Maggie Hammond*, 436; *The Portsmouth*, 682.
2. His right to sell part of the cargo in such a case, and when without either money or credit. *Star of Hope*, 203.
3. Wages of one, on the Mississippi River, fixed under particular circumstances at $900 a month. *Mephams* v. *Biessel*, 370.
4. Not held liable for bad stowage, he not having been to blame. *Ib.*

MEADE, Mr. R. W.

The case of his claims against the United States under the Spanish treaty of February 22d, 1819, considered. *Meade* v. *United States*, 691.

MISSOURI. See *Iowa; Swamp Lands.*

1. In a suit to recover lands which the plaintiff claims under one of the railroad grants, made by Congress to the State of Missouri, it is competent to prove by witnesses, who know the lands sued for, that they were swamp and overflowed within the meaning of the swamp-land grant, and therefore excluded from the railroad grant. *Railroad Company* v. *Smith*, 95.
2. The several acts of Congress of June 12th, 1812, May 26th, 1824, and July 27th, 1831, relating to the lands relinquished or reserved for schools, construed. *Public Schools* v. *Walker*, 282.

MUNICIPAL BONDS. See *Constitutional Law*, 4; *Coupons; Mandamus*, 3–6.

A debt for a specific sum contracted by a city, and invalid because a statute which authorized the city to contract a debt did not also limit the extent of it, is made valid by a subsequent statute recognizing the validity of the debt as contracted. *The City* v. *Lamson*, 478.

NATIONAL BANKS. See *Constitutional Law*, 7.

1. Under limitations, States may tax them, under the existing statutes of the United States, and the tax may be collected from the bank itself. *National Bank* v. *Commonwealth*, 353.
2. By the second limitation in the proviso to the 41st section of the National Banking Act, Congress but requires of each State, as a condition to the exercise of the power to tax, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation. The principle applied. *Lionberger* v. *Rouse*, 468.

NEGOTIABLE PAPER. See *Agency*, 1, 2.

NOTICE TO QUIT.

Not generally necessary in ejectment to recover for non-performance of contract of purchase. *Burnett* v. *Caldwell*, 290.

OFFICIAL BOND. See *Public Moneys; Rebellion*, 5, 14.

The obligation on an official bond of a person intrusted with the public money is not that of a mere depositary, but of a person who has made a contract, which he must at his own peril perform. The acts of Congress of April 29th, 1864, and March 3d, 1865, furnish the only exceptions to this rule which this court can act upon. *United States* v. *Keehler*, 83.

PARTNERSHIP.

Evidence that by the articles of partnership one partner had no right to indorse negotiable paper, is inadmissible to defeat a *bonâ fide* holder of such paper, indorsed with the firm name by a member of the firm, and taken by such *bonâ fide* holder for value, and without notice of the articles. *Michigan Bank* v. *Eldred*, 544.

PATENTS. See *Equity*, 7.

I. General principles relating to.

1. On a suit at law, involving a question of priority of invention where a patent under consideration is attempted to be invalidated by a prior patent, counsel cannot require the court to compare the two specifications, and to instruct the jury, as matter of law, whether the inventions therein described are or are not identical. How far a question for the jury under appropriate instructions. *Bishchoff* v. *Wethered*, 812.
2. Where several executors are appointed by the will of a patentee decedent—provision being made, however, for one alone acting—and but one proves the will and receives the letters of administration, he alone can maintain an action for infringement of the letters patent at common law. *Rubber Company* v. *Goodyear*, 788.
3. Where a patent is granted by the government to C. G. as executor, he can maintain a suit on the patent in all respects as if he had been designated in the patent as trustee instead of executor. *Ib.*
4. An objection to the authority of an executor to maintain a suit on letters patent should be taken by plea in abatement. *Ib.*
5. A patentee or his representative in a reissue may enlarge or restrict the claim, so as to give it validity and secure the invention. *Ib.*
6. A process and the product of a process may be both new and patentable, and are independent of each other. *Ib.*
7. Extended letters patent cannot be abrogated in any collateral proceeding for fraud. *Ib.*
8. A license to use an invention by a person only at "*his own establishment*," does not authorize a use at an establishment owned by himself and others. *Ib.*
9. An objection that the word "patented" was not affixed by the complainant under section 13 of act of March 2d, 1861, must be taken in the answer, if it is intended to be raised at the hearing or before the master. *Ib.*
10. A decree "for all the profits made in violation of the rights of the complainants under the patents aforesaid, by respondents, by the manufacture, use, or sale of any of the articles named in the bill of complaint," is correct in form. *Ib.*

PATENTS (*continued*).

11. Profits are rightly estimated by the master by finding the difference between cost and sales. *Rubber Company* v. *Goodyear*, 788.
12. In estimating this cost, the elements of cost of materials, interest, expense of manufacture and sale, and bad debts, considered by a manufacturer in finding his profits, are to be taken into account, and no others. *Ib.*

II. EVIDENCE IN CASES RELATING TO.

13. In giving notice, under the act of July 4th, 1836, section 15, of the names and places of residence of those by whom he intends to prove a previous use or knowledge of the thing, &c., it is enough if the party giving notice fairly puts his adversary in the way that he may ascertain all that is necessary to his defence or answer. He is not bound by his notice to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts. *Wise* v. *Allis*, 737.

III. VALIDITY OF PARTICULAR.

14. Charles Goodyear's for vulcanized rubber sustained. *Rubber Company* v. *Goodyear*, 788.

PAYMENT, VOLUNTARY or UNDER COMPULSION. See *Rebellion*, 5.

PLEADING.

I. IN CASES GENERALLY.

1. Pleading over without reservation to a declaration adjudged good on demurrer, is a waiver of the demurrer. *Watkins* v. *United States*, 759.
2. In an action by an administrator, the objection that as to the cause of action the plaintiff is not and never has been administrator, may be taken by special plea in bar. *Noonan* v. *Bradley*, 394.
3. In such an action a plea to merits admits nothing more as respects the plaintiff's representative character, than the title stated in the *narr.* *Ib.*
4. One plea in bar is not waived by another inconsistent one, in bar also. *Ib.*
5. Where a divorced husband brings a claim against a tenant of his wife for a portion of her rents allotted to him by the decree of divorce, the tenant, if he means to take advantage of an alleged nullity of the decree, must make his averment of the nullity in such form as that the husband can take issue. *Cheever* v. *Wilson*, 108.
6. In suing on coupons detached from a bond, it is proper enough to recite the bonds in such general way as by inducement and way of preamble explains and brings into view the relation which the coupons originally held to the bond, and in some respects still hold; but care must be taken not so to declare as to make the suit one upon the bond. *The City* v. *Lamson*, 477.
7. In an action in one State by an administrator appointed in another, on a bond given to the intestate, a plea that the bond was *bona notabilia* on the death of the decedent, in the State other than the one which appointed the administrator suing as plaintiff, and that an administrator of the effects of the decedent in that State has been ap-

PLEADING (*continued*).

pointed and qualified, is a good answer to the action. *Noonan* v. *Bradley*, 394.

8. Where the covenant in a submission to arbitration, after referring certain claims to the decision of arbitrators, adds the words, "as provided in articles of submission this day executed," and no such articles ever had an existence, the declaration in an action for breach of the covenant need not refer to any such articles. Proof that such articles never had an existence will answer an objection of variance. *Smith* v. *Morse*, 76.

9. Where an instrument provides for the settlement of certain claims between certain parties, and the submission of other claims between other parties, the latter parties should only be named in actions upon the covenant of submission, although the instrument be signed by all the parties named therein. *Ib.*

II. IN ADMIRALTY.

10. A slight error in alleging the *place* of collision, not fatal to a libellant's case, unless the question of exact place is material on the question of fault. *The Suffolk County*, 651.

11. The fact that in a libel for collision a contract of towage is recited in the libel, does not necessarily convert the libel into a proceeding on the contract; the real grievance alleged being a wrong suffered by the libellant in mismanagement of a boat libelled, by which his own was destroyed. *The Quickstep*, 665.

POLICE REGULATION. See *Internal Revenue.*

POSSESSION.

The possession of a wharf under color and with claim of title is sufficient to put the plaintiff, in an action on the case for obstructing him in its use, upon proof of a better title to the wharf, or, of an equal right with the defendant to its use. *Linthicum* v. *Ray*, 241.

POWERS.

Foreign to the proper duties of an executor given by will, do not pass to an administrator, unless the testator's intent that they should do so be clear. *Ingle* v. *Jones*, 486.

PRACTICE. See *Abandoned and Captured Property Act*, 3; *Appeal; Comity, Judicial; Court of Claims*, 3, 4; *Jury; Recognizance of Bail.*

I. IN THE SUPREME COURT.

1. Any person who in the State courts, on a proceeding where, under State statute, a boat has been made a party, has substantially made himself a party to the case, by asserting on the record his interest in the vessel, and conducting the defence in the highest court of the State, may prosecute a writ of error in his own name in this court under the 25th section of the Judiciary Act. *Steamboat Burns*, 237.

2. A question of jurisdiction in the court below may be considered here, though not raised by the pleadings nor suggested below. *The Maggie Hammond*, 435.

3. On a plea of *nul tiel record* in a court below, where the court, sitting

PRACTICE (*continued*).

as a jury, has found the facts setting forth the record relied on, and the same comes here as part of the record from below, this court can review a decision whether the record to which the plea of *nul tiel record* is put in, support or fail to support that plea. *Basset* v. *United States*, 38.

4. But this court will not review a finding of facts made by the court below sitting in the place of a jury. *Ib.*
5. Nor answer hypothetical questions. *Irvine* v. *Irvine*, 618; *Pelham* v. *Rose*, 103; *Michigan Bank* v. *Eldred*, 544.
6. Nor decide whether or not on the transfer of a case from a State court to a Federal court, under the 12th section of the Judiciary Act, a new declaration should be filed. *Insurance Company* v. *Weide*, 677.
7. Nor hear, except in support of the decree, a party who does not appeal. *The Quickstep*, 665.
8. Nor where a witness, when examined in chief, testifies apparently to the correctness of an abstract made from papers burnt in a conflagration, and is cross-examined upon the subject of that correctness, allow the party cross-examining, where he has not caused the cross-examination to be brought up on the bill of exception, to object, on a question, on error, as to the admissibility of the abstract, that the witness has not testified sufficiently to the correctness. *Insurance Company* v. *Weide*, 677.
9. Nor entertain an objection, made here for the first time, in an admiralty appeal in collision, of too general an allegation of injury. *The Quickstep*, 665.
10. Nor listen otherwise than with every presumption that the decrees below were right, to an appeal in admiralty on facts, where both District and Circuit Courts were of one view. *Ib.*
11. Nor in admiralty allow an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, to work injury to the libellant, on appeal, if the court can see that there was no design on his part in omitting to state them. *Ib.*
12. Nor sustain an appeal or writ taken where there has been no allowance of it. *Gleason* v. *Florida*, 779; *Pierce* v. *Cox*, 786.
13. Nor sustain an appeal or writ from the District of Columbia when the matter in controversy is less than $1000. *Pierce v. Cox*, 786.
14. Nor sustain an appeal in the name of a steamboat, though State legislation authorize such appeals. *Steamboat Burns*, 237.
15. Nor on error to a State court consider questions not called to its attention. *National Bank* v. *Commonwealth*, 353.
16. The 4th section of the act of March 3d, 1865, which establishes the mode in which parties may submit cases to the court without a jury, and the manner in which a review of the law of such cases may be had in this court, construed and explained; and a reasonably strict compliance with its terms held necessary by parties who act upon it. *Norris* v. *Jackson*, 125; and see *Flanders* v. *Tweed*, 425; *Copelin* v. *Insurance Company*, 461.

PRACTICE (*continued*).

These principles declared in *Norris* v. *Jackson*, 125:

(*a*) The special finding of the facts mentioned in that statute is not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties.

(*b*) If the finding of facts be general, only such rulings of the court, *in the progress of the trial*, can be reversed as are presented by a bill of exception.

(*c*) In such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury.

(*d*) Objections to the admission or rejection of evidence, or to such rulings or propositions of law as may be submitted to the court, must be shown by bill of exceptions.

(*e*) If the parties desire a review of the law of the case, they must ask the court to make a special finding which raises the question, or get the court to rule on the legal propositions which they present.

17. Some allowance made in a case from Louisiana, where the rules of the common law do not prevail, for an imperfect understanding of the proper practice under the act. *Flanders* v. *Tweed*, 425.

18. An appellant has a right to have his appeal dismissed notwithstanding the opposition of the other side. *Latham and Deming's Appeal*, 145.

19. Though not to have it dismissed for want of a citation when the appellee is in court represented by counsel, and makes no objection to the want of one. *Pierce* v. *Cox*, 786.

20. The rules stated which regulate rehearing of a case, and the practice proper to be pursued where a rehearing is desired. *Public Schools* v. *Walker*, 603.

21. Where an appellant becomes bankrupt after his appeal taken, his assignee in bankruptcy, upon the production of the deed of assignment of the register in bankruptcy, duly certified by the clerk of the proper court, may, on motion, be substituted as appellant. *Herndon* v. *Howard*, 664.

II. In Circuit and District Courts. See *Appeal; Jury; Practice*, 2, 5, 7, 9, 14, 16, 18; *Recognizance of Bail*.

(*a*) *In cases generally.*

22. A judgment of conviction on confession may for good cause be set aside, at the same term at which it was rendered, though the defendant had entered upon the imprisonment ordered by the sentence. *Basset* v. *United States*, 38.

23. In such case the original indictment is still pending, and a bail bond given after this, for the prisoner's appearance from day to day, is valid. *Ib.*

24. Where there is evidence before the jury—be it weak or strong—which so much as *tends* to prove the issue on the part of either side, it is error if the court refuse to submit it to the jury. *Hickman* v. *Jones*, 197; *Barney* v. *Schmeider*, 248.

25. An entry, omitted at the proper time by inadvertence, in the journal

PRACTICE (*continued*).

record of the clerk, of the issue of a writ of peremptory mandamus; and an amendment by the marshal to his return, so as to show that he had exhibited the original writ to the party served, allowed *nunc pro tunc*, as amendments of common practice. *Supervisors* v. *Durant*, 736.

26. The Federal courts will enforce, for the furtherance of justice, the same rules in the adjustment of claims against ancillary executors, that the local courts would do in favor of their own citizens. *Walker* v. *Walker*, 744.

27. Where a defendant pleads in bar inconsistent pleas, the plaintiff's remedy is not by demurrer but by motion to strike out one plea, or for the defendant to elect. *Noonan* v. *Bradley*, 394.

(*b*) *In Equity.*

28. In taking an account, the master is not limited to the date of entering the decree—he can extend it down to the time of the hearing before him. *Rubber Company* v. *Goodyear*, 788.

29. Amendment to bill allowed upon fair terms, after a cause had been heard, and a case for relief made out, though not the precise case disclosed by the bill. *Neale* v. *Neales*, 1.

30. Where a bill is dismissed for want of jurisdiction apparent on its face, the general rule is not to allow costs. *Hornthall* v. *The Collector*, 560.

31. Where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in its provisions, but, having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition, previous to the distribution, his right to share in the fund; and in the prosecution of his suit, he is entitled, upon a proper showing, to all the remedies by injunction, or order, which a court of equity usually exercises to prevent the relief sought from being defeated. *In the matters of Howard*, 175.

32. The three months allowed by the 69th of the Rules in Equity, for the taking of testimony, has reference to the taking of testimony by both parties. But the court may enlarge the time. Its action herein is hardly matter for review here. *Ingle* v. *Jones*, 486.

33. A bill of review will not be granted either where the party has been guilty of laches; or where the court is satisfied that upon the case offered to be made out, the decree ought to be the same as has been already given. *Rubber Company* v. *Goodyear*, 805.

34. Where, on a bill by several for infringement and an account, the court decree damages, a bill cannot be regarded as a cross-bill, which sets up a judgment in another suit against one of the complainants, and asks that the conjoined defendants in the principal suit discover what share of the damages they claim *respectively*, so that the defendant in that suit may set off his judgment as respects the one against whom it is. *Rubber Company* v. *Goodyear*, 807.

35. As an original bill it cannot be sustained, if it have either been filed before the decree for damages was rendered in the principal suit, or

PRACTICE (*continued*).
have been a judgment in *attachment* only, and where there was no service on the person of the defendant. *Ib.*
36. A bill which is in no wise auxiliary to an original suit, nor in continuation of that proceeding, does not present a case proper for substituted service. *Ib.*
37. Where certain heirs at law seek to set aside a sale of their ancestor's realty made under a decree of a competent court ordering, at a creditor's instance, such sale for the payment of a debt due him, they should make the creditor on whose application the sale was made a party. All the heirs also should be parties. *Hoe et al.* v. *Wilson*, 501.
38. This court will reverse and remand a case thus defective as to parties, although this deficiency have not been made a point at the bar below. *Ib.*
(*c*) *In Admiralty.*
39. Where a collision between two vessels results from the fault of both of them, a party injured may recover against both vessels, and they may be proceeded against in the same libel. *The Washington and the Gregory*, 513.
40. The damages so recovered may be apportioned by the decree equally between the two vessels; and at the same time the right be reserved to the libellant to collect the entire amount of either of them in case of the inability of the other to respond for her portion. *Ib.*

PRE-EMPTION. See *Public Lands.*
The Acts of September 4th, 1841, § 12, May 29th, 1830, and January 23d, 1832, relate to pre-emptive rights conferred upon actual settlers, and do not apply to a case where the entry has not been made under any of them. *Irvine* v. *Irvine*, 618.

PRINCIPAL AND AGENT. See *Agency; Public Law*, 3; *Rebellion*, 12.
Where an instrument, executed by an agent, shows on its face the names of the contracting parties, the agent may sign his own name first and add to it, "agent for his principal," or he may sign the name of his principal first, and add, by himself as agent. *Smith* v. *Morse*, 77.

PROVISIONAL COURTS. See *Constitutional Law*, 2.

PUBLIC LANDS. See *Pre-emption.*
1. Occupation and improvement on the public lands with a view to pre-emption, do not confer a vested right in the land so occupied. *Frisbie* v. *Whitney*, 187.
2. It does confer a preference over others in the purchase of such land by the *bonâ fide* settler, which will enable him to protect his possession against other individuals, and which the land officers are bound to respect. *Ib.*
3. This inchoate right may be protected by the courts against the claims of other persons who have not an equal or superior right, but it is not valid against the United States. *Ib.*
4. The power of Congress over the public lands, as conferred by the Constitution, can only be restrained by the courts, in cases where the land

PUBLIC LANDS (*continued*).

has ceased to be government property by reason of a right vested in some person or corporation. *Ib.*

5. Such a vested right, under the pre-emption laws, is only obtained when the purchase-money has been paid, and the receipt of the proper land officer given to the purchaser. *Ib.*
6. Until this is done, it is within the legal and constitutional competency of Congress to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler. *Ib.*

PUBLIC LAW.

1. The principle of *relation*, which as respects the rights of either government, regards a treaty as concluded from the date of its signature, does not apply to private rights under it. As affects these, it is not considered as concluded but from the exchange of ratification. *Haver* v. *Yaker*, 32.
2. Intercourse during war with an enemy is unlawful to parties standing in the relation of debtor and creditor as much as to those who do not. *United States* v. *Grossmayer*, 72.
3. Conceding that a creditor may have an agent in an enemy's country to whom his debtor there may pay a debt contracted before the war, yet the agent must be one who was appointed before the war. *Ib.*

PUBLIC MONEYS. See *Official Bond.*

1. In suits against persons accountable for such moneys, it is not necessary after introducing certified transcripts of the party's accounts, properly adjusted by the Treasury officers, to show that the defendant had notice of the adjustment, or of the balance found against him. *Watkins* v. *United States*, 759.
2. To allow the set-off a credit on the trial, it must be shown that the claim, after being properly presented by items and with vouchers to the proper accounting officers, had been refused. *Ib.*

PUBLIC POLICY. See *Public Law*, 2, 3.

QUARTERMASTER, ACTING ASSISTANT. See *War Department.*

RATIFICATION. See *Municipal Bonds.*

1. Cannot be made of an act unlawful in law and void. *United States* v. *Grossmayer*, 72.
2. A suit on a covenant contained in a submission to arbitrators, is a ratification of the act of a person who has undertaken as agent to make the submission in behalf of the person bringing the suit. *Smith* v. *Morse*, 76.
3. Ratification of an infant's deed will not be made by mere acquiescence, but any positive act showing intent to ratify will ratify it. The principle applied. *Irvine* v. *Irvine*, 618.

REBELLION, THE. See *Abandoned and Captured Property Act; Evidence*, 4; *Seizure.*

1. Is to be regarded, so far as respects rights under the above-mentioned act, as having been "suppressed," August 20th, 1866. *United States* v. *Anderson*, 56.

REBELLION, THE (*continued*).

2. The whole Confederate power must be regarded by the Federal courts as a usurpation of unlawful authority, and its Congress as incapable of passing any valid laws; whatever weight may be given under some circumstances to its acts of force, on the ground of irresistible power, or to the legislation of the *States* in domestic matters; as to which the court decides nothing in the case. *United States* v. *Keehler*, 83.
3. A prosecution in a so-called "court of the Confederate States of America," for treason, in aiding the troops of the United States in the prosecution of a military expedition against the said Confederate States, is a nullity. *Hickman* v. *Jones et al.*, 197.
4. A traitor against the United States may recover damages against other traitors, for having maliciously arrested and imprisoned him before a so-called court of the Confederate States, for being a traitor to these; the alleged treason having consisted in his giving aid to the troops of the United States while engaged in suppressing the rebellion. *Ib.*
5. A public debtor of the United States cannot defend against a suit on his official bond by proving that he paid the money due the United States to one of its creditors, under an order of the Confederate authorities, where he shows no force or physical coercion which compelled obedience to such order. *United States* v. *Keehler*, 83.
6. The doctrine declared in *Hanger* v. *Abbott* (6 Wallace, 532), that statutes of limitations do not run during the rebellion against a party residing out of the rebellious States, so as to preclude his remedy for a debt against a person residing in one of them, held applicable to the Judiciary Acts of 1789 and 1803, limiting the right of appeal from the inferior Federal courts to this court, to five years from the time when the decree complained of was rendered. *The Protector*, 687.
7. The first clause of the 4th section of the act of June 7th, 1862, "for the collection of direct taxes," &c. (which act must be construed with the act of August 5th, 1861, "to provide increased revenue, &c.") merely declares the ground of forfeiture of the party's title to land on which taxes are not paid, namely non-payment of the taxes, while the second clause works the actual investment of the title in the United States, through a public sale. *Bennett* v. *Hunter*, 326.
8. Under the act of 1862, payment prior to the sale is sufficient; and it may have been made through any person willing to act on behalf of the owner, and whose act is not disavowed by him. *Ib.*
9. The act of March 23d, 1863, relating to *habeas corpus*, does not apply to suits for matters after the rebellion nor to ejectments. *Bigelow* v. *Forrest*, 339.
10. Under the act of July 17th, 1862 (which is to be construed with the joint resolution of the same date), nothing beyond a life estate could be sold. *Ib.*
11. A permit by a proper treasury agent, to purchase cotton, in a certain region, raised a *prima facie* presumption of the region being within the occupation of the military lines of the United States. *Butler* v. *Maples*, 766.
12. Such a permit authorized purchases through an agent. *Ib.*

REBELLION, THE (*continued*).

13. The *seizure* of the property of which a forfeiture is sought by proceedings had under the act of Congress of July 17th, 1862, "to suppress insurrection," &c., is essential to give jurisdiction to the court to decree a forfeiture. *Pelham* v. *Rose*, 103.
14. Executing as surety official bonds of rebel quartermasters or commissaries, was giving aid and comfort to. *United States* v. *Padelford*, 531.

RECOGNIZANCE OF BAIL.

1. Conditioned to appear at the next regular term and at *any subsequent term* thereafter, means only at any subsequent term which may follow in regular succession in the course of business of the court. *Reese* v. *United States*, 13.
2. A stipulation of record between the government and the prisoner that a trial shall be postponed until the determination of cases pending in another court, is inconsistent with a recognizance thus conditioned, and releases the principal from obligation to appear at any such subsequent term; and it discharges the sureties also. *Ib.*
3. *A fortiori*, the sureties are discharged when it is stipulated that the prisoner may sojourn in a foreign country during the term of delay. *Ib.*

REHEARING.

Rules which regulate, in the Supreme Court, stated. *Public Schools* v. *Walker*, 603.

REPAIRS

To ships. See *Admiralty*, 1–3; *Lien*, 1, 2.

SCHOOL LANDS. See *Missouri*.

SEIZURE. See *False Return*.

As applied to a promissory note—under a statute which directs that the property of rebels be seized, the term means the physical taking into custody. *Pelham* v. *Rose*, 103.

SET-OFF. See *Official Bond; Rebellion*, 5.

SHIPS AND SHIPPING. See *Admiralty; Average; Commercial Law; Jettison; Master; Stranding.*

SOVEREIGN. See *Evidence*, 2.

STATUTE OF FRAUDS. See *Equity*, 1, 2.

STATUTE OF LIMITATIONS. See *Coupons*, 2; *Rebellion*, 6.

STATUTES OF THE UNITED STATES.

The following among others referred to, commented on, or construed.

September 24, 1789. See *Jurisdiction; Practice*, 1–15; *Rebellion*, 6.
March 3, 1803. See *Rebellion*.
June 12, 1812. See *Missouri*.
May 26, 1824. See *Missouri*.
May 29, 1830. See *Pre-emption*.
July 27, 1831. See *Missouri*.
January 23, 1832. See *Pre-emption*.
March 2, 1833. See *Jurisdiction*.

STATUTES OF THE UNITED STATES (*continued*).
July 4, 1836. See *Patents.*
September 4, 1841. See *Pre-emption.*
March 3, 1851. See *California.*
June 10, 1852. See *Missouri.*
February 24, 1855. See *Appeal.*
May 15, 1856. See *Iowa.*
March 2, 1861. See *Patent.*
July 22, 1861. See *Bounty.*
August 5, 1861. See *Rebellion*, 7.
August 6, 1861. See *Bounty.*
June 7, 1862. See *Rebellion*, 7.
July 17, 1862. See *Rebellion*, 10.
February 25, 1863. See *National Banks.*
March 3, 1863, Section 5. See *Appeal; Constitutional Law.*
March 12, 1863. See *Appeal; Abandoned and Captured Property Act.*
March 23, 1863. See *Rebellion*, 9.
April 29, 1864. See *Admiralty.*
June 3, 1864. See *National Banks.*
June 30, 1864. See *Jurisdiction*, 8.
July 1, 1864. See *California*, 9.
July 2, 1864. See *Evidence*, 2.
July 4, 1864. See *Court of Claims*, 1.
March 3, 1865. See *Army Officers; Evidence*, 2; *Practice*, 16.
July 13, 1866. See *Army Officers; Jurisdiction*, 8.
July 23, 1866, Section 7. See *California*, 1.
March 2, 1867. See *Internal Revenue; Practice*, 21.
June 25, 1868. See *Abandoned and Captured Property Act*, 2; *Court of Claims*, 4.

STRANDING. See *Average.*
1. Of a vessel when "voluntary." *Star of Hope*, 203.
2. If accidental, the captain must take all possible care of the cargo. *The Portsmouth*, 682.

SUBROGATION.
Principles of to be applied in favor of a husband receiving on a divorce from his wife, a decree for one-third of her rents from her patrimonial realty, yet subject to her mother's dower, *as the said rents should become due, for the education and support of their children;* she having previously to the divorce pledged her said rents, subject to the dower right, to creditors for advances, and becoming subsequently entitled to the dower third by her mother's death. *Cheever* v. *Wilson*, 108.

SWAMP LANDS. See *Iowa.*
1. The act of June 10th, 1850, concerning swamp and overflowed lands, confirmed a present vested right to such lands, though the subsequent identification of them was a duty imposed upon the Secretary of the Interior. *Railroad Company* v. *Smith*, 95.
2. They were excepted from the subsequent railroad grants to Iowa and Missouri. *Ib.*

TAXATION. See *Constitutional Law*, 7.

TAX SALES. See *Rebellion*, 7, 8.

Of land owned by United States void. *McGoon* v. *Scales*, 23.

THREAT OF SUIT.

If a party who has entered into possession of land as a tenant under another is threatened with suit upon a paramount title, the threat, under such circumstances, is equivalent to eviction. He may, thereupon, submit in good faith, and attorn to the party holding a valid title, to avoid litigation. In such case it is incumbent upon him, and those who have profited by his submission, to show the existence and superiority of the title in question. *Merryman* v. *Bourne*, 592.

TITLE PARAMOUNT. See *Threat of Suit.*

TOWING BOATS.

Bound to make up the tow rightly and strong. *The Quickstep*, 665.

TRAITOR. See *Rebellion*, 4.

TREATY. See *Public Law*, 1.

TRUSTEE. See *Husband and Wife; Wisconsin.*

Who was bound to invest, and did not, deprived of all commissions, and charged with interest compounded annually. *Walker* v. *Walker*, 44.

TUG. See *Towing Boats.*

VARIANCE. See *Pleading*, 8.

VIRGINIA.

The act of the Virginia legislature of February 27th, 1867, touching appeals to the Supreme Court of Appeals of the State, not inconsistent with the Virginia constitution of 1864. *Downham* v. *Alexandria*, 659.

VOLUNTARY PAYMENT. See *Rebellion*, 5.

WAIVER.

Of contract. See *Contract*, 1.

WAR DEPARTMENT.

A lease of premises by an acting assistant quartermaster for the use of the quartermaster's department, does not bind the government until approved by the quartermaster-general, even though the action of such assistant have been taken by direction of the military commander of the station. *Filor* v. *United States*, 45.

WISCONSIN.

1. The statute of Wisconsin of 1850 abolishes all passive trusts which require no duty to be performed by the trustee, and vests the title in the *cestui que trust*. *McGoon* v. *Scales*, 23.
2. Statutes of, relative to the late Bank of Illinois construed. *Ib.*