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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERMS, 1869 AND 1870.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. X.

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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.

ATTORNEYS-GENERAL.

HON. EBENEZER ROCKWOOD HOAR.
HON. AMOS T. AKERMAN,
Appointed June 23, 1870.

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

MEMORANDA.

The Honorable Robert Cooper Grier, late an Associate Justice of this Court, who, on account of increasing physical infirmities, retired from this Bench on the 31st of January, 1870, departed this life at his residence in the city of Philadelphia, on Sunday the 25th of the September following.

The Chief Justice did not participate in any of the judgments reported in this volume after page 141. Nor did Mr. Justice Nelson participate in those reported between pages 141 and 410. Both were detained by indisposition from their seats when the cases were heard or adjudged.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERMS, 1869, 1870.

The Blackwall.

1 A libel for salvage may be filed in the name of the master and owners of the salving vessel, although the master may make no claim in his own behalf, but, contrariwise, may disclaim.

2. A tug towing, under the direction of the fire department of a city, fire engines commonly used on land, from a wharf, into a harbor where a vessel is on fire, and laying alongside of the burning vessel while the engines throw water upon her, is entitled to salvage, the fire being successfully extinguished.

3. The owners of the tug will not be deprived of salvage because the representatives of the fire department have not made a claim as co-salvors.

4. A vessel owned by a corporation may be entitled to salvage, the vessel being otherwise a salvor. *The Camanche* (8 Wallace, 476) affirmed on this point.

5. One-twentieth part of the value of the property saved allowed to a tug carrying fire engines, and laying beside a burning vessel while the engines, under the management of the fire department of the town, worked them and extinguished the fire. This reversed a decree which had allowed a tenth for her salvage service; the fire department having presented no claim; no allowance having been made to *it;* and the tenth allowed having apparently been an allowance for the whole salvage service.

6. Non-prosecution of their claim by one set of salvors, enures to the benefit of the owners of the vessel, and not to that of other salvors who do prosecute *their* claim.

Appeal from the Circuit Court of the United States for California; the case as it appeared from the opinion of the District Court, from which it had been taken to the court below was this:

Statement of the case.

About 4 o'clock on the morning of the 24th of August, 1867, the British ship Blackwall, then at anchor in the harbor of San Francisco, was discovered to be on fire. Shortly afterwards the alarm was communicated to the shore, and the fire department of the city called out. As soon as the cause of the alarm was ascertained, the chief engineer of the fire department, with an officer of the harbor police, proceeded to the steam-tug Goliah, then lying at one of the city's wharves, and belonging to an incorporated towing company of San Francisco, and having aroused the person in charge, requested him to "fire up" without delay, in order that the engines might be conveyed on the tug to the burning vessel. This, after a few moments' hesitation, arising it was plain from reluctance to act without orders, he proceeded to do. Messengers were despatched to the captain and engineer of the tug, who were asleep at their homes on shore, and every effort made to get steam on the tug as quickly as possible. The captain and engineer were aroused, and at once repaired to the wharf. It being found impracticable for the tug to go into the slip where the fire engines lay, two of the latter were brought around to the wharf where the tug was, and taken across the deck of a steamboat which lay between the wharf and the tug, and so on to the tug with promptitude and skill. About 6 o'clock the tug, with two engines on board, together with the firemen, &c., attached to them, moved from the wharf, and in a few minutes were alongside the ship. The fire had by this time made considerable progress. The house on deck between the fore and mizzen masts was on fire, and the flames were mounting nearly half way to the tops. The ship was also burning between decks, where the fire first originated. The officers and crew, though assisted by a party from the United States ship Lawrence, *having found all attempts to subdue the flames abortive, had desisted from further efforts, and had a few moments before the Goliah arrived, left the vessel with their effects in small boats.* Without speedy assistance the total destruction of the ship and cargo was inevitable. The measures of the firemen and officers of the tug were taken with great

skill and energy. The hose of the engines was charged, as the tug approached the vessel, and as soon as she was near enough, four streams were directed upon her. The tug, without hesitation or delay, was made fast alongside the Blackwall. The firemen almost instantly mounted her rails, went thence to her forecastle, and from thence to her deck, sweeping the latter with four powerful streams, by which the fire was speedily controlled. They then descended to her between decks, and in a little more than half an hour the flames were entirely extinguished. Her anchor was then weighed by the advice of the captain of the tug, and the vessel was towed to certain flats near one of the city's wharves. The tug was then dismissed, and the engines were taken to the shore and landed.

As to the degree of danger incurred by the tug there was some conflict of testimony. That she was promptly and boldly laid alongside the burning vessel was undisputed. That she caught fire once or twice was proved, although this fire was instantly extinguished, and with the powerful appliances she had on board the danger from this cause was perhaps not great.

The chief risk incurred by her was from the falling of the masts or spars of the vessel. An accident of this kind, had it occurred, might have proved disastrous to the tug, and perhaps to many on board. The danger was not supposed to arise from the burning of the shrouds, for they were of wire, but from the fact of the mast seeming consumed by the fire, which had been burning between decks for several hours. As a matter of fact, it was found on subsequent examination that the mast was but little burnt, and was in no danger of falling. And the chief engineer of the fire department testified that he became convinced very soon after getting on board, that all fears of the masts falling were groundless. These fears were, however, entertained and expressed, not only by the officers of the tug, but by the pilot, and by the mate of the ship, so much so that axes were got in readiness to cut away the shrouds on the portside of the vessel, in order that the mast might fall to the other side.

It is also to be observed that the tug encountered the risk of the possible existence of explosive substances on board the vessel, and also, though this risk was slight, that of her own machinery or that of the fire engines becoming unserviceable, while she lay alongside the vessel.

The tug, however, was not the sole salvor. Without her assistance indeed the fire engines would have been powerless to save the ship, but without these engines on the other hand, the tug's aid would have been just as ineffectual.

In this state of facts the towing corporation, which was owner of the tug, *and* one Clark, her master, filed a libel against the ship and cargo, in the District Court at San Francisco, for salvage. The libel alleged that the ship was on fire; that the cargo as well as the ship was in great danger, and that both would have been destroyed had it not been for the exertions of the steamtug, her master and crew; that the master and crew went with the steamtug to the assistance of the ship, and that they succeeded, after great trouble and great risk to the tug, in quelling and subduing the flames, and that they then towed the ship to a place of safety. *The fire department was no party to the libel:* and in his testimony the master stated that his name was used in the libel only for the company owning the tug, and that he himself claimed no interest. The value of the ship and cargo, so far as saved, was $100,000; the value of the tug about $50,000. The District Court decreed "that libellants do have and recover of the claimants $10,000 with their costs;" and this decree having been affirmed in the Circuit Court, the owners of the Blackwall now appealed to this court.

Mr. Goodrich for the appellant:

1. Clark having no interest, and having in fact disclaimed, cannot maintain suit for others, either in his own name or jointly with those in whom the interest may be. There is in fact a misjoinder; and the libel should be dismissed. The general rule of law and equity about parties must apply to admiralty cases.

2. The owners of the tug in their libel, aver that the boat,

its master and crew performed the entire salvage service. They must prove this, or the libel, not having been amended or reformed, should on this ground also be dismissed. But they cannot prove it. The fire department did much more than the tug. Even if the owners of the tug were co-salvors, they do not aver themselves to have been so, and therefore, they cannot recover as such. The issue presented by the pleading is an entirety of service rendered by the libellants, when in fact only a slight proportion thereof was rendered by the steamtug; the value of this proportion is not distinctly in issue, and there is nothing before the court by which it can be apportioned.*

3. The service by which the fire was extinguished was performed by the fire department of San Francisco, in the discharge of its public official duties. The vessel was in a position to be under the surveillance of the harbor police, by one of which the fire was discovered. The engineer of the fire department seized upon the tug (no resistance or objection being made), and used the same for the transportation of his engines and men, with and by which the service and extinguishment of the fire was accomplished. No compensation by way of salvage could be made to the fire department if it made a claim for it. But it made none originally; and it has never asked, nor does it now ask for a proportion of the money in the registry. The reason for this is obvious. It is that all persons who are under any legal obligation, express or implied, to render assistance, are not entitled to salvage.† The fire department of San Francisco is, of course, paid by the city.

4. The decree of the district judge, affirmed by the Circuit Court, is joint in favor of the master and owners of the tug, and cannot be sustained, unless both make claim and are entitled to recover. The master disclaims. This objection is,

* Malcomson *v.* Clayton, 13 Moore, Privy Council, 198, 206; Zugasti *v.* Lamer, 12 Id. 331, 338; Orne *v.* Townsend, 4 Mason, 541; The Sarah Ann, 2 Sumner, 206; The Towan, 2 W. Robinson, 259; The Neptune, 1 Id. 302; The Princess Alice, 3 Id. 142.

† Conkling, Admiralty Jurisdiction, 274.

indeed, included in the first one. So far as to preliminary objections.

But others remain.

A party not actually occupied in effecting a salvage service, is not entitled to share in a salvage remuneration. There is indeed an exception to this rule in favor of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed.* But the libellants were incorporated for the purpose of owning and using boats for a towage service, and do not come within the terms or reasons of the exception from the general rule. The company is entitled to a fair compensation, a *quantum meruit* for its work and labor done. But clearly the sum of ten thousand dollars exceeds an equitable compensation for the service performed by the tug. Indeed the sum has not been allowed as such; for—

It is evident that the sum decreed as compensation for salvage includes the entire service, which was rendered by the fire department, as well as the transportation service of the tug.

Messrs. H. A. and J. S. Wise, contra:

1. Clark asserts his claim as a master and salvor. Whether his claim, which he asserts as a salvor, is to enure eventually to his benefit or not, is unimportant. It is asserted in the libel, and the decrees support it, they being joint for company and Clark. Opposite counsel need not exercise themselves as to the proportion due respectively to company as owners, and Clark as master. The decree is sufficiently certain to be good, as against *them*. The counsel will settle the respective proportions of company and Clark satisfactorily to the parties concerned, or they can have the proportions ascertained by the court. This disposes of the objection both to the form of the libel and to that of the decree.

* The Vine, 2 Haggard, 1, 2; The Charlotte, 3 W. Robinson, 72.

Argument for the vessel salved.

2. The allegation of the libel as to what the steamtug did is in form; and is essentially true. The libellants were not bound to allege all the subsidiary, collateral, and instrumental aids that assisted to produce the fortunate result.

3. The service by which the fire was extinguished, was not performed by the fire department alone. How could land-engines have got to the ship, if the tug had not taken them there? How could they have been used with effect if they had not remained on the tug? The tug did a great share of what was done. Indeed no towboat ever performed a more novel, skilful, and efficient feat than did this towboat.

4. The only question then is, was the tug a salvor? A salvor is one who, without any particular relation to a vessel in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the vessel.* Now the tug performed this exact kind of service. She was under no pre-existing contract, or in any particular relation to the vessel which made it her duty to risk her own safety in saving her. The engineer of the fire department had no right to seize her, nor did he seize her. Her service was voluntary and cheerful. It was bold also; and it was successful. Whether or not the fire department rendered any salvage service or not we need not inquire, for *they* make no claim.

5. The objection that the vessel was owned by a corporation, and that its owners rendered no personal service, is the same objection that was made by Mr. Ward at the bar, in *The Camanche*, conclusively answered by Mr. Casserly, opposing counsel, and overruled by this court.

6. *As to the amount awarded.* Plainly the decree is not meant to enure in any way to the benefit of the fire department, which makes no claim, and *never has made* any, for the reason (among others) stated on the other side, that it is paid by the city.

Then was the amount excessive for the tug alone? The

* The Wave, 2 Paine, 131.

ship was *derelict.* That is an immense feature in every case. The proportion for derelicts is from one-third to one-half.*

In *The Baltimore,*† £800 out of £1900 was awarded. This would give *us* upwards of $40,000. In *The Aid,*‡ a tenth was allowed to boats. In *The Albion* § nearly a fourth, and costs. A fifth in *The Branken Moor,*‖ a case in which the court said that the underwriters would not have underwritten for 50 per cent. In our case they would not have underwritten for 75. See also *The Medora,*¶ which was a case of mere towage, where £600 was allowed. In the case of a derelict where a claimant appears, generally from a third to a half is allowed. The modern cases give about a third.** But in the case of *Jonge Bastiaan,*†† two-thirds were allowed. See also *The Isabella,*‡‡ which is a strong case; and *The Thetis,*§§ where expenses, £29,000 out of £157,000 were allowed. These cases make allowances far in excess of the allowance made below, and that too, where the destruction of the property was not so certain.

In addition, this court declared in *The Camanche,*‖‖ that it would not reverse a decree in salvage on the matter of amount, "unless for clear mistake or *gross* over-allowance."

Mr. Justice CLIFFORD delivered the opinion of the court.

Salvage is claimed by the libellants, as owners of the steamtug Goliah, for services renderd by the steamtug, her master and crew, on the twenty-fourth of August, 1867, in saving the ship Blackwall and her cargo, then lying at anchor in the harbor of San Francisco. They allege that the ship was on fire; that the cargo as well as the ship was in great danger, and that both would have been destroyed had it not been for the exertions of the steamtug, her master and crew; that the master and crew went with the steamtug to the

* Rowe and others *v.* Brig ——, 1 Mason, 377; Hindry *v.* Priscilla, Bee, 1; L'Esperance, 1 Dodson, 46.

† 2 Dodson, 136. ‡ 1 Haggard, 84. § 3 Id. 255. ‖ Id. 373.

¶ 2 W. Robinson, 69. ** The Thetis, 2 Knapp, 410.

†† 5 Robinson, 287. ‡‡ 2 Robinson, 43.

§§ 3 Haggard, 14; 2 Knapp, 408. ‖‖ 8 Wallace, 478.

Restatement of case in the opinion.

assistance of the ship, and that they succeeded, after great trouble and great risk to the tug, in quelling and subduing the flames, and that they then towed the ship to a place of safety.

Information that the ship was on fire was communicated to the master of the steamtug by one of the deck-hands of the tug, and he went immediately to the slip where she was lying, in order to give directions to the men on board to kindle up the fires and put on steam; but he found, on arriving there, that one of the harbor police had been there before him, and that he had made a similar request, and that the firemen of the tug had started the fires for the purpose of putting on steam.

Two persons were sent to the ship, which was lying at anchor in the harbor, some seven or eight hundred yards from the wharves, to see if there was any chance to extinguish the flames, and they reported that the ship might be saved. She was an English ship of twelve hundred tons burden, and she was ready to sail for her port of destination with a cargo consisting of thirty-eight thousand five hundred and one sacks of wheat, valued at sixty-thousand dollars, and she was lying at anchor where the water was eight or ten fathoms in depth. They discovered the fire at four o'clock in the morning, and at six o'clock, or a quarter past that hour, they proceeded to the ship in the steamtug, having previously taken on board two steam fire-engines, each weighing five tons, with the engineer and several firemen belonging to each engine, and the chief engineer of the fire department, making twenty persons, including the master and crew of the steamtug. Both engines were well supplied with hose, and they had on board a considerable supply of fresh water. When the steamtug reached the ship those on board had become discouraged, and there were ten or twelve boats around the ship taking off the crew, but the boats were utterly unable to do anything towards extinguishing the fire.

Commanded, as all on board the steamtug were, by her master, their first act, after running alongside, was to fasten a stern-line to the main-chains of the ship, so as to lie across

the tide on the port side of the ship. At that time the fire seemed to be between decks, but the houses of the ship on deck were also on fire. Great apprehension was felt lest the foremast should fall, as it was on fire between decks, and the flames had extended to the deck and twenty feet up the mast. Her bulwarks were also on fire, and the master of the tug deemed it necessary to cut away the port-rigging attached to that mast to prevent it from falling across the steamtug. They put the engines in operation promptly, putting four streams of water on to the ship, and by those means extinguished the fire in an hour, the firemen working the engines under the command of their respective engineers. Some of the persons present advised the master of the steamtug to unshackle and slip the anchor; but he insisted that it could be saved, and it was hoisted on board the ship by the windlass.

Promptness and efficiency characterized the conduct of all engaged in performing the service throughout the transaction, and the steamtug, as soon as the fire was subdued and extinguished, took the ship in tow and proceeded with her to the adjacent flats, and left her there in safety in charge of her master and crew.

I. Certain preliminary objections are made by the appellants to the maintenance of the suit, which will be first considered before proceeding to examine the merits. Those objections are as follows: (1.) That the master, having no interest in the claim, is improperly joined in the suit. (2.) That the libellants have no just claim to compensation, as the salvage service was performed by the members of the fire department. (3.) That the service having been performed by the members of the fire department, in pursuance of a public duty, they are not entitled to any compensation as salvage. (4.) That the decree, inasmuch as it is joint, in favor of the master as well as the owners of the steamtug, is erroneous, because the master makes no claim to recover any compensation for his services.

1. Salvage suits are frequently promoted by the master

alone, in behalf of himself and the owners and crew, or in behalf of the owners and crew, or the owners alone, without making any claim in his own behalf, and the practice has never led to any practical difficulty, as the whole subject, in case of controversy, is within the control of the court. Much examination was given to the question as to proper parties, in a salvage suit decided at the last term, in a case where the owners of the steamer rendering the service were an incorporated company, and by reference to the authorities cited in the opinion of the court in that case it will be found that the suit is frequently promoted in the name of the master, or of the company and master, as in this case.*

Many other cases of like import might be referred to, but it must suffice to say that the court is of the opinion that the suit is well brought.†

2. Service undoubtedly was performed by the members of the fire department; but it is a mistake to suppose that service was not also performed by the steamtug, as it is clear that without the aid of the steamtug and the services of her master and crew the members of the fire company would never have been able to reach the ship with their engines and necessary apparatus, or to have subdued the flames and extinguished the fire. Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward.

Persons assisting to extinguish a fire on board a ship, or assisting to tow a ship from a dock where she is in imminent danger of catching fire, are as much entitled to salvage compensation as persons who render assistance to prevent a ship from being wrecked, or in securing a wreck, or protecting the cargo of a stranded vessel.‡

* The Camanche, 8 Wallace, 470.

† The Commander-in-Chief, 1 Wallace, 51; Houseman *v.* The Schooner North Carolina, 15 Peters, 49; The Propeller Commerce, 1 Black, 574; McKinlay *v.* Morrish, 21 Howard, 343; 2 Parsons on Shipping, 370.

‡ The Rosalie, 1 Spink, 188; Eastern Monarch, Lushington, 81; The Tees, Ib. 505; Williams & Bruce, Admiralty Practice, 92.

Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture. Success is essential to the claim; as if the property is not saved, or if it perish, or in case of capture if it is not retaken, no compensation can be allowed. More than one set of salvors, however, may contribute to the result, and in such cases all who engaged in the enterprise and materially contributed to the saving of the property, are entitled to share in the reward which the law allows for such meritorious service, and in proportion to the nature, duration, risk, and value of the service rendered.*

Salvors are not deprived of a remedy because another set of salvors neglect or refuse to join in the suit, nor will such neglect or refusal benefit the libellants by giving them any claim to a larger compensation, as the non-prosecution by one set of salvors enures, not to the libellants prosecuting the claim, but to the owners of the property saved.†

Cases may also be found where co-salvors who neglected to appear and become parties to the suit until the decree was pronounced, were allowed to petition the court for such compensation out of the fund in the registry of the court, and where their claim received a favorable adjudication.‡

3. Important service unquestionably was performed by the members of the fire department, but as they are not parties to this suit it is not necessary to determine whether they would, under the circumstances of this case, be entitled to a salvage reward. Pilots, under some circumstances, may become salvors, and cases may be imagined where firemen perhaps might come within the same rule, but the question not being before the court no opinion is expressed upon the subject.

* Norris *v.* Island City, 1 Clifford, 220; The Bartley, Swabey, 198; Pride of Canada, Browning & Lushington, 209; 2 Parsons on Shipping, 279.

† Ship Charles Newberry, 329; 2 Parsons on Shipping, 301.

‡ Henry Ewbank, 1 Sumner, 400; Roberts on Admiralty, 85; The Camanche, 8 Wallace, 476.

4. Comment upon the form of the decree is unnecessary, as it has already been determined that the joinder of the master with the owners of the ship was not error for which the decree should be reversed, as the distribution of the fund is within the control of the court. Exceptions of the kind, if the claimant intends to rely on the same, should be made in the District Court, where the pleadings may be amended.*

5. Objection is also made that the owners of a vessel cannot promote a salvage suit unless they participate in the salvage service; or if they may promote such a suit, that they cannot participate in the reward decreed for the salvage service except for the risk and damage to which their property was exposed in rendering the salvage service. Such an objection was made in the case of *The Camanche*, before cited, but the court overruled the objection, and that ruling is adopted and applied in this case.

Beyond doubt remuneration for salvage service is awarded to the owners of vessels on account of the danger to which the service exposes their property, and the risk which they run of loss in suffering their vessels to engage in such perilous undertakings, but it is not admitted that the amount of the allowance must be reduced on that ground. Corporations, as the owners of vessels, whether sail-vessels or steamers, may promote a salvage suit, and it makes no difference in that respect whether they were present or absent, provided it appears that the vessel employed was well manned and equipped for the service.†

II. Nothing remains to be considered but the question whether the amount awarded in the court below to the libellants was correct. Steam vessels are always considered as entitled to a liberal reward, not only because the service is usually rendered by a costly instrumentality, but because the service is in general rendered with greater promptitude and is of a more effectual character. Courts of admiralty usually consider the following circumstances as the main ingredients

* The Camanche, 8 Wallace, 476.

† Island City, 1 Black, 121; S. C., 1 Clifford, 210, 219, 221; Roberts's Admiralty, 104.

in determining the amount of the reward to be decreed for a salvage service: (1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit*, or as a remuneration PRO OPERE ET LABORE, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.*

Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation.†

Minute description of the circumstances attending the service rendered by the libellants is given in the opinion of the district judge, which is exhibited in full in the record, and we refer to that as a satisfactory statement of all the material facts in the case, and we concur with him in the conclusion, that without speedy assistance the total destruction of the ship and cargo was inevitable; that the measures for relief taken by the officers of the steamtug, and by the firemen, were characterized by great skill and energy, but the repetition of the details of those measures beyond what has already been stated, is unnecessary. Suffice it to say the flames were extinguished in an hour or less, and the property to the value of one hundred thousand dollars, including vessel and cargo, was saved. Success attended their efforts, and it is evident that the services were in a high de-

* Williams & Bruce, Admiralty Practice, 116; 2 Parsons on Shipping, 292.

† Island City, 1 Clifford, 228.

gree meritorious, as a total loss of the ship and cargo must have been the consequence of any considerable additional delay. Those who embarked in the enterprise incurred considerable danger from the fire, in laying alongside of the burning vessel, and also from the risk that the mast would fall in consequence of the fire between decks. Dangers of the kind were apparent, and there were others apprehended which proved not to be real.

Viewed in the light of all the circumstances, as they are exhibited in the record, our conclusion is that the amount allowed is no more than a just salvage compensation for the entire service performed by the firemen and the steamtug, her officers and crew, but it must be remembered that the libellants, to wit, the steamtug, her officers and crew, were not the sole salvors, and it is clear that the sum decreed is for the whole service. Whether the fire department might or might not have been joined in the libel is not a question in this case. They were not made parties to the libel, and consequently their claim, if any, was not before the court, and the decree must be reversed on that ground.

Our conclusion is that a moiety of the amount allowed as salvage belongs to the libellants, and we express no opinion whether the other moiety may or may not be claimed by the fire department; but if not, then it enures to the ship-owners.

DECREE REVERSED, and the cause REMANDED, with directions to enter a decree for the libellants in the sum of five thousand dollars, with costs, in the District and Circuit Courts, and with interest from the date of the former decree.

THE DAVIS.

1. Personal property of the United States on board of a vessel, for transportation from one point to another, is liable to a lien for salvage services rendered in saving the property.
2. Such lien cannot be enforced by the courts by a suit against the United States

Statement of the case.

3. Nor by a proceeding *in rem* when the possession of the property can only be had by taking it out of the actual possession of the officers or agents of the government charged therewith.
4. It may be enforced by a proceeding *in rem* where the process of the court can be enforced without disturbing the possession of the government, which, being thus compelled to appear in the court to assert its claim, must discharge the lien before the property will be delivered to it.

APPEAL from the Circuit Court for the Southern District of New York, the case being thus:

In 1865, Simeon Draper, treasury agent of the United States, shipped from Savannah a quantity of cotton on the schooner Davis, of which one Kemplen was master, to be carried and delivered to him, the said cotton agent of the United States, or his assigns, in New York. For this, the master gave the usual bills of lading, and was to run freight at the rate of fifteen cents a ton per day. On the voyage, the vessel met with a disaster, and she and her cargo were saved from total loss by the meritorious service of one Douglas and others. The vessel was carried by Douglas and the others, her salvors, to a place of safety, and left to find her way into the port of New York. Immediately on her arrival, and before any of the cotton was delivered to the agent, Douglas libelled the vessel and cargo, and a writ being issued, the marshal took possession of them under it. The United States appeared by attorney as claimant of the cotton, and interposed the defence that it was not liable to salvage under the circumstances.

The District Court admitted that the services were salvage services, and fixing their worth at a certain sum, entered a decree against the vessel for its proportion of the same; but "inasmuch as the cotton saved was in possession of and claimed by the United States, as the United States intervened, claiming the said cotton, and setting up that no lien existed, and that no attachment could be made against it in possession of the United States," dismissed the libel as to the cotton. The Circuit Court reversed the decree, so far as it relieved the cotton, affirming it in other respects.

From this decree of the Circuit Court the United States appealed, and two questions were raised by the record:

1st. Whether personal property of the United States, on board a vessel for transportation from one point to another, was subject to a lien for salvage services rendered in saving the property.

2d. Under what circumstances, if any, could the lien be enforced, if any lien existed.

Mr. Hoar, Attorney-General, and Mr. W. A. Field, Assistant Attorney-General, for the United States:

In *The Siren*,* this court, after saying that it is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent; that this doctrine is equally applicable to the supreme authority of the United States; that, therefore, they cannot be subjected to legal proceedings at law or in equity without their consent, and that whoever institutes such proceedings must bring his case within the authority of some act of Congress, says:

"The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property."

The case of *The Siren* was decided in accordance with the doctrine, that,

"Although direct suits cannot be maintained against the United States, or against their property, yet when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-off, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled."

The United States, in answer to the libel, here excepted to the jurisdiction of the District Court over the cargo of cotton, because it was the property of the United States, and could not be made subject to process in that court, nor

* 7 Wallace, 154.

to the compulsory exaction of salvage therefrom, by the process or decree of that court, and that exception and claim in this suit the United States have never abandoned.

The cases on this question are all collected in the opinion of the Supreme Court of Massachusetts, in *Briggs et al.* v. *Light Boats*,* and they show by a decisive weight of authority that, in the absence of any statute permitting it, the property of the United States is not liable to judicial process *in rem*.

Messrs. Donohue, Beebe, Cooke, and Flagg, contra.

Mr. Justice MILLER delivered the opinion of the court.

Two questions are raised by the record in this case, both of which are of importance.

The first is whether personal property of the United States on board a vessel for transportation from one point to another, is subject to a lien for salvage services rendered in saving the property.

The second is, under what circumstances, if any, can the lien be enforced, if one exists.

Of the first proposition there does not seem to be any reasonable doubt, upon a view of the authorities. *Brown* v. *Stapyleton*,† *The Marquis of Huntley*,‡ *The Lord Nelson*,§ *The United States* v. *Wilder*,‖ *The Siren*,¶ are all cases in which maritime liens are recognized and enforced against the property of the supreme government, the liens having their inception while the ownership of the property was in the government. The case of *Briggs* v. *The Light Boats*,** is a case in which a lien is recognized on property of the United States, created before the title and possession passed to the United States, but in which it was finally held, by the Supreme Court of Massachusetts, that it could not be enforced because the United States could not be sued in a personal action, and their possession could not be disturbed by a suit *in*

* 11 Allen, 158. † 4 Bingham, 119. ‡ 3 Haggard, 246.
§ Edward's Admiralty, 79. ‖ 3 Sumner, 308. ¶ 7 Wallace, 152.
** 7 Allen, 287 · S. C., 11 Id. 157.

rem. The proposition is treated by the modern text writers as settled.* We are quite satisfied with the reasons on which the principle rests, and are of opinion that when the property of the government has been saved from destruction by salvors, or by those sacrifices which are compensated by a contribution in general average, justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition.

The second of the questions above stated presents the more difficult problem.

Perhaps the two most authoritative and well-considered cases on that subject are *The Siren*,† and *Briggs* v. *The Light Boats*.‡ Both these cases assert the doctrine, after a full review of the authorities, that such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring a suit against the United States, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done.

They also both assert the proposition that no suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court.

There are some expressions in the opinion of this court in the case of *The Siren*, which seem to imply that no suit *in rem* can be instituted against property of the United States under any circumstances. But a critical examination of the case and the reasoning of the court, will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. In that case a prize, after capture and before condemnation,

* See Marvin on Wreck and Salvage, § 122; 1 Parsons, Maritime Law, 324; 2 Ibid. 625.

† 7 Wallace, 152.

‡ 11 Allen, 157.

had collided with another vessel and was in fault, and it was held that as the government had brought the prize into the court for condemnation, and was before the court as plaintiff, and had placed the *res* in possession of the court, the lien for the damages growing out of the collision could be enforced against the United States. It was not, therefore, necessary to define all the circumstances under which the court, having control of the *res*, might enforce a lien on property of the United States; and the learned judge who delivered the opinion cites with approval the case of *The Light Boats*, in 11 Allen, in which the doctrine is laid down and well supported that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of *The Siren*.

In the English courts, when it is made to appear that property of the government ought, in justice, to contribute to a general average, or to salvage, it seems to be the usual course of proceeding for the proper officer of the government to consent in court that it may take jurisdiction of the matter. This consent is given by the authority of the king, who thus submits to be sued in his own courts. The liberal exercise of this authority removes the difficulty presented here, where no power to do this exists in any officer of the government, and prevents any apprehension of gross injustice in such cases in England.*

We are therefore compelled to inquire into the special circumstances of this case to ascertain whether the cotton, which was the subject of salvage, can be brought within the jurisdiction of the court without violating the principle we have stated. In doing this the absence of any such power to submit the case to the jurisdiction of the court, as that exercised in England, seems to justify a liberal construction

* Marquis of Huntley, 3 Haggard, 246.

of the rule on which we are to act, in favor of the promotion of justice. That rule, as we have already stated, recognizes the existence of the lien for salvage, and admits that the lien can only be enforced by the courts in a proceeding which does not need a process against the United States, and which does not require that the property shall be taken out of the possession of the United States. But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the court? The possession which would do this must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process.

Bringing the facts of the case before us to the test of these principles, the case was the usual one of a common carrier contracting to deliver goods on his own responsibility, and not the case, as alleged by the United States, of a charter of the vessel. The goods were then delivered to the master, and he contracted to deliver them to the agent of the United States in New York. Immediately on her arrival, and before any of the cotton was delivered to the agent, the vessel and cargo were libelled and taken possession of by the marshal under the writ which issued on the libel being filed. The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer

of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage. His obligation was to deliver possession in New York to the agent of the government. This he had not done when the process was served on the cotton. The marshal served his writ and obtained possession without interfering with that of any officer or agent of the government. The United States, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor in the court to assert her claim to the cotton. Under these circumstances we think it was the duty of the court to enforce the lien of the libellants for the salvage before it restored the cotton to the custody of the officers of the government.

DECREE AFFIRMED.

McKee *v.* Rains.

1. A marshal of the United States sued in a State court after the 2d August, 1866, and convicted of a trespass in levying upon property not the defendant's in his writ, cannot remove the suit into the National courts either under the act of April 9th, 1866 (14 Stat. at Large, 27), or the act of March 3d, 1863 (12 Ib. 755), as a suit brought against him in a State court for a trespass made or committed during the rebellion by authority derived from an act of Congress.
2. A writ of error which, if sued out after certain decisions announced, might be to be regarded as sued out merely for delay, and be followed by an affirmance of the judgment below, with damages at the rate of ten per cent. per annum on the amount of the judgment, as provided for by the 23d Rule of Court, will not be so regarded, nor the suing out of it so punished in a case where the principle which it sought to establish had not been adjudged by this court and the judgment announced, but as yet was seriously controverted.

ERROR to the Circuit Court for Louisiana.

Louise Rains brought trespass, November 26th, 1866, in one of the State courts of Louisiana against McKee (who was marshal of the United States), Cady, and others, sureties of McKee in his official bond. The petition and supplemen-

tal petition alleged a forcible entry into the dwelling-house of the petitioner by the defendants McKee and Cady; violent eviction and exclusion from a great part of it, and seizure of a large quantity of valuable furniture, with special circumstances of aggravation, all which unlawful acts were perpetrated by McKee under the pretence of lawful authority as United States marshal. The petitioner claimed damages against the defendants, McKee and Cady, and against the other defendants, sureties of the former, to the amount of $50,000.

The defendants answered, alleging that the seizure was lawful, and authorized by a writ of execution out of the Circuit Court of the United States for the District of Louisiana, directed to the defendant, McKee, as marshal, and commanding him to make out of the property of his codefendant, Cady, the sum of $3841, and upwards; and that the property seized was the property of Cady.

Upon these pleadings the case went to the jury, who found for the plaintiff $7500, and judgment was entered upon the verdict.

Afterwards a petition was filed by the defendants in the State court for the removal of the cause into the Circuit Court of the United States: the petition alleged among other things that the defendants could not enforce in the State tribunal the rights guaranteed to them by the act of Congress of April 9th, 1866.* The act thus referred to provides for the removal, before or after judgment, of any suit or prosecution commenced in a State court against any officer or other person for any arrest or imprisonment or other trespass or wrong, made or committed *during the rebellion, by authority derived from any act of Congress*, on application of the defendant at the time of entering his appearance.

A prior act (one, to wit, of 3d March, 1863),† not referred to in any way in the petition, provides that if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer, civil or mili-

* 14 Stat. at Large, 28.

† 12 Ib. 756-7.

tary, or against any other person, for any arrest or imprisonment made, or other trespass or wrongs done or committed at any time *during the present rebellion, by virtue of any authority derived from any act of Congress*, the defendant may (on certain conditions) remove the case to the next Circuit Court.

The petition for removal was granted and an order for removal made accordingly. Upon the filing, under this order, of the record from the State court in the National court, an order was made, upon a rule to show cause to the contrary, for remanding the case to the State court; and McKee and the other defendants now brought this order of remand by writ of error before this court; alleging that it ought not to have been made.

Mr. Durant, for the plaintiffs in error:

The suit was for a "trespass" committed by the marshal. The marshal derives his authority from "an act of Congress." The case seems, therefore, to fall within the words alike of the act of March 3d, 1863, and that of April 9th, 1866: though the latter one being the only one referred to in the petition is the only one on which we chiefly insist.

Mr. P. Phillips, contra:

The case is not at all within the spirit of either of the acts of Congress relied on, nor even within their words. The taking of the writ of error is an effort on the part of executive officers to shield themselves from trespasses by invoking the authority of the United States, and thus transferring their cases to Federal jurisdiction; not a novel effort in this court, and denounced whenever made.*

The object of the removal to the Circuit Court, and its removal from the Circuit to this court, is so obviously to baffle and delay the plaintiff below in the collection of her judgment, that it justifies the application which we now make for an affirmance of the judgment, with damages at the rate of ten per cent. per annum, under the 23d Rule,

* Day *v.* Gallup, 2 Wallace, 97; Buck *v.* Colbath, 3 Id. 334; Millingar *v.* Hartupee, 6 Id. 259.

which authorizes such damages wherever the writ "shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay."*

The CHIEF JUSTICE delivered the opinion of the court.

We perceive no error in the order of the Circuit Court remanding the suit to the State court. The case made by the pleadings was clearly within the jurisdiction of the State court where the suit was brought;† and the parties being all citizens of the same State, was not within the original jurisdiction of any National court.

Nor was the case one which could at any stage be removed into the Circuit Court of the United States under the act of Congress of March 3d, 1863, or April 9th, 1866.

It is very plain that the first of these acts does not apply to the case before us. It was not a suit or prosecution described by the act. No act of Congress has been cited from which authority can be derived to the marshal of any court of the United States to seize the goods of one person for the satisfaction of the debts of another.‡ Nor was the suit brought during the rebellion; for the rebellion must be regarded as having closed, in all cases where private rights are affected by the time of its termination, on the 2d of August, 1866.§

And if neither of these points were decisive, the fatal objection to the attempted removal would remain; that no application was made until after verdict; and the Constitution provides¶ 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." All these propositions have been so recently determined by this court that nothing more is now necessary than to state them as settled.

* Prentice *v.* Pickersgill, 6 Wallace, 511.

† Buck *v.* Colbath, 3 Id. 340–1.

‡ Bigelow *v.* Forrest, 9 Id. 339.

‖ United States *v.* Anderson, Ib. 56.

¶ Justices *v.* Murray, 9 Wallace, 274.

Nor does it seem necessary to consider the right to remove this case claimed under the act of April 9th, 1866. The counsel for the plaintiffs did not insist upon it in argument; and it is evident, upon looking into the act, that the suits, for the removal of which it provides, are such as have arisen or may arise under that act; and it is quite clear that the suit before us is not of that description.

The order of the Circuit Court remanding the case to the State court must, therefore, be AFFIRMED.

The counsel for the defendant in error asks, under the twenty-third rule, that the order may be affirmed with damages at the rate of ten per cent. per annum on the amount of the judgment in the State court. If, upon the application for removal, the decisions of this court recently made had been announced, there might be ground for argument that the writ of error was sued out merely for delay. But it must be remembered that at the time of suing out the writ of error in this case, all the questions settled by those decisions were seriously controverted.

We cannot say, therefore, that the writ was not prosecuted in good faith, and in the expectation of obtaining a reversal of the order. The motion for affirmance with ten per cent. damages must be DENIED.

LITTLE *v.* HERNDON.

1. A defendant, claiming under an Illinois tax-deed, who would avail himself of the statute of Illinois, of February 21st, 1861, setting forth what facts may be shown to establish the invalidity of such a deed, and precluding, except upon certain conditions, a question of it for any other cause, must show not only a tax-deed in proper form, but show also a judgment under which the tax sale was made.
2. On an objection to the admission of a deed because of an alleged erasure and interlineation apparent on its face, the court may properly admit the deed, leaving it to the jury to determine whether there was any alteration.
3. A deed for lands in Illinois, executed in Virginia and acknowledged in

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conformity with its laws at the time of execution, may be lawfully recorded in Illinois, and read in evidence without further proof of execution.

ERROR to the Circuit Court for the Northern District of Illinois, the case being thus:

A statute of Illinois, on the subject of sales of land for taxes, passed 21st February, 1861, makes this enactment:

"All deeds hereafter made by the proper officer in pursuance of sales of real estate for the non-payment of taxes shall be held to be null and void, if it be shown that said taxes had been paid before the sale, or that said real estate was not subject to taxation, or that it had been redeemed from said sale, or if notice required by the constitution was not given, or that the description of said land was not sufficiently definite; and the validity of all such deeds hereafter made by the proper officers, for real estate sold for the non-payment of taxes, shall not be questioned in any suit or controversy in this State for any other cause, unless the party wishing to contest the same shall tender to the claimant under said tax-deed, or deposit in the court in which such suit is pending, for his use, the amount of the redemption-money now provided for by law, with ten per cent. per annum interest thereon from the date of said deed to the time of said tender or deposit; and after said tender or deposit is made, the validity of said deed may be questioned in the same manner and to the same extent as now provided by law."

At the time of the passage of this act, by the decisions of the courts of Illinois, full and explicit,* a tax-deed, executed by the proper officer, had no validity unless founded upon a judgment against the parcel of land in default for non-payment of the tax, an order for the sale, and precept thereon, and it was necessary that these preliminary steps should be first shown in order to give any effect to a title under the deed.

In this state of the law, one Herndon brought ejectment against Little, in the court below, to recover possession of

* Spelman *v.* Curtenius, 12 Illinois, 409; Marsh *v.* Chestnut, 14 Id. 224; Charles *v.* Waugh, 35 Id. 317.

a lot of land in Illinois, describing it. He gave in evidence two patents, including the premises, from the government to one Hood, each dated November 1st, 1839; and a deed from Hood to himself, dated February 4th, 1842, and recorded in the recording office where the land was, and rested.

The defendant, in his defence, offered in evidence a deed from the sheriff of the county where the land was, to a certain Peck, including the premises, dated July 1st, 1864, purporting to be a deed given in pursuance of a sale for the non-payment of taxes for the year 1861, but he did not show a judgment under which the tax-deed was made. He offered, also, a quit-claim deed from Peck and wife to one Bourland, dated July 1st, 1864, and from Bourland and wife to one Underhill, dated April 29th, 1865, and then offered in evidence five tax certificates, for taxes paid on the premises for the several years therein mentioned, stating that the object of offering the same in evidence was to recover the amount of the taxes and costs paid upon the land, in case the deed from the sheriff should be questioned as title by the plaintiff, under the terms of the act of February 21st, 1861, and to defeat his using his patents as a title, if he refused to pay the taxes according to the statute. But the court was of opinion that the defendant had not brought himself within the statute, for the reason, among others, that he must first show there was a judgment, as the foundation of the tax sale and deed. And so ruled. Judgment having been accordingly rendered for the plaintiff, the other side now brought the case here.

The principal question argued here was, whether upon a true construction of the act of February 21st, 1861, the plaintiff was bound to pay the taxes which had been paid by the defendant, and by those under whom he claimed, as a condition of being permitted to attack the deed under the tax sale; the defendant taking the position that upon a true construction of the act, the sheriff's deed of the sale properly executed, with its recitals, was sufficient evidence, in the first instance, to impose this condition upon the plaintiff.

Some minor objections, it should be added, were taken

below by the defendant to the admission of evidence, as, 1st. To the admission of one of the patents; the ground of the objection being an alleged erasure and interlineation, apparent, as he asserted, on the face of the same, by the erasure of the word *six*, and the interlineation of the word *seven* therefor in description of the premises. The court overruled the objection, and left it to the jury to determine whether there was any alteration. 2d. To the admission of the deed from Hood to Herndon. The ground of this objection being the acknowledgment. But the acknowledgment was in conformity with the requirements of the law of Virginia. And by statute of Illinois,* a deed acknowledged in conformity with the laws of the State in which the deed is executed, may be admitted to record in the county where the land is situated; and after being so recorded, may be used in evidence without further proof of the execution thereof. The court below overruled the objection, and allowed the deed to be read.

Mr. B. C. Clark, for the plaintiff in error.

Mr. Conway Robinson, contra.

Mr. Justice NELSON delivered the opinion of the court.

The principal question is, whether there is anything in the act of February 21st, 1861, indicating an intention, on the part of the legislature, to change the course of decision which the courts of Illinois had made, on the subject of a tax deed, made without evidence of a preceding judgment, and to give validity and effect to the naked deed of the officer?

The argument in favor of the construction of the statute which the plaintiff in error would establish is placed upon the introductory words of the act: "All deeds hereafter made by the proper officer in pursuance of sales of real estate for the non-payment of taxes shall be held," &c. It is contended that the words should be construed as meaning

* Session Laws, 1847, p. 47, § 3; Secrist *v.* Green, 3 Wallace, 750.

simply the deed of the "proper officer," and nothing more, and that they impliedly, at least, exclude the necessity of giving any evidence of the judgment, order of sale, or precept. But we are inclined to think that this idea fails to give full effect to the language used. The deed must not only be made by the proper officer, but must be made "in pursuance of sales of real estate for the non-payment of taxes." How are those sales made according to the law of Illinois? As we have seen, after a judgment rendered by the court against the parcel of land for default in payment of the taxes, on order of sale, and precept to the officer. Unless these steps have first been taken, the sale cannot be said to be in pursuance of sales of real estate for the non-payment of taxes, as provided in the act. It is, perhaps, not inappropriate to look at the consequences that might attend any different interpretation. If the naked deed of the officer is sufficient to impose the condition upon the owner to pay all taxes and costs, and ten per cent. interest, before he can be permitted to attack the deed for any irregularity, except as specified in the act itself, then a deed without a judgment, or order of sale (as these are not within the exception), would be just as available for the purpose as if founded on a judgment and order of sale. It is not necessary to stop to point out the abuses to which such an interpretation would naturally lead.

In the case of *Spelman* v. *Curtenius*,* the court observed "that a regular tax deed, founded upon a valid judgment and precept, is made by the statute *primâ facie* evidence of every fact necessary to authorize a recovery upon it; but, as it is only *primâ facie* evidence, it follows that there must be some way of contesting the case made by deed, else it would be conclusive of those facts of which the statute expressly declares it shall be *primâ facie* evidence merely." The opinion then points out many grounds and objections that would overthrow this *primâ facie* evidence and defeat the title. And, we think, it is this *primâ facie* title, thus explained, which is fairly embraced in the introductory language of the act of 1861.

* 12 Illinois, 411.

Opinion of the court.

In the ordinary case of a title to land, set up by virtue of a sale under a judgment and execution, the party is bound to give evidence of the judgment and execution to support this title. Without these, the sheriff's or marshal's deed would be a nullity. And it would be singular, in these tax sales, so stringently scrutinized by the courts, and every prerequisite prescribed by the legislature before a sale rigidly enforced, if the act in question was intended to dispense with the necessity of producing the judgment and precept as the foundation of the sale and of the validity of the deed. For these reasons we are inclined to think that the construction of the statute by the court below was right, and should be affirmed.

We regret that this statute has not come under the review of the courts of the State, as we should have been relieved from this examination of it. But, after a diligent search into the reports of their decisions, we have not been able to find any case involving its construction except one, which holds that the act is not retrospective.*.

A minor objection below was to the admission of one of the patents, on the ground of an erasure. The court left the question to the jury, which was quite as favorable a ruling as the defendant could ask. In the absence of any proof on the subject the presumption is that the correction was made before the execution of the deed. In a recent case in the Queen's Bench, Lord Campbell, Chief Justice, in delivering the opinion of the court, after referring to the note in Hargreve & Butler's Coke Littleton, 225 *b*, where this rule was asserted, observed: "This doctrine seems to us to rest on principle. A deed cannot be altered after it is executed without a fraud or wrong; and the presumption is against fraud or wrong."† The cases are not uniform in this country, but the most stringent leave the question to the jury.‡

* Conway *v.* Cable, 37 Illinois, 90.

† Doe *v.* Catomore, 16 Adolphus & Ellis, New Series, 745.

‡ Lewis *v.* Payn, 8 Cowen, 76; Jackson *v.* Jacoby, 9 Id. 126; Hatch *v.* Hatch, 9 Massachusetts, 312.

Another objection was to the admission of the deed in evidence from Hood to Herndon, which was executed and acknowledged in the State of Virginia. But it appears that the acknowledgment was taken in conformity with the laws of Virginia at the time the deed was executed, which, according to the laws of Illinois, was sufficient to admit it to be there recorded, and to be given in evidence.*

JUDGMENT AFFIRMED.

Mr. Justice MILLER, dissenting.

I dissent from the opinion of the court in this case on the construction of the statute of Illinois of February 21, 1861.

That act mentions certain facts which may be shown without any condition precedent in order to establish the invalidity of a tax deed. These are: 1. That the tax had been paid before sale. 2. That the land was not subject to taxation. 3. That it had been redeemed from the tax sale. 4. That the notice required by the constitution had not been given. 5. That the description of the land was not sufficiently definite.

It then provides that a tax deed, made after the passage of that act, shall not be questioned in any suit for any *other cause*, unless the party wishing to contest the same shall tender to the claimant under the tax deed, or deposit in the court in which the suit is pending, for his use, the amount of redemption-money required by law to redeem, and ten per cent. per annum interest.

The defendant in this case offered his tax deed, and required of the court to have the amount which he showed by the deed and tax receipts paid or deposited, before the plaintiff should be permitted to question it. The court refused to receive the tax deed in evidence, and permitted the plaintiff to contest it and exclude it from the jury on the ground that no judgment was produced by defendant under which the tax sale was made. The absence of such a judgment is not one of the grounds mentioned for which a deed may be

* Secrist *v.* Green, 3 Wallace, 744; Carpenter *v.* Dexter, 8 Id. 513.

contested without paying the redemption-money as a condition precedent. The decision of the court makes that part of the statute requiring the payment as a condition precedent to contesting the deed a nullity. The policy of the act is clear, and it is wise. It has been a *desideratum* for years to provide a law which would secure payment of taxes on real estate, and at the same time give the owner of the property, who may not have been prompt, some reasonable opportunity to save it. This law is happily conceived. It says in effect if no valid tax was levied, or if it has been paid, or no notice was given of proceedings for sale, the deed is void, and this may be shown at any time without condition. But if there has been a valid levy of a tax and a sale, and the tax has never been paid, either before or after sale, the party who should have paid this tax and has neglected to do so must pay it now before he can contest the deed made by the proper officer on such sale. This is fair, it is just, and would tend to procure bidders at tax sales, and to admit of redemption on just terms. As there is no decision of the State court of Illinois directly on this point, under this statute, I regret the construction that this court has placed upon it.

BATES *v.* EQUITABLE INSURANCE COMPANY.

1. A policy of insurance contained the usual covenant that if the property was sold the insurance ceased, unless the consent of the insurer was given in writing to the sale.

   Held, that an indorsement on the policy by the assured,

   "Payable, in case of loss, to E. C. Bates" (the plaintiff),

   and under this, the indorsement by the insurer that

   "Consent is hereby given to the above indorsement,"

   did not imply either a knowledge or consent to the *sale* of the goods insured.

2. Such indorsements are entirely consistent with the property in the goods remaining in the assured, and mean no more than that the loss of the *assured* shall be paid to the third party.

3. If such third party had really purchased the goods before the loss, then the party *assured* sustained no loss and the policy covered none, and no action could be sustained on it.

Statement of the case.

ERROR to the Circuit Court for Rhode Island; the case being this:

W. D. Philbrick being the owner of certain goods, got them insured by the Equitable Insurance Company of Providence. The policy contained a clause that if the property insured should be sold or conveyed, or if the policy should be assigned without the consent of the company, the risk should cease and the policy become void. It contained also provisions such as are cited below:

"And this company agree, that if the assured shall sell the aforesaid property, or any part thereof, before the expiration of this policy, a proportion of the premium received shall be repaid, upon receiving notice of such sale before a loss happens; . . . *or* this policy may be continued for the benefit of such purchaser, if this company give their consent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy."

Philbrick, the party insured, sold the goods during the life of the policy to one Edward C. Bates, and indorsed on the policy,

"*Payable, in case of loss, to E. C. Bates.*

"W. D. PHILBRICK."

The policy, with this indorsement, was sent by a policy-broker to the insurance company, and one Frederick W. Arnold, the secretary of the company, placed under the above indorsement these words:

"*Consent is hereby given to the above indorsement.* EQUITABLE INSURANCE COMPANY.

"FRED. W. ARNOLD, Secretary."

The goods having been destroyed by fire after the sale, and the indorsement by Arnold in behalf of the company, Bates, the owner of them, brought assumpsit on the policy. The company refused to pay on the ground that Philbrick had ceased to be owner before the loss occurred, and that the company had never consented to any change of owner

ship in the property. And the question was whether on the facts, this defence ought to be sustained.

Arnold, the secretary of the company, swore that he had no knowledge of the sale, nor was there any evidence that any officer of the company had notice of it, unless it was to be implied from the request to give their consent to the indorsement made by Philbrick, and the consent so given.

The court below was of the opinion that on the case stated the plaintiff could not recover, and judgment having been entered accordingly, the record was brought here.

Mr. Goodrich, for the plaintiff in error:

The indorsement by Philbrick being absolute without reservation, and accompanied by delivery of the policy, is an assignment of his entire interest both in the instrument and in the property insured. The words are capable of this construction. It is indeed their natural construction. The indorsement on the policy operated like an indorsement on a note. It carries all the indorser's interest in the subject-matter. There is no proof that Philbrick did not intend to sell the property, and no ground, therefore, on which the defendants can restrain the practicable and natural interpretation. The certificate of the company which is found on this policy, and under Philbrick's assignment, is just such a certificate as the policy provides that the company shall give when "the policy is to be continued for the benefit of the purchaser," but such as it does not provide or contemplate shall be given in any other case. The company have therefore interpreted in the sense in which we say it was made, this indorsement of Philbrick's.*

Messrs. W. H. Potter and A. H. Brown, contra.

Mr. Justice MILLER delivered the opinion of the court.

One of the conditions of the policy was that if the property insured should be sold or conveyed, the risk assumed ceased,

* Hooper *v.* Hudson River Railroad, 17 New York Court of Appeals, 426-8.

and the policy became void; and there can be no doubt that, looking to both the provisions of a policy, such as this one contained, and which are cited in the statement of the case, it ceases to be binding when the assured parts with his interest in the property insured, unless the company be notified of the sale. When this is done before a loss happens, the company is bound to refund a part of the prepaid premium, to be apportioned in reference to the unexpired time for which the policy was given.

If, however, the purchaser and the assured ask it, and the company consent to it, the policy may continue for the benefit of the purchaser. This latter proposition is founded upon the knowledge of the sale, and upon the consent of the company to accept the purchaser as the party whose interest is insured, instead of the vendor who was originally insured.

As there is no evidence, outside of the two indorsements, already quoted from the policy,* that there was any consent to accept Bates, the purchaser, as the party whose interest was insured, and as the presumption, if there is one arising from those indorsements of a notice of sale, is not supported by anything else, it becomes important to determine what those indorsements imply on those two points.

If Philbrick could not, in law or in fact, have directed the payment of the loss, if one should occur to him, as owner of the property, to another party, with the consent of the company, then it would be a reasonable inference that the indorsement made by him implied a sale of his interest. But if he could make, with the consent of the company, a valid appointment that any loss covered by the policy should be paid to a third person, though he remained the owner of the goods, and the loss was his loss, then the indorsement of Philbrick does not necessarily convey the idea of a sale, nor the consent of the company imply a consent to a sale.

Now, it is a well known and frequent thing in insurance business, for a person to insure his life, or his property, and either in the policy itself, or by indorsement at the time it

* *Supra*, p. 34, REP.

is made, or by subsequent indorsement, to which the consent of the company is generally required, to direct the loss to be paid to some third party. And this is done in language similar, if not identical with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor, gives him this indemnity.

In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale or a consent to insure the purchaser.

If it could be shown that it had been the course of dealing, between these particular parties, to recognize the indorsement of the party first assured as evidence of a sale, and the indorsement of the company as a consent to the sale; or if it could be shown that by custom and usage, in any particular place, these indorsements were so treated, the case might be different; but, in the absence of such usage or custom, we can see in these indorsements nothing more than the direction of Philbrick, and the consent of the company, that any loss sustained by Philbrick, covered by that policy, should be paid to Bates. As Philbrick did not have any interest in the goods when the fire occurred, he sustained no loss, and the policy covered none.

The analogy of the effect of such indorsements on promissory notes, in assigning the notes to the indorser, is very imperfect. In such case the sum mentioned in the note is payable absolutely, and without regard to the interest of the original payee in any other matter. It is all contained in the note whose contents, to use the language of the Judiciary Act, are thus made payable to the indorsee, and the indorser necessarily parts with his interest in the subject-matter of the contract.

These views are well supported by recently adjudged cases in this country.*

JUDGMENT AFFIRMED.

PEOPLE'S RAILROAD *v.* MEMPHIS RAILROAD.

A city invited bids for making a street railroad. Bids were made by an unincorporated company, and accepted; accepted, however, with a modification. To this modification the company agreed, expressing its readiness to sign a contract embodying the terms and conditions of it. The communication accepting the modification was referred to a committee; but no contract in form was ever signed. At this point of the matter the city passed a resolution giving permission to the unincorporated company to have themselves incorporated:

"The incorporation in no way to change the conditions of *the propositions heretofore made and accepted* by the parties respectively, the same being intended to secure the rights and more effectually preserve the remedies of parties against each other respectively, in case of any violation of contract to be *hereafter* entered into."

The unincorporated company accordingly got a charter, and so became an incorporated one. Its charter authorized it to *complete all agreements entered into*, with the city, for the use of the streets; AND, to operate street railroads in ALL the streets of the city *with the consent of the city*. The company, in its chartered form, now expressed to the city its readiness to execute their contract (which had been prepared by the city solicitor), and to enter on the construction of the road. This communication was referred to a committee. In the meantime opposition was made by the citizens to having rails in the streets, and the city resolved to recede from its project of having them, recognizing, at the same time, its "moral but not legal obligation to make good to those who had been incorporated as a street railway any real damage sustained by change of purpose."

Held,

1st. That there was no perfected contract between the city and the unincorporated company.

2d. That if there had been, there was no evidence that the city had accepted the incorporated company in place of the unincorporated one.

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* Fogg *v.* Middlesex Manufacturing Co., 10 Cushing, 346; Hale *v.* M. & F. Ins. Co., 6 Gray, 169; Young *v.* Eagle Ins. Co., 14 Id. 153; Grosvenor *v.* Atlantic Ins. Co., 17 New York, 391; State Mutual Fire Ins. Co *v.* Roberts, 31 Pennsylvania State, 438.

Statement of the case.

Error to the Supreme Court of Tennessee, the case being thus:

The city of Memphis being by its charter empowered "to regulate the laying of railroad iron and the passage of railroad cars through the city," and by general law "to grant privileges in the use and enjoyments of the streets," passed, on the 11th of November, 1859, an ordinance prescribing the terms on which the board would grant the exclusive privilege of constructing street railways in Main Street, and other streets specially named, and operating them under certain regulations for a term of twenty-five years.

By the ordinance, bids were invited to be made, on or before November 20th, to the mayor and finance committee, and were to be reported to and awarded by a board consisting of the mayor and aldermen, at the first meeting thereafter.

Accordingly, on the 29th of November, the board met, and received from the finance committee a number of bids, including one from H. D. Small, William Kirk, and nine persons named, "and others, as the People's Passenger Railroad Company of Memphis;" the proposition being made by Kirk and Small as "business agents of the company." The committee reported that the bid thus made was the best one for the interest of the city; and the board proceeded to make their award pursuant to the ordinance. The bid thus reported on contained four propositions, each offering to pay certain amounts, fixed or contingent, for the privilege of running upon certain streets. The board made their award by authorizing the mayor and city attorney to close a contract with Kirk, Small, and the others, upon the terms of their second proposition as to the amount and time of payment, but including other streets, making a reservation of a right to determine the sort and weight of rail to be used, and varying the time of completion.

These modifications were accepted by Kirk and Small, in behalf of the persons composing the People's Passenger Railroad Company, December 2d, and a notice thereof, in writing, with great form and specification that they were so,

given to the board, and by the board, December 8th, "read received, and ordered to be filed."

On the same 8th day of December, the board passed a resolution giving permission to the associates, describing them as "*the parties to whom has been awarded the contract for city railroads, under the ordinance passed the day of* , 1859," to have themselves incorporated, "the incorporation in no way to change the conditions of the *propositions heretofore made and accepted by the parties respectively*, the same being intended to secure the rights and more effectually preserve the remedies of parties against each other respectively, in case of any violation of contract to be *hereafter* entered into."

On the 1st of February, 1860, that is to say about two months afterwards, Small, Kirk, and their associates were incorporated by the style of "The People's Passenger Railroad Company of Memphis," and by section 4 of their charter authorized to complete all the contracts or agreements *entered into* with the city of Memphis, or other parties, for the use of the streets of said city, and to enlarge and alter the terms of the same with said parties—AND *to operate street railroads*, by animal power, *in* ALL *the streets of said city, with the consent of the said city.*

Section 5 authorized the company to extend said road or roads outside the corporate limits.

On the 21st of February, 1860, the president and secretary of the People's Passenger Railroad Company laid before the board of mayor and aldermen a copy of their charter, and expressed their readiness to sign the contract which had been prepared for their signature by the city attorney. They say:

"We think that the same is in accordance with the agreement with the city as embodied in the ordinance on the bid and the resolution of grant. By a resolution of our board of directors under the charter which you permitted us to obtain, we are authorized to sign the contract, and hold ourselves in readiness to do so. . . . We are prepared to give the required bonds as soon as the contract is executed."

They express also their readiness to enter immediately upon the construction of the road, for which they say they had made preparations.

This communication was referred to a committee, with instructions to report.

In the meantime, opposition had arisen among the property-holders on Main Street, one of the streets named in the contract, and the committee recommended a postponement of action as to that street till March 20th, for the purpose of obtaining information as to the effect of street railroads on the value of property.

On the 22d of March the board resolved to recede from the undertaking to have a street railway on Main Street, recognized their "moral but not legal obligation to make good to *those who had been incorporated as a street railway* company any real damage sustained by change of purpose," and referred the matter back to the committee, "to modify the plans for street railways with the company, if it can be effected, or, otherwise, to agree on a settlement of the supposed damages, and report back to the board." No opposition appeared to have existed on any street but Main Street.

The committee and the company came to no settlement as to damages; and the committee made no report till the 23d of April, 1861, when they reported a resolution, which was adopted by the board, offering to sanction the construction of the road on any street, provided the consent of two-thirds of the property-holders thereon were first obtained.

The occupation of the city by the army during the rebellion, and the suspension of the courts, prevented any proceedings by the company either to obtain the consent of the property-holders or to enforce its rights by legal proceedings, and so the matter remained until June, 1865.

In the month and year last named, the rebellion being now suppressed, the legislature of Tennessee chartered a new company, to wit, "*The Memphis City* Railroad Company, with authority to construct, maintain, use, and operate street railways by animal power on all or any of the streets of Memphis," and to make all contracts and agreements

with the city or other parties in connection with the matter. And it repealed the act by which the *People's* Passenger Railway Company had been incorporated.

The new company having begun to lay its track on the streets of Memphis, and opposition being made thereto, on account of the former charter to the other company, the new company filed its bill in chancery, in a State court of Tennessee, the old company being made a defendant, to test the right of the matter. The old company set up as a defence to the bill that they had an existing contract with the city; and that the charter to the new company was a law impairing its obligation. The court decreed in favor of the new company, and that decree being affirmed in the Supreme Court of the State, the old company brought the case here. The questions accordingly were:

1. Whether there existed any contract between the city and the old company? *And if yea, then,*

2. Whether the statute incorporating the second company was a law impairing the obligation of a contract?

Of course, unless the first question was determined affirmatively, that is to say, unless it was determined that a *contract* had been entered into between the old company and the city, then the second could never arise.

Messrs. McRae, Carlisle, and McPherson, for the old Company, plaintiffs in error:

1. Under the act of 1860 the old company acquired corporate rights in the very matter of this controversy, to wit, the right of laying and operating street railways through certain streets of Memphis.

The advertisement for proposals by the board of mayor and aldermen on the 22d of November, 1859, the propositions of Kirk and Small and their associates offered on the 29th, their acceptance with the alterations in the resolution of that date by the board, and the after-acceptance by the associates, constituted a perfect and full agreement, a *congregatio mentium*, wherein the terms, stipulations, conditions, and obligations were decided and mutually adopted; and

from that moment became binding on all the parties, which a court of equity would require the specific performance of, notwithstanding the formal contract was to be reduced to writing and confirmed, and the bonds confirmed.*

And when the consent of the city was solicited and granted, by the resolution of 8th of December, that the associates should be incorporated for the security of the mutual rights, it was a substitution of the corporation to the benefit of the agreement, so that when the company was chartered and tendered its acceptance of the contract, the previous agreement not having been revoked, its rights became perfect.

The legislature did but incorporate, at the instance of both parties, certain natural persons who had been acting under a company name into a legal entity, even their name being retained, for the more convenient assertion and protection of the rights of both parties in respect of the contract which had been entered into. In other words, it did but substitute, with the consent of both parties, the incorporated company—this plaintiff in error—for the unincorporated one, with which the city of Memphis had contracted.

To this the city had consented in advance. But if she had not, the case shows a subsequent consent, and a complete recognition of the incorporated company so created as standing in the place of the original unincorporated one with which the city had contracted. If, therefore, any renewed consent to the original contract was contemplated by the act of incorporation, that consent was given.

But it cannot be maintained that an act of incorporation, which was in effect applied for by both parties for the avowed and single purpose of making that contract more effectual, could have been intended by either of them, or by the legislature acting upon their joint solicitation, not only to unsettle that contract, but absolutely to annul it. Yet this is the construction which opposing counsel would seek to establish.

* Levering & Carncross *v.* The Mayor et al., 7 Humphreys, 553, 554 555; Blight *v.* Ashley, 1 Peters Circuit Court, 15.

In addition, it is more than doubtful if any assent was required in regard to making those roads already contracted for. The words of section four, which authorizes the company "to complete and execute all contracts and agreements entered into with the city of Memphis, for the use of the streets of said city, or building said railroad," point to a past transaction, begun, which is to be concluded; an agreement entered into already beforehand, which is to be executed. This agreement was for the use of the streets of the city or building said *railroad;* that is, the definite, fixed *railroad* heretofore agreed about. This agreement being already entered into, the parties "may alter or enlarge the terms of the same." But this agreement, as is evident from the future words, did not include *all the streets* nor other *roads* to be run on the excluded streets not yet the subject of any agreement. So the section goes on to authorize that they "may operate street rail ROADS (*in the plural*) by animal power on *all the streets* of the city of Memphis, *with* the consent of the city" (not yet had, but to be obtained), for they "may *enter in* to all necessary contracts for the building and operating said *roads.*"

Section 5 shows still further this meaning. The words are: "Said company may extend *said road* or *roads* outside the corporate limits," &c.

The clear meaning of the legislature, then, was that the company should have the use of the streets to operate its *road* according to the terms of the agreement it had made with the city, under the consent it had already obtained; and with reference to all streets not included in that agreement it might operate railroads thereon by obtaining the city's consent, under contract to be entered into for that purpose.

2. The act of the legislature incorporating the Memphis City Railroad Company impairs the obligation of the contract of the People's Passenger Railroad Company.

[The learned counsel then argued fully this point, but the court deciding, as it will be seen that it does, that no contract was ever made, the argument has no pertinence, and is not reported.]

Restatement of case in the opinion.

We need go into no argument on the question how far the municipal corporation, under its pretty broad powers, had a power to grant a franchise to a railroad company to use the streets. Such discussion would be unprofitable, because the board of mayor and aldermen not only made no effort to grant a franchise in the streets, but expressly, and by the consent of the contracting parties, limited themselves to regulating the terms and conditions on which the iron might be laid and the cars run, leaving the adventurers to secure their rights by obtaining a charter, the city only giving its consent to the incorporation to strengthen its application for a charter in the mutual interest. Without doubt the legislature could have chartered the company with a grant of the streets irrespective of this consent. And by consequence, it might bestow the grant in a charter, drawn conformably to this consent. In this point of view, the action of the city corporation would be regular, and the legislative action in conformity with it, would ratify and adopt it. The question of the confirmation of a void estate does not arise in the case. The act of the legislature is to be interpreted according to the intention appearing upon its face, and if the intention appear to be, to make valid a void thing, it is within the paramount authority of the legislature if no constitutional restriction interpose.

Even if the act of the board went further and undertook to grant the franchise, it would amount to no more than such an irregularity as the after-ratification by the legislature rendered valid.

But the whole discussion is irrelative.

Messrs. Wilson, Pike, and Johnson, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Express authority was vested in the Memphis City Railroad Company, by the fourth section of their act of incorporation, to "construct, maintain, use, and operate street railways by animal power, on all or any of the streets in the city of Memphis, using for that purpose all necessary ma-

chinery and equipments," and "to make, complete, and execute all contracts and agreements" made with the city or other parties for any purpose connected directly or indirectly with the construction, maintaining, or operating such railway, and to alter or enlarge the terms of the same with the said parties.*

Evidently the legislature assumed to confer the franchise of the company without regard to the consent or action of the city, and upon the assumption that there was no valid subsisting contract between any other parties and the city for constructing the described railroad and putting the same in operation. Confirmation of that proposition, if anything else is needed, is found in the ninth section of the act of incorporation, which provides that the act entitled an act to incorporate the People's Passenger Railway Company of the City of Memphis, passed February 1, 1860, be and the same is hereby repealed.

Pursuant to the act of incorporation the company was duly organized, and the stock necessary to construct ten miles of the railway track, and to equip, run, and maintain the same, was duly subscribed, and the contract awarded to responsible persons to construct and equip that part of the railway as authorized by the terms of the charter.

Regularly organized and ready and willing to comply with all the requirements of their charter, the corporation complainants allege that their contractor, employees, and agents commenced to construct the railroad with the intention of fulfilling all their obligations, and would have completed the undertaking if they had not been interrupted and obstructed in the work; that the mayor and aldermen of the city, or some of them, in disregard of the franchise of the company, forcibly and with violence caused the work to be discontinued and stopped.

Based upon these and similar allegations the prayer of the bill of complaint is that John Park, mayor, and the board of mayor and aldermen, may be made parties respondents

* Sessions Laws, 1865, p. 88.

Restatement of the case in the opinion.

in the suit, and for an injunction. They were accordingly made parties, and the complainants having executed a bond, with the usual conditions, in the sum of twenty thousand dollars, the writ of injunction was duly issued.

Service of the writ of injunction having been made, the People's Passenger Railroad Company filed a petition in the case, representing that they were authorized by their charter, *with the consent of the city*, to execute all contracts made with the city or other parties, for the use of the streets of the city for operating street railroads thereon by animal power, and praying to be made a party respondent to the bill of complaint. Hearing was had on the petition, and it appearing that the petitioners were interested in the issue, it was ordered by the court that the prayer of the petition be granted.

Being the original respondents, the city authorities filed a separate answer, in which they admit that the complainants made the offer in writing, as required by their charter, to construct the railroad, and that they took possession of one or more of the streets of the city for that purpose; that they commenced the work and that the mayor of the city interrupted the work as alleged and caused it to be discontinued.

Extended answer was also filed by the other corporation respondents, in which they set up their act of incorporation granted February 1, 1860, and especially the fourth section thereof, which provides that they "shall have power to complete and execute all contracts and agreements entered into with the city of Memphis, or other parties, for the use of the streets of said city for building said railroad, and may alter or enlarge the terms of the same with said parties, and may operate street railroads by animal power on all the streets in the city of Memphis, *with the consent of said city.*"

They also allege that the city authorities, prior thereto, invited bids for the construction of such railroad on certain streets in the city, including those mentioned in the bill of complaint; that on the twenty-ninth of November, 1859, the bids made for that object were reported to the mayor and aldermen, and that they awarded the contract to William

Kirk and H. D. Small, whose bid was made in their own behalf, and as agents of certain associates since constituted the People's Passenger Railroad Company of Memphis; that the said contractors and their associates were subsequently, with the consent of the city authorities, incorporated by the legislature of the State, and with the understanding that the conditions of the contract as made and accepted should not be changed; and the respondents aver that they are advised and insist that the consent of the city given as stated and subsequently ratified by the legislature, as by their charter appears, is a contract between the parties which no subsequent legislature can constitutionally alter or impair without their consent.

By virtue of those proceedings they claim that they are invested with a franchise which neither the city council, nor the legislature, nor any other party can constitutionlly invade; and that the ninth section of the complainants' charter, by which their act of incorporation was repealed, is null and void, because it was passed in contravention of that clause of the Constitution which forbids the States from passing any law impairing the obligation of contracts, and the respondents in conclusion submit to the court that the matters set forth in the answer call for the interposition of the court to protect their rights as though they were complainants asking relief in the premises, and they pray that the answer may stand as a cross-bill, and that the mayor and board of aldermen, as well as the complainants, may be required to answer the allegations, and that the injunction may be dissolved.

Complainants demurred to the cross-bill, and the demurrer was sustained, and the cross-bill was dismissed. On appeal to the Supreme Court of the State the decree was affirmed, and the respondents in the original bill of complaint appealed to this court.

Two things must clearly appear in order to justify the court in adopting the views of the respondents: (1.) That there was a contract between the respondents and the city

authorities, which was complete in itself, and which was binding on both parties. (2.) That the charter subsequently granted to the Memphis City Railroad Company impairs the obligation of that contract.

I. Prior in date as the charter of the respondents is, it is clear that the charter granted to the complainants invades the rights of the respondents, if the exclusive rights which they claim were ever perfected by a binding contract made between them and the city authorities, unless it be assumed that the charter under which they claim such exclusive right could be repealed by a subsequent legislature. Viewed in that light the case presents two questions for decision, both of which must be decided in favor of the respondents, or the decree of the Supreme Court of the State must be affirmed: (1.) Whether the city authorities ever entered into a binding contract with the respondents that the respondents might complete and execute all contracts and agreements previously made with the city, or other parties, for the use of the streets of the city for building and operating said railroad; and if they did make such a contract, then (2), whether the act of the legislature repealing their act of incorporation is or is not a valid law.

Apparently, it was a question in the State court whether the respondents were ever legally incorporated; but there does not appear to be any substantial ground of doubt upon that subject, as the persons named in the act, and their associates, are expressly constituted a body politic and corporate under the name therein set forth, and the first section also provides that they may have succession for the term of twenty-five years, may sue and be sued, plead and be impleaded, may have and use a common seal, purchase and hold real and personal estate, create stock, elect directors and other officers, and may make all necessary by-laws, subject to the usual condition that they shall not be inconsistent with the laws of the State. Unfounded as the objection is in any view of the case, it may be dismissed without further consideration.

II. Apart from that topic, however, the real question is,

whether the special powers described in the fourth section of their charter ever actually vested in the respondents, as they allege in their answer. They insist that the exclusive right to construct railroads for the transportation of passengers over the streets of that city, and to use the streets of the city for that purpose, was granted by the city authorities to certain individuals as contractors before the respondents were incorporated, and that they, the respondents, with the consent of the city, subsequently became the assignees of that contract and agreement, and as such were and are invested with the authority to complete and execute that contract and agreement as ratified and confirmed by the legislature.

None of the elements of that proposition are admitted by the complainants; but they insist that municipal corporations have no power to grant such a franchise to individuals or other corporations, unless thereto specially authorized by the legislature; and they also insist that no such power is shown to have been conferred in this case.

III. Serious doubts are entertained whether the mayor and aldermen of the city of Memphis possessed any authority to make such a contract as that set up in the answer as having been made by them with the persons under whom the respondents claim, as it obviously amounts to a franchise for twenty-five years; and if so, then it is clear that it could not be granted by those authorities in virtue of the ordinary powers possessed by such municipalities.

Power to make laws is vested in the legislature, under the constitution of the State, and it is very doubtful whether the legislative department can delegate to any other body or authority the power to grant such a franchise, as the exercise of that power involves a high trust created and conferred for the benefit of those who granted it, and as the trust is confided to the legislature it must remain where it is vested until the constitution of the State is changed.*

* Cooley on Constitutional Limitations, 117; Thorne *v.* Cramer, 15 Barbour, 112; Barto *v.* Himrod, 8 New York, 483; Parker *v.* Commonwealth, 6 Pennsylvania State, 507; Sedgwick on the Constitution, 165; Wayman *v.* Southard, 10 Wheaton 46

Opinion of the court.

Franchises, it is conceded, cannot, as a general rule, be granted by such a corporation, and it is clear that the privilege of making a railway or turnpike, or establishing a ferry and taking tolls for the use of the same, is a franchise, as the public have an interest in the same, and the owners of the privilege are liable to answer in damages if they refuse the use of the same, without any reasonable excuse, upon being paid or tendered the usual fare.*

IV. Consonant with that view this court held, in the case of the *Bank of Augusta* v. *Earle*,† that franchises are special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right; and that in this country no franchise can be held which is not derived from the law of the State.‡

Contracts undoubtedly may be made by such municipalities to the extent of the authority conferred for that purpose by the legislature, but the granting of a franchise is not the same thing as a contract, and the exercise of such a power cannot be upheld or vindicated as falling within the same rule as the power to make contracts.

By the amendment to their charter, passed February 13th, 1854, the authorities of the city were empowered to regulate the laying of railroad iron and the passage of railroad cars through the city; but the better opinion is, that the provision in that behalf relates to the construction of railroad tracks and the running of railroad cars through the city by incorporated companies whose cars are propelled by steam, and that it has no reference whatever to the construction or authorization of a street passenger railway within the corporate limits, as claimed by the respondents in their answer.§

Authority is also conferred on municipal corporations, by the code of that State, "to grant privileges in the use and

* 3 Kent (11th ed.), 590; Willoughby *v.* Horridge, 16 English Law and Equity, 437; Beekman *v.* Railroad Company, 3 Paige Ch. 45.

† 13 Peters, 595.

‡ Angell & Ames on Corporations (8th ed.), 2; State *v.* Armstrong, 3 Sneed, 634; Mayor, &c. *v.* Shelton, 1 Head, 24.

§ Sessions Laws, 1854, p. 294; Moses *v.* Railroad Company, 2 Illinois, 522.

enjoyment of the streets" of the municipality; but it would be a very forced construction to hold that the power to grant such a franchise for twenty-five years is included in that provision.*

V. Independently of those provisions, it is quite clear that the municipal authorities of the city possessed no such power as is supposed by the respondents. Such corporations are usually invested with the power to lay out, open, alter, repair, and amend streets within the corporate limits; but the rule is well settled, that by virtue of those powers, without more, they cannot grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such a right is void.†

Special powers are given to such corporations to lay out, open, and repair streets as a trust to be held and exercised for the benefit of the public, from time to time, as occasion may require, and the general rule is, that those powers cannot be delegated to others, nor be effectually abridged by any act of the municipal corporation without the express authority of the legislature.‡

Municipal corporations are doubtless invested with subordinate legislative powers to be exercised in the passage of ordinances for local purposes, connected with the public good, but they are merely derivative, and are subject, at all times, to the legislative control.§

VI. Suppose, however, the authority to make the contract set up in the answer of the respondents may be derived from the statutory provisions to which reference is made, still the

* Code, 1858, p. 303.

† Davis et al. *v.* The Mayor, 14 New York, 514.

‡ Milhau *v.* Sharp, 27 New York, 611; People *v.* Kerr, 27 Ib. 188; Elliott *v.* F. and W. Railroad, 32 Connecticut, 579; Wager *v.* Troy Union Railroad, 25 New York, 526; People *v.* Third Avenue Railroad, 45 Barbour, 63; Street Railway *v.* Cummingsville, 14 Ohio, New Series, 523; State *v.* Council of Hoboken, 1 Vroom, 225.

§ 2 Kent, 11th ed., 317; Rogers *v.* Burlington, 3 Wallace, 663.

court is of the opinion that the decree of the State court should be affirmed upon two grounds, which will be separately and briefly explained: (1.) Because the supposed contract with the persons under whom the respondents claim was never perfected between those persons and the city authorities. (2.) Because the respondents fail to show, even if it be admitted that the contract between those parties was perfected, that the city authorities ever consented to accept the respondents as the successors of the supposed prior contracting party.

1. Examined carefully, the evidence will show that at every stage of the negotiations something remained to be done to complete the contemplated arrangement.

Prior to the twenty-second of November, 1859, the proper authorities of the city passed an ordinance proposing to grant the right to construct and operate street railroads for the transportation of passengers in cars to be drawn by horses or mules, for twenty-five years from the passage of the ordinance. Bids were subsequently invited for that purpose, and the persons before named submitted four propositions as bids for the contract. On the twenty-ninth of the same month the city council authorized the mayor and corporation attorney to close a contract with those persons to construct such a railway on certain streets and on certain prescribed terms—they to pay to the city the sum of one hundred and twenty-seven thousand five hundred dollars, at the times and on the terms named in their second proposition. But the city authorities reserved the right to determine what description of rails and weight of iron should be used by the contractors, and the stipulation was that they should give a bond to the city in the sum of twenty-five thousand dollars to indemnify the city and individuals against damage. Subsequent proceedings intervened before any further action was taken under that resolution.

Kirk and Small, professing to act in behalf of the association called the People's Passenger Railroad Company of Memphis, December 2, 1859, addressed a letter to the mayor and aldermen of the city accepting the grant of the streets

named as set forth in the "general railroad ordinance" and in the aforesaid resolution, subject to the terms, conditions, privileges, and restrictions of said ordinance and resolution, and expressing their readiness to sign a contract embodying those terms and conditions.

Permission was given by the city authorities to those persons, on the eighth of the same month, to procure for themselves an act of incorporation, provided it did not change the conditions of their proposition, and was granted subject to the consent of the city, and was so framed as not to prevent any other company from building street railroads. They were accordingly incorporated February 11, 1860, and the act of incorporation provides, as before explained, that the respondents, "with the consent of said city," may exercise the powers described in the fourth section of the charter. No contract was ever executed between the persons before named and the city authorities, and no further efforts were made to complete the proposed arrangement until after the act of incorporation was passed.

Granted and accepted, as the charter was, on the condition that the respondents should secure the consent of the city before they could exercise the franchise in question, they are not at liberty to set up any other theory. Conclusive proof that the original arrangement was not concluded is exhibited in the letter of the president and secretary of the respondent corporation, written after the respondents were organized, and addressed to the board of mayor and aldermen, in which they refer to a contract as one prepared by the corporation attorney, and say that they are authorized to sign the contract on the part of the corporation. They say they are prepared to give the required bonds as soon as the contract is executed, but they do not pretend that any draft of a contract was ever before presented to the city authorities.

Nothing of the kind is suggested in the communication, but they speak of the contract as one prepared "for our signature," and the bid as "our bid," assuming throughout that the persons who made the bid and conducted the nego-

tiations and the corporation respondents are identical, which is a fatal mistake. They are not the same, and it is clear that the proposed contract between those who made the bid and the city was never completed.*

2. Attempt is made by the respondents to give a restricted construction to the phrase "with the consent of the said city," as contained in the fourth section of their charter, but the court is not able to concur in that suggestion. Briefly stated, the suggestion is that the phrase, as properly construed, only requires that the consent of the city should be obtained in case the company should desire to construct railways on streets other than those designated in the contract, but it is not possible to adopt that construction of the phrase. On the contrary it seems clear that the franchise described in the fourth section was granted subject to the condition precedent, that the respondents should obtain the consent of the city to use the streets for the purpose therein described.† Granted on that condition the charter would not avail the respondents in this case even if it appeared that the consent to that effect had been given to the two persons who made the bid and conducted the negotiations antecedent to the act of incorporation.‡

Consent to those individuals, even if given as supposed, did not bind the city to accept an incorporated company in their stead, as the legislature might, for good reasons, require that such consent should be again given after the franchise was granted; and as such consent was never obtained, it is quite clear that the decree of the State court must be affirmed. Influenced by that view of the case, the court does not think it necessary to refer to the subsequent proceedings between the parties, as it is clear that none of them are of a character to give any different aspect to the controversy.

Decree affirmed.

* Governor *v.* Petch, 10 Hurlstone & Gordon, 610; Musser *v.* Street Railway Co., 7 American Law Register, 284.

† Walker *v.* Devereaux, 4 Paige Ch., 251.

‡ King *v.* Mayor, 3 Barnewall & Adolphus, 271; King *v.* Justices, 1 Neville & Manning, 67.

The CHIEF JUSTICE, with NELSON and DAVIS, JJ., dissented, Mr. Justice DAVIS saying for himself and them, that they thought that there was a contract between the People's Passenger Railway Company and the City of Memphis which could not be impaired by State legislation, but that he did not go into the question at length, as it was of no general interest, and of importance only to the parties to the suit.

Justices STRONG and BRADLEY had not taken their seats on the Bench when this case was adjudged.

REILLY *v.* GOLDING.

1. By the practice of the courts of Louisiana, a practice which has been adopted in the Circuit Court in that district, the mode of proceeding in an attachment suit against a surety on a forthcoming bond given to obtain a release of property attached, is by rule to show cause; and this proceeding being merely incidental to the original suit, a jurisdiction existing in such suit will not cease, because the parties to the *rule* are citizens of the same State.
2. Especially is this true where the defendant in the rule has appeared and answered on merits, and the case has gone to judgment.
3. A judgment affirmed where there was no finding of facts in the case.

ERROR to the Circuit Court for the District of Louisiana.

Golding, a citizen of Louisiana, brought suit against Milne & Co., of Mississippi, to recover a certain sum due for machinery furnished the last-named parties. The suit was commenced by an attachment against the property of the defendants, situate within the former State, and then in possession of the factors of the defendants, Bradly & Co. Bradly & Co. intervened, and obtained the redelivery of the property to them on executing a forthcoming bond, one Reilly being the surety. Afterwards the defendants, Milne & Co., appeared and removed the cause to the Circuit Court of the United States, and put in an answer to the suit. Judgment was subsequently rendered in favor of the plaintiff against

the defendants for the amount claimed, and execution issued, which was returned unsatisfied. Afterwards judgment was rendered against the intervenors by default, dismissing the proceedings with costs, reserving the plaintiff's right under the forthcoming bond. Subsequently a rule was entered against Reilly, the surety upon the forthcoming bond, to show cause why he should not be condemned to pay the debt of the plaintiff according to the condition of the bond. Reilly appeared, and excepted to the jurisdiction of the court, on the ground that the proceedings to enforce payment of the bond was a new suit, and the plaintiff and defendant were both citizens of Louisiana. The court overruled these objections. Reilly then put in an answer to the rule on the merits, after hearing which the court below gave judgment against them.

To obtain a review of the action of the court in both particulars, Reilly sued out this writ of error. The record contained no bill of exceptions, demurrer, or statement of facts.

Messrs. Miles Taylor, Lacey, and Butler, for the plaintiff in error, maintained, by brief, that the exception taken by Reilly below was well founded, and that even if the Circuit Court had jurisdiction over the original suit, the proceeding to enforce payment was a separate action, over which the Circuit Court had no jurisdiction, Golding, the plaintiff, and Reilly being confessedly both citizens of Louisiana.

Mr. Durant, contra.

Mr. Justice NELSON delivered the opinion of the court.

The answer to the exception to the jurisdiction of the court is, that according to the practice of the courts in Louisiana, and which has been adopted by the Circuit Court of the United States, the court proceeds against the surety on a forthcoming bond by a rule to show cause, as in the present case. The proceeding is merely incidental to the principal suit.

Reilly, also, put in answer on the merits which was tried.

The court made the rule absolute, and rendered judgment against the surety for the whole amount of the claim of the plaintiff.

There is no finding of the facts in this case, and no reason for taking it out of the general rule on the subject, which, under like circumstances, as is well settled, is to

AFFIRM THE JUDGMENT.

BOYLAN *v.* UNITED STATES.

1. Under the 96th section of the Excise Act of June 30th, 1864, exempting from a tax laid on sundry articles of dress by section 95, clothes manufactured of materials on which a duty had been paid, unless "the increased value" exceeds *five per cent. ad valorem*, such "increased value" is to be ascertained by a comparison between the market value of the materials at the time the tax on them was paid, with the market value of the manufactured goods at the time of the assessment of the tax upon *them.*
2. When the sale and delivery is to the government which imposes and collects the tax, the market value of the goods may be well enough determined by the price which the government agrees to pay, and the contractor agrees to receive.

ERROR to the Circuit Court of New York, the case being this:

By the 95th section of the act of June 30th, 1864, a tax of five per cent. was imposed on ready-made clothing, and sundry other articles of dress.* But the 96th section of the same act exempted from the tax goods manufactured of materials on which duties had been paid, unless the increased value of such goods exceeded *five per cent. ad valorem.*†

These provisions of the statute being in force, Boylan, a manufacturer of clothing, on the 10th of May, 1864, entered into a contract with the United States to manufacture and deliver to it at times specified, a certain amount of army clothing, for which he was to receive a price fixed. He did

* 13 Stat at Large, 269. † Ib. 272.

manufacture and deliver the clothing during the month of October, 1864, under his contract, and received the contract price from the United States. These goods were manufactured of materials, the cash value of which, in open market, was more than the price received by him for the goods. But the cost of manufacturing the goods was more than *five per cent.* of their value when manufactured. Boylan, in his return of manufactures for October, 1864, under the internal revenue laws, made return of the goods. An internal revenue tax of five per cent. *ad valorem* upon the price received by Boylan for the goods having been assessed, the suit below, an amicable one, was brought to recover the amount of the tax. The materials of the manufactured goods had been previously assessed under the internal revenue law, and the tax on *them* had been duly paid: though *when* paid was not shown. Judgment having been rendered in favor of the United States, Boylan brought the case here to reverse it; the general question being whether the assessment was made in accordance with the proper construction of the act of Congress; or, in other words, by what rule the "increased value," spoken of in the 96th section of the act, was to be ascertained.

The case did not show what was the actual cost to Boylan of the materials, nor so whether the price agreed on for the clothes was greater than the actual cost by more than *five per cent. ad valorem.*

Mr. Evarts, for the plaintiff in error:

At the time when these goods became liable to duty—if liable at all—the materials were worth more in the market than the price received for the completed goods; the "increased value," therefore, does not exceed *five per cent. ad valorem*, and they are exempt. Had Boylan sold the materials in the market, instead of manufacturing and delivering them to the United States, he would have received more than he did receive. That is to say, by the process of manufacture he did not increase their value at all. But an increase

of value by that process to the extent of more than five per centum is necessary to render the product taxable.

Mr. W. A. Field, Assistant Attorney-General, contra:

To entitle a person, a manufacturer of clothes, to exemption from the payment of this tax, he must prove facts that bring him within the provisions that grant him the exemption.

Now this case does not show,

1st. What was the *market value* of the clothes when manufactured, and whether this *market value* was greater than the *market value* of the materials by more than five per cent. *ad valorem;* nor does it show,

2d. What the *actual cost* to Boylan of the materials was, so as to enable us to know whether the *agreed price* of the pantaloons was greater than this *actual cost* by more than five per cent. *ad valorem.*

The presumption, in such an omission, is that the increase of value of the pantaloons over the value of the materials out of which they were made was more than five per cent. *ad valorem.* Admitting the whole case shown, the defendant may have made, and the presumption is that he did make a fair and even an enormous profit upon this transaction, a profit consisting in the advance in value of materials held by him between the date of the contract and the delivery of the goods. Shall he yet be allowed to obtain exemption?

Reply.

1. The taxable value of the manufactured goods in this case is the price obtained by actual sales; that is, the contract price.

2. The government would introduce a new element into the computation—that of time, and hold the defendant liable on the ground that the goods were increased in value, not by manufacturing them, but by the length of time during which he held them. Assuming this to be true, it could not render the goods taxable. If we suppose the tax itself

levied on the increased value of any manufacture, no one would doubt that the increase of value *by the process of manufacture* is that which is to be taxed. The manufacturer might have held the materials for ten years, or forty; or might have obtained them by inheritance or by gift; still, the taxable *increased value* is the added value by the process of manufacture. In this case it is admitted that no value was added by this process. What has the tax claimed to do with any additions to their value made by other causes?

The CHIEF JUSTICE delivered the opinion of the court.

The general question in this case is, by what rule is the increased value to be ascertained?

It was insisted in argument that the true mode of ascertaining the amount of increase is to deduct from the price of the manufactured goods sold and delivered, the market value of the materials at the time of the delivery.

And we think it reasonable that in a case where the sale and delivery is to the government which imposes and collects the tax, that the market value of the goods shall be taken as determined by the price which the government agrees to pay and the contractor agrees to receive. But it is not so clear that the value of the materials is to be determined by their market value at the time of the delivery of the manufactured goods. On the contrary, it seems to us that when the legislature made the degree of increased value after the payment of the tax on materials, the criterion by which to determine whether the manufactured goods should be liable to, or exempt from taxation, its intention was to require a comparison between the market value of the materials at the time the tax on them was paid, with the market value of the manufactured goods at the time of the assessment of the tax upon them. The time of this assessment in the case before us was in October, 1864, and the market value, on that day, must, as we have just said, be taken as determined by the contract price.

When the duties on the materials were paid is not shown, but it is agreed that they were paid, and that the market

value of the clothing at the time of delivery to the United States was greater than the market value of the materials when made or sold by the manufacturers, or purchased by the plaintiff in error, by more than *five per cent. ad valorem.* We infer that the duties on the materials were paid when or before they became the property of the plaintiff in error.

And these circumstances, as it seems to us, take the manufactured goods out of the category of exemption established by the law.

The language of the act seems, indeed, hardly to admit of any other interpretation. In terms stripped of superfluous words, it provides that goods manufactured from materials upon which duties have been paid, when the increased value shall not exceed the amount of five per cent. ad valorem, shall be exempt. The obvious construction of this language is, that increased value means the value augmented since the original payment of the duties; and that the five per cent. is to be computed on the value of the materials when those duties were paid.

This construction requires the affirmance of the judgment of the Circuit Court, and it is accordingly

AFFIRMED.

MAHONEY *v.* UNITED STATES.

The provision of the act of Congress of May 1st, 1810, fixing a salary to the consul at Algiers and assigning to him certain duties, treating that place as belonging to a Mohammedan power, ceased to be operative when the country, of which it was the principal city, became a province of France. The construction of the Secretary of State to this effect, impliedly sanctioned by the act of Congress of March 1st, 1855, "to remodel the diplomatic and consular systems of the United States" (10 Stat. at Large, 621), and expressly sanctioned by the act of August 18th, 1866, to regulate those systems. (11 Id. 52.)

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

An act of Congress, "fixing the compensation of public ministers and of consuls residing on the coast of Barbary,

and for other purposes," passed on the 1st of May, 1810,* provides that the President shall not allow "to any consul, who shall be appointed to reside at Algiers, a greater sum than at the rate of $4000 per annum as a compensation for all his personal services and expenses." Provision is made by the same act for salaries to consuls at Tangiers, Tripoli, and Tunis, other towns of the same coast.

At the time when this act was passed, Algiers was and had long been the capital, regency, or pachalic of the same name; one of the well-known Barbary States, a Mohammedan power, and dependent on the Ottoman empire; from which empire Turkish pirates had issued in early days, establishing themselves as sovereign masters of the city of Algiers. In 1830, a French army landed on the African coast, and after some fighting Algiers opened its gates, and the Dey gave up his city and government. The city then, A. D. 1831, became and still remains the capital of the French colonial province of Algeria; French tribunals, including at Algiers a tribunal of commerce, having largely displaced the native.

The act of 1810 above-mentioned, specified the sum which might be allowed to consuls residing at Algiers, *Tangiers, Tripoli, and Tunis*—all of them ports of what were known as the already mentioned Barbary States. It also provided that "no consul of the United States, residing in the *Barbary States*, should own, in whole or in part, a vessel, or be concerned in trade;" and some other provisions in the act showed that it had reference to a consul at Algiers† as a place under the control of one of these same states.

An act subsequent to the conquest of Algiers by the French —the act of March 1st, 1855—making provision for consuls in the "*Barbary States*," fixed a compensation for consuls at the last three named places italicized as above, but made no provision for the appointment or payment of a consul at Algiers; and a still later act—that of August 18th, 1856, making similar provision, and specifically mentioning the

* 2 Stat. at Large, 609.

† See §§ 4, 5, and 6.

last three, but not specifically mentioning Algiers—enacted that consuls for places not thus specifically mentioned should be entitled, as compensation for their services, to *such fees as they might collect.*

With this act of 1810 on the statute-book, but after the conquest of Algiers already mentioned, one Mahoney, in 1854, was appointed consul of the United States at the city of Algiers, in the north of Africa. He soon afterwards entered upon the discharge of his duties, and continued in office until November, 1859, when he resigned. During this period he received no salary from the government, *nor did he make any return to the government of fees received by him as consul, but he was paid the necessary expenses of his office, and was allowed by the Department of State to transact business as a merchant.* Whilst in office he preferred no claim for any salary or compensation for his services, nor did he afterwards advance any such claim until July, 1865. He then presented his claim for $4000 a year as salary to the Treasury Department. That department referred the matter to the State Department, and Mr. Seward, then Secretary of State, informed him that his claim could not be allowed. Its payment was accordingly refused. He then brought suit in the Court of Claims to recover the amount.

That court, which found as facts the matters stated in this last paragraph, dismissed the bill, holding among other things as matter of law, that from and after the recognition of Algeria by the United States as a province of France, the powers and duties of the consulate at Algiers were regulated and defined by the treaties of the United States with France, and that the consul became entitled to receive and hold his fees of office and to transact business, and was not entitled to receive the salary of $4000 per annum, authorized by the act of 1810, fixing the compensation of consuls residing on the coast of Barbary.

From this dismissal Mahoney, the claimant, appealed.

Mr. T. J. D. Fuller, for the appellant, contended that the conquest of Algiers by the French, and their taking possession

of it, could not repeal, annul, or even impair an act of Congress; that though the changed state of things, brought about by the conquest, was a good reason why Congress should alter the law passed before the change, yet if Congress did not alter it the law remained.

Nor could it be argued as a fact, he contended, that old Algiers had so completely ceased to exist as that the statute of 1810 became null. Neither town, port, nor people had disappeared from the exact place where they were. It was still the same city; a port of the sea frequented as before by merchants, and for commerce and trade. The only change was that it had ceased from being a power subject to Turkey, and had become a vice-royalty or dependency of France. But, he argued, that the office being a commercial, and not a diplomatic one, it mattered not whether Algiers became subject to the sovereignty of France, or remained subject to the Ottoman Porte. The port remained the same, and the laws regulating the consulate the same; just as if the island of Cuba should be ceded by Spain to any other European power, Havana would remain a commercial port, and the salary fixed by law to the American consul residing there also remain.

Mr. Talbot, contra, was stopped by the court.

Mr. Justice FIELD, after stating the facts as found by the Court of Claims, delivered the opinion of the court.

The language of the act of Congress of May 1st, 1810, would seem to indicate that the extent of the compensation to be made to the consul at Algiers was, within the limits prescribed, $4000 a year, subject to the control of the President, and that the amount specified was not payable absolutely to the person appointed. But assuming, for the purposes of this case, that the act fixes absolutely the rate of compensation, we do not think it sustains the claim of the appellant.

When that act was passed Algiers was a part of one of the Barbary States of that name, and it is evident, from an ex-

amination of its provisions, that the act was intended to apply to a consulate at that place only so long as it belonged to one of the Barbary powers. Years before the appointment of the appellant, Algiers, and the country of which it was the principal city, had become a province of France.

A great distinction has always been made between consuls to Mohammedan and consuls to Christian countries, both in the powers intrusted to them and in the duties with which they are charged. The full reciprocity which, by the general rule of international law, prevails between Christian states in the exercise of jurisdiction over the subjects or citizens of each other in their respective territories, is not admitted between a Christian state and a Mohammedan state in the same circumstances; and in our treaties with Mohammedan powers, express stipulations are made for the enjoyment by our citizens of certain exterritorial rights with respect to their persons and property. Whilst, therefore, in Christian countries consuls are little more than mere commercial agents, in Mohammedan countries they are clothed with diplomatic and even with judicial powers. Consuls to Christian countries are often allowed to engage in business; but consuls to Mohammedan countries are restricted to the duties of their offices, are paid a stated salary, and are prohibited from entering into commercial transactions.*

Thus, in the treaty with the Dey of Algiers, made in 1816,† it was stipulated that disputes between citizens of the United States should be decided by the consul; and in case a citizen of the United States should kill, wound, or strike a subject of Algiers, or, on the contrary, a subject of Algiers should kill, wound, or strike a citizen of the United States, the law of the country should "take place, and equal justice" be rendered, the consul assisting at the trial; and that the property of a citizen of the United States dying in Algiers should be under the immediate direction of the consul, unless otherwise disposed of by will.

* Halleck on International Law, chap. 10, §§ 21, 22; Opinions of the Attorneys-General, vol. vii, 346–348.

† 8 Stat. at Large, 244.

Provisions like these are not generally made in treaties between Christian nations; and they impose duties upon consuls which are not exacted of those officers when acting as mere commercial agents. It is plain that the duties for which a consul, inhibited from engaging in commerce, and charged with diplomatic and judicial functions, was required at Algiers, whilst that place formed part of a Mohammedan power, and this treaty was in force, ceased when that country passed under the jurisdiction of a Christian nation, and the treaty with the Dey thus expired. The Department of State from that time has treated the consulate there as one without salary, to which the provisions of the act of May, 1810, were no longer applicable; one which allowed the incumbent, as consuls in the countries subject to France are allowed, to engage in business, and only entitled to receive as compensation for his services such fees as he might collect, besides the necessary expenses of his office.*

The construction thus given by the secretary was impliedly sanctioned by the act of Congress of March 1st, 1855, "to remodel the diplomatic and consular systems of the United States,"† and was expressly sanctioned by the act of August 18th, 1856, to regulate those systems.‡

The act of 1810, after specifying the compensation which might be allowed to the consul appointed to reside at Algiers, designated the sum which might be allowed to other consuls appointed to reside in any other of the states on the coast of Barbary, thus making provision for all the Barbary States. The ports of these states, where consuls were appointed to reside, were Tangiers, Algiers, Tripoli, and Tunis. Now, in the act of March 1st, 1855, compensation is fixed, under the head of "Barbary States," for consuls to all those places except Algiers, and no provision is anywhere made for the appointment of a consul at that place, or for compensation to one there, showing that Congress did not then think that a consul with a salary there existed, or was there required.

The act of August 18th, 1856, enumerates the same places,

* 8 Stat. at Large, 106; 10 Id. 992. † 10 Id. 621. ‡ 11 Id. 52.

under the same head of Barbary States, at which consuls are to be appointed to reside, and designates their compensation, omitting, as in the act of 1855, the city of Algiers, and pro vides that consuls not thus enumerated shall be entitled, as compensation for their services, to such fees as they may collect, a provision which in effect declares, when read in connection with the preceding clauses of the act, that they shall receive no other compensation. And this latter act repeals all acts and parts of acts inconsistent with its provisions.

We find no error in the judgment of the Court of Claims, and it is accordingly

AFFIRMED.

TEXAS *v.* HARDENBERG.

1. Under a bill by a State praying that a defendant may be enjoined from asking payment of certain United States bonds belonging to it, unlawfully taken some time before from its treasury, and now redeemable, *and for such other and further relief as the court may deem proper*, equity will follow a substituted security (new bonds bearing interest) given by the United States; the substitution having been made after the issue of process under the bill, though before service, by agreement between the holder of the bonds and the United States, in order that the party properly entitled, whoever he might be finally under the bill decided to be, should not lose interest; and the new bonds being held by a trustee for this purpose.
2. A party buying bonds of the United States with overdue and unpaid coupons, is to be taken as affected with knowledge of prior equities when he purchases them after the date when they are redeemable, and for which the coupons run, knowing that the government, paying promptly all its bonds generally, objects at that time to redeeming these, and does not in fact redeem them or the overdue coupons, and where notice has been given in public papers of great circulation that payment of the bonds was forbidden, and that there was difficulty about them.

THIS case, which, in its principal aspect, has been already reported,* was now here upon an additional part of it, and

* 7 Wallace, 700.

under an order made when the main decree was given for further hearing on that additional part, if such hearing should be demanded. The case as presented by that part—a presentation of which, in a full and consecutive way, makes necessary a repetition of some parts of the original case—was thus:

In 1851, the United States issued five thousand bonds for $1000 each, and numbered successively from No. 1 to No. 5000, to the State of Texas. The bonds, which were dated January 1st, 1851, were coupon bonds, payable, by their terms, to the State of Texas or *bearer*, with interest at five per cent. semi-annually, and "*redeemable after the* 31*st day of December*, 1864." Each bond contained a statement on its face that the debt was authorized by act of Congress, and was "*transferable on delivery*," and to each were attached six-month coupons, extending to December 31, 1864, but no further.

In pursuance of an act of the legislature of Texas, the controller of public accounts of the State was authorized to go to Washington, and to receive there the bonds; the statute making it his duty to deposit them, when received, in the treasury of the State of Texas, to be disposed of "*as may be provided by law;*" and enacting further, that no bond, issued as aforesaid and payable to bearer, should be "available in the hands of *any* holder until the same shall have been indorsed, *in the city of Austin, by the governor of the State of Texas.*"

Most of the bonds were indorsed and sold according to law, and purchased in or paid by the United States prior to 1860. A part of them, however, appropriated by act of legislature as a school fund, were still in the treasury of Texas, in January, 1861, when the late Southern rebellion broke out. Texas was one of the rebel States; and the part which she took in the rebellion is sufficiently known. In the particular matter of this case, the legislature of the State, immediately after its so-called "ordinance of secession" was passed, directed the rebel military board of the State to dispose of any bonds and coupons which may be in the treasury

on any account, and use such funds or their proceeds for the defence of the State; and repealed the act which made an indorsement of the bonds by the governor of Texas necessary to make them available in the hands of the holder.

Under these acts, the military board, on the 12th January, 1865, a date at which the success of the Federal arms seemed probable, agreed to sell to White & Chiles a large number of these bonds, then in the treasury of Texas, and the bonds were delivered to White & Chiles on the 15th March following, *none of them being indorsed by any governor of Texas.*

In February, 1862, after the rebellion had broken out, the Secretary of the Treasury of the United States was informed by the Hon. G. W. Paschal, a loyal citizen of the State of Texas, that an effort would be made by the rebel authorities of Texas to use the bonds remaining in the treasury in aid of the rebellion; but that they could be identified, because all that had been circulated before the war were indorsed by different governors of Texas. The Secretary of the Treasury acted on this information, and refused in general to pay bonds that had not been indorsed. On the 4th of October, 1865, this same gentleman acting as an agent of the State of Texas, caused to appear in the money report and editorial articles of the New York Herald, a notice of the transaction between the rebel government of Texas and White & Chiles, and a statement that the treasury of the United States would not pay the bonds transferred to them by such usurping government. In addition to this, on the 10th October, 1865, the provisional governor of the State published in the New York Tribune, a "*Caution to the Public,*" in which he recited that the rebel government of Texas had, under a pretended contract, transferred to White & Chiles "one hundred and thirty-five United States Texan indemnity bonds, issued January 1, 1851, payable in fourteen years, of the denomination of $1000 each, and coupons attached thereto to the amount of $1287.50, amounting in the aggregate, bonds and coupons, to the sum of $156,287.50." His caution did not specify, however, any particular bonds by number. The

caution went on to say that the transfer was a conspiracy between the rebel governor and White & Chiles to rob the State treasury, that White & Chiles had never paid the State one farthing, that they had fled the State, and that these facts had been made known to the Secretary of the Treasury of the United States. And "a protest was filed with him by Mr. Paschal, the agent of the State of Texas, against the payment of the said bonds and coupons unless presented for payment by proper authority." The substance of this notice was published in money articles of various newspapers of about that date, and men in New York and other places, dealing in stocks, spoke to the agent who had caused it to be inserted in the Tribune, about it. It was testified also, that after the commencement of the suit, White & Chiles said that they had seen it.

The rebel forces being disbanded on the 25th May, 1865, and the civil officers of the usurping government of Texas having fled from the country, the State of Texas, on the 15th February, 1867, filed, with the leave of the court, a bill against White & Chiles, one Hardenberg, and some other persons, as defendants, on account of these bonds.

The bill set forth the issue and delivery of the bonds to the State, the fact that they were seized by a combination of persons in armed hostility to the government of the United States, sold by an organization styled the military board, to White & Chiles, for the purpose of aiding the overthrow of the Federal government; that White & Chiles had not performed what they agreed to do; that they had transferred such and such numbers, specifying them, to Hardenberg, and such and such others to different persons named; that these transfers were not in good faith, but were with express notice on the part of the transferees of the manner in which the bonds had been obtained by White & Chiles; that the bonds were overdue at the time of the transfer; and that they had never been indorsed by any governor of Texas; that they were placed in the hands of the defendants holding them, for the purpose of collecting the proceeds from the United States; and that the defendants designed to collect

the proceeds and apply the same to their own use, in disregard of the just rights, and to the great loss and injury of the complainant. And one of the interrogatories required from each defendant, except White & Chiles, to whom somewhat different interrogatories were addressed, a statement whether any other person was interested in any, and, if any, in which of the bonds, or the proceeds thereof.

The prayer of the bill was for an injunction against the defendants or any of them *asking, or receiving payment of the bonds from the United States*, and that the *bonds* might be delivered to the State of Texas; and for *other and further relief as to the court should seem fit and proper*. On the same 15th of February, 1867, that the bill was filed, a motion for injunction was made, and it was ordered to be set down for hearing on the 2d of May following, and that copies should be served on the defendants at least ten days before. Process and subpœna were issued forthwith and served; the service on Hardenberg being made February 27th. He filed his answer May 15th, and on the 16th, the motion for an injunction was granted with leave to the defendants to move to dissolve it at December Term, 1868. The dates are important, as will appear in connection with other dates hereafter stated.

The different defendants answered, and evidence having been taken and the cause argued, a decree was entered affirming the jurisdiction of the court (of which a denial had been made, and which was a main point argued), and finding that the contract of the 12th of January, 1865, between White & Chiles and the military board of Texas, was null and void; and that the indemnity bonds, received by the State from the United States, and transferred under that contract to White & Chiles, remained the property of the State notwithstanding that transfer.

The decree further found that the State of Texas was entitled to recover any of the bonds and coupons, or any proceeds thereof, which had come to the possession of any other defendants than White & Chiles, with notice of the equity of the complainant, and perpetually enjoined Hardenberg,

with other defendants, from setting up any claim or title to any of the bonds and coupons, or proceeds, which had come into their possession and control with such notice.

It was further decreed that certain defendants were accountable to make restitution of the bonds and the proceeds received by them; but it appearing that Hardenberg, before the commencement of this suit, had deposited thirty-four bonds with the Secretary of the Treasury, and now alleged that he had *received payment from the United States before the service of process, it was ordered that the counsel of those parties should be further heard in respect to such payment and the effect of it.*

It was this matter, therefore, a sequel, as already said, of the main case, which made the chief subject of the present hearing; re-argument being also, in fact, allowed on a point argued on the hearing of the main case,—how far Hardenberg was a holder *bonâ fide*, for value and without notice, of the bonds held by him.

The case, as respects both these points, was thus:

1. *As to the effect of the payment.*—The answer of Hardenberg to the bill filed by the State of Texas, stated, that "on the 16th of February, 1867, the Secretary of the Treasury ordered the payment to the respondent of all said bonds and coupons, and the *same were paid* on that day." That the *bonds* had been taken up was true; and the *books of the treasury* showed them as among the redeemed bonds; and showed nothing else. As a matter of fact, however, and as regarded the matter of a *payment*, the case was not so clear. It appeared that the agents of Texas, on the one hand, had been urging the government not to pay the bonds, and that Hardenberg, on the other (who had been advised by Mr. Tayler, December 17th, 1866, that payment was delayed in order that information might be got from Texas), was pressing for payment; it being insisted by him, as also by other bondholders who were pressing for payment of their bonds, that the United States had no right to withhold the money, now overdue, and ceasing to draw interest. The Controller of the Treasury, Mr. Tayler, in this state of things, made a

report, on the 29th of January, 1867, to the Secretary of the Treasury, in which he mentioned, that it seemed to be agreed by the agents of the State, that her case depended on her ability to show a want of good faith on the part of the holders of the bonds; and that he had stated to the agents, that as considerable delay had already been incurred, he would, unless during the succeeding week they took proper legal steps against the holders, feel it his duty to pay such bonds as were unimpeached in title in the holders' hands. He accordingly recommended to the secretary payment of Hardenberg's and of some others. The agents, on the same day that the controller made his report, and after he had written most of it, informed him that they would take legal proceedings on behalf of the State; and were informed in turn that the report would be made on that day, and would embrace Hardenberg's bonds. Two days afterwards (January 31st, 1867), a personal action was commenced, in the name of the State of Texas, against Mr. McCulloch, the then Secretary of the Treasury, to compel the detention of the bonds of Hardenberg and others. On the 8th of February, Mr. Tayler informed Hardenberg that *his* bonds had been reported to the secretary, with a recommendation that they be paid; but that while the clerk in the secretary's office, according to the usual practice, was preparing a statement, the personal action above referred to had been commenced against Mr. McCulloch for the detention of the bonds, and that "this of course compelled the secretary to postpone the payment." This personal action was dismissed February 19th. On the 15th of this same February, as already stated, the present bill was filed. On the 16th of the month, *no process under the present bill having then, nor until the 27th following, been served on Hardenberg*, Mr. Tayler, Controller of the Treasury, and one Cox, the agent of Hardenberg, entered into an arrangement, by which it was agreed that this agent should deposit with Mr. Tayler government notes known as "seven-thirties," equivalent in value to the bonds and coupons held by Hardenberg. The seven-thirties were then delivered to Mr. Tayler, and a check in coin for the amount of the bonds and

interest was delivered to Hardenberg's agent. The seven-thirties were subsequently converted into the bonds called "five-twenties," and these remained in the hands of Mr. Tayler, being registered in his name as "trustee." The books of the treasury showed nothing in relation to this trust; nor, as already said, anything more or other than that the bonds were paid to Hardenberg or his agent. But a correspondence, referred to in the opinion of the court below, gave the particulars of the transaction. The correspondence was thus:

[TAYLER TO COX.]

WASHINGTON, February 19, 1867.

DEAR SIR: In accordance with the understanding between you and me in relation to the Texan indemnity bonds presented for payment by your client, Mr. Hardenberg, you deposited with me $55,000, in 7-30 Treasury notes, and I advised the secretary to pay you the bonds.

You were accordingly paid 34 bonds, . .	$34,000
170 coupons, ...	4,250
Total in gold, ...	$38,250

The $55,000 7-30 notes *were deposited with and are held by me as indemnity for Mr. McCulloch against any personal damage, loss, and expense in which he may be involved by reason of the payment of the bonds.*

I believe this states substantially the arrangement, and the cause and condition of the deposit.

I am, very sincerely, yours,

R. W. TAYLER.

HON. S. S. COX, New York.

[TAYLER TO HUNTINGTON.]

WASHINGTON, February 26, 1867.

SIR: Herewith I hand you $55,000 dollars U. S. 7-30 notes, which were delivered to me by S. S. Cox for a purpose explained in my letter to him of the 19th inst. In lieu of these 7-30's I have received from you $55,000, 5-20 registered bonds of 1865, which are taken, as advised by Mr. Cox, and are to be held for

the purpose above referred to. The bonds are registered in my name as trustee.

I am, very respectfully,

R. W. TAYLER.

W. S. HUNTINGTON,
Cashier of the First National Bank, Washington.

[TAYLER TO COX.]

WASHINGTON, March 2, 1867.

DEAR SIR: Referring to my letter of the 19th February, to yours of the 20th, and to our conversation a few days since, I have to inform you that W. S. Huntington, cashier of the First National Bank, Washington, placed in my hands $50,000 registered 5-20 bonds of 1865, in lieu of the 7-30's mentioned in my letter, and that I handed the 7-30's to him. The bonds are registered in my name as trustee, and carry interest from January 1, 1867.

I am, very respectfully,

R. W. TAYLER.

HON. S. S. COX, New York.

Besides these letters, which were exhibits to depositions of Tayler, a letter and memorandum were in the record, being papers addressed by Mr. Tayler, the one to the Chief Justice, in consequence of some inquiry from the Bench, at an early stage of the case, whether the secretary had paid bonds after a bill was filed on the order to prevent payment; the other an explanatory memorandum to counsel. The letter and memorandum were thus:

[TAYLER TO THE CHIEF JUSTICE.]

TREASURY DEPARTMENT,
WASHINGTON, January 22, 1868.

SIR: In the answer of Mr. Hardenberg, in the case of "The State of Texas *v.* White et al.," it is stated that "on the 16th day of February, 1867, the Secretary of the Treasury ordered the payment to the respondent of all said bonds and coupons, and the same were paid on that day." I am told the court think this action of the secretary disrespectful toward them; but I am sure nothing disrespectful was intended, and I know that no act of the secretary in relation to these bonds disregarded any order or decree of the court. In form the bonds were paid; in fact the

proceeds have been withheld from Mr. Hardenberg, because of the legal proceedings, which the secretary did not desire to defeat.

I am, very respectfully,

R. W. TAYLER.

HON. S. P. CHASE, Chief Justice.

[MEMORANDUM GIVEN TO COUNSEL.]

WASHINGTON, January 24, 1868.

The particular form in which the matter of Hardenberg, referred to in my letter of the 22d to the Chief Justice, was arranged, is as follows: At the time, the agent of Hardenberg claimed that the personal action against the secretary having been withdrawn, and the decree enjoining the collection of the bonds not having been served upon Hardenberg, there was no legal objection against the payment of the bonds. The secretary, however, while not disputing this, was not inclined under the circumstances to pay them. It was then insisted that the United States had no right to withhold the money, thus depriving the holder of interest upon it; and upon this suggestion it was arranged that 7-30 notes, equivalent in value to the bonds and interest, should be deposited with an officer of the department to secure the secretary against any claim growing out of the litigation, in whatever shape it might come, and from any censure in the matter. The 7-30's were accordingly deposited, and then a check in coin, for the amount of the bonds and interest, was delivered. This arrangement was not made by Hardenberg in person, but by a gentleman representing him The 7-30's were subsequently converted into 5-20 bonds, which are in the hands of the same officer.

R. W. TAYLER.

As to the bona fides, &c., the case seemed much thus:

In the beginning of November, 1866, *after the date of the notices given by the State of Texas and her agents, and after the date from which the bonds by their terms were "redeemable," and after which the coupons ran out; some coupons then, of course, overdue and unpaid being on the bonds*, one Hennessey, residing in New York, and carrying on an importing and commission business, sold to Hardenberg thirty of these same bonds,

originally given to White & Chiles; and which thirty, a correspondent of his, long known to him, in Tennessee, had sent to him for sale. Hardenberg bought them "at the rate of $1.20 for the dollar on their face," and paid for them. Hennessy had "heard from somebody that there was some difficulty about the bonds being paid at the treasury, but did not remember whether he heard that before or after the sale."

Hardenberg also bought others of these bonds near the same time, at 1.15 per cent., under circumstances thus testified to by Mr. C. T. Lewis, a lawyer of New York:

"In conversation with Mr. Hardenberg, I had learned that he was interested in the Texan indemnity bonds, and meditated purchasing same. I was informed in Wall Street that such bonds were offered for sale by Kimball & Co., at a certain price, which price I cannot now recollect. I informed Mr. Hardenberg of this fact, and he requested me to secure the bonds for him at that price. I went to C. H. Kimball & Co., and told them to send the bonds to Mr. Hardenberg's office and get a check for them, which I understand they did. *I remember expressing to Mr. Hardenberg the opinion that these bonds, being on their face negotiable by delivery, and payable in gold, must, at no distant day, be redeemed according to their tenor, and were, therefore, a good purchase at the price at which they were offered.*

"My impression is, that *before* this negotiation I had read a paragraph in some New York newspaper, stating that the payment of the whole issue of the Texas indemnity bonds was suspended until the history of a certain portion of the issue, supposed to have been negotiated for the benefit of the rebel service, should be understood. I am not at all certain whether I read this publication before or after the date of the transaction. *If the publication was made before this transaction I had probably read the article before the purchase was made.* My impression is, that it was a paragraph in a money article, but I attributed no great importance to it. I acted in this matter simply as the friend of Mr. Hardenberg, and received no commission for my services. I am a lawyer by profession, and not a broker."

Kimball & Co. (the brokers thus above referred to by Mr

Lewis), testified that they had received the bonds thus sold, from a firm which they named, "in perfect good faith, and sold them in like good faith as we would any other lot of bonds received from a reputable house." It appeared, however, that in sending the bonds to Kimball & Co., for sale, the firm had requested that they might not be known in the transaction.

Hardenberg's own account of the matter, as declared by his answer, was thus:

"That he was a merchant in the city of New York; that he purchased the bonds held by him in open market in said city; that the parties from whom he purchased the same were responsible persons, residing and doing business in said city; that he purchased of McKim, Brothers & Co., bankers in good standing in Wall Street, one bond at 1.15 per cent., on the 6th of November, 1866, when gold was at the rate of $1.47\frac{1}{4}$, and declining; that when he purchased the same he made no inquiries of McKim, Brothers & Co., but took the bonds on his own observation of their plain tenor and effect at what he conceived to be a good bargain; that afterwards, and before the payment of said bonds and coupons by the Secretary of the Treasury, and at the request of the Controller, Hon. R. W. Tayler, he made inquiry of said firm of McKim, Brothers & Co., and they informed him that said bonds and coupons had been sent to them to be sold by the First National Bank of Wilmington, North Carolina; that he purchased on the 8th of November, 1866, thirty of said bonds, amounting to the sum of $32,475, of J. S. Hennessey, 29 Warren Street, New York city, doing business as a commission merchant, who informed him that, in the way of business, they were sent him by Hugh Douglas, of Nashville, Tennessee; that he paid at the rate of 120 cents at a time, to wit, the 8th of November, 1866, when gold was selling at 1.46 and declining; that the three other bonds were purchased by him on the 8th of November, 1866, of C. H. Kimball & Co., 30 Broad Street, brokers in good standing, who informed him, on inquiry afterwards, that said bonds were handed them to be sold by a banking house in New York of the highest respectability, who owned the same, but whose names were not given, as the said firm informed him they could 'see no reason for divulging pri-

vate transactions;' and that he paid for last-mentioned bonds at the rate of 120 cents, on said 8th day of November, 1866, when gold was selling at 1.46 and declining.

"Further answering, he saith that he had no knowledge at the time of said purchase, that the bonds were obtained from the State of Texas, or were claimed by the said State; that he acted on information obtained from the public report of the Secretary of the Treasury, showing that a large portion of similar bonds had been redeemed, and upon his own judgment of the nature of the obligation expressed by the bonds themselves, and upon his own faith in the full redemption of said bonds; and he averred that he had no knowledge of the contract referred to in the bill of complaint, nor of the interest or relation of White & Chiles, nor of any connection which they had with said complainant, or said bonds, nor of the law of the State of Texas, requiring indorsement."

The answer of White mentioned, in regard to Hardenberg's bonds, that they were sold by his (White's) broker; that he, White, had no knowledge of the name of the real purchaser, who, however, paid 115 per cent. for them; "that at the time of the sale, his (White's) broker informed him that the purchaser, or the person acting for the purchaser, did not want any introduction to the respondent, and required no history of the bonds proposed to be sold; that he only desired that they should come to him through the hands of a loyal person, who had never been identified with the rebellion."

It appeared further, in regard to the whole of the Texas bonds, the subject of this suit, that, in *June*, 1865, Chiles, wanting to borrow money of one Barret, and he, Barret, knowing Mr. Hamilton, just then appointed provisional governor of Texas, but not yet installed into office, nor apparently as yet having the impressions which he afterwards by his caution made public, went to him, supposing him well acquainted with the nature of these bonds, and sought his opinion as to their value, and as to whether they would be paid. Barret's testimony proceeded:

"He advised me to accept the proposition of Chiles, and gave

it as his opinion that the government would *have* to pay the bonds. I afterwards had several conversations with him on the subject, in all of which he gave the same opinion. Afterwards, (*I can't remember the exact time*), Mr. Chiles applied to Birch, Murray & Co. for a loan of money, proposing to give some bonds as collateral security; and at his request I went to Birch, Murray & Co., and informed them of my conversations with Governor Hamilton, and of his opinion as expressed to me. They then seemed willing to make a loan on the security offered. In order to give them further assurance that I was not mistaken in my report of Governor Hamilton's opinion verbally expressed, I obtained from him a letter [letter produced]. It reads thus:

"NEW YORK, June 25th, 1865.

"HON. J. R. BARRET.

"DEAR SIR: In reply to your question about Texas indemnity bonds issued by the U. S., I can assure you that they are perfectly good, and the gov't will certainly pay them to the holders.

"Yours truly,

"A. J. HAMILTON."

The witness "mentioned the conversations had with Governor Hamilton, and also spoke of the letter, and sometimes read it to various parties, some of whom were dealing in these bonds," and, as he stated, had "reason to believe that Governor Hamilton's opinion in regard to the bonds became pretty generally known among dealers in such paper." The witness, however, did not know Mr. Hardenberg.

Messrs. Evarts and Carlisle, for Hardenberg:

1. *As to the effect of the payments.*—When the bill was prepared, and indeed when it was filed, a wholly different state of facts existed from that against which it is *now* sought to have relief. The bonds were then in the hands of Hardenberg, and unpaid. Assuming that he was not a holder *bona fide*, &c., a prayer for injunction against receiving payment was proper, and the only prayer which was proper, or indeed possible. Before, however, any process was served on us, or bound the parties in any way, the bonds were paid and surrendered. A wholly new state of facts arose, and the case assumed by the bill is discovered to have no

existence. And what is now wanted is a bill that shall set forth, along with the former alleged facts of purchase, the fact of payment, substitution, &c., and a prayer to have the substituted securities. Some such bill, in some form, is indispensable, unless we are to violate all rules of equity proceeding. The prayer for general relief cannot be so interpreted as to apply to a state of things which is the reverse of the true state of things, to the state of things alleged in the bill, and to the only state of things which was in the complainant's mind at all. The difficulty of the complainant's case is not that his bill does not set forth his now case directly and with distinctness, and does not pray for the proper relief in the most specific way; but that it does not set forth his now case at all, nor pray, in any way, relief suitable to *it;* though it does set out another case, and assuming that case to be true pray proper relief for *it.*

The reliance of the other side will have to be on Mr. Tayler's letter to the Chief Justice, and his memorandum to counsel, *after* he thought that he had made a mistake; an exculpatory paper and memorandum. He had no capacity, when he wrote that letter and made that memorandum, to say what the transaction was in fact as distinguished from form. That is a point to be judged of as a question of law on a view of the thing done.

2. *As to the bona fides, &c.*—Hardenberg knew nothing of the bonds except what appeared on their face, and from the published official treasury reports, that similar bonds, of the same issue, had been paid and redeemed at the Treasury of the United States, notwithstanding the secession of Texas, and the civil war and rebellion, which had been suppressed, in point of fact, long before his purchase. He had no knowledge or information that Texas had at any time assumed to alter the terms of the contract of the United States, as expressed on the face of the bonds, so as to expunge from them the express declaration that they were payable to "*bearer*," and the repeated declaration to the same effect, that the bonds passed "*by delivery.*" He, therefore, was not affected by the fact that the bonds were not indorsed by the governor

of Texas (if that alteration of the tenor of the bonds had any legal efficacy), and was wholly ignorant that such indorsement had been authorized or required by Texas, for her security against fraud, or for any other purpose.

He had no knowledge or information that the bonds purchased by him had ever been held or claimed by White & Chiles, or either of them; or that any such contract as that set up by the bill had been made. In brief, he was a perfect stranger to all and singular the matters alleged by the bill, as affecting the title to the bonds.

He found them in open market, in the city of New York, in the month of November, 1866, and bought them in good faith, and for their full market value, of brokers and others of high standing, in the usual and regular course of business, not only without knowledge or notice, but without suspicion, or reason to know or suspect, that there was any infirmity in the title of his respective vendors, or any of them.

All this appears by his answer. It is plainly stated, is responsive to the bill, is uncontradicted, and is, therefore, *the case of Hardenberg.*

Against this case, in matter of fact, nothing can be opposed but an alleged constructive notice of the dishonor of the bonds, derived from the language on the face of the instruments, that they were "redeemable after the 31st day of December, 1864," which day had passed when he purchased; and the further fact that there were unpaid and overdue coupons attached to the bonds. This, it will no doubt be insisted, for the complainant opens the bonds in the hands of Hardenberg "to all equities," and lets in the complainant to the relief claimed by the bill.

That coupon bonds, payable to bearer, are negotiable securities, passing by delivery, like bank notes, and that the possession is sufficient evidence of title, and that nothing short of knowledge of the infirmity of title, even in the case of *stolen* bonds of this description, will defeat the title of a *bonâ fide* purchaser for value, is now settled.*

* Murray *v.* Lardner, 2 Wallace, 110.

Will it be insisted for the complainant, that when Hardenberg purchased these bonds they were *overdue*, and that this circumstance defeats his title?

Suppose they were, in all respects, like a promissory note, indorsed after it was due? What would be the legal consequence? Such an instrument does not cease to be negotiable when it is past due and unpaid. It is now settled,* both in England and in this court, as we have seen, that circumstances which would have put a prudent man upon inquiry, are not enough to affect the title of a *bonâ fide* holder for value. And there is not, and cannot be, the slightest imputation to Mr. Hardenberg of *mala fides*. The most that can be said of the fact, apparent on the face of a negotiable instrument, that it is overdue, is that it implies, *primâ facie*, that the bill or note has been *dishonored;* that the maker or acceptor (the party primarily liable) refuses to pay.

In point of fact, in the case at bar, no such thing is pretended. On the contrary, the whole ground for the suit, which is an invocation of the equity powers of the court, is that the maker, the United States, will certainly pay the bonds to the holder, according to the face and tenor thereof, unless the court will interfere and forbid such payment. It is not perceived how such a fact could have any such significance upon the question, whether the *holder* is, as his possession imports, really *the owner;* and that is the principal question made by the complainant here, upon the *first* proposition above considered.

Nor can it have any significance as to their second proposition, which is in effect the want of consideration for the transfer. At most, the fact of the transfer, when overdue, of a bill or note, is to subject it in the hands of the holder to all *its* equities; to all the equities with which it is incumbered at the time of the transfer.

An original absence of consideration is not one of those equities which attach on the instrument, and defeat the title

* Murray *v.* Lardner, 2 Wallace, 110.

of an indorsee for value of an overdue bill, although with notice of the fact.*

But it is a mistake to say that these bonds were "overdue." It is only necessary to read the bonds themselves, to see that there is no analogy, in this respect, between them and a promissory note, payable to order on a certain day. They were issued as *stock*, not *payable to bearer on any certain day*, but "*redeemable after* fourteen years from their date." They certified that interest would be paid semi-annually for that period; but *thereafter* the bonds might be redeemed by the United States at its pleasure and convenience. The fact that the day had passed *after which* the bonds might be redeemed, and that they had in fact not been redeemed, signified nothing inconsistent with the obligation on its face. The bonds had never been called in. The fiscal condition of the country, and its unsettled political relations with the rebel States, sufficiently explained the fact that they had not been redeemed at the earliest day, when, by their tenor, they were redeemable.

Upon this question of *bona fides*, considerable weight is due to the opinion and action of Mr. Controller Tayler, who upon the whole case, which he necessarily examined, considered that the bonds held by Hardenberg ought to be paid, and who in fact did pay them.

Messrs. Paschall and Merrick, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It is asserted, in behalf of Hardenberg, that he can, in no event, upon the pleadings in this suit, be held to account for the proceeds of the bonds which came to his possession, because the bill prays only relief by injunction against receiving payment of the bonds or coupons, and by decree for delivery of them specifically to the State.

It is not denied that the bill also prays for such other and

* Charles *v.* Marsden, 1 Taunton, 224; Sturtevant & Ford for Manning & Granger, 101; Lazarus *v.* Cowie, 3 Queen's Bench, 459; Stein *v.* Yglesias, 1 Compton, Meesor & Roscoe, 565.

further relief as to the court shall seem just and proper; but it is insisted that there is nothing in the frame of the bill which will support a claim for relief as to proceeds where payment of the bonds and coupons had been actually received before service of process.

It is undoubtedly true that no relief can be granted under the general prayer except such as is agreeable to the case made by the bill.*

And it is plain enough that the principal object of the bill in this case was to prevent the collection of the bonds by the defendants, and to compel the surrender of them to the State of Texas. But there are averments and interrogatories which look to the proceeds as well as to the bonds themselves. For example, it is charged that the bonds were placed in the hands of the defendants holding them, for the purpose of collecting the proceeds from the United States; and again, that the defendants design to collect the proceeds and apply the same to their own use, in disregard of the just rights, and to the great loss and injury of the complainant. And one of the interrogatories requires from each defendant, except White and Chiles, to whom somewhat different interrogatories are addressed, a statement whether any other person is interested in any, and, if any, in which of the bonds, or the proceeds thereof.

It may be admitted that these allegations and interrogatories do not assert the right of the complainant to the proceeds with absolute directness and distinctness. The bill might have been better drawn. But we think it would savor of extreme technicality to refuse to see in the bill enough in relation to the proceeds of the bonds to warrant relief in this respect under the general prayer.

It is proper to observe here that this objection to relief, in respect to the proceeds of the bonds, was not taken on the former hearing, and that the decree heretofore made distinctly finds that the State of Texas is entitled to restitution of such of the bonds, and coupons, and proceeds as have

* Story's Equity Pleading, § 40; English *v.* Foxall, 2 Peters, 595.

come into the possession or control of the defendants—among whom Hardenberg is expressly named—with notice of the equity of the State. It might well be held, therefore, that this question is concluded by the former decree; but willing to allow this defendant the benefit of any defence consistent with the rules which govern proceedings in equity, we have looked into the question as if it were still open. Having thus looked into it, we find no sufficient ground for altering the conclusion embodied in the decree.

We come then to the real question upon which further hearing was allowed, namely, what was the nature and effect of the payment received by Hardenberg from the Secretary of the Treasury, before service of process in this suit?

The bill was filed on the 15th of February, 1867, in pursuance of leave granted by the court. On the same day a motion for injunction was made, and it was ordered that this motion be set down for hearing on the 2d of May, 1867, and that copies of the order be served on the defendants at least ten days previously. Process was ordered, and subpœnas were issued on the same day, and copies of the subpœna and of the motion for injunction were served on Hardenberg on the 27th of February. The answer of Hardenberg was filed May 15th, and on the following day the motion for injunction was allowed, with leave to defendants to move for its dissolution at the next term.

In the interval between the filing of the bill and the service of process, as Hardenberg avers in his answer, the Secretary of the Treasury ordered the payment to him of all his bonds and coupons deposited for redemption, being the same bonds and coupons alleged in the bill to be the property of the State of Texas, and they were paid accordingly on that day.

What was this payment? On the 17th of December, 1866, Hardenberg had been advised by Controller Tayler that payment was delayed for information from Texas. On the 8th of February he was further advised by the same official that the bonds and coupons had been reported to the Sec-

retary of the Treasury for payment, but that payment had been postponed in consequence of a personal action in the name of the State of Texas against the secretary for their detention.

It is clear that Hardenberg was now informed that the bonds and coupons, deposited by him for redemption, were claimed by the State of Texas.

Subsequently, on the 16th of February, thirty-eight thousand two hundred and fifty dollars, being the amount of the bonds and coupons, was paid to the agent of Hardenberg in a coin check, and at the same time treasury 7-30 notes to the amount of fifty-five thousand dollars were deposited with Controller Tayler, according to his statement, made in a letter to the agent, dated February 19th, "as indemnity for Mr. McCulloch" (the Secretary of the Treasury) "against any personal damage, loss, and expense in which he might be involved by reason of the payment of the bonds."

This payment was made on the day after the bill of the State was filed in this court and subpœnas issued. That the institution of the suit, thus begun, was known to the secretary at the time is apparent from the letter of Mr. Tayler to the Chief Justice, dated January 22d, 1868, in which he says: "In form the bonds were paid; in fact the proceeds have been withheld from Mr. Hardenberg because of the legal proceedings, which the secretary did not desire to defeat."

And all this is still further apparent from a memorandum statement made by Mr. Tayler on the 24th, and handed to one of the counsel in the cause.

These statements Mr. Tayler in his deposition reaffirms; but for additional particulars refers to his letter to the agent, already quoted, and to a letter addressed by him on the same day to the cashier of the First National Bank.

From these letters, this memorandum, and the deposition of Mr. Tayler, we do not think it difficult to collect the substantial facts of the transaction. Hardenberg was naturally solicitous to collect the amount of his bonds and coupons, which had ceased to bear interest; or, at any rate, to make

some arrangement by which the loss of interest pending the liquidation might be avoided. The controller seems to have thought that he was entitled to payment, and the secretary was willing to order payment to be made, but not willing to incur any risk of consequential loss or injury. It was his duty, in any arrangement that might be made, to protect the government, and through the government the parties really entitled to the bonds, as well as himself. And the statements of Mr. Tayler, taken together, satisfy us fully that it was the intention of the secretary, and his own, that these objects should be accomplished.

With these views it was arranged that Hardenberg should deposit with the controller the 7-30 treasury notes, and receive the amount of the bonds and coupons in coin, as already mentioned. And further, that on the deposit with the controller of fifty-thousand dollars in registered 5-20 bonds upon the same trust, the 7-30 bonds should be delivered to him or his agent.

That this arrangement was carried into effect appears from Mr. Tayler's letter of March 2d, 1867, addressed to Hardenberg's agent at New York. The letter concludes with these words: "The bonds are registered in my name as trustee, and carry interest from January 1, 1867."

Trustee for whom? Equity looks through forms to substance; and the substance of this transaction clearly was the substitution of one set of securities in the hands of the Controller of the Treasury for another, for the benefit of the parties really entitled. In no other way could the object of the trust, namely, the security of the government and the secretary against loss, be attained. At the beginning, he held bonds or coupons of the United States issued as indemnity to Texas. At the end, he held registered bonds of the United States in their place. And he held both for Hardenberg, subject to the same equities. The net result of the transaction to Hardenberg was the putting of the debt in a shape to bear interest. If the coin received for the indemnity bonds exceeded the amount invested in the 5-20 bonds deposited in their stead, he may have also gained that excess.

In this view of the case, it is not important to inquire whether the delivery of the coin check to Hardenberg took place before or after the service of process. That transaction was correctly described as "a payment in form," the proceeds having been, in fact, withheld. It was not designed, on the part of the Secretary of the Treasury, to defeat the legal proceedings already commenced by filing the bill and issuing the subpœnas in the cause. We will not presume that any one else entertained such a design. Certainly no such effect, if designed, can be accomplished through the aid of a court of equity. We are obliged, therefore, to say that the delivery of the coin check to the agent of Hardenberg was not payment. There was, indeed, no real payment at all. There was a transaction beginning with the delivery of the coin check, and ending with the substitution of the 5-20 bonds in place of the indemnity bonds, which was to be perfected into actual payment by the delivery to Hardenberg of the substituted bonds whenever this could be safely done. During the progress of this transaction, process in this suit was served on Hardenberg. No real payment, therefore, was made before service of process.

Our conclusion on this part of the case is, that the so-called payment on the 16th of February, 1867, did not affect the equities of the complainant, except by transferring them from the indemnity bonds to the 5-20 bonds substituted in their place, so far as may be necessary to satisfy to the complainant the amount then due upon the former.

This conclusion leaves but one question for consideration, namely, whether Hardenberg, at the time he purchased the bonds, had notice of the equity of the State of Texas? This question was not concluded by the decree, but it was fully considered by the court upon the former argument, and our conclusion was stated in the opinion then delivered, that Hardenberg, as well as the other purchasers of indemnity bonds about the same time, was affected by such notice. We will not restate what we then said. It is only necessary

to say that we have reconsidered the grounds of that decision, and are still satisfied with it.

It follows that, upon the whole case, our decree must be for the complainant as to the bonds claimed by Hardenberg.

STRONG and BRADLEY, JJ., had not yet taken their seats when this case was adjudged.

THE SCHOOLS *v.* RISLEY.

1. Calls for the Mississippi River in deeds or conveyances from one private individual to another private individual for lots in St. Louis do not give or create riparian rights in the grantees.
2. The eastern boundary of the corporation of St. Louis of 1809, and the eastern line of the out-boundary of December 8, 1840, both extend to the middle of the main channel of the Mississippi River.
3. A street or tow-path or passway or other open space permanently established for public use between the river and the most eastern row of lots or blocks in the former town of St. Louis, when it was first laid out, or established, or founded, would prevent the owners of such lots or blocks from being riparian proprietors of the land between such lots or blocks and the river. But this would not be true of a passage-way or tow-path kept up at the risk and charge of the proprietors of the lots, and following the changes of the river as it receded or encroached, and if the inclosure of the proprietor was advanced or set in with such recession or encroachment.
4. The act of June 13, 1812, reserving certain lands for the benefit of the public schools of St. Louis, does not reserve lands made by accretion to lots on the river which were inhabited, cultivated, and possessed by persons at the time of the cession of December, 1803, and till the already mentioned act of June 13, 1812.
5. A concession which would have effect to bind a person when claiming under it and when it relates to one piece of property, has no effect when the person does not claim under it and when it relates to another.
6. Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and they are framed in clear and unambiguous terms, it is no cause for the reversal of a judgment to show that one or more of the prayers for instruction presented by the losing party and not given by the court were correct in the abstract.
7. The map known as Chouteau's map in the office of the record of land titles at St. Louis is not evidence conclusive upon questions of the extent of lots in that town. But it may go to a jury with other evidence.

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ERROR to the Supreme Court of the State of Missouri, the case being this:

The city of St. Louis, as is known, is situated on the west side of the Mississippi River and faces the stream. It was formed by the French and Spanish in times as early as 1764; and passed to the sovereignty of the United States by the cession which France made December 20, 1803, of the large region then known as the province of Louisiana. French subjects being already in possession of various rights throughout the town, Congress by statute of 1812 enacted that "the rights, titles and claims to those town or village lots, out-lots, common field lots and commons, in, adjoining, and belonging to the towns which had been inhabited, cultivated or possessed, prior to the 20th of December, 1803, should be, and the same were thereby, confirmed to the inhabitants of the town according to their several right or rights in common thereto." The act proceeds, in its first section:

"And it shall be the duty of the principal deputy surveyor of the said territory to survey the out-boundary lines of the said town, so as to include the out-lots, common field lots and commons thereto belonging. And he shall make out plats of the surveys, which he shall transmit to the surveyor-general, who shall forward copies of the said plats to the commissioner of the General Land Office and to the recorder of land titles. The expense *of surveying the said out-boundary* lines shall be paid by the United States."

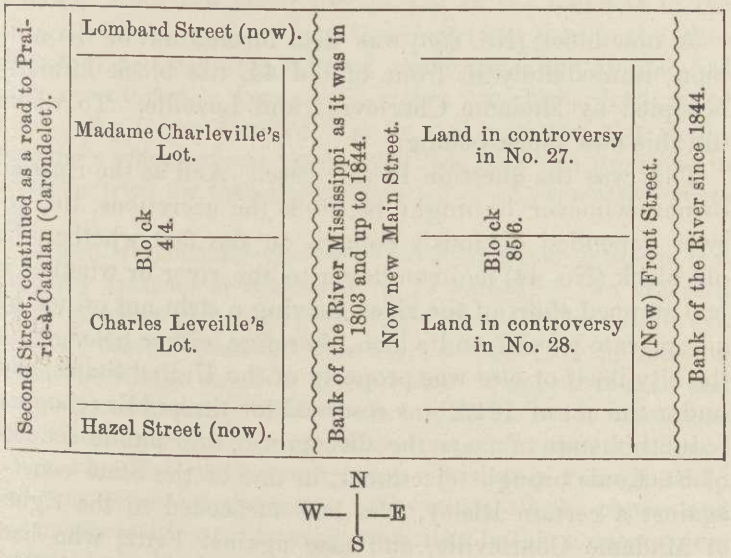
The second section of the act provided that "all town lots, out-lots or common field lots *included in such surveys*, which were not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns and villages, . . . should be reserved for the support of schools."

In 1803, and indeed till the year 1844, there was a street running nearly parallel to the Mississippi River and within less than two hundred feet of it (the river rather eating into the bank, year by year), known as Second Street, or some-

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times (in its extension), Prairie-à-Catalan or Carondelet. On the east side of this street, a block of ground, No. 44, ran eastward—ran, therefore, *towards* the river or *to* it; but whether "towards" only or "to" was a matter of dispute. On the north side of this block, for many years prior to the cession of 1803, one Madame Charleville had been settled, inhabiting and cultivating it; and on the south side, a free negro, named Charles Leveille.

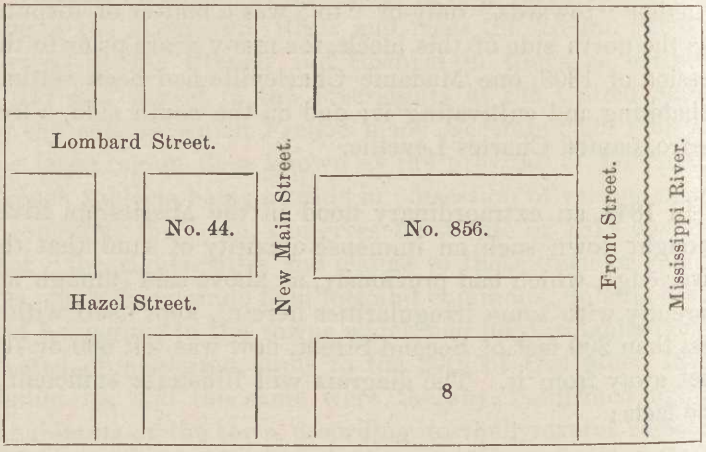
In 1844, an extraordinary flood in the Mississippi River brought down such an immense quantity of sand that the river edge, which had previously, as above said (though apparently with some irregularities herein), kept itself within less than 200 feet of Second Street, now was left 600 or 700 feet away from it. The diagram will illustrate sufficiently the facts:



The result was that the city caused to be extended down to the new edge of the river those streets (Hazel and Lombard) which, running at right angles to the old stream, formerly met it at their extremity; and it made a new street

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(New Main Street) parallel to old Second Street. The idea will be better understood from a diagram:



A new block (No. 856) was thus formed out of the alluvion, immediately in front of old 44, the block formerly occupied by Madame Charleville and Leveille. To whom did this new block belong?

That was the question in this case. And as the riparian owner, whoever he might be, took the accretions, the answer depended obviously enough on the fact whether the old block (No. 44) had run down to the river or whether it had stopped short of the river, leaving a strip not owned by any private person, and which, therefore, either belonged to the city itself or else was property of the United States, and under the act of 1812, was reserved for the public schools.

In this state of facts the directors of the public schools of St. Louis brought ejectment, in one of the State courts, against a certain Risley, who had succeeded to the rights of Madame Charleville, and also against Fritz, who had succeeded to the rights of Leveille, to recover the block. The former case (No. 27 on the docket) is here reported; it being understood that the latter case (No. 28) should follow any decision given in the other.

THE PLAINTIFF, relying on the act of 1812, introduced a

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large amount of documentary evidence, and among other concessions one to a certain Louis Ride, and a confirmation of it, with a survey of the same by the surveyor-general. According to this survey, the claim was located in the northwest corner of block No. 44 and extended eastwardly no further than 150 feet. He introduced also several plots of the town, among them especially one known as Chouteau's map, with the opinion of the Supreme Court of Missouri given in the case of *St. Louis Public Schools* v. *Erskine*.* In that case, where apparently objection had been made to the reception of the map at all, the court said:

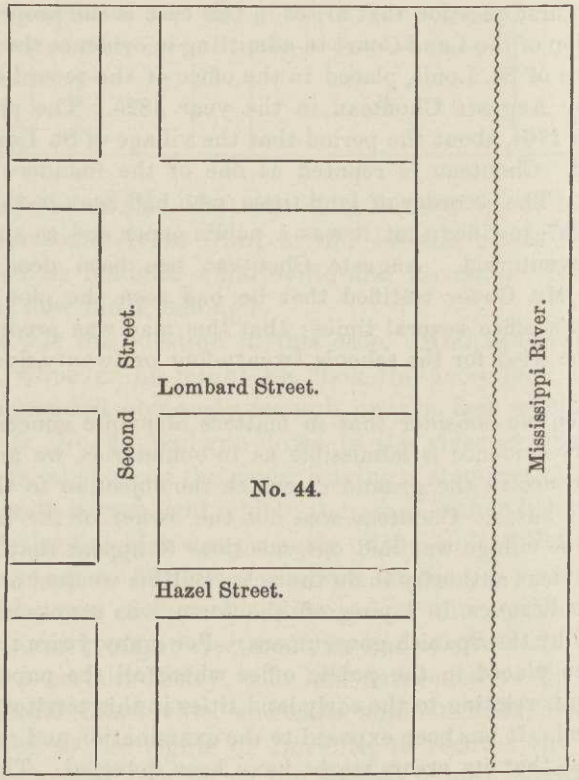
"The first question that arises in this case is the propriety of the action of the Land Court in admitting in evidence the plat of the town of St. Louis, placed in the office of the record of land titles by Auguste Chouteau in the year 1825. The plat was made in 1764, about the period that the village of St. Louis was founded. Chouteau is reputed as one of the founders of the village. The recorder of land titles, who had been in the office since 1837, testified that it was a public paper and as such had been inventoried. Auguste Chouteau has been dead many years. Mr. Geyer testified that he had seen the plot in the recorder's office several times; that this map was produced in a case he tried for the schools twenty-four or twenty-five years ago.

"When we consider that in matters of public concern, traditionary evidence is admissible as to boundaries, we are at a loss to conceive the ground on which the objection to the evidence is based. Chouteau was not the owner of the land on which the village was laid out, nor does it appear that he had any previous authority to do the act. But his conduct and that of his colleagues, in laying off the town, was sanctioned and adopted by the Spanish government. For many years the map has been placed in the public office where all the papers and documents relating to the early land titles in this territory were deposited. It has been exposed to the examination and scrutiny of all, so that its errors might have been detected. The map was made at a time and in a manner which show that its execution could not have been prompted by any sinister motive.

* 31 Missouri, 112, 113.

"We know that it has frequently been in use in this court, to show the plans and extent of the ancient village as originally laid out by its founders. For such purposes, when all the circumstances attending this map are considered, it is not easy to conceive more satisfactory evidence of facts of so ancient a date. If authority is wanted, in support of this view of the subject, it may be found in the cases of *Morris* v. *The Lessees of Harmer's Heirs* (7 Peters, 560), and *The Commonwealth* v. *Alburger* (1 Wharton, 469)."

Chouteau's plat represented the place thus; leaving a broad strip between block No. 44 and the river:



THE DEFENDANT, on the other hand, introduced a concession by the Spanish governor, dated March 1, 1788, to the negro Leveille, for a lot in St. Louis of 60 by 150 feet,

described in the concession as bounded on the one side by the heirs of Louis Ride, on the other by his Majesty's domain; *on the rear by the Mississippi*, and on the main front by the road which follows from the second main street to the Prairie-à-Catalan.

He also introduced a concession by Governor Manuel Perez to Augustin Amiot, dated September 2, 1788, of a lot in the southern part of St. Louis, described in the concession as "120 feet front by 150 feet deep, bounded on the north side by the lot of the free negro called Charles, on the other side by the royal domain, *on the rear by the Mississippi*, and on its principal front by the royal road leading to the Prairie-à-Catalan."

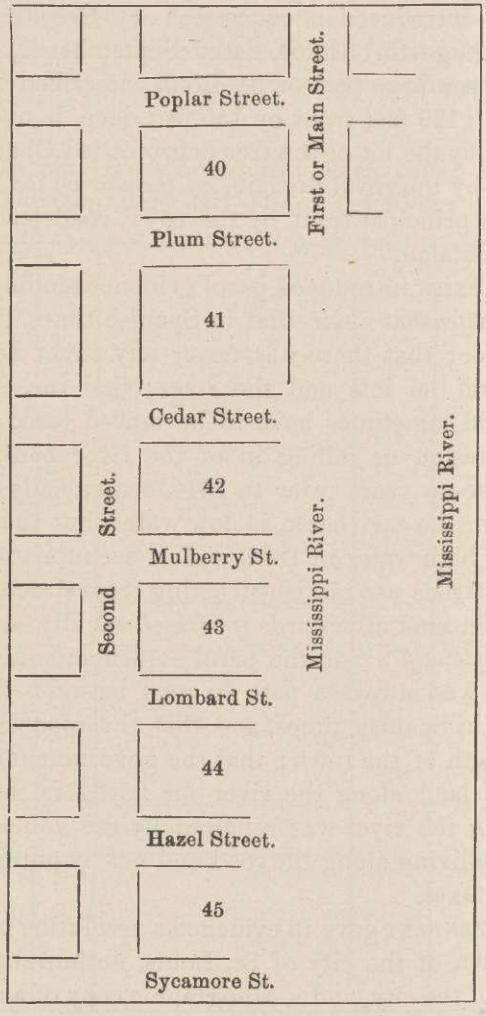
BOTH PARTIES introduced parol evidence tending to show:

On the defendant's side, that in Spanish times the lots ran to the river; that there was never any street between the east end of the lots and the river; that the ends of the fence would sometimes have to be moved back on account of the abrasion or falling in of the river bank; that the river, for some years prior to 1844, occasionally slightly receded from the east bank, in low water, but that in consequence of high water in 1844, and of accumulations caused by the materials used in constructing cross streets out in the river, the ground afterwards increased rapidly eastwardly.

On the plaintiff's side the parol evidence tended to prove that there was always a path or road between the lots and the river, in Spanish times, and that the road extended the whole length of the town; that the government always left a strip of land along the river for voyagers, but that the road along the river was repaired by the voluntary act of the people living along the road and not by public authority or public taxes.

THE DEFENDANT gave in evidence a resolution of the board of aldermen of the city of St. Louis, authorizing a survey and map of the city, and a lithographic copy of a map known as Paul's map of 1823, which was proved to be a true copy of the original made under such resolution. It was admitted that the field-notes of the survey and the original map were

lost. From this map it appeared that the main street extended at the date of the map no further south than Plum Street, and that the river covered all the eastern part of Block 44. The defendant then introduced the ordinance of



the city, passed in 1851, opening Main Street south of Plum and through Block 44, and proved that defendant, in con

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formity with the ordinance, relinquished the right of way; also a tax sale of the lot of Leveille for the city taxes of the year 1820. The certificate of sale of the assessment describe the lot as bounded east by the river.

The defendant also showed in evidence the tax receipts for his real property for the years 1837, 1838, 1839, 1845, 1846, 1847, 1848, 1849, 1853, 1854, 1855, 1856, 1857. From these receipts, it appeared that up to 1853 the defendant was taxed for a lot in Block 44, as bounded *on the east by the river*. The depth of the lot was described as increasing from 150 feet in 1837 to 800 feet in 1854. In 1854 and following years the defendant was taxed for the property in dispute as lying between Main and Front Streets. The defendant also showed that he had been assessed by the city, and had paid in 1854 a tax on the property in question for opening streets, and then introduced a map of Risley's Addition, recorded in 1855.

The defendant then introduced one Marshall as a witness, who testified that he was an examiner of titles to lands; that he had examined almost all titles to lands in the city of St. Louis, and he gave it as his conclusion, that the land of Ride was north of Elm Street, that is to say, was nowhere in the neighborhood of Madame Charleville's lot, but was in fact in a different and distant part of the city. He also read in evidence a deed of Tayon to Papin in 1832, in which the lot was described as bounded eastwardly by the Mississippi River, or street if any there be; also the deed of Papin to Stearne and Risley, containing the same boundaries; also the deed of Stearne to Risley in 1836, with the same boundaries.

There was much other testimony on both sides, but that above stated constituted the controlling parts, and the residue was merely auxiliary or cumulative.

Upon this case the plaintiff's counsel asked the court to give fourteen instructions, the purpose of which, in the general, and so far as insisted on here, was to charge the jury as to the effect in law of the evidence; and that the plan of the town by Chouteau should be taken as a conclusive

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muniment of title.* The court gave none of these instructions. But it did instruct the jury in effect,

FOR THE PLAINTIFF:

1. That calls for the river, in the deeds or conveyances read in evidence, from one private individual to another, did not give or create riparian rights.

2. That the eastern boundary of the corporation of St. Louis of 1809, and the eastern line of the out-boundary of December, 1840, both extended to the eastern boundary of Missouri, which is the middle of the river.

3. That if the jury believed that a street, tow-path, or passage-way, or other open space, was permanently established, for the public use, between the river and the most eastern row of blocks (of which 44 was one) when the town was founded and laid out, then that the owners of that block were not riparian proprietors of the land between the block and the river.

FOR THE DEFENDANT:

1. That if the jury believed that the original claimant, prior to the cession, inhabited, cultivated, and possessed the land described in the petition, claiming title to the same, and that she and those claiming title under her continued to inhabit, cultivate, and possess the premises to the passage of the act of 1812, and that the land in controversy is a part of the accretions made to that lot along the eastern line extending to the river in its present position, then that the verdict must be for the defendant.

2. That the evidence that a passage-way or tow-path existed along the river bank would not affect the rights of the parties if the jury found that the same was kept up at the charge and risk of the proprietor of the lot, and that it followed the changes of the river, going to the east or west as the river receded from or encroached upon the lot, and that

* The reader interested specially in the case, can see these fourteen instructions in the report of the case below, 40 Missouri, 358.

the inclosure of the proprietor was advanced or set back with such changes.

3. That the claim confirmed to Louis Ride could not affect the rights of the parties if the jury found that the claim was located on a different block from that of Madame Charleville.

The jury found for the defendants, and judgment having been entered accordingly and afterwards affirmed in the Supreme Court of Missouri, the case was brought here under the 25th section of the Judiciary Act.

Messrs. M. Blair and F. A. Dick, for the plaintiff in error:

The court refused to instruct the jury for the plaintiff as to the effect of evidence, but left the case to the jury on their construction of it. It refused to give any effect in law to the plan of the town made by Chouteau, and to the confirmations and surveys by the United States of the lot in question, fixing the extent and boundaries of the lot, and treated the case as one to be left exclusively to the opinion of the jury on the weight of the parol evidence against the documentary evidence. In fact, the court left the jury to treat testimony of witnesses as of more effect than all the documentary proof offered by the plaintiff; and, indeed, allowed the record title of the plaintiffs to be overturned by oral testimony which did not conflict with it.

Now it is matter of common knowledge that there is, in the public archives, in the recorder's office and surveyor-general's office, in St. Louis, and in the land office here, full evidence of the establishment of St. Louis as a Spanish town, with streets and blocks, public places, and lots used for cultivation, called common field lots, and town lots, and barn lots. There were public authorities, who regulated streets, commons, bridges, and all general matters.*

What had been public property when the town plan of Chouteau was settled upon in 1764 for the common use of the town, descended to the public when the country was ceded in 1803; and even though in 1812 the land which

* See Mackay *v.* Dillon, 4 Howard, 430; Strother *v.* Lucas, 12 Peters, 412.

embraced the lot in controversy was under water, yet, if by the plan of the town there was a margin of public ground in front of this block, and this block had by such plan an actual boundary on a line in common with the blocks further north, then such public plan must control the private property, and such public space is the actual limit of the blocks and the lots composing them.

If there ever was a vacant public space reserved for common use as a landing or street by the public plat in front of these lots, such as marked on Chouteau's map, the public title would not pass to private lot-owners, even though the encroachments of the river might wear away that part of the soil above water. The river bottom within such lines would remain still subject to the same title. Now, Chouteau's map is an ancient document which establishes the line of this Block 44 in the relative position that it occupied in 1764 with reference to the blocks north of it, and we thus can certainly fix the precise line of the front of Block 44 as indicated on Chouteau's map, and as it was in 1764. The blocks to the north, remaining as they were in 1764, and giving a uniform and permanent front line to the old town where they lie, thus serve to fix the precise position of such front line of Block 44. Now the block there in 1764 had a front line not touching the river, and there was this same public wharf that then and still exists to the north, extending along the entire front of the town. It was by Chouteau's map actual ground above the surface of the water. This was public property, established by a title-paper of *conclusive effect*, if admissible at all.

The question, then, of controlling importance is, whether Chouteau's map and the other documentary evidence was evidence of what was the plan of the town, showing the blocks, streets, and lines of public and private property.

This depends upon the construction of the act of 1812. This act required the United States surveyor "to survey the out-boundary lines of said towns so as to include the out lots, common field lots, and commons;" and he was directed to make out plats of the surveys, and transmit the

same to the commissioner of the General Land Office and recorder of land titles. The expense "*of surveying the said out-boundary* lines shall be paid by the United States."

Section 2d says that all town lots "*included in such surveys*, which are not rightfully owned by private individuals, are reserved for the support of schools."

This act is in all its provisions binding upon individual owners, and they must take their titles subject to the survey it calls for; what it reserved to the United States was, and continued to be, public land, and the surveys it required became, when made, muniments of title.*

By the construction of the act of 1812 given by the defendant, a public survey of a reservation which the President might have chosen to make out of the public lands of St. Louis, would not prevail over verbal proof of title such as is offered here. This is contrary to the whole current of decisions of this court respecting surveys of grants of land made under the laws providing for such grants.†

A grant of title, that Congress reserved the power to locate by survey, and promises to so locate, is not available as a title, if the very same act be interpreted to mean that such location, when made, may, at any length of time, be overthrown by parol evidence. This places the plaintiff's title at the mercy of a single witness; for the act of Congress provides for no other evidence of title in the plaintiff; and we see the effect of this construction of the law in practice when a jury decides in support of the views of the court below, against the survey, on the recollection, perhaps, of one single witness, testifying to what years before he thought as to the description of the premises.

The possibility that a regular survey and assignment, of the validity and effect given to this by this court in Kissell's case,‡ can be overthrown by the recollections of a child as to a matter that perhaps he had the slightest means of observ-

* Kissell *v.* Public Schools, 18 Howard, 21.

† West *v.* Cochran, 16 Howard, 403; Willot *v.* Sandford, 19 Id. 79; Carondelet *v.* St. Louis, 1 Black, 179; Menard *v.* Massey, 8 Howard, 313.

‡ *Supra.*

ing, and not become material until he was perhaps eighty years of age, shows a construction of this act by the court below contrary to good sense, to security of titles, and to the current of decisions of this court.

The surveyor-general, under the act of 1812, was charged with a duty that he then could readily and accurately perform, and this was to gather together all the archives and documents which had been before the boards of commissioners, and were recorded in the recorder of land title's office, and determine where the different kinds of property were located. The Spanish concessions were open to him, Chouteau's map, and all that could furnish him with information; and also innumerable intelligent witnesses, including the large landowners, the proprietors of large tracts of land, the members of the boards of commissioners, who had investigated officially all these public facts. In the light of all these investigations, Chouteau's plat was filed in the recorder's office, and no error in it has ever been pointed out. It is from such material as all this that the assignment to the schools is made up. On this material the surveyor-general was made a special judge, and it was for him to ascertain and decide what was public land and what not, and in *Kissell* v. *Schools*,* this court say: "We are of opinion that the certificate of the surveyor-general . . . is *record evidence of title*," &c.

It could have been consistent only with the rulings of this court to have declared that this survey was authoritative and *conclusive* against another title under the same act, not sustained by a survey.

The defendants, to avoid this result, attempt to prove another plan of the town,† by showing that the street along the rear of their lots shifted east and west as the river receded or encroached. But the little passage-way spoken of by the witnesses was not the public space marked on Chouteau's map. The court below made the decisive question of fact the nature of this little pass-way as it was within the

* 18 Howard, 25.

† Paul's map of 1823; *supra*, p. 98.

knowledge of the witnesses. But this was turning attention to a small and almost immaterial matter, and excluding the public space shown by Chouteau's map, which established the character of the land, from the jury.

The *vivâ voce* testimony of old witnesses proved nothing contradictory of the map and record offered by us, but only the fact within their recollection, which was nearly, if not altogether, after 1803, that the land above water did not reach as far east as the east line of Block 44. If, therefore, the jury believed the testimony of these witnesses, they would find for the defendant, notwithstanding they might believe that, far east of the water-line, on the plan first established for the town, there was a public wharf reserved permanently for public use.

There was a direct and irreconcilable contradiction between the instructions given for plaintiff and defendant. An instruction declaring on the proof that, as a matter of law, the lots did not rightfully extend across this public wharf, under the act of 1812, ought to have been given.

Mr. J. J. Gantt, contra:

If the fact that the river was the boundary of the lot in 1803, carried the owner of it to the *medium filum aquæ*, the lot, up to the middle thread of the stream, was confirmed by the first section of the act of 1812. This was the whole matter in dispute in this cause. And the case lies within ordinary and narrow limits. The instructions given were proper on this question.

The plaintiff assumes that the authorities of the Spanish government had a fixed and ascertained plan for laying off the town of St. Louis in 1764, and that this plan was not only immutable, but that a paper called "Chouteau's map," which was first filed in the office of the recorder of land titles, in St. Louis, in 1825, was the authentic, exclusive, and infallible evidence of this scheme. These assumptions are unwarranted. If we accept Chouteau's map as the scheme or plan for laying off the town of St. Louis, which *he* recommended to the authorities in 1764 (we have no sort

of authority for assuming that he ever did this), nothing is plainer than that one of two things must be true: either Chouteau did not, in making this sketch, go upon the ground and ascertain carefully whether natural obstacles interfered with the plan sketched in his diagram; or else he attempts to make these natural obstacles bend to his theory of what the town should be. Chouteau was not proprietor of the land to be covered by the town, nor an officer of the crown of Spain, in 1764, when this plan is supposed to have been made. We see plainly that the Spanish governor did not pay any attention to this plan. Either he never heard of it, or, knowing of it, he treated it as worthy of no heed; for the grant to Leveille, the grant to Amiot, and the possession of many others, permitted by the authorities, were inconsistent with Chouteau's plat. The refused instructions declared that the presumption of fact was that the Spanish government sanctioned a particular plan of St. Louis; whereas, the only evidence we have on the subject proves clearly that all the limitations of the supposed scheme were disregarded by the Spanish government. Chouteau's map was deposited by Chouteau, in 1825, in the recorder's office. There is no certificate upon it by him. Its character, whatever it was, must have rested upon Chouteau's parol statement, without any sanction of either an oath or official duty. We do not know what his statement, if any, was. But whatever it was, it could be no more than a mere statement, which is admitted as tradition. If the instructions refused should have been given, it would follow, among other things, that the general plan of a town may be proved by parol, but that particular deviations from that plan cannot be proved by parol.

The whole instructions given are consistent, and were the right ones.

Mr. Justice CLIFFORD delivered the opinion of the court.

Possession of the colony or province of Louisiana, ceded by France to the United States under the treaty of cession

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of the thirtieth of April, 1803, was formally delivered to the United States on the twentieth of December of that year; and on the thirteenth of June, 1812, Congress passed the act making further provision for settling the claims to land in the Territory of Missouri, the first section of which provides to the effect that the rights, titles and claims to town or village lots, out-lots, common field lots and commons in, adjoining and belonging to the several towns or villages therein named, including St. Louis, in that Territory, "and which have been inhabited, cultivated, or possessed" prior to the date of that formal delivery, "shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."*

Lands confirmed by the board of commissioners were not included in that section, and the further provision is that the principal deputy surveyor of the Territory shall survey or cause to be surveyed and marked, where the same has not been legally done, the out-boundary lines of the said towns or villages, so as to include the out-lots, common field lots, and commons thereto respectively belonging.

Provision having been made in the first section for such surveys, the second section provides that all town or village lots, out-lots, or common field lots included in such surveys, which are not rightfully owned or claimed by private individuals or held as commons belonging to such towns or villages, or selected by the President for military purposes, "shall be and the same are hereby reserved for the support of schools in the respective towns or villages aforesaid," not to exceed, however, one-twentieth part of the whole lands included in such general survey.

Part of block numbered eight hundred and fifty-six, situated in the city of St. Louis, is claimed by the plaintiffs in this case under the second section of that act, as appears in the description of the tract set forth in the petition, which is in the nature of an action of ejectment to recover posses-

* 2 Stat. at Large, 748.

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sion of the premises. Process was duly issued and served, and the defendant appeared and filed an answer in which he denied that the plaintiffs, at the commencement of the suit, were entitled to the immediate possession of the same, and he also denied that he, the defendant, did, at the time mentioned, unlawfully withhold from the plaintiffs the possession thereof as alleged in the petition.

Application for change of venue was subsequently made by the plaintiffs, and the cause, in pursuance of such application, was transferred into the St. Louis Circuit Court, where the parties went to trial, and the verdict and judgment were for the defendant, and the plaintiffs excepted and removed the cause into the Supreme Court of the State.

Subsequent to the removal of the cause into the Supreme Court the defendant deceased and his legal representatives became parties to the suit, and after hearing, the judgment of the Circuit Court of the State was in all things affirmed, and the plaintiffs sued out a writ of error under the twenty-fifth section of the Judiciary Act, and removed the cause into this court.

By the bill of exceptions it appears that the plaintiffs in the trial before the jury in the Circuit Court of the State introduced the following evidences of title in support of their claim to the immediate possession of the premises: (1) A copy of the ordinance dated November 9, 1809, incorporating the town of St. Louis. (2) Survey and plat of the boundary of the town, which purport to have been made in conformity to the requirements of the first section of the before-mentioned act of Congress. (3) School assignment numbered four hundred, and dated December 10, 1855, as more fully set forth in the transcript. (4) An act of the State legislature, approved November 23, 1857, which it is agreed may be read from the printed volume. (5) Copy of the deed from the city of St. Louis to the plaintiffs relinquishing to them the land in controversy. (6) Quit-claim deed from the plaintiffs to the city of St. Louis relinquishing their title to certain tracts therein specified. (7) An act of the legislature of the State, approved March 3, 1851, en-

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titled "An act respecting swamp lands in St. Louis County." (8) Three acts of Congress upon the subject, to wit, the act passed June 13, 1812, also the act passed May 26, 1824, and the act passed January 27, 1831, to which reference is made.* (9) A stipulation waiving objections to certain depositions, and agreeing that the defendant was in the possession of the premises at the commencement of the suit.

Separate examination of the respective evidences of title introduced by the plaintiffs will not be necessary, for two reasons: (1) Because the defendant concedes that the assignment of the land to the schools under the act of May 26, 1824, vested a good title in the plaintiffs, unless the title to the same was confirmed by the first section of the prior act to those under whom the defendant claims a superior title. (2) Because the questions to be determined are presented in the exceptions to the refusals of the court to give the instructions as requested by the plaintiffs and to the instructions given by the court to the jury.

Both parties agree that the land in controversy adjoins block forty-four, which belongs in part at least to the defendant and is not claimed by the plaintiffs. They also agree that prior to 1844 block forty-four was the front block facing the river, and that the land of the entire block in controversy has been formed since that time by alluvial deposits, but the theory of the plaintiffs is that block forty-four, as originally located and marked on the plan of the town, never extended to the river, that there was in fact a margin of shore between that block and the river, which was reserved for public use as a way for voyagers or a tow-path for persons engaged in propelling boats, and that such way or tow-path never was a part of the block possessed and claimed by the defendant and his associates.

Suppose the fact to be so, then it is not pretended by the defendant that the land described in the petition was confirmed by the first section of the act of June 13, 1812, but he denies the entire theory of the plaintiffs and insists that

* 2 Stat. at Large, 748; 4 Ibid., 65, 435.

there never was any such public reservation between the block possessed and claimed by him and the river, as is supposed by the plaintiffs; that the use of the supposed margin by voyagers and other persons as a way or tow-path, if any, was permissive and by consent of the owners of the block, and that the block as laid out, inhabited, cultivated and possessed was always understood to extend to the river, and consequently that the same was confirmed by the first section of the before-mentioned act of Congress, as contended by the defendant.

Conceded, as the fact is, that the title to block forty-four was in those under whom the defendant claims, prior to the alluvial deposits which formed the land described in the petition, the principal contest in the State court was and still is as to the extent and boundaries of that block antecedent to the time when the land in controversy was formed by such alluvial deposits and accretions. Beyond doubt, block forty-four, if it was inhabited, cultivated, and possessed prior to December 20, 1803, as claimed by the defendant, was confirmed by the first section of the act of June 13, 1812; and if it extended to the river at that time it is clear that the owners thereof were riparian owners; and if so, it is equally clear that they were entitled, as such to all the accretion thereto occasioned by alluvial deposits or by the gradual recession of the waters of the river from the usual water-mark.*

On the other hand, unless that block extended to the river, as supposed by the defendant, it is certain that he has no title to the land in controversy, as those under whom he claims in that state of the case were not riparian proprietors, and the act of Congress referred to as confirming the title to that block could not and did not have the effect to enlarge its boundaries.†

Evidence, written and oral, was introduced by the defendant to show that the northern half of block forty-four

* Kissell *v.* The Schools, 18 Howard, 21.

† Railroad *v.* Schurmeir, 7 Wallace, 287; 3 Kent's Commentaries, 11th ed. 427.

was inhabited, cultivated, and possessed by Madame Charleville and her children several years before the treaty of cession was ratified, and the witnesses testify that there was a house and barn on the lot and other improvements, and that it extended to the river. She and her family occupied and cultivated the northern half of the block, and the witnesses also testify that it was fenced in on all sides excepting the side bordering on the river, and the evidence to that effect is full and satisfactory. They admit, however, that there was a passage-way on the shore or bank of the river kept by the owner for her own convenience, where people used to pass as on a street or alley, but they generally agree that it was not a public way, and that it was frequently interrupted by fences built by the owner of the premises.

Parol evidence was also introduced by the defendant, showing that Charles Leveille inhabited, cultivated, and possessed the southern half of that block prior to the ratification of the treaty of cession, and the defendant introduced the original concession to him of that part of the block, dated March 1, 1788, and also a translation of the same, and the proofs show that his lot was sixty by one hundred and fifty feet, and that it was inhabited, cultivated, and possessed by the donee of the tract some eight years before the date of the concession.

As there described, the lot is "bounded on one side by the land of Louis Ride, on the other by His Majesty's domain, on the rear by the Mississippi, and on the main front by the road which follows from the second main street to the Prairie-à-Catalan." He also introduced a concession from the governor to Augustin Amiot, dated September 2, 1788, of a lot in the southern part of St. Louis, described in the concession as follows, to wit: "120 feet front by 150 feet deep, bounded on the north side by the lot of the free negro called Charles, on the other side by the royal domain, on the rear by the Mississippi, and on the principal front by the royal road leading to the Prairie-à-Catalan." Other exhibits were also introduced by the defendant as fully set forth in the record, and the parties agreed that Prairie-à-Catalan and Carondelet, as used in the record, mean the same thing.

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Defendant also introduced a resolution and ordinance of the city, adopted in 1823, in relation to the survey of the city, and also a lithographic copy of the map made by the city surveyor in accordance with that ordinance; also the revised ordinances of 1843, concerning streets. Proof was also introduced by him to show that the original map was lost and that the copy was correct, and it appears that it was put in evidence to show that Main Street, at that date, extended no further south than Plum Street, and that the eastern part of block forty-four, as now claimed, was a part of the bed of the river.

By the record it also appears that the defendant introduced a tax sale of the lot occupied by the colored man, Charles Leveille, for the non-payment of the taxes for the year 1826, and the assessment shows that the lot was therein described as bounded east by the river. Tax receipts for ten or fifteen years, given for the taxes paid by the defendant, as assessed on his property, commencing in the year 1837 and ending in the year 1857, were also introduced by the defendant, and it appears that prior to the year 1853 he was taxed for a lot in block forty-four, described as bounded on the east by the river.

Rebutting evidence, written and oral, was then introduced by the plaintiffs, tending to show that there was a public passage-way or street between block forty-four and the river, and that no part of that block ever extended easterly beyond that passage-way. Chouteau's map is one of the written evidences referred to as having been introduced by the plaintiffs, and they insisted, and still insist, that their title to the land in controversy is conclusively shown by that document.

When the plaintiffs rested, the defendant was permitted to rejoin, and he introduced new evidence to show that the block as originally inhabited, cultivated, and possessed did extend to the river, and that there never was any such public passage-way or street as that described by the plaintiff's witnesses.

Both parties resting, instructions were given by the court

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to the jury, first at the request of the plaintiffs, and secondly at the request of the defendant, but the finding of the jury was adverse to the plaintiffs, affirming the theory of the defendant, that there was not any such public passage-way or street between the river and block forty-four, as is supposed by the plaintiffs, and that the block referred to, as originally located, did extend to the river, as claimed by the defendant.

Five instructions presented by the plaintiffs were given by the court to the jury as requested, and three presented by the defendant were also given without any qualification, but the plaintiffs presented at the same time fourteen other prayers for instruction which were refused by the court. Reference is made to the record for the precise form of the instructions as requested and given or refused, as they fill too much space to be reproduced without abbreviation. Those given at the request of the plaintiffs are in substance and effect as follows: 1. That calls for the river, in the conveyances read in evidence, do not give or create riparian rights. 2. That the eastern boundary of the city and the eastern line of the out-boundary, as read in evidence, extended to the middle of the channel of the river. 3. That if the jury believe from the evidence that a street, tow-path, or passage-way, or other open space, was permanently established, for the public use, between the river and block forty-four when the town was founded and laid out, then, and in that case, the owner or owners of that block were not riparian proprietors of the land between that block and the river. Two other instructions were given at the request of the plaintiffs, but they are omitted as not material in this investigation, because they are the same in principle as those already reproduced.

Instructions were then given to the jury as requested by the defendant, which are in substance and effect as follows: 1. That if the jury believe from the evidence that the original claimant, prior to December 20, 1803, inhabited, cultivated, and possessed the land described in the petition, claiming title to the same, and that she and those claiming title under

her continued to inhabit, cultivate, and possess the premises to the passage of the act of June 13, 1812, and that the land in controversy is a part of the accretions made to that lot along the eastern line extending to the river in its present position, then the plaintiffs cannot recover, and the verdict must be for the defendant. 2. That the evidence that a passage-way or tow-path existed along the river bank will not affect the rights of the parties if the jury find from the evidence that the same was kept up at the charge and risk of the proprietor of the lot, and that it followed the changes of the river, going to the east or west as the river receded from or encroached upon the lot, and that the inclosure of the proprietor was advanced or set back with such changes. 3. That the claim confirmed to Louis Ride cannot affect the rights of the parties if the jury find from the evidence that the claim was located in another and different block from that inhabited, cultivated, and possessed by Madame Charleville.

Obviously the third instruction given at the request of the plaintiffs is in substance and effect the same as the first instruction given at the request of the defendant, and it is clear that those instructions fairly presented the whole merits of the controversy to the jury as it is exhibited in the pleadings and evidence.*

No attempt is made by the plaintiffs to call in question the instructions given at their own request, nor could they be permitted to do so if the attempt was made, as such errors, if any, are to be imputed to the party making the request rather than to the court.†

They do insist, however, that the instructions given at the request of the defendant are inconsistent with those given at their request, but the court, after having carefully examined and compared the respective instructions referred to, is of the opinion that the proposition finds no support in the record.

* The Schools v. Risley et al., 40 Missouri, 365.

† Buie v. Buie, 2 Iredell, 87.

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Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and they are framed in clear and unambiguous terms, it is no cause for the reversal of a judgment to show that one or more of the prayers for instruction presented by the losing party and not given by the court were correct in the abstract, as the refusal of the court to give the instructions as requested, under those circumstances, would not work any injury to the party making the request, and therefore cannot be regarded as error.*

Apply that rule to the present case and it is not necessary to add another observation in respect to the prayers for instruction presented by the plaintiffs, and which were not given by the court. Certainly the instructions given, as well those given for the plaintiffs as those given for the defendant, are clear and unambiguous, and they expressly concede that the plaintiffs must recover if block forty-four was bounded on the east by a street, passage-way, or tow-path, which is all that the plaintiffs now ask, if the case is one to be submitted to the determination of a jury. They contend that Chouteau's map is conclusive in their favor, but the court is of a different opinion, and accordingly affirms the correctness of the other branch of the instructions, in which the jury were told that their verdict must be for the defendant if they found from the evidence that there was no such street, passage-way or tow-path between that block and the river, and that the river, when the town was laid out and when the act of confirmation was passed, constituted the eastern boundary of that block.†

Suffice it to say, without pursuing the argument further, that the court is of the opinion that the instructions were, in all respects, proper, and that they were clear and unambiguous, and amply sufficient to enable the jury to dispose

* Law *v.* Cross, 1 Black, 536; Hall *v.* Hall, 6 Gill & Johnson, 386.

† Jones *v.* Soulard, 24 Howard, 41; Smith *v.* Public Schools, 30 Missouri, 301; Le Beau *v.* Gaven, 37 Id. 556; Dovaston *v.* Payne, 2 Smith Leading Cases (6th Am ed.), 243.

of the whole controversy as exhibited in the pleadings and evidence.*

Complaint is also made by the plaintiffs that the court erred in not regarding Chouteau's map as a muniment of title conclusive in their favor; but the court is of the opinion that the view taken of it by the State court is correct, and that it was properly regarded as evidence of title, and not as a muniment of title conclusive in itself, and that as such it was regular to submit it to the jury with the other evidence introduced by the parties. Neither party can justly complain, as the action of the court in giving the instructions was in accordance with their respective requests.

Ejectment was also brought by these plaintiffs in the same court, at the same time, against Mary Fritz, to recover possession of the southern part of the same block. Before trial the venue was changed, as in the preceding case, to the same Circuit Court, where the parties went to trial, and the verdict and judgment were for the defendant or her legal representatives. Appeal was taken by the plaintiffs to the Supreme Court of the State, and the judgment in that court was affirmed. They then removed the case into this court, where it is numbered twenty-eight on the calendar, and it was argued and submitted to the court here at the same time with the case just decided. Since that time it has been carefully examined, and it should be remarked that the facts of the case are in many respects different from the case just decided, but the differences are not of a character to affect the result in this court, and as both parties agree that the decision of the case must follow that in the preceding case, it is not thought necessary to point out those differences.

DECREE IN EACH CASE AFFIRMED.

* Savignac *v.* Garrison, 18 Howard, 136; New Orleans *v.* United States, 10 Peters, 662; Railroad Company *v.* Schurmeir, 7 Wallace, 287.

Statement of the case.

STIMPSON *v.* WOODMAN.

Where a roller in a particular combination had been used before without designs on it, and a roller with designs on it had also been used in another combination, it was not a patentable invention to place designs on the roller in the first named combination. Such a change, with the existing knowledge in the art, involved simply mechanical skill, which is not patentable.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

Woodman sued Stimpson, in the court below, to recover damages for an infringement of a patent granted on the 29th March, 1864, for "a new and useful machine for ornamenting leather," as stated in the letters patent. In the specification the plaintiff stated that he has "invented a new and useful improvement in boarding or pebbling leather," and describes how this process was formerly carried on. He says:

"What is known as a boarded or pebbled grain or finish, has hitherto been given to leather by what is called the boarding operation, which consists in doubling the skin over on to itself on a table, so that the flesh side shall be out, and then forcing or rucking one part over the other, in different directions, by means of a flat 'cork-board,' which breaks or wrinkles the grain, and gives it a rough, checkered, or pebbled appearance. This operation is performed by hand, and is very slow and laborious, and produces only one particular kind of finish."

He then observes:

"The nature of my invention, therefore, consists in producing this 'pebbled' or 'boarded' grain or finish on leather, by subjecting it to the pressure of a short revolving cylinder or roller of steel, or other suitable metal, having the required design or figure engraved or sunk on its periphery. . . . My improvement further consists in combining with said roller a certain new and useful combination of mechanical devices for carrying my invention into practical operation, so as to accomplish the object desired with great rapidity and cheapness."

He further observes:

"It is obvious that my 'pebbled' roller may be combined with various mechanical devices, whereby it can be rolled with sufficient pressure over a skin of leather. I will, however, now describe a combination of devices which I find to answer every purpose required."

The plaintiff then describes with great minuteness the machine, and every part of it, and closes with his claims:

"First. Boarding or pebbling skins or leather by means of a single short cylinder rolling over a table with the requisite pressure, substantially as described.

"Second. I also claim raising and lowering the table 'A' by means of the toggles 'Q,' arm 'S,' spring 'U,' arm 'T,' and cam 'P,' or their equivalents, substantially as set forth, and for the purposes described."

The second claim was not in the case, as the arrangement or contrivance was not found in the defendant's machine. The first was the only one in question. That, as already stated, was "boarding or pebbling" skins or leather by means of a single short cylinder rolling over a table with the requisite pressure, substantially as described, which means, as this court stated that they understood the claim, finishing or figuring the leather, by means of a revolving roller, the design or figure engraved or sunk on its periphery, and worked over the grain of the leather by the use of the machinery described, or by machinery substantially like it.

It was admitted, in the bill of exceptions, that evidence was given on the trial, by the defendant, tending to show that prior to the plaintiff's invention, boarded or pebbled grain or finish, described in his patent as produced by him, had been produced on leather by subjecting it to the pressure of a short revolving cylinder of steel or other metal, having the required design or figure engraved or sunk on its periphery, and rolling over a table upon which the leather was placed; and that the said revolving figured cylinders, which

are known in the case as "pebbling rollers," were operated with the requisite pressure by means of hand devices.

It was also admitted that the defendant gave evidence tending to show that prior to the plaintiff's improvement there was known and used a machine (made by one Green) which, in its substantial combination or arrangement of its parts, co-operating together for the purpose of impressing the surface of leather, differed in no material respect from the machine described in the letters patent, whereof a model was produced, except in respect to the mechanism for raising and lowering the table (not in the defendant's machine), and except that instead of operating a short revolving roller like the plaintiff's, having a figured surface for the purpose of producing the pebbled grain on leather, it operated a short revolving metallic roller, having a smooth surface, for the purpose of giving to the leather a closer natural grain; that this was the only diversity between the two machines; and that having the smooth roller instead of the roller with the ornamented surface, made no difference in the substantial combination or arrangement of machinery co-operating together in said machines for the purpose of doing the work.

On this case the defendant asked the court to instruct the jury as a second instruction, thus:

"If they find that the form of the surface of the rollers in the plaintiff's machine is not material to the mechanical action of the roller in combination with the other devices, and their arrangements, by which the roller is moved, the leather supported, and the pressure made; and if they find that before the plaintiff's invention a machine was known and used not differing substantially from the plaintiff's machine in any other respect, but having a roller for giving a finish to leather, the surface of which roller was different from that specifically shown and described in plaintiff's patent; and if they find that, before the plaintiff's invention, rollers having such a surface as the plaintiff's, substantially, were known and used in other machines for the same purpose, the plaintiff's patent for the first claim is void."

This was refused, and the jury found in favor of the plaintiff. The other side now brought the case here.

Messrs. B. R. Curtis and G. L. Roberts, for the plaintiff in error; Mr. Wakefield, contra.

Mr. Justice NELSON delivered the opinion of the court.

Taking the evidence as stated in the bill of exceptions, it will be seen that the only difference between the prior machine and the plaintiff's, in its combination and arrangement, and in its working and effect upon the leather, is that the metallic roller in the former had a smooth, and in the latter a figured surface. In all other respects the two machines were the same. But, as also appears in the bill of exceptions, this figured revolving roller was old, and the use of it in pebbling leather was also old and well known. Neither the plaintiff nor the defendant could claim any right to it as inventors. The same pebbled grain or finish, as described in plaintiff's patent, had already been produced on leather by subjecting it to pressure while rolling over the table on which the leather was placed. But this pressure was produced by means of hand devices. The field of invention was open to any person to construct new devices or machinery by means of which to operate this old instrument in "pebbling leather,"—in the language of the patentee in this case, "so as to accomplish the object desired with greater rapidity and cheapness." And this the plaintiff would have accomplished by his machine if he had not been anticipated. But the case admits that evidence was given tending to show that the device or machine he has patented for the purpose, so far as used by the defendant, was the same as the Green machine, which was prior in date.

The prayer for the second instruction to the jury prayed for by the defendant is somewhat involved and obscured by too much verbiage; but when analyzed and understood, it was clearly warranted and supported by the evidence, and should have been given. In substance it is, if the jury should find that the figured roller in the plaintiff's machine

was not material to the mechanical action of the roller in the combination and arrangement of the machinery by which it was moved, the leather supported, and the pressure made; and if they find that before the plaintiff's a machine was known and in use similar to his, except that the surface of the roller was smooth; and if they find that before the plaintiff's invention figured rollers were known and used in other machines for the same purpose, then the plaintiff's first claim was void. In other words, and, in short, if the plaintiff's machine had been anticipated in every part of its construction except the figures or designs on the roller, which roller was old, he was not entitled to recover. This instruction was refused, which, for the reasons already stated, we think was error.

There is, also, another ground upon which we think this instruction should have been given. Assuming the plaintiff to have been anticipated in the construction of his machine in every part of it, except that the prior machine used a smooth revolving roller, and the plaintiff a figured one, but which figured roller had been used for pebbling leather by pressure, and was well known, all of which the jury would have been warranted in finding, the engraving or stamping of the figure upon the surface of the smooth roller, or the substitution of the old figured roller for the purpose, required no invention; the change with the existing knowledge in the art involved simply mechanical skill, which is not patentable.

JUDGMENT REVERSED. VENIRE DE NOVO.

Mr. Justice CLIFFORD, dissenting.

Inventions secured by letters patent are property, and as such they are under the protection of the Constitution of the United States and the laws of Congress. When duly secured in that way the patentee acquires the exclusive right, if the invention is a machine, to make and use the same and to vend it to others to be used during the entire term for which it was granted, as provided by law. Vested with that exclusive right he may have an action on the case to recover damages against any person who infringes his exclusive

right; and on the trial of the case, to the jury he may introduce his letters patent in evidence, and when so introduced the letters patent afford a *primâ facie* presumption that the patentee is the original and first inventor of what is therein described as his improvement; and the defendant, if he denies that proposition, takes the burden to establish the affirmative of the general issue or of the notices filed in that behalf.*

Letters patent bearing date the twenty-ninth of March, 1864, were granted to the plaintiff for a new and useful improvement in boarding and pebbling leather, which, as described, consists in giving to the surface of the leather a checkered or pebbled appearance by subjecting the leather on the finished side to the pressure of a short, engraved revolving cylinder or roller, made of steel or other suitable metal, having the required design or figure engraved on the periphery of the device. My improvement, says the patentee, consists *in combining* with said *roller* a certain new and useful *combination* of mechanical devices for carrying my invention into practical operation, so as to accomplish the object desired with great rapidity and cheapness.

Nothing can be plainer than is the meaning of those two passages in the specification, the substance of which is here reproduced. In the first passage he describes the result or effect which his invention will produce, and in the second he gives a terse general description of the invention itself, alleging that it consists in combining with the roller a certain new and useful combination of devices to accomplish the work. Had the patentee stopped there the specification might perhaps have been regarded as wanting that full, clear and exact description of the invention which is required by the sixth section of the Patent Act.†

But the patentee did not stop there, as fully appears by what immediately follows in the specification. On the contrary, he gives a minute description of the roller, and then proceeds to describe the several mechanical devices to be

* Agawam Co. *v.* Jordan, 7 Wallace, 596. † 5 Stat. at Large, 119.

combined with the roller, and which, as he says, will answer every purpose to produce the required effect; and in conclusion he gives a minute description of every element composing the organized machine described in the patent as it was issued.

Exact description is also given of the several devices composing the apparatus for raising and lowering the table on which the leather is placed as it is subjected to the operation of the pebbling instrument. Such an apparatus is essential to the effective operation of the machine, as the table must be raised in order that the leather may be subjected to the pressure of the roller or pebbling instrument as it passes over the upper surface, and it must also be lowered in order that the arm to which the pebbling instrument is attached may pass back, and it is obvious that the contrivance is ingenious and useful.

What the patentee claims is as follows: First, boarding or pebbling skins or leather by means of a single short cylinder rolling over a table with the requisite pressure *substantially as described.* Striking out the words substantially as described, it might be contended that the claim is for the effect and not for the means by which the effect is produced, but such a construction cannot be maintained for a moment, as it would be contrary to the settled rules of law everywhere applied in such cases.

Patents for inventions are not to be treated as mere monopolies, and therefore as odious in the law, but they are to receive a liberal construction, and under a fair application of the rule that they be construed *ut res magis valeat quam pereat.* Hence where the claim immediately follows the description, it may be construed, says Curtis, in connection with the explanations contained in the specification, and be enlarged or restricted accordingly.*

Construed in view of that rule, it is clear to a demonstration that the first claim of the patent is for the means described in the specification for accomplishing the effect,

* Curtis on Patents, § 225; Turrill *v.* Railroad, 1 Wallace, 510; Ryan *v.* Goodwin, 3 Sumner 520.

which is the exact view taken of the claim by the presiding justice in the court below.

Strike out the second claim and it might be contended that the first claim covers the whole invention, including the apparatus for raising and lowering the table as well as the combination of devices for pebbling the leather, but the whole specification must be construed together, and when so construed it is clear that the claims were intended to be distinct, as the second claim not only specifies the "raising and lowering of the table," but it also includes by name every one of the described devices to perform that office.

Giving due weight to these considerations, it is as clear as anything can be that the first claim of the patent is a claim for a combination of the described mechanical devices, with the roller for carrying the invention into practical operation, and for accomplishing the described result by the described means, excluding the apparatus for raising and lowering the table, which is included in the second claim.*

Influenced by these considerations I dissent from the opinion of the court, because it adopts an erroneous construction of the patent, and one utterly at variance with the whole tenor of the specification and the language of the claim.

Some attempt was made at the trial to show that the invention of the plaintiff was superseded by the machine of Garnar, or by that of Green, but the attempt was an utter failure, and the jury found the issue in favor of the plaintiff. Questions of fact are certainly for the jury, and it is too plain for argument that the finding of the jury cannot be revised here under a bill of exceptions. Suppose, however, it were otherwise, still it would be impossible to come to any other conclusion than that their finding is right.

Take the Garnar machine, which is the first in order as the evidence is exhibited in the bill of exception. Evidence was introduced by the plaintiff, showing not only that the machine differed from the machine of the plaintiff, but that

* Le Roy v. Tatham, 22 Howard, 132.

it operated in a substantially different manner, and produced a substantially different effect upon the leather, which must be obvious, upon comparing the two machines, to every one having any acquaintance with the subject. Equally decisive evidence was also introduced by the plaintiff showing that the Green machine did not supersede his patent. Among other things the plaintiff proved that the figuring instrument described in that patent was not a revolving instrument, but an instrument for rubbing the leather, as appears by the model; that the adaptation of the pebbling roller to that machine, so that the same could be practically used therein, would require invention and was not within the common knowledge and skill of a mechanic, and that a figured, rotating cylinder, such as is described in the plaintiff's patent, had not in fact been introduced and operated in that machine prior to the plaintiff's invention.

Remark upon the question of infringement is not necessary, as that issue was found by the jury for the plaintiff, and there is no exception calling for any review of the instructions given by the court.

Suggestion is made in the opinion just read that perhaps the judgment might be reversed upon the ground that the invention was not patentable.* Patented inventions which are not new and useful, or which did not require any invention as compared with what existed, and was in use before, may doubtless be held invalid on that account, but the question whether a particular invention is new and useful, or whether it did require any invention to produce it, as compared with what existed before, are everywhere admitted to be questions of fact for the jury, and certainly no such question is open here for the determination of this court under this bill of exceptions.† Such a remark cannot have been well considered, as the authorities are all the other way; but if it were otherwise the bill of exceptions shows

* Many *v.* Jagger, 1 Blatchford, 372; Wilbur *v.* Beecher, 2 Id. 132.

† Curtis on Patents, § 41; Lowell *v.* Lewis, 1 Mason, 182; Winans *v.* Railroad, 2 Blatchford, 297; Bedford *v.* Hunt, 1 Mason, 302; Hall *v.* Wiles, 2 Blatchford, 194.

that the finding of the jury was right, as it appears that the pebble finish can be made cheaper and better by the plaintiff's machine than by any other machine or instrument known in the trade, which is a complete answer to both suggestions.

Valuable as the property of the plaintiff in this invention is, I cannot concur in the judgment which assigns it to an infringer. Most modern patents are for new combinations of old elements, just like the present one, but many of them are of great utility, and they are as much within the protection of the patent law as those of any other class.* Such patents being for the combination only, no one can be held liable for infringing the invention unless it be shown that the infringer uses all of the elements which compose the combination, showing that the public have the most ample security that nothing will be protected by the patent except what was in fact invented by the patentee.†

Where an invention is for distinct combinations which are separable, and where it embraces two distinct improvements, one having respect to the operative part of the machine and the other to the motive power, it is entirely competent for the commissioner to grant separate claims for the two combinations in the same patent, or he may, under existing laws, grant separate patents for each combination, if it is new and produces a new and useful result.

Two combinations are embraced in this patent: one consisting of a combination of certain described mechanical devices with the roller to do the work of pebbling the leather, the other consists of the described combination to raise and lower the table; and the one last named is admitted to be new and useful, and therefore valid, but the opinion of the court surrenders the first one to infringers, and of course the property of the inventor is rendered of no value.

* Union Sugar Refinery *v.* Matthiessen, 2 Fisher, 605.

† Prouty *v.* Ruggles, 16 Peters, 341; Carver *v.* Hyde, 1b. 520; Stimpson *v.* Railroad, 10 Howard, 346; Barrett *v.* Hall, 1 Mason, 477; Howe *v.* Abbott, 2 Story, 194.

TEXAS *v.* CHILES.

Motion made on the foot of a decree against a defendant to compel an account, when the decree, by its terms, limited the accounting to the date of service of process in the suit, denied, where the property for which the account was asked was received (if received at all) after such service, and where, in addition, the original decree, which charged all those defendants against whom proofs existed, did not charge the one now sought to be charged, and where the proofs on the motion were no other than the proofs at the original hearing.

THE State of Texas filed a bill, February 15, 1867, against White, *Chiles*, and several others, to recover possession of some one hundred and eighty-five United States "Texas Indemnity Bonds" for $1000 each, charged to have been illegally obtained by them. Chiles having been served, put in his answer on May 25th, 1867, in which he accounted specifically for some fifty-one of the bonds. The court decreed that the complainant was entitled to recover the possession of the bonds transferred to White & Chiles, which, *at the several times of service of the process in the suit*, were in the possession or control of the defendants respectively, or of any proceeds, &c., with notice of the equity; and then proceeded to determine for how many and for which bonds, or their proceeds, the defendants respectively were accountable. But *no decree was entered against Chiles for either bonds or proceeds.**

Mr. Durant, for the State of Texas, now made a motion on the foot of the decree for a rule on Chiles to show cause why he should not deliver to the clerk of this court twelve of these bonds, which it was charged that he had in his possession and had not accounted for.

The only proofs furnished upon which the rule was prayed for were the answer of White, a co-defendant, and a deposition of one McKinley, *all in the original case*, and an affidavit of one George Taylor, produced on this motion. The deposition of McKinley showed that some time in *the summer* of

* See the report, with the decree, 7 Wallace, 700, 741.

1867 he thought he delivered to Chiles ten bonds that had been deposited with him as a banker about a year previous for a third person on certain conditions, which had not been complied with. According to the affidavit of Taylor, Chiles admitted to him that he had received of E. K. Thompson, cashier of the Branch Bank of Kentucky, two bonds, *after the service of the injunction in the case*, and which he said he held subject to the order of the court.

Mr. Hughes opposed the motion.

Mr. Justice NELSON, having recapitulated the facts, delivered the opinion of the court.

The answer of White, which is one of the proofs on which the present rule is prayed for, not being competent evidence against a co-defendant, needs no notice.

No decree was entered against Chiles for bonds or proceeds, although the same evidence was then before this court, as it respects ten of the bonds in question, as is presented in support of this motion. It would seem, therefore, that in the judgment of the court the pleadings and proofs furnished no ground, legal or equitable, for charging him personally in respect to either the bonds or proceeds.

We may add that the twelve bonds, sought to be brought before the court under the rule to show cause, founded upon the suggestion at the foot of the decree, were received by Chiles after the filing of the bill in February, 1867. The decree, in terms, limits the accounting of the defendants to bonds in their possession at the several times of the service of the process in this suit. The case, therefore, presented is not within the scope or tenor of the decree.

MOTION DENIED.

WIGGINS ET AL *v.* BURKHAM.

1. An account rendered, and not objected to within a reasonable time, is to be regarded as admitted by the party charged, to be *primâ facie* correct.
2. If certain items in an account under such circumstances are objected to within a reasonable time, and others not, the latter are to be regarded as covered by such an admission.
3. What is to be regarded as a reasonable time is, when the facts are clear, a matter of law. Where the proofs are conflicting, it is a mixed one of law and fact; and in such cases the court should instruct the jury upon the several hypotheses of fact insisted on by the parties.
4. Between merchants at home, an account presented, and remaining unobjected to, after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account.
5. But the court will not take notice judicially of the time which rail-cars require to run between different places, and of the frequency of the mails between them.
6. Where the bill of exceptions does not purport to set out all the evidence given in a case below, and it does not appear what other evidence, if any, was there given, a court of error will not reverse for an instruction whose correctness or want of it depends upon the state of the evidence; the terms of the instruction not necessarily implying that there were not facts in proof bearing upon the subject besides those of which the instruction was expressly predicated; and error not being matter to be presumed, but contrariwise.

ERROR to the Circuit Court for the District of Indiana, in which court Burkham brought suit to recover an account against Wiggins and four other defendants.

Mr. T. A. Hendricks, for the plaintiff in error; Messrs. McDonald, Roache, and McDonald, contra.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Indiana. The action is assumpsit. The declaration contained only the common counts. The case, as shown by the bill of exceptions, is as follows: Burkham, the plaintiff, lived in Chicago, and the defendants at Hagerstown, in Indiana, distant from Chicago about 220 miles by railroad. Upon the trial, evidence was given tend-

Statement of the case in the opinion.

ing to prove that the plaintiff, *on or about the 16th of May*, 1866, sent to the defendants by mail a written statement of the account sued upon, in the nature of an account current, and that the defendants made no objection to it till on or about *the 28th of that month*, when they addressed a letter to the plaintiff by mail objecting to some items of the account, but making no objection to others, to which latter items it did not appear they ever objected until after the commencement of the suit. The plaintiff asked the court to instruct the jury:

"That when an account is rendered by a creditor to his debtor, if the debtor does not, within a reasonable time after he has examined the same, make any objection thereto, his silence unexplained is an implied admission of the correctness of such account, though not conclusive evidence thereof; and if the debtor, within such time, objects to some of the items, and, during such reasonable time, makes no objection to the residue of such items, he ought, *primâ facie*, to be presumed thereby to admit the correctness of the items not objected to; and in both the foregoing instances the account so in whole or in part admitted, is to be deemed, in legal effect, an account stated."

This instruction was given. The defendants thereupon asked the court to instruct as follows:

"That if the plaintiff made out his account on the 16th day of May, 1866, and then sent it to the defendants, it was within a reasonable time, if the defendants, on the 28th day of that month, by letter, notified the plaintiff of their dissatisfaction with that account."

But the court refused to give the said instruction, and, on the contrary, then and there instructed the jury:

"That what was reasonable time for a debtor to object to his creditor's account, after its presentation to him, is a matter of fact for the consideration of the jury, and not a matter of law to be decided by the court."

The defendants excepted to the instructions given, and to the refusal to instruct, as asked by them. This action of the court presents the only subject for our consideration. The

bill of exceptions does not purport to set out all of the evidence. What other evidence was given, if any, does not appear.

The first instruction given by the court below, embraces two propositions:

1. That an account rendered, and not objected to within a reasonable time, is to be regarded as admitted by the party charged to be *primâ facie* correct.

2. That if certain items in an account under such circumstances are objected to within a reasonable time, and others not, the latter are to be regarded as covered by such an admission.

We see nothing objectionable in these propositions. They are in accordance with all the leading authorities on the subject.*

The other exception also involves two propositions:

1. That the court refused to instruct the jury that, upon the hypothesis stated, the account was objected to by the defendants within a reasonable time.

2. That the court did instruct that what was a reasonable time was not a question of law to be decided by the court, but a question of fact for the jury.

Judge Story says: "Between merchants at home, an account which has been presented, and no objection made thereto, after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account."†

The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it, as that the party was absent from home, suffering from illness, or expected shortly to see the other party, and intended, and preferred, to make his objections in person. Other circumstances of a like

* Lockwood *v.* Thorne, 1 Kernan, 170; 1 Story's Equity, § 526.

† Equity, § 520. See also Lockwood *v.* Thorne, 1 Kernan, 173, 174.

character may be readily imagined.* As regards merchants residing in different countries, Judge Story says: "Several opportunities of writing must have occurred."†

We see no objection to the rule as he lays it down, in respect to parties in the same country.

When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in no wise concluded by the admission implied from his silence after it was rendered.‡

If the car-time between Hagerstown and Chicago were ten hours, as is alleged by the counsel for the defendant in error, and there were "several posts" between the time when the account sent to the defendants, on the 16th of May, reached them, and the 28th of that month, when they replied, the court properly refused the instruction which they asked. Whether these facts were in evidence does not appear. We are asked to take judicial notice of them. This we cannot do, however well satisfied we may be upon the subject. They should have been proved by proper testimony. But error is not to be presumed. It must be affirmatively shown. The facts in question may have been proved, and this may have been the reason of the refusal by the court to instruct as asked by the defendants. The propriety of the refusal depended upon the state of the evidence. The terms of the instruction do not necessarily imply that there were not facts in proof bearing upon the subject, besides those of which the instruction was expressly predicated. The car-time and the number of mails may have been proved or admitted. If these facts were not in proof the bill of exceptions, under the circumstances, should have so stated. It does not appear, from anything in the record, that the court erred in refusing to give the instruction. The presumption is the other way.

The proposition that what is reasonable time in such cases is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always

* Lockwood *v.* Thorne, 18 New York, 289. † Equity, § 526.

‡ Perkins *v.* Hart, 11 Wheaton, 256.

Statement of the case.

a question exclusively for the court. The point was so ruled by this court in *Toland* v. *Sprague.** Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties.

If the evidence in the case was such as warranted the court in refusing the instructions asked by the defendants,—if there were several posts between the time of the receipt of the account by the defendants and the date of the letter objecting to it,—the court should have instructed the jury that the letter was not within a reasonable time, which is the opposite of the instruction asked. This would have been conclusive against the defendants. The error of the court in submitting the question to the jury was therefore favorable to them, and they have no right to complain.

JUDGMENT AFFIRMED.

CLARK *v.* BOUSFIELD.

A claim for arranging an elastic bed for printing designs, is not a claim for a design under the eleventh section of the act of March 2d, 1861, entitled "An act in addition to an act to promote the progress of the useful arts,"—but is a claim for a device.

ON certificate of division between the judges of the Circuit Court for the Northern District of Ohio, the case being this:

The Patent Act of July 4th, 1836, "to promote the progress of the useful arts," authorized the patenting of any "new and useful art, *machine*, manufacture or composition of matter," and gives an exclusive right to the patentee for a term of fourteen years, with a privilege of renewal for seven in certain cases, but this act did not allow a patent for mere *designs*.

* 12 Peters, 336; see also Lockwood *v.* Thorne, 1 Kernan, 175.

The eleventh section of an act of March 2d, 1861, entitled "An act in addition to an act to promote the progress of the useful arts," extends this privilege of patent. *It* secures to the inventor or producer of any original *design*, &c.; or any new and original impression or ornament, to be placed on any article of manufacture, &c.; or any new and useful pattern, or print, or picture, to be either worked on, or printed, or painted, on any article of manufacture; or any new and original shape or configuration of any article of manufacture, not known or used before, &c., a patent for the exclusive property therein; and it gives this right for a term of years, different from the term granted by the act of 1836 to the inventor of a machine, &c.

With both acts in force, R. & A. Cross obtained, December 27th, 1864, a patent for a new and useful improvement in machines for graining pails, and other analogous uses. [See the diagram, page 135.] The nature of it, as declared by them in the schedule to the letters patent, consisted in constructing an elastic bed, containing the impression or impressions of the device to be grained upon the pail, in separate panels, each panel to be of different design, so that by moving the pail over the same the various designs would be stamped upon the pail, thus producing a pail whose staves were painted in imitation of different kinds of wood. The patentees then described the instrument or machine, which they stated to be a box, into which the elastic material, with the required designs to be grained upon the pail, is placed, and which might, according to their statement, be constructed of wood or iron, or any other suitable material, and so shaped (describing the shape minutely), that when the pail was adjusted properly upon the bed, and rolled upon and over it, the upper or larger end of the pail should follow the outer curve of the bed, and the lower or smaller should follow the interior or smaller curve with exactness and precision. "The elastic bed," they say, "may present one continuous or uniform design if desired, or it may be arranged in blocks or staves, each of different designs, so that the pail grained thereon or thereby shall present the appearance of

being constructed of different kinds or species of wood. The elastic bed may be composed of any suitable impressible material, as rubber or leather; but a compound of glue and molasses, such as is used for printers' rollers, is preferred."

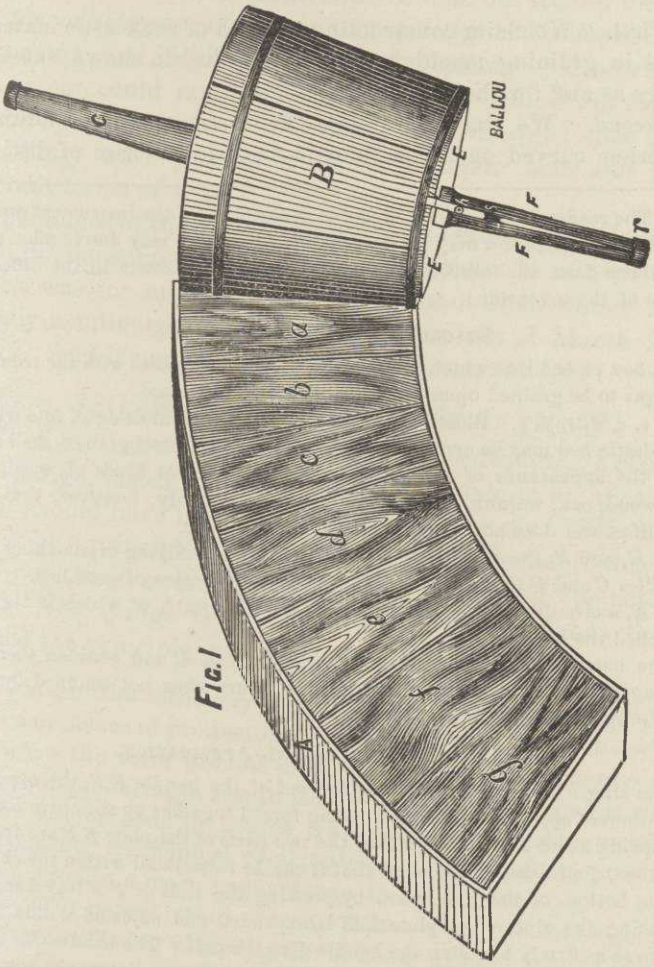


FIG. 1

The patentees then described the contrivances for *working* the elastic bed in connection with the pail, so as to effect the graining of the latter. By this contrivance the pail, they state, is readily rolled by hand across the bed, leaving upon

it the desired design or figure, or the pail may be suspended on handles, and the elastic bed itself moved beneath it, in a suitably arranged groove or track, producing the same result.* The patentees then set forth their claims, the first two of which only are material:

First. "We claim constructing the bed of the elastic material used in graining machines, in the form herein shown, substantially as and for the purposes specified."

Second. "We claim arranging the elastic material aforesaid, whether curved or rectangular in form, in a series of distinct

* The reader to whom the foregoing description of the instrument and of its mode of operation may not be sufficiently specific, may derive more precise ideas from the following account, referring by letters to the different parts of the invention:

DESCRIPTION OF THE INVENTION.

A, box or bed into which the elastic material, impressed with the required designs to be grained upon the pails, is placed or framed.

a, *b*, *c*, *d*, *e*, *f*, *g*. Blocks or staves, each of different designs, into which the elastic bed may be arranged, so that the pail or vessel grained shall present the appearance of being constructed of different kinds of woods, as rosewood, oak, walnut, and others; this in case only, however, that the manufacturer does not prefer one continuous design.

C, *E*, and *F*, the handles and other devices for affixing or attaching the handles *C* and *F* to the pails, to facilitate the operation of graining.

E E, a circular plate divided in two parts, to each of which is rigidly attached the handles *F F*.

The handles *F F* are connected by a hinge at *h*, and between them is arranged a spring *s*, to throw said handles apart when not confined by the ring *r* upon the ends of the same.

MODE OF OPERATION AND APPLICATION.

The ring *r* being removed from the end of the handle *F F*, the opposite ends thereof approach each other, being forced together by the operation of the spring *s* and hinge *h*; and thus the two parts of the plate *E E* are drawn together, diminishing its size, so that it can be introduced within the chime of the bottom of the pail, when by pressing the ends of *F F* together and replacing the ring *r*, the plate *E E* is expanded and adjusted within said chime so as firmly to fasten the handle *F* to the pail. The handle *C* is then inserted and adjusted within the pail, when the operator grasps the handles *C F*, and adjusts the pail upon the elastic bed, as shown; the paint or coloring matter having been previously applied thereto by means of a roller, or in any other suitable and convenient manner. The pail is then readily rolled across the bed and grained.

staves or designs, substantially as and for the purposes herein shown and set forth."

On a suit below, by Clark and others, assignees of Cross, the patentees, against one Bousfield, for infringement, it was suggested on behalf of the defendant that the second claim was for nothing more or other than a *design* to be impressed on the bed: and if this was so, that the claim would be void, as a patent could not properly contain a valid claim for a machine, and contain also a claim for a design; that the two things were patentable under different acts and for different terms of time.

The judges of the Circuit Court were accordingly divided upon the question whether this second claim in said letters patent was for anything patentable other than under the already mentioned section eleven of the act of March 2d, 1861? And if not, whether the patent was not void?

Messrs. J. Canfield and A. G. Riddle, for the plaintiff:

We admit that if this second claim is, in substance, a claim for a design, instead of a claim for a principle in an apparatus, it should have been patented under the act of 1861; but if it is for a principle in an apparatus, then we assert that it does not come under the act of 1861, but under the act of 1836. Now Judge Grier, in *Corning* v. *Burden*,* has thus defined the principle patentable as a machine:

"It is for the discovery or invention of some practicable method or means of producing a beneficial result, or effect itself. It is when the term process is used to represent the means or method of producing a result, that it is patentable; and it will include all methods or means which are not effected by the mechanism or mechanical combinations. But the term process is often used in a more vague sense, in which it cannot be the subject of a patent; thus, we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by me-

* 15 Howard, 268.

chanical means or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material, subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the *machine* which produces it."

This language is both concise and correct, and tested by it our second claim is for the machine which produces the effect, and not for the effect itself. In other words, it is for the machine which grains a pail in staves, which staves represent different kinds of wood, and not for the impression upon the pail, representing staves of different kinds of wood. The means of producing this effect on the pail, is our machine, which comes under the act of 1836; the effect as produced, is a design, which comes under the act of 1861, and for which we claim nothing.

Mr. George Willey, with a printed brief of Messrs. George Willey, John E. Carey, and H. S. Sherman, contra:

The nature and object of the invention, as stated in the specification, contemplated a design and the construction of a bed corresponding with the shape of the design, but as an obvious sequence or incident of the design. Nothing is claimed on the material, or box or bed or its material, nor as to form could anything be claimed in the way of invention, inasmuch as it involves the mere measurement of surface, the simplest of mechanical operations. Then it says, "the elastic bed may present one continuous or uniform *design* if desired, or it may be arranged in blocks or staves, each of different designs," meaning block or stave designs. Again, it speaks of "different *designs* arranged in staves," which is but another form of representing stave *designs*. Again, it speaks of the "pail being rolled across the bed and grained in staves in imitation of various woods or marbles." The specification does not say, series of separate pieces or blocks, but a "series of distinct staves or *designs*," and the specification speaks of "different *designs* arranged in staves, impressed upon a single united mass, so as to produce the

same effect as when constructed in separate blocks," evidently treating staves and designs as synonymous or convertible, the word "staves" meaning stave designs; so that from all these considerations it is obvious that stave designs impressed on a bed, whether curved or rectangular, for the purpose of transferring said stave designs to a pail or "other analogous uses," or to rectangular objects, is the substantial object or meaning of this second claim. If this be so, then the doubt suggested below is well founded and the plaintiff has no valid patent.

Mr. Justice NELSON delivered the opinion of the court.

It will be seen by reference to the eleventh section of the act of 1861, that if the second claim is patentable under this section, it must be a claim for an original design or impression, or ornament, or pattern, or picture, and the like, wholly irrespective of the means of producing it. The patent is simply for the design, &c., itself.

In order to understand the full meaning of this second claim, it will be useful to settle the meaning of the first, as the two are intimately connected.

The first, as we have seen, is for constructing the bed for the elastic material used in graining machines in the form shown and for the purposes specified. The patentees describe it as a box or bed, and which may be constructed of wood or iron, or of any other suitable material. This box or bed is made for the purpose of holding the elastic material, whether of rubber or leather, or the compound of glue and molasses, which is preferred. Now, the second claim is for arranging the elastic material, when placed in this box or bed, whether curved or rectangular in form, "*in a series of distinct staves or designs*," for the purpose specified, that is, for the purpose of graining pails in the variety of colors or figures described. The elastic bed may be arranged, as is stated in the specification, so as to present one continuous or uniform design, or it may be arranged in blocks or staves, each of different designs, so that the vessel shall present the appearance of different kinds of wood, as rosewood,

oak, walnut, and others. It may also be constructed of separate pieces or blocks, as shown in the drawing, or the material may be a single united mass, impressed by different designs arranged in staves, so as to produce the same effect as when constructed in separate blocks. The two claims, as we see, are closely connected, and each essential to the complete construction of the instrument or apparatus, which, when put into practical operation by the contrivances pointed out in the specification, can accomplish the desired result, which result is the graining of the exterior body of the pail with a variety of colors and figures.

The learned counsel for the defendants below insists that this second claim is only an arrangement of designs, and, in a limited sense, he is no doubt right, but in its connection with the first claim, and with the machine for transferring the design to pails, it is more; it is a part of the machine or instrument, and an indispensable part; it is the elastic bed of rubber, or of leather, or compound of glue and molasses, of any arranged figure or design, that constitutes an element in the machine, and which, with the curved box and contrivances for working the instrument, produces the desired result. The figure or design is but incidental, and, as such, has no other protection than that which the patent secures to the inventor of the machine. The right to the use of the machine carries along with it the right to use the designs.

The arranged figure in the elastic bed is not the one protected by the eleventh section of the act of 1861; that is the one which is transferred to the pail or wares, where its beauty is first visible to the eye. While it remains in the elastic material it exhibits no more beauty than if engraved on stone or metal.

It may be that the inventors of the machine for impressing figures or designs upon pails or other wares would not be protected from using figures or designs, the right of property in which had been secured to the original inventor under this eleventh section, but they may clearly use any and all not thus protected. The machine in question is invented for reducing to practical use these figures and

designs, and will make them profitable to the original inventors or owners of them, if they choose to employ it.

We are of opinion that the first question should be answered in the affirmative and the second in the negative.

FEILD v. FARRINGTON.

1. In a suit between a consignor and his factors, who had made advances on the consignment nearly equal to its value—the allegation of the consignor being non-compliance by the factors with his order to sell—the alleged order, however, having been but a verbal one, and a conflict of testimony existing as to whether such an order was given at all—an instruction was rightly refused to the consignor, which rested the liability of the factor on the bare fact of an order to sell, and which made no allusion either to the large advances or to the fact that three weeks after the alleged order to sell was given the factors wrote to their consignor a letter informing him that they had not sold his goods, as the market had been dull and on the decline every day since he left them; that the goods would not then sell for more than so much (a decline from former prices); that they would be compelled to sell unless he made other shipments, or remitted in cash as a margin, the money market being tight; that they had held on thus far to *meet his views*, but that the declining tendency of the market induced them to write, *and asking to hear from him on his receipt of their letter;* which letter the consignor received, and purposely declined to answer.
2. Where factors have made large advances, or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their right to sell at such a time, as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves and to promote the interests of the consignor; they acting, of course, in good faith and with reasonable skill.
3. The effect of the refusal by the consignor to reply to such a letter as the one mentioned in the first paragraph above, within a reasonable time after he received it, was to raise a presumption that he approved of what his factors had done, so far as their letter informed him; and in the absence of anything to rebut that presumption, he was to be regarded as having consented to whatever delay had occurred in effecting a sale, even though the delay was contrary to his directions.
4. The receipt and non-acknowledgment of such a letter would not, however, relieve the factors from a continuing obligation to sell within a reasonable time, all the circumstances of the case being considered; and at the best prices that could be obtained.

Statement of the case.

Hence where, after writing such a letter, the factors did not sell for nearly ten months afterwards, the market declining all the while; *Held*, that though the letter was never acknowledged, it was a question which should have been submitted to the jury, whether this long delay to sell in view of a market falling the whole time, was in the exercise of sound discretion, good faith, and reasonable diligence; and that an instruction that the consignor should bear all losses sustained after his refusal to answer the factors' letter without excepting such portion of the loss as might have been caused by the factors' fault, was error. This, notwithstanding that the court charged that, as a general principle, the factors were found to use due diligence, care, and skill in the sale of the goods, and to obey instructions given to them by the consignors in regard to the sale; this charge not having been given by way of qualification to the specific instructions previously given.

ERROR to the Circuit Court for the Eastern District of Arkansas, the case being this:

Feild, a resident of Little Rock, Arkansas, owning a quantity of cotton, put it, personally, on the 9th October, 1865, into the hands of Farrington & Howell, commission merchants of Memphis, Tennessee, with directions to sell it; cotton being then worth not less than 50 cents a pound. On the next day, being now on his way homeward, he telegraphed to them, "Do not sell my cotton till I see you." The market at this time was excited, and higher than at any subsequent time. A short time after this, Feild returned to Memphis, and being about to visit the Eastern cities, requested Farrington & Co. to make him an advance of $11,000 on the cotton, which they made him. The advance was very nearly if not quite equal to its value. He then went to the Eastern cities. According to the testimony of Farrington, by whom the business of the firm with Feild was chiefly managed, Feild, on that occasion, left the cotton "to be sold at their discretion; but expressed great confidence in higher prices;" and according to the same testimony, on his return from the Eastern cities, approved of the course of the firm in not selling, and "said he would appreciate it, and remember it in future." The market was all this time rather a declining one, and the firm justified whatever of irregularity their action in not selling in the face of their

quite large advance might be supposed to have, on the ground, sworn to by Farrington, "that Mr. Feild was always represented to them as entirely solvent and able to pay his debts, and that they wished to follow his own views about the sale." Feild, it was testified, had promised them, when making this one, further consignments.

According to the testimony of *Feild*, however, he gave Farrington & Co., when he was going to the Eastern cities, express instructions to sell within ten days, and to reimburse themselves for the money advanced; which according to his testimony they promised to do. Feild's testimony proceeded thus:

"I then went East, and returned in about fourteen or fifteen days to Memphis, where I only made an hour's stay on my way home to Little Rock, which I occupied in seeing the firm. Cotton had declined one cent on the pound since I had told them to sell, and I remonstrated with them for not having sold. They excused themselves by saying that they had only been acting for my interest, which excuse I accepted. I, however, renewed my instructions, and the last words I said to Mr. Farrington, on shaking hands with him, were these: 'Whatever you do, do not let the cotton fall one cent lower.'"

This the witness testified was between the 25th and the 28th of October, 1865. Nothing further took place till the 16th of November following, when cotton having declined, the firm thus addressed Feild:

MEMPHIS, November 16th, 1865.

DEAR SIR: We have not sold your cotton, as the market has been dull and on the decline every day since you left. The dispatches from New York yesterday quote middling cotton about 50c., and very dull. The public dispatches quote 50@51c., while the private give 49@50. Your cotton would not, in the present market, sell here for over 43@44c. As the money market is very tight, *we will be compelled to sell your cotton unless you make other shipments, or remit us as a margin in cash.*

We have held on thus far to meet *your* views, but the declin-

ing tendency of the market induces us to write this letter. *Please to let us hear from you on receipt.*

Very truly, your friends,

FARRINGTON & HOWELL.

This letter Feild received, but never answered or in any way took notice of. Referring in his testimony on the trial to his receipt of it, and to his omission to answer, he said thus:

"I was surprised to learn that the cotton had not been sold. I thought the plaintiffs had made themselves liable by their neglect to sell. *I was afraid to answer their letter, as I regarded it as a mere endeavor to obtain some admission or concession from me; and I concluded to abandon the matter, leaving them with whatever responsibility they might have incurred. Cotton had fallen in the market*, and I did not feel disposed to make myself a party to their delinquency."

Nothing further was said or written, on either side, till August 8th (nearly nine months after the preceding letter), when cotton still declining the firm wrote again to Feild thus:

MEMPHIS, August 8th, 1866.

DEAR SIR: We have been much astonished at not hearing from you in regard to your cotton. We wrote you on the subject, and requested a reply, but have heard nothing from you. By the same mail we wrote to other parties in your city, and we received due acknowledgment. This was many months ago, date not recollected. *When you left your cotton here you were not satisfied with the market, although that was about* 50c. When you returned from the Northern cities you approved of our efforts to promote your interest, and *that the cotton had not been sold.* The price has greatly declined, and the expenses have been going on. *Now let us hear your views.* The cotton will not pay your account, as you know, and we ask you to remit us for the balance. According to the present market the cotton would be well sold at 32c., including internal revenue. We have now *waited to meet your views* until it is necessary for something to be done. *Will you please write us on receipt of this, for we are anxious to hear from you?*

Very respectfully,

FARRINGTON & HOWELL.

Statement of the case.

This letter the firm inclosed to one of their correspondents at Little Rock (Feild's residence), in order that it might be certainly delivered to him, and it was delivered, and the firm advised accordingly. Of this second letter Feild took no notice; stating in his testimony on the trial that he had omitted to do so for the same reason that he had omitted to take notice of the first one.

About five weeks afterwards, that is to say, on the 12th September, 1866, cotton having gradually declined from the month in which it was put into the hands of Farrington & Co. till now, they sold it all; the chief part at 30 cents a pound, and the residue at 25 and 20 cents. "The cotton was sold at this time," said Farrington in his testimony, "because we had despaired hearing of Mr. Feild, who appeared to us to have abandoned it, and to have had no intention of assuming the control of it, or of paying us the amount he owed us. . . . I had but one wish," he continued, "and that was to act in a manner which would be satisfactory to Mr. Feild."

Feild was immediately advised by letter of the sale, and that low as the prices obtained seemed, the sale was at the highest rates of the then market, and that the firm would send account sales and account as soon as the cotton was delivered. To this letter Feild paid no attention.

Five days afterwards, that is to say, on the 17th September, 1866, the cotton being now delivered, the firm sent the accounts, and drew for $6695, the difference between the sum due on the advance made in October, 1865, and the sum for which the cotton was now sold. Feild took no notice of this letter, and refused payment of the draft.

Whereupon in January, 1867, Farrington & Howell sued him in the court below for the balance.

On the trial the defendant asked the court to give the following instructions, to wit:

"1. If the jury find from the evidence that, after the cotton was placed in the hands of the plaintiffs, Feild gave them instructions to sell before the price should fall any lower, and that

the plaintiffs failed to do so, then the plaintiffs must suffer any loss occasioned by reason of their failure to sell at that time, and Feild is entitled to a credit for the amount that the cotton would have brought if sold at the time such instructions were given.

"2. If the jury find from the evidence that the cotton was left by the defendant in the hands of the plaintiffs to sell without any specific orders as to the time and mode of sale, and that the plaintiffs had made large advances on account of said cotton, then the plaintiffs were bound to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade might require, and to reimburse themselves for their advances out of the proceeds of the sale, and the defendant could not, by his silence, prevent the plaintiffs from making such sale; and if the jury find from the evidence that the plaintiffs did not exercise a sound discretion in the premises, and kept the cotton on hand for an unreasonable and improper length of time, then the defendant is entitled to a credit for the amount which it would have brought, if sold in accordance with the usage of trade and the exercise of such discretion.

"3. If the jury find from the evidence that the cotton was shipped, by the defendant, to the plaintiffs, as commission merchants, to be sold; and that the plaintiffs made large advancements on the same; and that the plaintiffs wrote to the defendant that, unless other shipments were made them, or the defendant made them remittances in cash, they would sell the cotton, then, on the failure of defendant to write to plaintiffs in reply, the plaintiffs were bound to sell the cotton in a reasonable time; and the defendant is entitled to a credit on the plaintiffs' demand for the amount which the cotton would have brought, if sold within a reasonable time after the failure of the defendant to answer said letter."

But the court refused to give these instructions, or any of them; and in lieu thereof, instructed the jury:

"That in case they find that defendant gave the plaintiffs instructions orally to sell the cotton before any further fall in the price; and that the plaintiffs failed to do so, but afterwards, on the 16th day of November, 1865, wrote the letter of that date; and that Feild refused to answer the same, then the plaintiffs are responsible for any loss sustained by reason of the fall in

prices up to the time of the failure of the defendant to reply to said letter, but all losses sustained after that time must be borne by the defendant."

The court also charged that, as a general principle, the plaintiffs, as factors, were bound to use due diligence, care, and skill in the sale of the cotton committed to them for sale; and that it was their duty to obey instructions given them by defendant in regard to a sale.

Exceptions were taken to the refusal to charge as asked, and to the charge as given, and verdict and judgment having gone for the plaintiffs, in $5690, the defendant brought the case here, where it was submitted on briefs.

Messrs. Watkins and Rose, for the plaintiffs in error; Mr. A. H. Garland, contra.

Mr. Justice STRONG delivered the opinion of the court.

There is some conflict in the testimony respecting the instructions given to the plaintiffs below by the defendant, at the time when he obtained the advance on his consignment, and at the time when he last saw them, some fifteen days afterwards. It is claimed that he then gave them instructions to sell the cotton before the price should fall any lower, and that this direction was given not later than the 28th of October, 1865. It was upon this theory that his first prayer for instructions to the jury was framed. It is very obvious that no such directions, as that prayer asked for, should have been given to the jury. The prayer was based upon a very imperfect statement of the case. It overlooked material facts, without considering which it could not be determined to what amount of credit he was entitled. There was undisputed evidence that on the 16th of November, 1865, some three weeks after the defendant's alleged directions were given to the plaintiffs, they wrote to him a letter informing him that they had not sold his cotton, as the market had been dull and on the decline every day since he left, that his cotton would not then sell for more than from forty-three to forty-

four cents per pound, and that they would be compelled to sell unless he made other shipments, or remitted in cash as a margin, the money market being tight. They wrote farther that they had held on thus far to meet his views, but that the declining tendency of the market induced them to write, and they asked to hear from him on his receipt of their letter. It was also in evidence that the defendant received this letter, and that he purposely declined to answer it. No allusion was made to these facts in the defendant's first prayer for instructions to the jury. Yet it is manifest they ought not to have been overlooked by the court, for they bear directly upon the question whether the defendant was entitled to credit for the sum for which the cotton would have sold if the plaintiffs had sold it before the price fell in the market. The effect of his refusal to reply to their letter within a reasonable time after he received it, was undoubtedly to raise a presumption that he approved of what his factors had done, so far as their letter informed him. In the absence of anything to rebut that presumption, he must be regarded as having consented to whatever delay had occurred in effecting a sale, even though it was contrary to his directions. He could not, therefore, hold his factors responsible for the consequences of acts which he had ratified. Mr. Livermore, in his Treatise on Agency,* says that "when the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account." And in Story on Agency,† it is said that, "In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of one party receiving a letter from the other to answer the same within a reasonable time, and if he does not, it is presumed he admits the propriety of the acts of his correspondent, and confirms and adopts them."

* Vol. 1, p. 50.

† § 259; see also Abbe *v.* Rood, 6 McLean, 106, and Norris *v.* Cook, 1 Curtis, 464.

Whatever, then, may have been the instructions given to the plaintiffs by the defendant respecting the time of sale, even though they were disobeyed, and though the cotton was not sold before the price had fallen, his refusal or neglect to reply to the plaintiffs' letter of November 16th, 1865, which notified him of the fall in the market price, and informed him that they had not sold but had held on thus far to meet his views, must be deemed an approval of their delay, and equivalent to an antecedent authority. It has been argued that at most it raised a presumption of fact that should have been submitted to the jury. To this it may be answered there was nothing in the case to repel the presumption, and the jury would, therefore, have been bound by it had it been submitted. But the defendant's prayer for instruction ignored it, and, in effect, called upon the court to withdraw it from the jury.

There is still another reason why the court should not have affirmed the defendant's first proposition. The plaintiffs had made large advances on the cotton consigned to them, advances very nearly, if not quite, equal to its value, and much more than its market value at any time after their letter to the defendant was written. They had, therefore, acquired a special property in the cotton, and they held it for their own indemnity as well as for the benefit of the defendant. Now, though it is true that factors are generally bound to obey all orders of their principals respecting the time and mode of sale, yet when they have made large advances or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their right to sell at such a time as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor. Of course they must act in good faith and with reasonable skill. This is the rule as laid down in *Brown* v. *McGran*,* in which it was said that "where a consignment has been made generally

* 14 Peters, 479.

without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of sale, and the consignor has no right, by any subsequent orders given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary to the reimbursement of such advances or liabilities." In view of this it is apparent that the jury had more to find than the fact that Feild gave instructions to sell the cotton before any fall in the price, in order to justify a credit to him for the amount the cotton would have brought if sold at the time the instructions were given. There was, therefore, no error in denying the defendant's first prayer for instructions to the jury.

And the second prayer was correctly refused for the reason that it allowed no effect to the letter of November 16, 1865, and the defendant's refusal to reply.

But we think there was error in refusing to affirm the defendant's third proposition, and the instruction which was given.

The instruction given, we think, was not sufficiently qualified. It gave undue effect to the plaintiff's letter and to the defendant's neglect, or refusal, to reply to it. Surely it cannot be maintained that, by leaving their letter unanswered, the defendant relieved the plaintiffs from the consequences of subsequent neglect, or want of good faith. His silence, at most, was an assent to what they had done up to the time when they informed him of their breach of his orders. It was a condonation of past neglect, not a permission given for future negligence or faithlessness. It did not relieve the plaintiffs from their continuing obligation to sell the cotton within a reasonable time, all the circumstances

of the case being considered, and to sell at the best price that could be obtained. They were still his factors, and under the obligations of factors. Though the order to sell before a fall in the price had expired, they were still agents to sell, and without any particular instructions. It cannot be said that the letter of the plaintiffs proposed, or that the defendant by his silence assented to an indefinite or unreasonable postponement of a sale of the cotton. On the contrary, the letter threatened an immediate sale, unless other shipments were made or cash was remitted, and the silence of the defendant can be deemed no more than an assent to what his correspondents had done, and to what they proposed to do. Yet the charge of the court shielded them against all responsibility for good faith and diligence after the defendant neglected to reply to their letter, and threw upon him all loss sustained after that time, though it may have been occasioned in whole or in part by their failure to sell when they should have sold. The plaintiffs held the cotton, without making a sale, nearly ten months after their letter of November 16, 1865, in which they notified the defendant that they would be compelled to sell unless he made other shipments or remittances. During this period the price of cotton was constantly falling in the market, until at last they sold what they said was worth in November, 1865, forty-three to forty-four cents, for thirty, twenty-five, and twenty cents. Whether this long delay, in view of a falling market, was in the exercise of a sound discretion, good faith, and reasonable diligence, was a question that should have been submitted to the jury. If the delay was unreasonable, if it was in violation of the plaintiffs' duty as factors, they, rather than the defendant, should bear the loss that resulted from it. Such was the instruction the defendant sought to obtain by his third prayer; but it was denied, and the jury were charged that he must bear all losses sustained after his refusal to answer the plaintiffs' letter, without excepting such portion of the loss as may have been caused by the fault of the plaintiffs. Herein we think was error.

Statement of the case.

It is true the court also charged that, as a general principle, the plaintiffs, as factors, were bound to use due diligence, care, and skill in the sale of the cotton, and to obey instructions given them by the defendant in regard to the sale. But this was not said as a qualification of the specific instructions previously given, and the jury must have understood that if they found the facts as stated by the court, they must charge the defendant with all the loss which accrued after his failure to answer the plaintiffs' letter.

The judgment must, therefore, be

REVERSED, AND A NEW TRIAL ORDERED.

BANK OF THE REPUBLIC *v.* MILLARD.

1. The holder of a bank check cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer.
2. The fact that the check was properly drawn on a National bank (a public depositary) by an officer of the government in favor of a public creditor, does not alter this general rule.

IN error to the Supreme Court of the District of Columbia, the case being this:

Millard, a captain in the military service of the United States, was, in 1865, on leaving the service, a creditor of the government for $859, arrears of pay as captain. In settlement of this account the proper paymaster of the army drew and issued a check for that sum upon The National Bank of the Republic, a *depositary of public moneys and financial agent of the United States*, for the custody, transfer, and disbursement of the government funds, having funds for the payment of the check.

The bank, as testimony tended to show, had once paid the check on a forged indorsement of Millard's name. Ascertaining and exposing the forgery, and recovering possession of the check, Millard now presented the same, demanding

payment to himself. This payment the bank refused to make. Thereupon he sued it, declaring on a special count on the transaction, and also on a general count for money had and received by the bank to his use.

On the trial the bank requested the court to charge, "that unless the jury were satisfied from the evidence that it *accepted* the check in favor of the plaintiff, or his assignees, or promised to pay the same to the plaintiff, or his assignees, he was not entitled to recover." But the court refused so to charge, and verdict and judgment having gone against the bank, it brought the case here on error; the questions here argued and considered being: 1st. The general one,—whether the holder of a bank check could sue the bank for refusing payment in the absence of proof that it was accepted by the bank *or charged against the drawer*. 2d. If not, whether the fact existing in this particular case, that the check was on a National bank (a public depositary of the government funds) by an officer of the government, in favor of a public creditor, varied the general rule.

Mr. Edwin L. Stanton, in support of the judgment below:

1. It may be admitted that the holder of *a bill of exchange* might not be able to sue without acceptance or a promise of it; but no argument from analogy can hence be made against such right in the holder of a common check drawn against funds confessedly existing on deposit.

A bill of exchange is, *primâ facie*, a single transaction between the drawer and the drawee; the latter does not hold himself out as the custodian and disburser of the former's money. He may not be a debtor to him at all. And even if he has money belonging to him, though an order to pay over the exact sum would, on notice, operate as an equitable assignment, yet he is under no obligation to pay it out in fragments, nor to several persons. Hence, in the case of a bill of exchange, a necessity may arise for the drawee's acceptance. It is recognition by him of the drawer's competence to give the direction expressed by the bill.

But bank checks are drawn on common repositories where

many persons agree to keep their cash, to be always and immediately ready at their call or subject to their directions, in any amount, to any and every payee. Such checks, therefore, require no acceptance. In point of fact, none is ever given or thought of being asked for in regard to them. No custom is more prevalent, none more practically affects the dealings of men, than the usage and regular course of business out of which arise an understanding and expectation that a check, upon presentment for payment (if the drawer has the money on deposit to meet it), transfers to the holder the title to the money it calls for, and will at once be paid. Upon the strength and convenience of this usage and understanding, checks pass from hand to hand like cash, and are used in most payments and settlements between individuals and between banks.

The right of the holder to sue without acceptance has been sustained in Illinois, in *Munn* v. *Burch*;* in South Carolina in two cases,† as also in Louisiana.‡ And this right rests upon what is said by this court in *Mandeville* v. *Welch*,§ that "an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties as part of their contract."

2. But *this* plaintiff, an officer of the government, had a special and indeed a statutory right. The National Bank of the Republic was not a bank holding the deposits of a common customer and transacting ordinary banking business. It was a financial agent of the United States; a depositary and disburser of its funds; directly and completely the representative of the government, because the government can only act through its proper agent. The plaintiff

* 25 Illinois, 35; see also Chicago Marine Insurance Co. *v.* Stanford, 28 Id. 168.

† Fogarties *v.* State Bank and Ambler *v.* State Bank, 12 Richardson's Law, 518.

‡ Vanbibber *v.* Louisiana Bank, 14 Louisiana Annual, 481.

§ 5 Wheaton, 286; and see Carnegie *v.* Morrison, 2 Metcalf, 381; Weston *v.* Barker, 12 Johnson, 276; Russell *v.* Wiggin, 2 Story, 237; Brewer *v.* Dyer, 7 Cushing, 337; 3 Kent, 105, note A; Beawes' Lex Mercatoria, 371.

was a creditor of the United States. The money for his payment was appropriated by law; his demand was admitted and definitely ascertained and payable in money. The bank, as agent of the government, held the sum set apart for his payment. It held it therefore to his use, payable on his proper demand, which was the presentment of this check. By statute, the refusal of such an agent to obey such an order and promptly pay such a check is, upon trial of an indictment, *primâ facie* evidence of embezzlement. Claiming credit for payment without having made payment is conversion of the amount, punishable by fine and imprisonment.*

Messrs. Bradley and Cox, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The only question presented by the record which it is material to notice is this: Can the holder of a bank check sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer?

It is no longer an open question in this court, since the decision in the cases of *The Marine Bank* v. *The Fulton Bank*† and of *Thompson* v. *Riggs*,‡ that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has

* Act of Feb. 25, 1863, 12 Stat. at Large, 668; Act of June 3, 1864, 13 Id. 99; Act of Aug. 6, 1846, 9 Id. 59; McCulloch *v.* Maryland, 4 Wheaton, 316; Osborn *v.* U. S. Bank, 9 Id. 738; Kennedy *v.* Gibson, 8 Wallace, 498.

† 2 Wallace, 252.

‡ 5 Id. 663.

nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell, in the House of Lords, in the case of *Foley* v. *Hill*,* and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect.

As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status, which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks,

* 2 Clark and Finnelly, 28.

it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge,* is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depositary. This is a well-established principle of law, and is sustained by the English and American decisions.†

The few cases which assert a contrary doctrine, it would serve no useful purpose to review.

Testing the case at bar by these legal rules, it is apparent that the court below, after the plaintiff closed his case, should have instructed the jury, as requested by the defendant, that the plaintiff, on the evidence submitted by him, was not entitled to recover. The defendant did not accept the check for the plaintiff, nor promise him to pay it, but, on the contrary, refused to do so. If it were true, as the evidence tended to show, that the bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature, to a person not authorized to receive the money, it does not follow that the bank promised the plaintiff to pay the money again to him, on the presentation of the check by him for payment.

It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the

* Gardiner, J., Chapman *v.* White, 2 Selden, 417.

† Chapman *v.* White, 2 Selden, 412; Butterworth *v.* Peck, 5 Bosworth, 341; Ballard *v.* Randall, 1 Gray, 605; Harker *v.* Anderson, 21 Wendell, 373; Dykers *v.* Leather Manufacturing Co., 11 Paige, 616; National Bank *v.* Eliot Bank, 5 American Law Register, 711; Parsons on Bills and Notes, edition of 1863, pp. 59, 60, 61, and notes Parke, Baron, in argument in Bellamy *v.* Majoribanks, 8 English Law and Equity, 522, 523; Wharton *v* Walker, 4 Barnewall & Cresswell, 163; Warwick *v.* Rogers, 5 Manning & Granger, 374; Byles on Bills, chapter "Check on a Banker;" Grant on Banking, London edition, 1856, 96.

count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore, under an implied promise to him to pay it on demand.

It is hardly necessary to say, that the check in question having been drawn on a public depositary, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents.*

As soon as the deposit was made to the credit of Lawler as paymaster, the bank was authorized to deal with it as its own, and became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit.

JUDGMENT REVERSED AND A VENIRE DE NOVO AWARDED.

DEAN *v.* NELSON.

1. A sale of stock in a company at its par value, the consideration to be paid out of the net receipts of earnings of the stock, received quarterly by the company, and a note given therefor, with the condition that the principal should become due if the instalments were not regularly paid; *held* a valid sale under the circumstances.
2. Such a condition in the note is not a penalty, but is of the substance of the contract.
3. A mortgage to secure such note being given upon the grantee's interest as a stockholder in the property of the company, the equity of redemption is not extinguished by proceedings to foreclose the same during the war, when such proceedings were taken within the Union lines, whilst the defendants were absent in the Confederate lines and were prohibited from entering the Union lines.

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* The United States *v.* Bank of Metropolis, 15 Peters, 377.

Statement of the case.

APPEAL from the Circuit Court of the United States for West Tennessee; the case having been thus:

Thompson Dean, of Cincinnati, prior to the breaking out of the late rebellion, was the owner of a large amount of capital stock in the Memphis Gaslight Company, a corporation of Tennessee, situated and doing business at Memphis, in that State. In May, 1861, he transferred his entire stock to one Pepper, secretary of the company, to enable him (Pepper) to make some disposition of it in view of approaching hostilities.

On the 11th day of June, 1861, Pepper sold and transferred fifty shares, of $100 each, to a certain Nelson, then of Memphis, at par, receiving for the consideration Nelson's note, under seal, dated June 11th, 1861, whereby he promised to pay to the order of Pepper $5000, with interest at six per cent. per annum out of the net receipts of earnings on the sum of $5000 of the capital stock of the company, payable in quarterly instalments, the interest being first paid and balance of said net receipts then to be applied upon the principal, which instalments should amount to such sum of money as should be equal to the quarterly net receipts of earnings on $5000 of the capital stock of the company; it was further expressed in the note that it was given for the purchase-money of $5000 of the capital stock of the company, sold and transferred to Nelson by Pepper; and that if Nelson failed to pay any of the instalments quarterly, as aforesaid, after the receipt by the company of said net earnings, then the full sum of $5000, with interest, less interest and instalments paid, should become due and payable.

To secure the payment of this note Nelson, on the same day, executed to Pepper a paper, in the ordinary form of a mortgage, conveying to Pepper, his heirs and assigns, the following real and personal property, viz., "so much of Nelson's individual interest, right, title, and estate in the property and premises of and belonging to the Memphis Gaslight Company as should be represented by and equal to the $5000 of capital stock of said company at par," then

describing the real and personal property which the company owned, being gas works and other property in Memphis, and concluding with the usual condition, to be void on the payment of the note according to the tenor and effect thereof. This instrument was duly acknowledged and recorded in the registry of mortgages for Shelby County. On the 20th day of July, 1861, Pepper sold and transferred to Nelson one hundred and fifty-four additional shares of said company, at the par value of $15,400, and received a similar note and instrument for the consideration thereof. It appeared from the evidence in the case that Pepper sold this stock to Nelson and the remainder of Dean's stock to other persons, when he did, under apprehension that it would be confiscated by the Confederate authorities, as was threatened to be done, and from a desire to leave Memphis (which he soon afterwards did do, going north) for his own personal safety. But Nelson swore that he made the purchase of the stock in good faith, and that he received it without any trust or pledge for its return.

The war soon began to rage with severity, and all intercourse between the States in rebellion (including Tennessee) and the other States of the Union was not only interrupted, but was prohibited by President Lincoln's proclamation of August 16th, 1861, made in pursuance of the act of Congress of the 13th of July previous.

Nelson continued to reside at Memphis, within the Confederate lines, and received the regular quarterly dividends on the two hundred and four shares of stock, but did not and could not make any payment to Pepper or to Dean, to whom Pepper assigned the notes and mortgages, they both being within the Union lines. The amount of dividends thus received by Nelson was $3672.

On the 1st of June, 1862, Nelson transferred one hundred and ninety-four shares of the stock to Miriam Nelson, his wife, having previously transferred ten shares to a certain Benjamin May. Both transfers were without consideration, except that the object of the transfer to May was to make him a director, and the professed object of the transfer to

Nelson's wife was to make her a separate provision for maintenance.

On the 6th of June, 1862, the Federal forces entered the city of Memphis, and held military possession of that part of Tennessee until the close of the war. Dean visited Memphis during the summer and autumn of 1862, and saw Nelson there, who failed to make any payment on the notes. Nelson swore in the proceeding below, that Dean refused to receive any payment, alleging that the stock was absolutely forfeited by the failure to pay. Dean swore that he asked Nelson what he proposed to do about the payment of the net earnings which he had received, and that Nelson answered that he was not disposed to pay it, because he might have to pay it again to the Confederate government. From the evidence in the case this court expressed itself as inclined to believe that this ground was assumed by Nelson, and that he did not make an unequivocal tender of the money due, and whilst it admitted that it was probably true that Dean insisted that the stock was forfeited, it was not satisfied that his conduct was such as to obviate the necessity of a tender by Nelson if the latter wished to prevent the principal from becoming due. At this time Nelson was allowed to remain peaceably within the Union lines, and there was no reason why he should not have paid the money to Dean.

On the 5th of April, 1863, Nelson, with his family, was ordered to remove south of the lines of the United States forces, and not to return. This order was made in retaliation for some outrages committed by guerillas in the vicinity. In pursuance of it Nelson and his family removed within the Confederate lines, and remained therein during the remainder of the war; and were not permitted to re-enter Memphis, although Nelson, at one time, requested permission to do so. The other complainant, May, was within the Confederate lines during the entire contest.

On the 25th of April, 1863, General Veatch, then commanding the military district of Memphis, by a special order, established and organized a court or civil commission for

the hearing and determination of all complaints and suits instituted by loyal citizens for the collection of debts, enforcement of contracts, prevention of frauds, recovery of the possession of property, and generally to do whatever can be done by a court deriving its powers from military authority. Before this court or civil commission, on the 1st day of September, 1863, Dean filed a petition setting forth the fact of the sale of the stock to Nelson, that Nelson had given a note, and to secure the payment of said note had executed and delivered *mortgages* on all the interest of said Nelson in said company, represented by said stock, which *mortgages* were recorded, &c.; and praying for the foreclosure of the "*said mortgages*," and sale of the two hundred and four shares of stock, in order to raise the amount due on the notes. Nelson and wife, and May, were made defendants, but were returned "*Not found;*" and publication of notice to them to appear was made in accordance with the laws of Tennessee existing prior to the rebellion. No appearance being effected, a decree was made, execution issued, and the stock was sold by the marshal on the 23d day of October, 1863, to one Hanlin, and was subsequently transferred to him on the books of the company by the secretary, pursuant to an order of the civil commission. Hanlin immediately transferred the stock to Dean. From that time till June, 1865, Dean drew the dividends on the stock.

In the month just named, Nelson, his wife, and May, filed a bill in the court below, praying, in substance, that the stock might be decreed to belong to them, and that Dean might account for all the dividends received by him, to be applied to the payment of the notes, &c., and for general relief.

Dean, in his answer, set up and insisted upon two grounds of defence:

First, the forfeiture of the condition of the mortgage, which, under the circumstances of the case, and from the unconscionable nature of the transaction, he insisted should be held to be an absolute forfeiture, without benefit of redemption; in other words, that the instrument should be

regarded as a conditional assignment or transfer, and not as a mortgage.

Secondly, he set up the proceedings before the civil commission, by which, as he contended, even if the instrument were a mortgage, all equity of redemption in the stock was foreclosed. The defendants, Nelson, his wife, and May, on the contrary, insisted that the paper was a mere mortgage; that the condition in the notes making the principal due if the instalments were not regularly paid, was in the nature of a penalty, and should not have been enforced in an equitable proceeding; that the court or civil commission was illegal and without authority; that it never had any jurisdiction of the person of the appellants, nor of the property attempted to be foreclosed; that the existence of the war, and the residence of the appellees within the Confederate lines, forbade any legal proceedings against them or their property; that, therefore, they had been illegally dispossessed of the latter, and were entitled to have it restored to them without conditions; and, finally, that Dean was accountable to them for the dividends received by him, to be credited on the notes.

The court below decreed that Dean should transfer to Mrs. Nelson, for her sole and separate use, one hundred and ninety-four shares of the stock, and to May ten shares, so as to restore the stock to them respectively, as they had it prior to the decree of the civil commission divesting it out of them. And that a master should take and state—

An account of what amount of dividends had been declared and paid on the said two hundred and four shares since the sale to Nelson by Pepper, and when, how, and to whom they were paid:

And an account between Nelson and Dean, as assignee of Pepper, which should show the amount of principal and interest of the notes executed by Nelson to Pepper, for the two hundred and four shares, with all amounts of dividends and profits received on them by Dean, applied as credits according to the laws of Tennessee, as to the application of partial payments, and showing what balance, if any, was now

due upon the said obligations, or what balance, if any, was due from Dean, after paying the said obligations in full.

From this decree Dean took an appeal here.

Mr. Holman, for the appellant:

The assignments of stock by Pepper to Nelson were made without any consideration whatever. There was no mutuality in the contracts. They imposed no obligation on Nelson. His agreement to pay for the stock out of his own net earnings was not a valuable consideration for its assignment to him. Pepper acted under what was, practically, duress; under an influence which disturbed his judgment, and deprived him of the capacity to act calmly; and this condition of mind was brought about by the prospect of a rebellion; by the acts of traitors, with whom Nelson was doubtless himself in concert. Is *he* to profit by a profitable contract obtained by him at such a moment? Certainly, if this contract were executory, equity could not, under the decision in this court of *Dorsey* v. *Packwood*,* enforce it. But Dean, without fraud on his part, has, through the decree of the military court, got the legal title to the stock in his hands, and the other side come in to ask the aid of equity. In such a case the court will consider the original contract, its fairness, and the consideration on which it was founded, in determining whether the party asking relief is in equity entitled to it, and the court will refuse its aid, as in case of a bill for specific performance, if the original contract, if executory, ought not to have been enforced.

These instruments were not mortgages, but were absolute conveyances of the stock with defeasance, to be null and void if the conditions were performed, but to be absolute upon default. The condition of paying over dividends received has been broken. The conveyances, therefore, have become absolute, and all of Nelson's title has been divested, and vested in Pepper, and in Dean, his assignee, even without reference to the decree of the civil commission. Cer-

* 12 Howard, 126.

tainly, in view of the unconscionable character of the bargain on Nelson's part, this is the light in which the court must consider the instruments.

We assume, of course, that whatever the instruments were, they operated on shares of stock. Nelson, indeed, had nothing else on which they could operate.

If prior to June 6th, 1862, Nelson could pretend to be excused from paying the dividends he had received by reason of the hostile military power, which he had himself doubtless contributed to organize, between the city of Memphis and Cincinnati, the domicile of Dean, no such excuse could avail after the 6th of June, 1862, when the Federal forces took possession of Memphis, or when he met Dean in Memphis, in the autumn of that year. And, considered as contracts, time was clearly of their essence.

Even if the instalments are to be regarded as mortgages, still upon the failure of Nelson to fulfil his contracts, if he possessed any right or interest in this stock, it was only a right in equity to redeem; and a court of equity will not aid a party to redeem, and relieve him from the consequence of his default, when he seeks thereby to obtain the benefit of an unconscionable contract, which, if executory, a court of equity would not enforce.

But a right of redemption arises, in any case, but from the payment or tender of payment of the debt. Here Nelson and May, still retaining the $3672 of dividends received on this stock, without payment or tender to Dean of that sum, or of any portion of the debts, both long since due by the terms of the contracts, seek by their bill to be reinvested with the title to the stock. The claim set up is against equity and good conscience.

But, independently of this, the decree of the civil commission affords a judicial bar to this bill. That a military commander, in a conquered district, in which the civil authority is overthrown or suspended, may, to aid him in the protection of private rights and to preserve civil order, establish agencies of civil government, and among them courts of justice, is scarcely open to discussion. The humane prin-

ciples of modern international law not only recognize this power in a military commander, but would seem to demand its exercise, thus ameliorating as far as may be the severities of military law. The duty of the Federal government to protect the rights of all of its loyal citizens rendered the application of those enlightened principles of international law to the districts of country under military occupation in the late war imperative. General Veatch, commanding the military district of Memphis, a commercial city of sixty thousand people, with intimate commercial relations with many of the loyal States of the Union, was not only authorized, but was bound to establish in that city, while held by force of arms, such a tribunal. The validity of the proceedings of such tribunals, established by military power, seems to be sustained by many decisions in the courts of this country.*

Mr. P. Phillips, contra; a brief of Messrs. Kortrecht and Craft being also filed:

1. Even if this were a bill for the specific performance of an executory contract it would be maintained; for it is not necessary that a consideration should be adequate, but only that it be valuable. The parties themselves are the best judges of the adequacy, and, therefore, inadequacy will not be an answer in equity to the prayer for specific performance, if not so gross as to prove fraud or imposition. But we here stand on an *executed contract*, and ask relief only to enforce the rights which pertain to *it*. The distinction between the two classes of cases is elementary.† Where in such a contract there is neither fraud, accident, nor mistake, however absurd the stipulations, the contract will be enforced. In those cases where the inequality of the bargain

* Jecker *v.* Montgomery, 18 Howard, 116; Cross *v.* Harrison, 16 Id. 164; Leitensdorfer *v.* Webb, 20 Id. 176; Hefferman *v.* Porter (Supreme Court of Tennessee), American Law Register for January, 1870, 41; Rutledge *v.* Fogg, 3 Coldwell, 554; The Grapeshot, 9 Wallace, 129.

† Ellison *v.* Ellison, 6 Vesey, 662; Pulvertoft *v.* Pulvertoft, 18 Id. 99; Bunn *v.* Winthrop, 1 Johnson's Chancery, 337.

is so gross that the mind cannot resist the inference of fraud, the court interposes, not on the ground of the inequality, but because from its grossness there arises the most vehement presumption of fraud.* The inadequacy complained of in this case is, that the payments were to be made only out of the dividends received from the stock; but as these dividends were regarded as *certain to be made*, they were merely taken as the measure of the payments.

The contract in this case is no doubt an unusual one; but the condition of the country when it was made, and by which it was suggested, was unusual; far more unusual than a contract of such a nature itself.

It is again objected that the complainant is not entitled to relief, because the sale of the stock was made under circumstances which constituted duress. Admit that these sales would not have been made if the country had been at peace. What has that to do with the result? When it was supposed, as for a short time during the rebellion it was by some, that Washington would be captured by the rebels, the stress of that belief forced sales of property at great sacrifices. The contingencies of the war operated in determining the judgment and action of men; but such considerations, in the absence of fraud or imposition, have not heretofore been considered as sufficient to avoid a contract for duress. We do not deal with the question of "free will" as one of metaphysics. All that the law requires is the exercise of a sane mind, with liberty of action. That Pepper and Dean were of sound mind and discretion is admitted. They speculated as to the *chances of war*. If they had firmly believed in the defeat of the rebel cause, the sale would not have been made. That it was made, is but an evidence they did not so believe.

The force which deprives the party of his free will must have a *direct relation to, and connection with the contract which is sought to be avoided.* Violence, and the rule of a mob, or the action of the elements, may create such apprehension

* Dunn *v.* Chambers, 4 Barbour, S. C., 379; Eyre *v.* Potter, 15 Howard, 60.

for the safety of property as to induce its sale for an inadequate consideration. But however strong the apprehension, and however it may sway the mind, the will is still left free, what to choose, and what to do. The owner may retain his property, and take the hazard of its destruction, or he may dispose of his title to others who have more confidence in its safety. If his judgment, influenced by fraud or imposition, induces him to select the latter course, this is the exercise of free will. He cannot in legal parlance assert that he was forced to enter into the contract. If Pepper had made the sale in Cincinnati, and to one of its citizens, with what pretext could he have maintained the right to annul it? How would such a sale differ from the sale made in Memphis in execution of the determination arrived at in Cincinnati? If the apprehension that confiscation laws might be passed induced the sale, this is not a duress which authorizes a repudiation of the contract, when the danger had ceased to exist.

2. If the instruments which we call mortgages were, as it is contended on the other side they were, conditional sales, still they are conveyances only of Nelson's interest in the property of the Gaslight Company, and *stock* would not pass under them. But we submit that this theory is too far at variance with the whole history of the transaction, and with Dean's statements made in the petition filed in the civil commission, to be now considered. As a question of law, however, this transaction has none of the elements of conditional sales.* If they had been conveyances of stock, only the equitable title would have passed, because the legal title could not be transferred except upon the stock books of the company. The legal principles as to conditional sales, sought to be relied upon, have application only to *legal titles.*

3. The decisions cited on the other side in support of the lawfulness of the civil commission, fail to show that a military commander of a city in easy communication, as it is matter of public history that Memphis then was, with the

* Hickman *v.* Cantrell, 9 Yerger, 172.

capital, may without any authority from Congress or the President establish courts of justice. If not confined to the commander-in-chief, then it must exist in every officer in command of a particular place, even though the command may not extend beyond a corporal's guard.

4. But if it were a lawful court, of what value was its decree of divestment in this special case? The same military power which sent Nelson beyond the Federal and into the rebel lines, with a prohibition against return, a few months thereafter, renders a decree *pro confesso* against him, because he did not respond to an advertisement directing his appearance, and because though *called* to come into court, he made no answer. Such a decree cannot be maintained except we adopt the fiat of arbitrary power "*sic volo, sic jubeo.*" Then, indeed, no advertisement and no proclamation are necessary. But tested by the principles of universal justice, it is a mere nullity. The law of nations, the acts of Congress, nay, the direct command of this military power itself, *forbade* Nelson from appearing, even if accident had brought the publication to his notice. The law cannot create a default when the law forbids a performance. In England, in Sir Alexander Don's case,* in the House of Lords, a decree was reversed which permitted a judgment against Don recovered in France without personal service, during the war, to be given in evidence to avoid the plea of prescription in a suit brought against Don in Scotland after the war; Don, at the institution of the proceedings, being a subject of Great Britain, resident therein.

In the northern part of our own country (Illinois),† a decree of foreclosure, founded on such an advertisement as the one here, was set aside, though the statutory period of redemption had passed. The court considering that "titles thus acquired would rest on the basis of robbery, not upon a judicial divestiture of the debtor's interest recognized as just '*jure gentium.*'" And the same doctrine is held in the south-

* 5 Clark & Finelly, 21.

† Connecticut Insurance Company *v.* Hall, 16 American Law Register, 606.

ern part (Georgia), in a case where the jurisdiction was exercised within Confederate lines against a defendant being at the time in one of the loyal States.*

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

In determining the questions raised by this record, the court is of opinion in the first place, that Dean must be regarded as concluded on the question of the sale of his stock. Had the transaction been merely an agreement for a sale upon the terms on which the sale was actually made, and this a bill by the vendees for a specific performance, we should find great difficulty in distinguishing this case from that of *Dorsey* v. *Packwood.*† But here the sale was actually made, and the stock was actually transferred to Nelson, so that, in the absence of fraud, it became absolutely his. And in support of the *bona fides* of the transaction, it may be said that in view of all the contingencies of the situation, the arrangement was at the time an advantageous one for Dean. At all events, he chose, on the whole, to acquiesce in it, and in his bill to foreclose the stock, presented before the civil commission, he makes no claim but that of holder of the mortgage, affirming and claiming under Nelson's title throughout. And in his answer to the present bill he nowhere hints that Nelson was guilty of any bad faith in the transaction, or made any agreement to hold the stock for him, or in any other way than as a *bona fide* purchaser thereof. And it is hardly correct to say that Nelson incurred no obligation in the transaction. He agreed to pay the whole amount immediately in case of failure to pay any instalment after the receipt *by the company* of the net quarterly earnings. And this condition was not in the nature of a penalty, as surmised by the appellees; but was of the substance of the contract. So that, on failure to pay or tender the money received by him, or by the company, on account of the stock

* Cuyler *v.* Ferrill, 8 American Law Register, New Series, 100.

† 12 Howard, 126.

purchased, the whole debt became due and payable as a personal obligation of Nelson.

But, at all events, the stock was actually sold and transferred, and became the property of Nelson, and was possessed by him. The contract was an executed contract, and that transaction cannot now be impeached.

The next question relates to the character of the instrument given by Nelson to Pepper as security for the payment of his notes. Was it a conditional sale, or was it a mortgage? On this question hardly a doubt can be raised. The court is asked by the appellant, under the circumstances of the case, which the appellant asserts to have been unconscionable on Nelson's part, to *consider* the instrument as a conditional conveyance of the stock, and not a mortgage. But the court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage, it is the duty of the court to declare it a mortgage; and if it is a mortgage it has, perforce, all the incidents and privileges of a mortgage; and that it *is* a mortgage there is no room for question. The principal engagement is contained in the note, which creates a debt as soon as earnings or dividends are received. The other instrument is secondary, and is intended as security for the payment of the note. The appellee himself, in his proceedings before the civil commission, treats his claim as a debt, and the instrument of security as a mortgage. He calls it a mortgage; and the doctrine of "once a mortgage, always a mortgage," applies to it.

Then, being a mortgage, whether of real or personal property, the mortgagor has an equity of redemption, unless it has been extinguished in some legal way. The great question of the cause is, whether the equity of redemption has been extinguished.

It is unnecessary to decide whether the mortgage was one of real or of personal estate, or whether it was a legal or only an equitable mortgage. As no attempt has been made to cut off the equity of redemption, in any other manner than by legal proceedings, the question is reduced to the

simple one, whether those legal proceedings are valid and effectual for the purpose.

It is objected that the court or civil commission was not legally established; but it is not necessary to determine that question, as the proceedings themselves were fatally defective. The defendants in the proceedings (the appellees here) were within the Confederate lines at the time, and it was unlawful for them to cross those lines. Two of them had been expelled the Union lines by military authority, and were not permitted to return. The other, Benjamin May, had never left the Confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see nor obey it. As to them, the proceedings were wholly void and inoperative.

This leaves the equity of redemption in the mortgaged property unextinguished; and it is, therefore, the right of the appellees to redeem it.

In the opinion of the court, the whole principal and interest of the notes have become due and payable, and a redemption and retransfer of the stock should be decreed only on condition of the payment of principal and interest in full, after giving to the appellees credit for the sums received by the appellant; legal interest on each side to be allowed.

The decree of the Circuit Court, therefore, will be so far modified that, instead of requiring the appellant to forthwith transfer the stock, as directed in the decree, he be decreed to transfer it to the defendants, Miriam W. Nelson and Benjamin May, respectively, as therein directed, upon payment by the appellees to the appellant of the amount which shall be found to be due to him on the said two notes, after taking and stating the account in the said decree afterwards directed; neither party to recover costs of the other in this appeal.

DECREE MODIFIED ACCORDINGLY.

Statement of the case.

DOWNHAM ET AL. v. ALEXANDRIA COUNCIL.

An ordinance of the city council of Alexandria imposed a license tax of two hundred dollars upon dealers in beer or ale by the cask which was not manufactured in that city, but brought there for sale. The defendants were commission merchants in that city, and dealt in beer and ale by the cask, not there manufactured, but brought there for sale without having obtained a license therefor, or having paid the required tax. In an action by the city council to recover of the defendants the license tax, *held*, that the ordinance, so far as it operated upon the business of the defendants, was not in conflict with that clause of the Constitution which declares that "Congress shall have power to regulate commerce with foreign nations, and among the several States;" nor with the clause which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States;" it not appearing that the beer or ale in which they dealt was manufactured either in a foreign country or in another State of the Union. If they were manufactured within the State, the exaction of the special license tax for the privilege of selling them in casks in Alexandria, would not be obnoxious to either of those clauses of the Constitution.

ERROR to the Fourth Judicial District Court of the State of Virginia. The case was thus:

The Constitution by one clause declares that "Congress shall have power to regulate commerce with foreign nations, and among the several States;" and by another that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." With these provisions existing, the city council of Alexandria, in Virginia, passed in June, 1867, an ordinance for the purpose of raising revenue for that year, and by it imposed a license tax, in proportion to the capital invested, upon all merchants commencing business, and a tax proportioned to their sales, upon all merchants who had been carrying on business for one year, prior to the first of June. The same ordinance also imposed a special license tax upon commission merchants commencing business, and a tax in proportion to the commissions received upon those who had been doing business for one year prior to the first of June. The ordinance further imposed a license tax of two hundred dol-

lars "on all agents or dealers in beer or ale by the cask, not manufactured in this city (Alexandria), but brought there for sale."

In this state of things Downham & Co. were, at the commencement of this action, in August, 1867, and had been from the first of the previous June, conducting the business of liquor merchants and commission merchants in Alexandria, and at the same time had been dealing on commission in beer and ale by the cask, which was not manufactured in the city, but was brought there for sale. They obtained, as required by the ordinance, a license from the mayor of the city, as merchants and commission merchants, for the year ending June 1st, 1868, and paid the liquor tax; but they did not obtain a license to deal in beer and ale by the cask, which were not manufactured in Alexandria, but were brought there for sale; nor did they pay the tax of two hundred dollars required by the ordinance for such license. The city council brought the present action to recover that sum. The defendants set up by way of defence, that the ordinance, in the imposition of a tax upon dealers in beer or ale by the cask, when not manufactured in the city of Alexandria, but brought there for sale, was in conflict with the two clauses of the Constitution already above quoted.

The case was submitted to the Circuit Court of Alexandria County upon an agreed statement of facts, the parties waiving all matters of form and pleading, and expressing a desire to present for the decision of the court two questions:

1st. Whether the city council of Alexandria had exceeded its authority in imposing the tax upon dealers in "foreign ale or beer?"

2d. Whether the license of the defendants, as merchants and commission merchants, authorized them to deal in ale or beer by the cask, which was not manufactured in Alexandria, but brought there for sale, when the ordinance imposed a specific license tax upon this particular branch of the trade?

The Circuit Court gave judgment for the city, and the District Court affirmed the judgment, and this latter court

being the highest court of law in the State in which a decision could be had, the case was brought here for review; the plaintiffs in error assuming that the case came within the twenty-fifth section of the Judiciary Act.

Messrs. Brent and Wattles, for the plaintiffs in error, urged in this court the same positions which the defendant set up below.

Mr. D. L. Smoot, for the city council of Alexandria, contra.

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

The argument of counsel proceeds upon the supposition that the beer and ale in which the defendants dealt was manufactured either in a foreign country, or in another State of the Union; but there is nothing in the record to warrant the supposition. The first question that the parties desired to present in the agreed statement is not, in truth, raised by the facts admitted. It is not alleged in the statement that the defendants were dealers in "foreign beer or ale," or even in beer or ale manufactured without the State of Virginia. It is only alleged that they were dealers in beer and ale by the cask, which was not manufactured in the city of Alexandria. For anything which appears, the beer and ale in which they dealt may have been manufactured in other parts of the State. If manufactured within the State, the exaction of the special license tax for the privilege of selling them in casks in Alexandria, would not, of course, be obnoxious to either clause of the Constitution cited. In that case, it would not interfere with any regulation of commerce with foreign nations, or between the States, or with any authority to make regulations for such commerce. Nor would it, in that case, impair any privileges or immunities of citizens of other States, who, equally with citizens of Virginia, and upon the same terms, could deal in the city of Alexandria in similar goods. It is only equality of privileges and immunities between citizens of different States that the Constitution guarantees.

The defendants have, in fact, presented for our consideration a possible, but not an actual question, one which may hereafter arise under the ordinance, but which has not arisen as yet; at least the record does not aver any facts which show that it has arisen, and we cannot indulge in presumptions to supply the omissions of material averments.

The second question presented in the statement depends for its solution upon the construction of local statutes, and does not involve the consideration of any act of Congress, or any provision of the Constitution of the United States.

We are of opinion that no question is raised by the record which this court can consider under the twenty-fifth section of the Judiciary Act, and the writ of error must, therefore, be

DISMISSED.

RAILROAD COMPANY *v.* REEVES.

1. When a common carrier shows that a loss was by some *vis major*, as by flood, he is excused without proving affirmatively that he was guilty of no negligence.
2. The proof of such negligence, if the negligence is asserted to exist, rests on the other party.
3. In case of a loss of which the proximate cause is the act of God or the public enemy, the common carrier is excused though his own negligence or laches may have contributed as a remote cause.
4. The maxim *causa proxima non remota spectatur* applies to such cases as to other contracts and transactions; and ordinary diligence is all that is required of the carrier to avoid or remedy the effects of the overpowering cause.
5. The mere promise of a carrier, without additional consideration, to forward freight already on the route by an earlier train than usual, is not evidence from which a jury can infer a special contract to do so.

IN error to the Circuit Court for the Western District of Tennessee, the case being this:

Reeves sued the Memphis and Charleston Railroad Company as a common carrier for damage to a quantity of tobacco received by it for carriage, the allegation being negligence and want of due care. The tobacco came by rail from Salisbury, North Carolina, to Chattanooga, Tennessee,

reaching the latter place on *the 5th of March*, 1867. At Chattanooga it was received by the Memphis and Charleston Railroad Company on the 5th of March, and reloaded into two of its cars, about five o'clock in the afternoon.

The Memphis and Charleston Railroad track extends from Memphis to Stevenson, Alabama, a point west of Chattanooga, on the Nashville and Chattanooga Railroad. Between Chattanooga and Stevenson, by a contract between the two companies, the trains of the Memphis and Charleston road were drawn by engines belonging to the last-named road, an agent of the road being at Chattanooga and receiving freight and passengers there for Memphis.

One Price, who as agent of Reeves was attending and looking after the tobacco along the route, testified (though his testimony on this point was contradicted) that the agent of the company at Chattanooga promised that, if the bills were brought over in time, the tobacco should go forward at six o'clock *that evening;* and shortly before that time informed him that the bills *had* come over, and assured him that the tobacco would go off at that hour. It did not do so, though he, Price, the agent, supposing that it would, went on by a passenger train and so could no longer look after the tobacco. By the time-tables which governed at the time the forwarding of freight, goods received during one day were forwarded the next morning at 5.45 A.M., and at that time the train on which the tobacco in question was placed went off. This train, however, found the road obstructed by rocks that had fallen *during the night* and had to return, and in consequence of information of the washing away of a bridge on the road, *had to remain at Chattanooga.* Chattanooga is built on low ground, on the Tennessee River, which, a short distance west of it, runs along the base of Lookout Mountain. On the 5th of March there had been heavy rains for some weeks, and the river had been rising and was very high. Freshets of the years 1826 and 1847, the highest ever remembered previous to one now to be spoken of, or of which there was any tradition, had not risen by within three feet as high as the level of the railroad track in the station

where the cars containing the tobacco were placed, on their coming back to Chattanooga, after their unsuccessful attempt to go forward.

The river rose gradually *until the evening of the 7th* (*Thursday*), at which time it reached the high water mark of 1847. That night it rose an average of four inches an hour from 7 P.M. to 6½ A.M. of the 8th of March, and it continued to rise until about 2 P.M. of Sunday, the 10th of March. On Friday, at 1 P.M., the engines standing on the tracks were submerged so that their lower fire-boxes were covered. On Saturday, at 8 P.M., the engines and cars were submerged ten feet or more, and the freight in question was thus damaged. *Had it gone off on the evening of the 5th it would not have been damaged.* A freight train did leave Chattanooga going towards Memphis on that evening, but it carried freight of the Nashville and Chattanooga road only, and none for the road of the defendant. Four or five days elapsed from the time when the water began to come up into the town, before it was so high as to submerge the cars and injure the freight. No one expected the water would rise as it did, because it rose full fifteen feet higher than had ever before been known. The rise was at first gradual, and from the direction of Lookout Mountain, by backing; but afterwards it came suddenly from the direction of the Western and Atlantic road, opposite to its former direction, and then rose very rapidly. Although on the 6th the river was getting out of its banks, there was no apprehension, up to the night of the 7th, that the water would submerge the town. During the night of the 7th merchants removed their goods, and one Phillips, who that night removed his to the second story of a building standing on ground no higher than the depot, saved them. The water rose into his building on the morning of the 8th. *The people finally fled to the hills, and there was a universal destruction of property as well of individuals as of railroads passing through the city.* The waters indeed were so high and the flood finally so unexpected that the mayor broke open railroad cars and took provisions which were in process of transportation, to feed the famishing population. The cars

in which the tobacco was were standing on the highest ground in the region of the station. There were roads in other directions, beside the road over which the rock had fallen, physically traversable by the cars which had the tobacco; but there were difficulties of various kinds in going on them, which the agents considered amounted to a bar to trying to use them.

On this case the defendant, having by a first and second request, asked the court to instruct the jury that there was no obligatory contract even if the jury believed the conversations deposed to by Price, asked further instructions.

"*Third.* That if the jury shall believe that the train was stopped on the morning of the 6th by the falling of rock on the track and the washing away of a bridge, and was obliged to put back to Chattanooga in order to send force and implements to put the road in repair, then such delay was inevitable, and would not subject the road for any consequential damages, the immediate cause of the damage being the flood.

"*Fourth.* That when the damage is shown to have resulted from an immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case.

"*Fifth.* If the freight train carrying the tobacco left Chattanooga on the morning of the 6th of March, 1867, on its proper time under the contract, and was prevented from going forward by obstructions on the track or the washing away of a bridge, caused by an extraordinary fall of rain and freshet, and was detained at Chattanooga by these obstructions, or either of them, until the tobacco was injured by the subsequent freshet, which could not be avoided, then the delay at Chattanooga would not be negligence, and the defendant would not be liable for the injury caused by such subsequent freshet, if such freshet was such as is described in the former request for instructions as an act of God, provided the defendant used all proper diligence to rescue the property from injury at Chattanooga, or provided the freshet was so sudden and overwhelming as to prevent rescuing it."

But the court refused to give any of these instructions, and gave the jury, among others, the following ones:

"2d. If you shall be satisfied from the proof that the tobacco was injured while the cars upon which it was being shipped were standing at the depot in Chattanooga by a freshet which submerged the cars containing the tobacco, and that no human care, skill, and prudence could have avoided the injury, then such injury would be occasioned by the 'act of God,' and the defendant would not be liable. But, if you believe that the cars containing the tobacco were brought within the influence of the freshet by the act of the defendant, or its agents, and that if the defendant or agents had not so acted the tobacco would not have been damaged, then the injury would not be occasioned by the 'act of God,' and the defendant would be liable for the damage sustained.

"3d. If you shall believe that the tobacco was received at Chattanooga by the defendant on the evening of the 5th of March, 1867, and that the agent of the defendant having the charge of the freights at, and superintending their shipment from, that point to Memphis, *made a contract* with Price, the agent of the plaintiff, by which the tobacco was to be sent forward for Memphis on the same evening, and that the agent of the defendant did not comply with the said contract or engagement so made with the agent of the plaintiff, but held the tobacco over until the next morning's train, and, as a consequence of such delay, the tobacco was injured by a freshet in the rivers and creeks contiguous to Chattanooga, and which freshet would not otherwise than by said delay have caused the said injury, then the defendant can claim no exemption from its liability as carriers on account of any injury or damage occasioned by the said freshet, and you will find a verdict in favor of the plaintiff.

"4th. If you shall believe that the tobacco in controversy was not sent forward from Chattanooga, *en route* for Memphis, until the morning of the 6th of March (and this in the absence of any such *contract* as stated in the preceding instruction), and that the train upon which said tobacco was being transported was delayed and hindered in its progress by an obstruction upon the track of the road some two and a half or three miles from Chattanooga, which obstruction was occasioned by a slide or tumbling of a rock from the mountain side along which the track

of the road is located, and in consequence of said obstruction the said train returned to the depot at Chattanooga, when, by a diligent effort on the part of the defendant's agents the obstruction might have been removed and the train gone through to some other point on the road where no injury would have resulted; and if you believe that while the train was so at the depot at Chattanooga the tobacco aforesaid was damaged as alleged, then the returning of the train to Chattanooga was the immediate cause of the injury, and not the freshet; and the injury would not be caused by 'the act of God,' man's agency having intervened, and the defendant would not be relieved from liability, and the plaintiff will be entitled to a verdict in his favor.

"5th. That the loss or damage to the goods in question, if produced by a rise, or freshet, in the river or creeks in the vicinity of the depot where the train was standing, such rise, or freshet, to constitute it 'the act of God,' in a legal sense, must have been so sudden, immediate, and unforeseen as to leave the carrier no sufficient time or means of escape from its consequences. But if it be not shown by the evidence that such was the fact, then it was the duty of the defendant or its agents to save the property of the plaintiff from the impending danger, if it were possible to do so, by extraordinary exertion. If the damage could have been prevented by any means within the power of the defendant or its agents, and such means were not resorted to, then the liability of the defendant would not be relieved, and the jury must find for the plaintiff."

The trial and verdict, which went for the plaintiff, was had March 26th, 1868. On the 15th of April following a motion was made by the defendant for a new trial, and overruled. The record went on, under date of *the 18th of April*, 1868, to say, after giving the title of the case, that,

On *this day* came the defendant by attorney and tendered its bill of exceptions herein, and asked that the same might be signed and sealed by the court and made part of the record in this cause, which was accordingly done.

The "*bill of exceptions, filed April* 18, 1868," then followed. It commenced, after the title of the case, by saying that, "on

the *trial* of this cause, the following proceedings were had." Then came the testimony introduced, the prayer of the plaintiff in error for five distinct instructions, the refusal of the court to grant them, and the instructions which the court did give (all as already mentioned), and the statement that the defendant *excepted* to the action of the court in refusing the instructions aforesaid, and also in giving the charge aforesaid, and also in overruling his motion for a new trial.

The exceptions to the charge of the judge at the trial, and to his refusal to charge as requested by defendant below, presented the only grounds on which error was alleged.

Mr. P. Phillips, for the plaintiff in error:

Although the case shows, from the published schedule and the oral proof, that it is impossible that any such conversation as Price states took place between himself and the agent could have occurred, we admit its truth for the purpose of the argument.

But this admitted, there is nothing in the evidence to authorize the court to submit to the jury the finding of *a contract* to forward this freight on the night of the 5th. There was no new consideration. But a consideration is of the essence of every *contract;* of every *obligatory* promise; and so indispensable is it, that it must be always shown, and cannot be presumed.* The loose language of Story, J., in his book on Bailments, as to what constitutes consideration, has no foundation in the common law.†

Whether the agent made the promise or not, the duty of the company was to forward the freight thus received, using due diligence for this purpose, and it had no higher one in consequence of the promise. There was no new agreement at Chattanooga for freight, or for any other purpose. The freight had been arranged at Salisbury, and was to be col-

* Hughes *v.* Hughes, Admr. 7, Term 350.

† See American Jurist, vol. xvi, p. 254; American note (tit. Unpaid Agents) to Coggs *v.* Bernard, 1 Smith's Leading Cases, 419, 6th American edition.

Argument for the carrier.

lected at Memphis, the terminus. The promise was a vol unteer statement merely, *nudum pactum*.

But admit that there was a contract to forward on the evening of the 5th, the damage occasioned by the flood on the 6th cannot be referred to a violation of that contract. This is the view taken by the Supreme Court of Pennsylvania in *Morrison* v. *Davis*,* and by the Supreme Court of Massachusetts, in *Denny* v. *New York Central Railroad Company*, cases analogous, both, to ours.†

All the instructions asked for by the defendant ought therefore to have been given. Though the proximate cause may be occasioned by inevitable accident, the carrier is still bound to care and diligence. Yet no greater foresight of extraordinary perils is expected of him than of other men, and no greater penalty visited for its failure. When he discovers himself in peril, the law requires of him ordinary care, skill, and foresight. This is defined to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. As difficulties increase in danger, great care then becomes the ordinary care of a prudent man. If one uses the precautions which a reasonable man would use under the circumstances, he is not responsible for omitting other precautions which are conceivable, even though if he had used them the injury would certainly have been avoided.

Now as to the question of proof of negligence. The rule is admitted to be that the burden of proof is on the carrier to show that the loss was occasioned by a cause for which he is not responsible. When, however, the evidence brings the loss within the excepted danger, the *onus probandi* is changed. It is then upon the plaintiff to show that the danger might have been avoided by the exercise of reasonable skill and attention of the carrier.‡

The case shows that due diligence and care were used to avoid the threatened danger.

* 20 Pennsylvania State, 171.

† 13 Gray, 487.

‡ Clark et al. *v.* Barnwell, 12 Howard, 280.

Argument for the owner of the goods.

Messrs. Albert Pike and R. W. Johnson, contra:

1. It does not appear that any exceptions were taken or points reserved during the trial. The bill of exceptions sets out five *instructions* to the jury, asked by the defendant below, and refused by the court, covering some pages. These the court refused, and gave a charge in regard to the law in general as to the responsibilities of common carriers, and as to the case in hand upon the facts proven.

The bill of exceptions was taken three days after the motion for a new trial was overruled, and twenty-three days after the trial concluded. Now, does the word "excepted" necessarily show that the exception was taken during the trial? It is not said that the company excepted at the time; and the court cannot *presume* that it did, in the absence of any statement, even the most vague, to that effect. On the contrary, as the statement is that the defendant also *excepted* to the overruling of his motion for a new trial, without saying that this was at a different time, the court must hold that there was no exception at all taken until *that* motion was overruled.

Now a bill of exceptions must be upon points expressly reserved and excepted to at the trial, otherwise they are waived, as a bill of exceptions originally was, if not presented at the trial. That was the rule under the statute of Westminster. If the exception was not stated in writing, and tendered at the trial, it was considered as waived, and the party could not resort to it after a verdict against him. *Wright* v. *Sharp*,* is conclusive on that point. Holt, C. J., said there:

"If this practice should prevail, the judge would be in a strange condition; he forgets the exception, and refuses to sign the bill, so an action must be brought; you should have insisted on your exception at the trial; you waive it if you aquiesce, and shall not resort back to your exception after a verdict against you. . . . *The substance must be reduced to writing while the thing is transacting*, because it is to become a record."

* 1 Salkeld, 288.

Argument for the owner of the goods.

Little profit accrues to the law by the abandonment of its old principles. It is not safe to trust the memory of a judge engaged in trying a multitude of cases, even for a week, in regard to the evidence given or refused, or to the language he may have used in directing the jury. We submit, therefore, that there is no bill of exceptions here, on which the court can act; and that the judgment below must necessarily be affirmed.

If the court should think that the single word "excepted" has virtue enough to authorize it to conclude that the record shows affirmatively that the exceptions *were* taken on the trial, then we object that the exceptions are such as the rules of the law, and its own rules, will not *permit* the court to consider. They are sweeping and indiscriminate, being to the refusal to give long instructions, and to the giving of pages of legal principles and propositions in their stead. It surely will be *at some time* understood that this court will not look into a case which thus brings up a mass of instructions given and refused, and in which the party has put his finger on no particular errors. It is directly contrary to rule No. 4; and it is equally contrary to the law, and to the practice of all appellate courts of respectability. The rule will cease to be disregarded when it is rigidly enforced. To dispense with it, or overlook disobedience of it, on account of particular circumstances, makes it mere *brutum fulmen.*

There is no doubt that some portions, at least, of the charge and directions of the judge below, in this case, were correct in point of law. If he stated one correct proposition, the exception to his charge falls.*

2. *Of the contract made at Chattanooga, and the law as to common carriers, as set forth in the instructions given.*

The court instructed the jury that if the agent having charge of freights and their transshipment did make such a contract, it bound the company. This was right. The testimony shows that the company sent only one freight train each day, and that in the morning; but it *could* certainly

* Rogers *v.* The Marshal, 1 Wallace, 645; Harvey *v.* Tyler, 2 Id. 328.

send a car in the evening, with the freight train of the Nashville and Chattanooga road, if it chose to pay for the service; and if its agent contracted with a party owning freight to do so, the company would be responsible for all damage caused by the delay.

So the instructions as to the liability of the company as a common carrier. No matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome is inevitable, yet if it be the result of human means, the carrier is responsible.* In *Campbell* v. *Morse*,† one Deft's wagon, in which he was carrying for hire, stuck fast in fording a creek, and the water, rising suddenly, damaged the goods; but he was held responsible. So in *Bason* v. *Charleston & Columbia Steamboat Company*,‡ where a steamboat grounded from reflux of tide, and in consequence fell over, and the bilge-water, rising into the cabin, produced injury to the goods.

Denny v. *New York Central Railroad Company*, cited on the other side, is not against these cases, because the court there held that when the damages by flood occurred, the defendants no longer held the goods as common carriers.

In fact, the moment a faulty negligence begins, the carrier becomes an insurer against the consequences therefrom, both ordinary and extraordinary.§ If he improperly detains goods, and they are injured by a sudden and extraordinary rise of water, the detention being negligence, he is responsible. To relieve him there must be an entire exclusion of human agency from the cause of the injury or loss.‖ In *Read* v. *Spaulding*, cited below, the goods were injured by a flood, being delayed at a point *in transitu*.

* McArthur *v.* Sears, 21 Wendell, 196; Sherman *v.* Wells, 28 Barbour, 403; Ferguson *v.* Brent, 12 Maryland, 9.

† 1 Harper's Constitutional, 468.

‡ Id. 262.

§ Davis *v.* Garrett, 6 Bingham, 716; Bell *v.* Reed, 4 Binney, 127; Hart *v* Allen, 2 Watts, 114; Williams *v.* Grant, 1 Connecticut, 492; Crosby *v.* Fitch, 12 Id. 410.

‖ Michaels *v.* Central Railroad Company, 30 New York, 570; Read *v.* Spaulding, 30 Id. 630; Merritt *v.* Earle, 29 Id. 115.

Reply for the carriers.

The fact, which in this case, with the windows of heaven opened, and the torrents descending day after day, ought to have been anticipated by the agents of the company, that the flood was coming, should have increased and stimulated their vigilance and caution, and if *by any known means* they could have prevented the damage, they should have done so.* What if the floods never did, within *their memory or their records*, rise so high? These calamities, like great fires in cities, are encyclical. They come at long intervals only; often very long intervals. But come at some time they surely will, and on such a premonition as was had *here*, the company should not have stood "stupidly gazing" at the menacing clouds till they burst and deluged the land. They should have moved the cars off at once to the farthest and highest spot possible, and if one route was blocked they should have gone in another.

When the negligence of the carrier exposes him to what he might otherwise have escaped, he is responsible for losses thus occurring through the combined agency of his own negligence and of inevitable accident. If his own neglect is the proximate cause of the peril being incurred, he is responsible. If he could have removed the property injured, beyond the reach of flood or fire, and so have escaped from that cause of loss, but did not do so, then, although the flood or fire was the act of God, yet the injury or loss was really caused by his negligence, and the accident was not *inevitable*. The fact that the carrier has done what is *usual*, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. If he could have prevented the accident by the exercise of due diligence and care, and did not, he is liable.†

Mr. Phillips in reply: No doubt the bill of exceptions is open to animadversion, as not in good technical form. But it is certain that the exception to the action of the judge was

* Gordon *v.* Buchanan, 5 Yerger, 82.

† Wing *v.* New York & Erie Railroad Company, 1 Hilton 235.

a "proceeding," and a very important one, and the opening of the bill declares that all the "*following proceedings*" were had "*on the trial of the cause.*"

It is again said, that the exceptions are too general, and that they should have been specifically made to the several charges. It is to be observed that the charges were asked in the first place by the defendant. These were rejected, and the defendant excepted. Then the court gave several charges, all involving the single question of negligence. The substance of these was a denial of the doctrine asserted in the prayers of the defendant, and to these instructions the defendant also excepted.

It is evident that the charges given are in direct response to the charges asked and refused, and no revision is now asked which involves a question that was not distinctly presented to the court below.

The court will not allow the right of review to be defeated because of any *mere* informality or irregularity in the mode in which the exceptions had been presented.*

Mr. Justice MILLER delivered the opinion of the court.

A preliminary point is raised by the defendant in error that the exception was not taken at the trial, but was taken afterwards on the overruling of a motion for a new trial.

It seems probable that the formal bill of exceptions was not signed or settled until after the motion was overruled, but it is a common practice, convenient in dispatch of business, to permit the party to claim and note an exception when the occasion arises, but defer reducing it to a formal instrument until the trial is over. We think the language of the bill implies that this was done in the present case, and that it is a reasonable inference from the language used at the beginning and end of this bill, that the *exceptions* were taken during the trial, as the rulings excepted to were made.

Comment is also made, that the exception does not point out to which instruction it is taken, nor to any special part

* Simpson & Co. *v.* Dall, 3 Wallace, 460.

of the charge which was given. But the instructions prayed by defendant were not offered as a whole, but each one for itself, and the action of the court in refusing them, to which exception is taken, may be fairly held to mean each of them.

As to the charge given by the court, the language of the exception is more general than we could desire. And if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent, and might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds upon a theory of the law of common carriers, as it regards the effect of loss from the act of God, on the contract, so different from our views of the law on that subject, that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning-point of the case.

We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination. As regards the first, we will only notice one of the rejected instructions, the fourth. It was prayed in these words:

"When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.

What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

The testimony in the case, wholly uncontradicted, shows one of the most sudden, violent, and extraordinary floods ever known in that part of the country. The tobacco was being transported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a land slide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill, and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In *Morrison* v. *Davis & Co.*,* goods being transported on a canal were injured by the wrecking of the boat, caused by

* 20 Pennsylvania State, 171.

an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur*, applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them.

In *Denny* v. *New York Central Railroad Co.*,* the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison* v. *Davis & Co.*

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract, the failure to comply would have been only the remote cause of the loss.

* 13 Gray, 481.

Statement of the case.

But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

JUDGMENT REVERSED AND A NEW TRIAL ORDERED.

THE LULU.

The Grapeshot (9 Wallace, 129) affirmed on the second point adjudged therein (pp. 133-141); and the doctrine again declared, that in the case of a lien asserted against a vessel supplied or repaired in a foreign port, necessity for credit must be presumed where it appears that the repairs and supplies for which a lien is set up were ordered by the master, and that they were necessary for the ship when lying in port, or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts, or one of them, or that such facts and circumstances were known to them as were sufficient to put them on inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.

APPEAL from the Circuit Court for the District of Maryland.

This was a suit in admiralty to enforce a lien claimed upon the steamer Lulu for repairs made upon her at the request of the master. It was consolidated with other suits, all brought by material men for supplies or repairs to the vessel to the extent of $8796.21.

The steam vessel was owned in New York, which was her home port, but employed in the trade between Baltimore, in Maryland, and Charleston, in South Carolina. When the libel was filed she had been plying in the trade about eleven months, that is to say, from April, 1866, to March, 1867. The repairs and supplies for which satisfaction was sought were furnished in Baltimore during and after July, 1866, but chiefly in November and afterwards, at

fair prices, and were proper and necessary; and there was *no proof whatever* that the master had any funds which he could have applied to procure the repairs and supplies.

In each suit a New York company filed a claim and answer, asserting a prior right to satisfaction out of the proceeds of the steamer, which under an order of the court had been sold, bringing but $10,250. The claim of this company was founded upon a bill of sale, made to it by the former owners of the vessel (residents of New York also), in consideration of an advance of $12,000, on the 24th of August, 1866. This bill of sale, though in form absolute, was intended as a mortgage to secure repayment of the advance in six months from the date, but no part of it had been repaid.

The only question in the case was: "Were the repairs and supplies in question furnished under such circumstances as would entitle the material men to the liens which they claimed?" If they were, this lien was superior to that created by the bill of sale or mortgage, whether prior or posterior in time, and the mortgage or most of it was cut out.

The District Court, in which the libel was originally filed, decreed for the material men; but the case coming before the Circuit Court, held by the Chief Justice in November, 1868, and therefore before the recent judgment in *The Grapeshot*,* which explained what had been received as law since *The Laura*† (*Thomas* v. *Osborn*), and more particularly since *The Sultana*‡ (*Pratt* v. *Reed*), in which last case the court stated the rule thus:

"The proof of a necessity at the time of procuring a supply for a credit on the vessel . . . is as essential as that of the necessity of the article itself. . . . It is only under very special circumstances, and in an unforeseen and unexpected emergency, that an implied maritime hypothecation can be created"—

and put the decision of the case upon the ground, not that the supplies were not necessary, but that there was no sufficient *proof* of necessity for the implied hypothecation of the vessel, or of any unexpected or unforeseen exigency

* 9 Wallace, 129. † 19 Howard, 28. ‡ Ib. 359.

that required it—the Circuit Court finding itself "unable to make any distinction which had substance" between that case and the present, felt "constrained" to reverse the decree, and with obvious reluctance deprived the material men of their lien.

The case was now here on appeal from that reversal, the case of *The Grapeshot* being in the meantime decided, and deciding that if there have been,

1. A necessity for the repairs—

2. If the credit have been given to the ship and not to the owner, master, or agent—

3. Then a presumption of necessity for the credit will arise, conclusive, in the absence of evidence to the contrary, if the material man has acted in good faith.

Messrs. Orville Horwitz and G. H. Williams, for the material men, appellants, relied on the case of *The Grapeshot*, decided, as above-mentioned, since the reversal below, a reversal, as they said, made only in deference to old authorities, now overruled or explained away by that more recent case. This was the end of the matter.

But, independently of that, the vessel was mortgaged in August, 1866, by the owners to the claimants, for about $2000 more than she was worth, according to the result of the sale. This mortgage was overdue and unpaid at the time of the libels filed. So that at the time of the repairs, confessedly needed, the owners had created a mortgage over and above the value of the steamer, which they had been unable to liquidate, and the effort here is to appropriate the labor and materials of the libellants towards the payment of that mortgage. Suppose that the onus of showing that the necessity for credit to the ship existed still remained on the libellants, the facts prove that those owners could have obtained no credit in a strange city on their personal responsibility.

Mr. William Meade Addison, contra:

Maritime liens are given but in the interests of commerce, and are not favored by the courts. They are allowed only

Argument against the lien.

from the necessities to which vessels in *foreign* ports may be exposed. In their origin they were never designed to apply to vessels in their own country, nor ought they now to apply to those vessels, which, though in reality belonging to a common country, are, by a pure fiction, deemed foreign vessels because owned by citizens of other States than those where they chance to be, except in cases of extreme necessity. It was a mooted question, until the decision, A.D. 1819, in *The General Smith*,* whether the ships of one State were foreign as to another. If the question were a new one, now for the first time to be decided, a different rule perhaps would govern. Certainly in a country of *United States*, States separated often only by rivers, each State having ports directly in face of ports of the other, nothing seems more unreasonable than *now* to regard one port as foreign to the other. The great vessels of New York now have their docks at Jersey City opposite, for convenience, as those of Philadelphia have theirs at Camden, New Jersey, also opposite, for the same cause. How unreasonable to say that Jersey City is a port foreign to New York, and that of Camden foreign to the port of Philadelphia! And since *The General Smith* was decided, telegraphs and railways have changed the whole ground, even as to ports far separated, on which it was rested. Indeed, if there be anything that is especially National, and withdrawn from the operation of State laws, it is a vessel whose home is *a port*, not a State; whose flag is that of the Union, and not of any State; where National officers watch her, and control her, and tax her, and National custom-houses constitute the repositories of her papers.

Still with the safeguards thrown around the subject by the two decisions which it is said that *The Grapeshot* has explained away and overruled, we might admit that ships in one State are foreign as to another. The difficulty of creating a valid lien obliged the material man to inquire. *Presumptions* were against him, not in his favor. But if all old safeguards are thrown overboard, as it is said they are by *The*

* 4 Wheaton, 443.

Grapeshot, there is great reason for treating as *foreign* ports only those ports which are so in fact, and of considering the power vested in a master to impawn his owner's ship or goods for necessaries furnished in a foreign port, as what it was originally declared to be, "*a legal indulgence founded on the urgency* of the case, and intended for the general benefit of commerce,"* and of obliging the person disposed and perhaps eager to trust, to show that he had inquired in the ship's home port as to whether the master had funds.

Again: "Where money," says Mr. Justice Bee, "is borrowed on a ship before the voyage is begun, she is not answerable in the admiralty. The law means to favor the *completion, not the commencement* of a voyage."† Now, the Lulu while obtaining necessaries in the port of Baltimore must have made not less than eleven distinct voyages to Charleston and back. These repairs and supplies were all made, in the language above quoted, not "*to favor the completion of a voyage*," but "*the commencement*" of eleven distinct voyages.

To sustain a lien under such circumstances would be an innovation upon the ancient and well-established principles of the admiralty law. It will have no precedent to support it; and arrayed against it are the principles of sound maritime policy and commercial fair dealing. This court in *The Grapeshot* in no wise impairs the force of its language, in *Pratt* v. *Reid*, where it says:

"These maritime liens in the coasting business, and in the business upon the lakes and rivers, are greatly increasing, and as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of this law in this respect, will tend to perplex and embarrass business rather than furnish facilities to carry it forward."

Mr. Justice CLIFFORD delivered the opinion of the court.

Experience shows that ships and vessels employed in commerce and navigation often need repairs and supplies in

* Boreal *v.* Golden Rose, Bee, 132. † Ib.

course of a voyage, when the owners of the same are absent, and at times and places when and where the master may be without funds, and may find it impracticable to communicate seasonably with the owners of the vessel upon the subject.

Contracts for repairs and supplies, under such circumstances, may be made by the master to enable the vessel to proceed on her voyage, and if the repairs and supplies were necessary for that purpose, and were made and furnished to a foreign vessel or to a vessel of the United States in a port other than a port of the State where the vessel belongs, the *primâ facie* presumption is that the repairs and supplies were made and furnished on the credit of the vessel unless the contrary appears from the evidence in the case.

Where it appears that the repairs and supplies were necessary to enable the vessel to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the vessel, as well as the master and owners, is responsible to those who made the repairs and furnished the supplies, unless it appears that the master had funds on hand, or at his command, which he ought to have applied to the accomplishment of those objects, and that they knew that such was the fact, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence in that behalf they might have ascertained that the master, under the rules of the maritime law, had no authority to contract for the repairs and supplies on the credit of the vessel.

Repairs and supplies amounting to eight thousand seven hundred and ninety-six dollars and twenty-one cents, as adjudged by the District Court, were made and furnished by the various parties mentioned in the record to the steamship Lulu, at the request of her master, while she was lying in the port of Baltimore, and the owners of the steamer refusing to pay for the same, those several parties, including the appellants in this case, filed separate libels against the steamer in the District Court to recover the amount of their

respective claims. Monitions were issued in the several suits, and the steamer was arrested to answer to the allegations of the respective libels.

Appearance was entered in each suit by the owners of the steamer as claimants, and on their petition, and pursuant to the order of the court, the steamer was sold by the marshal and the proceeds of the sale were paid into the registry of the court to abide such further order of the court as might be made in the respective causes.

Answers were filed by the claimants to the several libels and the suits were subsequently consolidated, and the order of the court was to the effect that they should be heard together.

Testimony was taken on both sides and the District Court entered a decree that the several libels filed in the case, except one, "be allowed as liens against the steamer to the amount of the respective claims," and by the decree of distribution the court awarded to the appellants the sum of two thousand three hundred and thirty-seven dollars and forty-six cents, as appears of record.

Appeal was taken from that decree by the claimants to the Circuit Court for the same district, where the parties were again heard, and the Circuit Court reversed the decree of the District Court and ordered, adjudged, and decreed that so much of the fund in the registry of the court as was applicable to the payment of the appellant's claim, under the decree of the District Court, should be paid to the claimants as the owners of the steamer. Dissatisfied with that decree the libellants appealed from the same to this court, and now insist that it ought to be reversed.

Prior to the twenty-fourth of August, 1866, the title to the steamer was in the grantors of the claimants, but the claimants admit, in their answers, that their grantors, as well as themselves, were residents of New York, and that the port of New York was the home port of the steamer. Whatever title they have was acquired by virtue of a bill of sale executed on that day, and the record shows that it is duly recorded in the custom-house of that port. Although

the bill of sale is absolute in form the claimants allege that it was intended only as a mortgage, but the fact alleged is of no importance in the decision of the case, as it is admitted that the former owners, as well as the claimants, were residents of a State other than the one where the repairs were made and the supplies furnished, and that the steamer belonged to a port of the State where her owners resided.

When arrested the steamer had been engaged for a period of eleven months in carrying passengers and freight between the ports of Baltimore, in the State of Maryland, and Charleston, in the State of South Carolina, and the evidence is full to the point that the repairs made and the supplies furnished were necessary to enable the steamer to continue to make her regular trips between those ports and to fulfil the obligations to the travelling and commercial public which her owners had contracted. Argument upon that topic is quite unnecessary, as the point is conceded by the claimants, but they deny that the repairs and supplies were made and furnished on the credit of the steamer, or that the evidence shows that there was any necessity for any such credit to the steamer. Full proof is exhibited that the repairs were made and the supplies furnished in the several cases at the request of the master, and there is no proof whatever that he had any funds which he ought to have applied, or which he could have applied, to accomplish those objects or any other.

Attempt is made to show that the agent of the steamer had funds derived from freight which might have been so applied, but the evidence in the case fails to establish that theory and satisfies the court that he had no funds of the owners and that he was not under any obligations to grant them any further credit for that purpose.

Unless the repairs or supplies, as the case may be, are necessary to render the ship or vessel seaworthy or to enable her to prosecute her voyage, it is quite clear that the master, as between himself and the owners, is not authorized to make any such contracts or purchases either on the credit

of the vessel or her owners. Such necessity usually arises when the ship or vessel is in a port distant from the owners, and oftentimes when they have no knowledge or means of knowledge as to the actual condition of the vessel, and it is chiefly for that reason that the authority is reposed in the master to act in their behalf and for the best interest of all concerned, but it should be borne in mind that his authority in that respect is limited to the circle of duties which that necessity requires should be performed before the owners can be consulted.

Merchants are not obliged to make advances to the master, nor to make repairs or furnish supplies at his request, and before they can safely do so they should be reasonably satisfied that the vessel needs what the master requests them to make and furnish, as the law supposes that the vessel is in the port where the request is made, and that they have the opportunity of making due inquiry and investigation upon that point.*

Subject to that limitation the master is the agent of the owners for the voyage, and they are bound to the performance of all lawful contracts made by him relative to the usual employment of the ship and for repairs made and supplies furnished for her use in a foreign port.†

Ports of States, other than those of the State where the vessel belongs, are for that purpose considered as foreign ports, and the authority of the master in contracting for repairs and supplies is not confined to such as are absolutely or indispensably necessary, but includes also all such as are reasonably fit and proper for the ship and the voyage. Where such repairs and supplies are reasonably fit and proper the master, if he has not funds and cannot obtain such on the personal credit of the owners, may obtain the same on the credit of the ship, either with or without giving a bottomry bond, as necessity shall dictate. Reasonable dili-

* 2 Parsons on Shipping, 329; Bold Buccleuch, 7 Moore, Privy Council, 284; Roberts on Admiralty, 395.

† The General Smith, 4 Wheaton, 443; The Bark Union, 2 Story, 463; The Aurora, 1 Wheaton, 102.

gence in either event must be exercised by the merchant or lender to ascertain that the repairs and supplies were necessary and proper, as the master is not authorized to hypothecate the vessel unless such was the fact within the meaning of the maritime law.*

Such 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.†

Proof that the repairs and supplies were necessary will not in any case be sufficient to entitle the furnisher or lender to recover by a suit *in rem* against the vessel if it appear that the master had funds sufficient to execute the repairs and furnish the supplies, and that the party who made and furnished the same knew that fact, or that facts and circumstances were known to him sufficient to put him upon inquiry, and to show that if he had used due diligence he would have ascertained that no funds except such as the master already possessed were necessary for any such purpose.

Good faith is undoubtedly required of a party seeking to enforce a lien against a vessel for such a claim, but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained.‡

Express knowledge of the fact that the master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape

* The Paragon, Ware, 336; The Fortitude, 3 Sumner, 225.

† The Grapeshot, 9 Wallace, 141; The Alexander, 1 W. Robinson, 362; The Medora, 1 Sprague, 138

‡ The Sarah Starr, 1 Sprague, 455.

the consequences which would flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.*

None of these rules, however, have any application to a case where the master had no funds which could be applied to any such object, as the party making the repairs and furnishing the supplies could not know what was not true in point of fact, nor could he be put upon any inquiry in respect to any supposed funds which had no real existence.

Inquiry certainly need not be made as to the necessity for credit if the master has no funds nor any other means of repairing his vessel or furnishing her with supplies, and it is equally certain that proof of failure to institute inquiries is no defence to such a claim even if the master had funds, unless that fact was known to the libellant or such facts and circumstances were known to him as were sufficient to put him on inquiry and fairly subject him to the charge of collusion with the master or of bad faith in omitting to avail himself of the means of knowledge at hand to ascertain the true state of the case.

Whenever the necessity for the repairs and supplies is once made out, it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the libellant knew the same or was put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the libellant.†

Extended discussion of that question, however, is no longer necessary, as the principle is conclusively settled by a recent

* May *v.* Chapman, 16 Meeson & Welsby, 355; Goodman *v.* Simonds, 20 Howard, 343.

† The Virgin, 8 Peters, 550, The Phebe, Ware, 265; 2 Parsons on Shipping, 333; The Nestor, 1 Sumner, 73.

decision of this court. Where proof is made of necessity for the repairs and supplies, *or for funds raised by the master to pay for the same*, and of credit given to the ship, a presumption will arise, said the Chief Justice, in the absence of evidence to the contrary, of necessity for credit.*

Remarks are found in two cases decided by this court quite at variance with that rule, but it is unnecessary to comment upon those cases or to enter into any explanation of those remarks, as it is clear that if they assert any different rule of decision they are in that respect directly overruled.†

Whether the master has funds or not is a matter always known to him, and seldom or never known to merchants in the port selected by the master as a port for relief, unless they obtain it from the master. Masters, if they are honest, will not ask for such assistance when they are supplied with funds, and if they are dishonest they are not likely to communicate any facts to the merchant which would induce him to refuse to make the requested advances.

Inquiry as to the credit of the owners of the vessel, except of the master, would seldom be of any avail unless it was extended to the great majority of the merchants resident at the port of distress, and any rule which should impose that obligation upon the merchant as a condition to his right of action to recover the amount of his advances would in many cases operate as a denial of justice, as he could better afford to lose his claim than to incur the expense of making the required investigation.

Viewed in any light it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of

* The Grapeshot, 9 Wallace, 141; The Barque Mason, 2 Story, 463.

† The Grapeshot, 9 Wallace, 141; Thomas *v.* Osborn, 19 Howard, 22; Pratt *v.* Reed, Ib. 359; The Sea Lark, 1 Sprague, 571; The Prospect, 3 Blatchford, 526.

them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel. Applying that rule to the present case the conclusion is inevitable that the decree in the Circuit Court was erroneous.*

Decree in the Circuit Court is REVERSED, and the cause remanded with instructions to enter a decree

AFFIRMING THE DECREE OF THE DISTRICT COURT.

NOTE.

Soon after the preceding appeal was decided, two other appeals, both from the same court with it, and with facts which distinguished them little, if at all, from it in principle, were adjudged. They were

THE KALORAMA,
THE CUSTER.

1. *The Grapeshot* (9 Wallace, 129), affirmed a third and a fourth time as to the second point adjudged by it; the point relating to admiralty liens. *The Lulu*, *supra*, p. 192, also affirmed.
2. It is no objection to the assertion in the admiralty of a maritime lien against a vessel for necessary repairs and supplies to her in a foreign port, that the owner was there and gave directions in person for them; the same having been made expressly on the credit of the vessel. *The Guy*, 9 Wallace, 758, affirmed:
3. Nor that the libellant have brought a common law action for the value of the repairs and supplies; the action not being yet determined.

THE case was exactly the same in both these appeals; which were accordingly argued with one set of briefs, on one set of depositions, contained in one record; the appeals having been,

* Roberts on Admiralty, 210; The Fortitude, 3 Sumner, 268; The Nelson, 1 Haggard, 176.

Statement of the case.

in fact, regarded at the bar as presenting throughout identically the same points. The case was thus:

Morgan, of New York, owning the steamer Kalorama, belonging to that port, and Comstock, of the same place, owning the Custer, belonging to the port of Georgetown, D. C., agreed with one Pendergast, of Baltimore, Md., who was disposed to purchase both steamers, that he should run them for two trips between Baltimore and Charleston, and if, after this trial, he liked the vessels, that he might purchase them. For the two voyages Pendergast was to charge 10 per cent. commission on the gross freights of the vessels, and to disburse the steamers, and to have all freights and disbursements insured for the benefit of the owners; and in case the vessels were not satisfactory after a trial of two trips, Pendergast was to retain them in the Southern trade on the same terms. Pendergast accordingly took the two vessels to make the trips, and the owners of them respectively being at the time in Baltimore, he with their consent changed the master, and selected some of the crew. After the two trial trips he elected not to make the purchase, and subsequently refused to disburse the vessels on the credit of the owners.

While in the port of Baltimore, the steamers needed repairs and supplies to enable them to make their trips to Charleston. The masters of neither vessel had funds which they could apply to the purpose, nor could either procure any on the credit of the respective owners. Pendergast therefore made repairs and furnished supplies to both; all of the repairs being made and the supplies furnished at the request of the masters in the absence of the owners, or at the request of the owners themselves when present in Baltimore, as they frequently were on the arrivals of the steamers in that port; and as the court considered that it was, in every case, "quite clear" "with the express understanding that the repairs were so made and furnished on the credit of the steamer."* Part of the supplies and repairs were made during the two trips made under the agreement, and part during two afterwards, but part of the bills had been paid before any libel was filed, and payments were made afterwards also. For the value of the repairs and supplies unpaid for, Pen-

* See opinion of the court, *infra* p. 214.

dergast brought a common law suit against the owners in one of the State courts of Baltimore, and while that suit was pending and undecided filed a libel for the same repairs and advances on the admiralty side of the District Court at Baltimore.

The District Court decreed in favor of the libellants, the amount allowed by it being for a less sum than had been disbursed by Pendergast *after* the first two trips had been made. The Circuit Court, the Chief Justice holding it, reversed the decree, he stating that he thought that a literal construction of the language used by this court in the cases of *The Sultana** and *The Laura*† made it his duty as a Circuit Judge to do this; but stating it to be his opinion also that the Supreme Court did not, in those cases, intend to establish the law which the language used in the opinions in those cases seemed to announce, and that, considered in connection with the facts of the cases in which it was used, the language was susceptible of a different interpretation, and that this, the Supreme Court, in *The Grapeshot* and *The Guy*, which had been argued and were then pending before it, and which involved, as he considered, the same points, might give to it an interpretation, as he himself as a judge of *this* court might feel at liberty to do, which would necessitate the reversal of his own decrees and the affirmance of those of the District Court.

It was in these circumstances that the appeals came before this court.

Messrs. J. H. Thomas and *S. T. Wallis, for the appellants:*

Since the recently announced opinions of this court in *The Grapeshot*‡ and in *The Guy*,§ there is nothing open in this case. The former case, explaining the ill-considered language of the opinions in *The Sultana* and *The Laura*, settles conclusively that the repairs and supplies, supposing them to have been furnished in the owner's absence, are a lien; and the case of *The Guy*, where obviously the owner was present, treats that feature as not qualifying the general principle.

We need say nothing about the writs issued out of the State court of Baltimore City; these proceedings *in personam*, are of course no bar to the right to maintain libels *in rem;* it being

* Thomas *v.* Osborn.
† Pratt *v.* Reed.
‡ 8 Wallace, 141.
§ 9 Id. 758.

perfectly and long settled that creditors making advances to ships in a foreign port are entitled to a threefold remedy,— against the ship, the master, and the owners; that these are cumulative, not alternative, and that they may all be pursued simultaneously.*

The judgment of the Circuit Court must be reversed, and that of the District Court affirmed, as of course.

Mr. William Shepard Bryan, contra:

1. The advances were made in pursuance of a contract entered into with the owners personally, by which the appellants assumed entire charge of the steamers for a series of voyages, and were to receive the specified compensation of 10 per cent. commission on the gross freights. They became the agents of the owners; freighted the ships, collected the freights, and paid their expenses. These agents appointed captain, officers, and crew, ordered supplies, and stood in the place of owners generally. There is nothing in the nature of a maritime lien in the case, but the case is the ordinary one of an agent against a principal for a settlement of accounts, and the remedy is by *assumpsit* at common law.† Indeed, from such common law suit having been brought, it is plain that the suit in admiralty is an afterthought.

2. The claim maintained in the libels is for a tacit or implied hypothecation. Now all the authorities show that no one but the master can create these liens. The owner himself cannot do it, except where he also sustains the character of shipmaster or captain.‡ This seems to be assumed as settled law in *The Grapeshot*. *The Guy* hardly decides that if the master be present the lien can exist. Such a doctrine would be in the face of the whole idea and nature of a maritime lien, such as is set up here. That lien exists only in case of a foreign vessel in a foreign port. It is an implied trust, founded on a necessity, and never existing without a necessity, proved or presumed. A constant argument against this class of liens has been that the master or material men could have communicated with the owner. This

* Certain Logs of Mahogany, 2 Sumner, 589, 91; The Paul Boggs, 1 Sprague, 369; Harmer *v.* Bell, 22 English Law and Equity, 70.

† Minturn *v.* Maynard, 17 Howard, 477.

‡ The St. Jago de Cuba, 9 Wheaton, 409-416.

very argument is made in *The Lulu;* and that the port was not a foreign port, but, on the contrary, one where the owner was, or could readily come to.

If the lien can be created in a foreign port where the owner is, and appears, and acts, why shall it not exist, *cæteris paribus*, in the domestic port? Yet it does not exist there. No doubt an owner can either at home or abroad pledge his vessel, or he can sell her, and whether he have credit or no credit, funds or no funds. But an actual pledge is not here set up. The libel proceeds upon the idea of "a maritime lien," that sort of implied lien given to persons who, in cases of necessity, repair or supply a foreign vessel in a foreign port at the *master's* instance; an ancient, well-known, and well-*defined* lien.

But, independently of that question, everything was in this case defined by a contract, and Pendergast was to make the disbursements.

3. The suit in the State court of Baltimore is still pending. It may be proceeded in to judgment; and if a decree is sustained on this libel, two judgments would be had for the same claim. The pendency of the common law suit is a bar within the maxim, *Nemo debet bis vexari pro eâdem causâ.*

Mr. Justice CLIFFORD delivered an opinion of the court in each of the cases, thus:

I. IN THE KALORAMA.

Advances for repairs and supplies to the steamer named in the pleadings were made by the libellants to an amount much larger than the sum claimed in the libel, and allowed in the decree of the District Court.

Payments made before the suit was instituted were deducted from the claim as set forth in the libel, and it was ordered, adjudged, and decreed by the District Court, that there was due to the libellants at the date of the decree the sum of five thousand one hundred and thirty-two dollars and thirty-six cents as a lien upon the steamer, for which the stipulators for value were liable.

Process was duly served in the District Court, and the owner of the steamer appeared as claimant and filed an answer setting up several defences, as follows: (1.) That the repairs and sup-

plies were not necessary, as alleged in the libel. (2.) That they were not made and furnished on the credit of the steamer. (3.) That the steamer is not chargeable with the moneys advanced for the repairs and supplies described in the libel, as they were not made and furnished under a maritime contract. (4.) That the libellants brought a common law suit for the same cause of action before the libel was filed, and that the same is still pending and undecided.

None of these defences call in question the correctness of the charges in the account, and no motion was made to refer the cause to an assessor to report the amount of the expenditure nor was any exception taken to the finding of the District Court in that behalf.

Appeal was taken by the owner and claimant of the steamer from the decree of the District Court to the Circuit Court, where the decree of the District Court was reversed.

Remarks respecting the correctness or incorrectness of the accounts exhibited in the record may well be omitted, as it is not pretended that, in view of the evidence, there can be any well-founded doubt that the advances were made as therein set forth.

Distinct issues of law are presented in the pleadings, and the District and Circuit Courts differed as widely as the parties; the former holding that the advances were a lien upon the steamer under the general rules of the maritime law. On the other hand the Circuit Court, in deference to certain expressions contained in the opinions of this court in the two cases of *Thomas* v. *Osborn** and *Pratt* v. *Reed*,† held that the advances were the mere personal debt of the owner, that they did not constitute a lien upon the steamer, and accordingly dismissed the libel, which was a libel *in rem* against the steamer, setting up a maritime lien. Whereupon the libellants appealed to this court, and now seek to reverse that decree.

Before examining the special defence set up by the respondent, growing out of the contract of the libellants to employ the steamer in two or more trips between Baltimore and Charleston, it becomes necessary to define with some precision what is meant by a maritime lien as affording a security for such ad-

* 19 Howard, 22. † 19 Id. 359.

vances, and under what circumstances it arises where repairs are made or supplies are furnished to a vessel engaged in commerce and navigation.

In considering that question it will be sufficient to state that the owner of the steamer throughout that period was a resident of the city of New York, and that the port of New York was the home port of the steamer, as conceded by both parties. Proof satisfactory to both courts was introduced, showing that the steamer needed the repairs and supplies when the advances were made by the libellants, and that they were made while the steamer was lying in the port of Baltimore, where the libellants resided, to enable the steamer to continue her regular trips as contemplated by her owner; that her master had no funds which he could apply to that purpose, nor could he procure any on the credit of the owner, and that all of the advances were made at the request of the master, in the absence of the owner, or by the owner in person when he was present.

Contracts or claims for service or damage purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. Wherever a maritime lien arises in such a contract or claim, as in controversies respecting repairs made or supplies furnished to a ship, or in case of collision, the injured party may pursue his remedy, whether it be for a breach of a maritime contract or for a marine tort, by a suit *in rem* against the vessel, or by a suit *in personam*, at his election, against the owner, or against the master and owner in cases where they are jointly liable for the alleged default.*

By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, whether the vessel was at her home port or abroad, when the repairs and supplies were made and furnished.†

But the only lien which the common law recognizes in such cases, independent of statutory regulations, is the possessory lien, which arises out of, and is dependent upon, the possession of the ship, as in cases where goods are delivered to an artisan

* The Belfast, 7 Wallace, 642.

† Dig. 14, 1, 1; 1 Valin, Commentary, 363; 3 Kent, 168; Williams & Bruce, Admiralty Practice, 155.

or tradesman to be repaired or manufactured. Such a lien, as understood at common law, did not attach unless the ship was in the possession of the person who set up the claim, and the extent of the privilege which it conferred was that he might retain the ship in his possession until he was paid the money due him for the repairs made and the supplies furnished. Until paid he might refuse to surrender the ship, but if he relinquished the possession of the ship his lien was displaced and extinguished.*

In jurisdictions where the rules of the common law prevail the shipwright who works upon the ship, without taking possession of it, or if he parts with the possession before collecting what is due for his services, is not deemed to be a privileged creditor, nor is the merchant so considered who furnishes the ship with necessary supplies unless the ship is placed within his control.†

Important alterations have recently been made in those rules of decision by acts of Parliament; but it is not necessary to pursue that inquiry, as those rules were never regarded as rules of decision in the admiralty courts of this country exercising jurisdiction under the present Constitution and the laws of Congress. On the contrary, some of the Federal courts, immediately after their organization under the Judiciary Act, decided that repairs made and supplies furnished to a ship, if made and furnished on the credit of the ship, were a lien upon the ship, whether she was at the time in her home port or in a foreign port. Other district judges were of the opinion that a maritime lien did not arise if the repairs were made and the supplies were furnished in the home port of the vessel, and some uncertainty for a time prevailed upon the subject until the same was examined by this court, when the question was put at rest.‡

Such a lien is a privilege in the thing, and is not dependent upon possession or registry, nor is it displaced, as in a contract of affreightment, when possession is relinquished, unless the circumstances are such as to show that it was waived; nor is it

* Westerdell *v.* Dale, 7 Term, 312; Justin v. Ballam, 4 Salkeld, 34; Watkinson *v.* Bernadiston, 2 Peere Williams, 367; 3 Kent, 169; Maude & Pollock on Shipping, 64; The Zodiac, 1 Haggard's Admiralty, 320; Spartali *v.* Benecke, 10 C. B. 223.

† McLachlan or Shipping, 101; Doddington *v.* Hallet, 1 Vesey, 497.

‡ The General Smith, 4 Wheaton, 443.

lost by delay, unless for such a time as to show gross laches, and to afford a reasonable presumption that it was abandoned.*

Where repairs had been made and supplies furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, said Judge Story, following the civil law, gives the party a lien on the ship itself for security, and he may well maintain a suit *in rem* in the admiralty to enforce his right.

Many of the rules of the general maritime law are doubtless drawn from the civil law; but it is not quite correct to say that the maritime law of the United States, as laid down in that case, follows the civil law in respect to the lien conceded to the shipwright and tradesman who make repairs and furnish supplies to ships engaged in commerce and navigation, as the civil law extends that privilege to such repairers and furnishers without any such distinction between domestic and foreign vessels, as that which is constantly maintained in the decisions of this court.†

Ports of States other than those where the vessel belongs are for that purpose considered as foreign ports, and of course the port where the steamer in this case was lying when the repairs were made and the supplies were furnished must be regarded, as between the parties in this controversy, as a foreign port.‡

Controversies respecting such liens usually arise in cases where the repairs or supplies were ordered by the master without any express directions from the owner, and in such cases the repairer or furnisher must prove affirmatively that the ship needed such repairs and supplies, as the authority of the master in such a case is implied from the necessity for the repairs or supplies, the want of funds for that purpose, the inability to procure the same, and the absence of the owner.

Where it appears that the repairs and supplies were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances,

* Paragon, Ware, 322; Young Mechanic, Id. 535, second edition, S. C.; 2 Curtis, 404.

† 2 Parsons on Shipping, 312; The Marion, 1 Story, 68; The Chusan, 2 Id. 455; St. Jago de Cuba, 9 Wheaton, 409.

‡ The Grapeshot, 9 Wallace, 129.

and it is clear that the necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, unless it is shown that the master had funds or that the owner had sufficient credit, and that the repairers, furnishers, and lenders of the money knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.

Subject to those conditions, the master, in the absence of the owner, is vested with the authority to order necessary repairs and supplies, but it is no objection to his authority that he acted on the occasion under the express instructions of the owner, nor will the lien of those who made the repairs and furnished the supplies be defeated by the fact that his authority emanated from the owner instead of being implied by law.

When the owner is present the implied authority of the master for that purpose ceases, but if the owner gives directions to that effect the master may still order necessary repairs and supplies, and if the ship is at the time in a foreign port, or in the port of a State other than that of the State to which she belongs, those who make the advances will have a maritime lien, if they were made on the credit of the vessel.

Grant all these several propositions, still it is contended by the respondent that no such lien arises in this case because, as he insists, the repairs were made and supplies furnished in pursuance of a contract with the owner, by which the appellants assumed the entire charge of the steamer for a series of trips and were to receive the specified compensation of ten per cent. commission on the gross freights.

Doubtless some of the repairs and supplies were ordered by the owner, and the respondent contends that the appellants, by virtue of the arrangement, became the agents of the owner, and that it was in that capacity that they freighted the steamer and paid the expenses of the repairs and supplies, without any other lien upon the steamer than that given by the common law.

Strong doubts are entertained whether the written agreement, even if it had continued in force without alteration, and if the advances in question had been made under it, would sup-

port the theory set up by the respondent, but it is not absolutely necessary to decide that point, as it is quite clear that the repairs were made and supplies furnished in every case either by the order of the master or the owner, and with the express understanding that they were so made and furnished on the credit of the steamer.

They employed the steamer, in the first place, under the written agreement of the fourteenth of March, 1866, for two trips between Baltimore and Charleston, and it was agreed that they were to receive ten per cent. commissions on the gross freights, and that they should disburse the steamer, but they also stipulated to have the freights and disbursements insured for the benefit of the owner, which shows to a demonstration that they were not owners for the voyage. Suggestion is made that they changed the master and selected some of the crew, but the evidence shows that all those acts were performed by the consent of the owner and subject to his approval. Much the larger portion of the advances was paid before the libel was filed, and additional payments have since been made.

Viewed, as the state of the case was, at the date of the decree entered in the District Court, it is not doubted that an amount much greater than the amount allowed in that decree had been disbursed by the libellants for repairs and supplies to the steamer subsequent to the two trips made under the written agreement. Suppose the libellants had no lien for the disbursements made under that agreement, which is not admitted, still it is fully proved that the appellants, subsequent to the two trips, refused to make further advances on the credit of the owner, and that the owner expressly requested that the advances should be made on the credit of the steamer.

Implied liens, it is said, can be created only by the master, but if it is meant by that proposition that the owner, or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise.

Undoubtedly the presence of the owner defeats the implied authority of the master, but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners and save the vessel and cargo from the perils of the seas.*

* The Guy, 9 Wallace, 758.

Restatement of the case in the opinion.

More stringent rules apply as between one part-owner and another, but the case is free from all difficulty if all the owners are present and the advances are made at their request, or by their directions, and under an agreement, express or implied, that the same are made on the credit of the vessel. Were it not so mariners would refuse to ship for distant ports if the owner was to remain with the ship, either as supercargo or passenger, unless it was known that he had credit everywhere, as in case the ship should become disabled and need repairs and provisions the most reliable means of relief would be withdrawn, and it is not difficult to imagine a case where life and property might be lost because the owner was on board and without personal credit.

Decree of the Circuit Court REVERSED, and the cause remanded with directions to enter a decree

AFFIRMING THE DECREE OF THE DISTRICT COURT.

II. IN THE CUSTER.

Jurisdiction, it is conceded, is vested in the district courts, by the ninth section of the Judiciary Act, to enforce maritime liens by a suit *in rem* in all cases where such liens arise, whether the libel is for the breach of a maritime contract or to recover damages for a marine tort.

Repairs were made and supplies furnished by the appellants to the steamer named in the pleadings, and the owners of the steamer refusing to pay for the same, the appellants filed their libel in the District Court for the District of Maryland, and caused the steamer to be arrested, claiming that the repairs and the supplies were a lien upon the steamer. Appearance was entered by the owners of the steamer, as claimants of the same, and they filed an answer setting up the same defences as those pleaded by the owner of the steamer in the suit just decided. Testimony was taken by both parties in the two suits, as exhibited in the transcript of the other suit, and the parties entered into a stipulation that reference might be made in the trial of this suit to the depositions printed in the other, and that both should be heard at the same time.

Two principal questions, it seems, were discussed in the District Court. (1.) Whether the evidence showed that the credit

for the repairs and supplies was or was not given to the steamer, under the rules of the maritime law as understood and administered in the Federal courts. (2.) Whether the repairs made and the supplies furnished, in view of the circumstances, became a lien upon the steamer. Both of those questions were answered by the district judge in the affirmative, and the court entered a decree for the libellants in the sum of six thousand four hundred and ninety-six dollars and sixty-three cents against the owners of the steamer and the stipulators for value. Appeal was taken by the respondents to the Circuit Court, where the decree of the District Court was reversed, upon the ground that the evidence in the transcript, if tested by the rules laid down in *Thomas* v. *Osborn*,* and in the case of *Pratt* v. *Reed*,† does not show the existence of any such lien.

Since that ruling was made the whole subject has been very fully reconsidered by this court in the case of *The Grapeshot*,‡ in which the opinion was given by the Chief Justice. Viewed in the light of that decision, and of the opinion of the court in the case of *The Lulu*,§ lately delivered, as the case must be, it is clear that further discussion of the same is unnecessary, as it is conclusively settled that "where proof is made of necessity for the repairs and supplies, or for funds raised to pay for the same, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit," or, in other words, the necessity for credit must be presumed where it appears that the repairs and supplies were necessary, unless it is shown that the master had funds, or that the owner had sufficient credit, and that the person or persons making the advances knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence in that behalf they would have ascertained that the master was not authorized to obtain any such relief on the credit of the steamer.

Suppose that defence cannot be sustained, still the respondents insist that the steamer is not liable for the advances made by the appellants, because the decree, as they contend, falls within

* 19 Howard, 22.
† 19 Ib. 360.
‡ 9 Wallace, 137.
§ *Supra*, p. 192.

Opinion of the court.

the rule laid down in the case of *Minturn* v. *Maynard*,* where it was held that a libel *in personam* could not be maintained to recover a balance of account, consisting of moneys paid, laid out, and expended for the respondents in payment for repairs and supplies to a steamer owned by the debtors, together with charges for commissions and for advertising the steamer.

Examples might easily be given where a party may sue in the admiralty or in the common law courts at his election, but it is unnecessary to express any doubts as to the correctness of the rule laid down in that case, as it is clear that it does not control the case before the court even if the rule be admitted to be correct without any qualification.†

Undoubtedly the appellants took charge of the steamer for two trial trips between Baltimore and Charleston, and by the terms of the written agreement entered into at that time they were to receive for the services rendered in those trips a commission of ten per cent. on the gross freights of the steamer, but they also stipulated to disburse the steamer, and to insure the freights and disbursements for the benefit of the owners. They took the steamer on trial for those two trips with a view to purchase her in case they were "satisfied with the vessel," but they elected not to make the purchase, and subsequently refused to disburse the steamer on the credit of the owners. Uncontradicted as the evidence is upon this point, it does not seem necessary to reproduce it, especially as it is all one way.

Objection is also made that the advances cannot be held to be a lien upon the steamer, because some of the repairs and supplies were ordered by the owners in person, but the objection is entitled to no weight, as the evidence shows that it was expressly agreed that the advances should be furnished on the credit of the steamer.‡

Payments have been made by the respondents since the decree was entered in the District Court, but the court here is not asked to revise the finding of the District Court as to the amount, nor to deduct the payments since made, as those matters will be adjusted under the stipulations executed between the parties.

* 17 Howard, 477.

† The Belfast, 7 Wallace, 644; Davis *v.* Child, Davies, 71; The Grapeshot, 9 Wallace, 141; Merritt *v.* Brewer, 14 Law Rep. 452.

‡ The Grapeshot, 9 Wallace, 141; The Guy, 19 Id. 758; S. C. 1 Benedict, 112; The Lulu, *supra*, 192.

Suggestion is also made that the lien was waived by the commencement of an action for the advances in the State court, but the record shows that the action is still pending, and it is well-settled law that the pendency of such an action is no bar to a suit in a Federal court.*

Had the judgment been rendered it might be different, but it is clear that the rule "*transit in rem judicatam*" cannot apply during the pendency of the action.†

All sums collected in that proceeding have been duly credited in this case, and it is fully proved that the whole amount included in the decree of the District Court was properly cognizable in the admiralty.

Decree of the Circuit Court is REVERSED, and the cause remanded with directions to enter a decree

AFFIRMING THE DECREE OF THE DISTRICT COURT.

BRAUN *v.* SAUERWEIN.

1. Although the running of a statute of limitations to the right of suing may be suspended by causes not mentioned in the statute itself, as, for example, by the fact that the plaintiff, without default of his own, has been disabled by a superior power from the capacity to sue; still, when by the removal of the disabling power the right reverts, the question in a case where the statute is afterwards set up to bar a suit, will be, "*How long* did the suspension which it caused continue?" And the operation of the statute will not be prevented for a longer time than that during which the suspension was an enforced one.

   Ex. gr. Where an act of Congress, which took effect August 1st, 1866, enacted that no suit to recover a tax once paid should be maintained, until appeal had been duly made to the Commissioner of Internal Revenue, and his decision had, unless such suit was brought within six months from the time of such decision, &c.

   Held—in a case where suit was brought February 18th, 1868, to recover a tax that had been paid February 2d, 1864, and where appeal to the commissioner had been made August 20th, 1867, and decided by him Janu-

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* Loring et al. *v.* Marsh et al., 2 Clifford, 320; Wadleigh *v.* Veazie, 3 Sumner, 165; White *v.* Whitman, 1 Curtiss, 494; Lyman *v.* Brown, 2 Id. 559; The Paul Boggs, 1 Sprague, 369; The Highlander, 1 Id. 510.

† Murray *v.* Lovejoy, 2 Clifford, 197; S. C. 3 Wallace, 16.

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ary 11th, 1868,—that a statute of the State where the suit was brought which barred such suits, unless brought within three years from the time when the right of action accrued, operated; the plaintiff's appeal having been pending only from August 20th, 1867, to January 11th, 1868 (four months and twenty-two days), and the time which he permitted to elapse between August 1st, 1866 (when the act took effect), and August 20th, 1868 (when he appealed), having been lost by his own delay, and not taken from him by any superior power. And it thus appearing that, deducting the time during which the appeal was pending (four months and twenty-two days), and during which alone he was disabled from the four years and sixteen days that elapsed between the inception of his right to sue and the commencement of his suit, there remained much more than three years, in which he was under no legal disability.

2. This view is not altered by the fact that the replication to the plea setting up the statute of limitations, averred that the appeal was "*duly*" made, its date not being set forth; the rejoinder first setting forth the date of the appeal and of the decision of it.

3. The effect of such a replication (which might have been demurred to), was only to aver that the statute was suspended for a time; nothing more being well pleaded by it.

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

An act of Congress, passed July 13th, 1866,* and which by its terms took effect on the 1st of August of that year, enacts:

"That no suit shall be maintained in any court, for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect. *Provided*, that if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

With this statute in force, Braun, on the 18*th of February*, 1868, brought suit in one of the State courts of Maryland

* § 19, 14 Stat. at Large, 152.

against Sauerwein, a collector of internal revenue, to recover a sum of money alleged to have been illegally exacted by him, in virtue of his office, from the plaintiff.

The defendant pleaded a statute of limitation of the State of Maryland, which bars actions of this nature unless brought within three years from the time when the right of action accrued. The plaintiff replied, that after the defendant had received the money for which the suit was brought, the plaintiff *duly* appealed from the assessment and collection thereof made by the defendant, to the Commissioner of Internal Revenue of the United States, according to the provisions of law and in conformity to the regulations of the Secretary of the Treasury; that a decision of his appeal was not made until *on or about* the —— day of February, 1868, and that his suit was brought within six months from that date. But the replication, it will be observed, did not aver *when the appeal was taken, nor the day when it was decided.* The case being removed after this into the Circuit Court of the United States, under certain acts of Congress,* the defendant rejoined, averring that the money alleged to have been taken, was received on the 2d day of February, 1864, and not afterwards, and that the appeal of the plaintiff to the Commissioner of Internal Revenue was taken on the 20th of August, 1867, and not before; and that the decision of the appeal by the commissioner was made on the 11th of January, 1868. To this rejoinder the plaintiff then demurred. The court overruled the demurrer, and judgment went for the defendant.

The case, therefore, as worked out by the pleadings, and with its facts arranged in order of time, stood thus:

The collector took the money and the cause of action arose,	February 2, 1864.
The act of Congress took effect, ...	August 1, 1866.
The appeal to the Commissioner of Internal Revenue was taken, ...	August 20, 1867.
The commissioner decided the appeal, ...	January 11, 1868.
The suit was brought, ...	February 18, 1868.

It thus appeared that more than three years had elapsed

* See 12 Stat. at Large, 756; 14 Id. 46.

Argument for the taxpayer.

after the cause of action accrued before the suit was brought, and more than three years before the appeal was taken to the Commissioner of Internal Revenue; that the statute began to run on the 2d of February, 1864, and supposing that nothing intervened to suspend its operation, that the bar would have been complete on the 2d of February, 1867.

The question was, whether the act of Congress of the 13th of July, 1866, had, under the facts of this case, worked *such* a suspension as that the suit, though thus brought four years and sixteen days after the cause of action accrued, was still *un*barred by the Maryland statute.

The court below, in overruling the demurrer, decided that it had not; and the correctness of that view was the only important point now here on error.

Messrs. Brent, Crittenden, and Hughes, for the plaintiff in error:

As we could not sue after the 13th July, 1866 (the date of the act of Congress), until an appeal taken and a decision thereon, and as our replication avers that the appeal was *duly* made (a matter not denied in the rejoinder), the appeal must be taken to have been in time. The rejoinder then shows a decision of that appeal on the 11th day of January, 1868, and this suit being brought on the 19th February, 1868, some thirty-nine days after the appeal, it results that if we deduct the whole term between the 13th July, 1866, and 11th January, 1868 (date of the decision), we have only two years, five months, and twenty days left between the receipt of the money on the 2d February, 1864, and the bringing of this suit on the 19th February, 1868. The State statute of three years could not therefore bar the action.

We make no point as to whether the suit was properly transferred under any act of Congress, though, possibly, one might be raised.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is undoubtedly a general principle, that when a statute of limitation has begun to run, a disability to sue subse-

quently intervening does not stop its running, even though the disability be one of those expressly recognized in the statute itself. Notwithstanding this, however, the courts in this country have engrafted upon such statutes at least one implied exception. Thus, in *Hopkins* v. *Bell*,* this court held that the treaty of peace of 1783, by which the independence of the United States was acknowledged by Great Britain, prevented the operation of a Virginia statute of limitations upon debts due to British subjects, and contracted before the treaty was made. In that case, though the statute had begun to run before the commencement of the war in 1775, the time during which it had thus run was not allowed to be added to any time subsequent to the treaty. This, perhaps, is not to be regarded as a clearly judicial exception, incorporated into the Virginia statute. It was rested upon the force of the treaty which declared that creditors on either side (British or American), should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted. The treaty, however, was not the act of Virginia, and the suspension of the statute's operation was by something outside of the statute itself. But in *Hanger* v. *Abbott*† it was ruled, after grave consideration, that the time during which the courts of the recently rebellious States were closed to the citizens of other States, is, in suits brought by such citizens, to be excluded from the computation of the time fixed by statutes of limitation, within which only suits may be brought, and this, though the statutes contain no such exception. In other words, it was held that the statutes of limitations of the insurrectionary States were suspended, while the courts in those States were closed by the war. Similar decisions have been made in the State courts. They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case; that unless the statutes

* 3 Cranch, 454. † 6 Wallace, 532.

cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue.

It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself. Assuming, then, that the act of Congress did, for a time, stop the running of the Maryland statute against the plaintiff, the inquiry remains, how long did the suspension continue? To this there can be but one answer. Manifestly, only so long as he was prevented from suing by the act of Congress. The act, speaking from August 1st, 1866, prohibited a suit until he should appeal to the Commissioner of Internal Revenue, and until his appeal should be decided, unless the decision should be postponed longer than six months, in which case he was at liberty to sue within a year from the time when his appeal was taken. The interval between the appeal and its decision, then, was the entire period during which he was disabled by the act. If, in fact, he was disabled a longer time, the prolonged disability was caused by his own neglect to appeal. The replication to the defendant's pleas fail to state when the appeal was made. True, the averment is, it was "*duly*" made, but that is pleading a conclusion of law rather than a fact. The time when the appeal was taken was material to show how long the statute of limitation was suspended. The effect of the replication was only to aver that the statute was suspended for a time. Nothing more was well pleaded by it. Instead of meeting it by a demurrer, however, the defendant rejoined, setting forth the date of the appeal, and the date of its decision, and the plaintiff demurred to the rejoinder. It is thus admitted that the plaintiff's appeal was pending only from August 20th, 1867, to January 11th, 1868, four months and twenty-two days. The act of Congress denied to him a right to sue during that period, and no longer. The time which he permitted to elapse between August 1st, 1866 (when the act of Congress took effect), and August 20th, 1868, when he appealed, was not taken from him by any controlling power. He lost it by his own delay.

It would be giving a most unreasonable construction to the act were we to hold, that by merely delaying to appeal, when it was all the time in his power, he could have suspended the running of the statute indefinitely. Deducting, then, the four months and twenty-two days, during which his appeal was pending, and during which he was disabled, from the four years and sixteen days that elapsed between the inception of his right to sue and the commencement of his suit, there remain much more than three years in which he was under no disability, except such as was imposed by himself. The judgment of the Circuit Court on the demurrer was, therefore, correct.

It remains only to add that the case was well removed into the Circuit Court of the United States.*

JUDGMENT AFFIRMED WITH COSTS.

HORNSBY ET AL. v. UNITED STATES.

1. Grants of the public domain of Mexico, made by governors of the department of California, were of three kinds: 1st, grants by specific boundaries, where the donee was entitled to the entire tract described; 2d, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by out-boundaries, where the donee was entitled out of the general tract only to the quantity specified; and 3d, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence.
2. Grants of the second class,—those by quantity,—passed from the government to the grantees, upon their execution, the right to the quantity of land specified therein, to be afterwards laid off by official authority at the place or within the larger tract designated.
3. Under Mexico the measurement and segregation from the public domain of the quantity, specified in this class of grants, could only be made by the officers of the government. A measurement by the grantee was inoperative for any purpose. Although a general possession of the

* Hodgson *v.* Milward, 3 Grant, 412 and 418; Bigelow *v.* Forrest, 9 Wallace, 339.

land ceded was permitted in California before the official measurement, the grantee acquired by such possession no absolute right to the tract occupied, or any interest which could control the action of the officers of the government in the segregation of the land.

4 Although the regulations of 1828, which were adopted to carry into effect the colonization law of 1824, provided that a map of the land solicited should accompany the petition for a grant, a compliance with the provision was not exacted in all cases. The governors exercised a discretionary power of dispensing with it under special circumstances. No motive existed for insisting upon its presentation when the information, which it was designed to impart, was already in the public archives open to the inspection of the governor; and such information existed there in the present case.

5. Although the regulations provided that the governor, upon receiving a petition for land, should proceed to obtain the necessary information as to the qualifications of the petitioner and the character of the land; they did not prescribe any particular mode by which this information should be acquired. It might have been obtained by the governor from his own investigations, or he might, as stated in the regulations, if that course were preferred, consult the appropriate municipal authority, which was that of the district, whether any objection existed to making the grant. Formal reference to the local magistrate, and a report from him, were not essential to give the information required, although this course was usually adopted.

6. A clause in the grant in this case, subjecting it to the approval of the departmental assembly, did not prevent the title from passing to the grantees upon the execution of the instrument. Such approval was not a condition precedent to the vesting of the title. According to the regulations of 1828 the authority to make grants of land in California was lodged solely with the governor. It was not shared by him with the assembly. That body only possessed the power to approve or disapprove of grants made by him. Until such approval the estate granted was subject to be defeated. With such approval the grant became, as it was termed in the regulations, "definitively valid," that is, it ceased to be defeasible, and the estate was no longer liable to be divested, except by proceedings for breach of its other conditions.

7. It was the duty of the governor, and not of the grantee, to submit to the assembly grants issued by him for its approbation. His neglect in this respect supended the definitive validity, as it was termed, of the grants; that is, it prolonged the liability of the estate to be defeated by the action of the assembly, and of the supreme government thereon, to which the matter was referred in case the approval of the assembly was not obtained; and no other consequence followed. His neglect was not permitted to operate to divest the grantees of the estate already vested in them.

8. In passing upon claims under Mexican grants in California, the question is, what right did the grantees acquire in the land from the Mexican

authorities? This court cannot inquire into any acts or omissions by them since those authorities were displaced. It is not authorized to pronounce a forfeiture for anything done, or anything omitted by them since that period.

9. The political department of the government having designated the 7th of July, 1846, as the period when the conquest of California was completed, the judiciary follows the action of the political department. On that date, therefore, the authority and jurisdiction of Mexican officials in California are considered as having terminated.

10. The grant in this case was for the surplus land remaining in two places after satisfying out of those places two previous grants to other parties, including other lands within the jurisdiction of the same pueblo to make up the amount of nine leagues; and to it were annexed conditions, the second of which provided that the grantees should solicit the proper judge to give them juridical possession of the land; and it was here objected to the confirmation of the claim, that the grantees had forfeited their rights under the grant by not applying for such possession, and never entering upon the land. The objection was answered: 1st, by the fact, that between the date of the grant and the displacement of the authority of Mexican officials only sixty-one days had elapsed, and that within a period so limited juridical possession was seldom delivered after the issue of a grant; 2d, by the fact, that it was impossible for the magistrate to deliver such possession until the previous grants in the same general locality had been surveyed and severed from the public domain, and no such survey and severance were had, nor was any action ever taken by the previous grantees to have the quantity granted to them segregated previous to the conquest; and the grantees in this case could not of themselves have lawfully intruded upon the possessions of the previous grantees, and undertaken themselves to determine what part of the general tract should be set apart to those previous grantees, and appropriate the balance as the surplus to which they were entitled; 3d, by the fact, that mere neglect to comply with the condition, even if unreasonably prolonged, did not of itself work a forfeiture of the grantees right under the Mexican law, but only left the land open to denouncement by other parties. Some formal and regular proceedings were required to effect a divestiture of a grantee's interest under the Mexican law, and these had their inception in what is termed a denouncement by a party desirous of obtaining the land. An investigation then followed whether or not the condition had been complied with or so disregarded as to justify a decree of forfeiture. Without such inquisition and decree the title did not revert to the government, nor was the land subject to be regranted.

11 The interest which passed by the grant in this case, whether it be regarded as a legal title, imperfect in its character, and to be perfected by a subsequent official survey and segregation of the quantity designated, or as a mere equitable or inchoate title, constituted property which the United States were bound to protect by the stipulations of

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the treaty of cession. By the term property, as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect.

APPEAL from the District Court of California.

This case was brought by the appellants, Hornsby and Roland, for the confirmation of a claim made by them under a Mexican grant for nine square leagues of land, situated in California, under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in that State.* The grant was issued to Luis Arenas (whose interest had since passed to the claimant Hornsby) and Jose Roland, May 6th, 1846, by Pio Pico, then governor of the Department of California.

Some years before the issue of this grant, a grant of two square leagues in the place called Las Animas had been made to one Thomas Brown, from whom the property by mesne conveyances had passed to a certain Charles Weber; and a grant of about the same quantity in the place called Canada de Pala had been made to Jose Bernal and others. For the surplus land remaining in these places, after satisfying the previous grants, including lands of the Cerro Colorado, within the jurisdiction of the same pueblo, to make up the amount of nine leagues, Arenas and Roland, on the 5th of May, 1846, presented their petition to the governor. No map of the land accompanied this petition, but the parties in the petition offered to present a map to the governor at a convenient time.

On the margin of the petition, the governor made an order that a decree of concession be issued, and the title (the grant) be delivered to the parties for their protection. On the following day, the 6th, the governor made a full and formal decree of concession, in which he stated that in the exercise of the powers with which he was invested by the supreme government, and in the name of the Mexican nation, he declared the petitioners owners of the land so located, and directed that the title (titulo—the grant) be issued which would secure to them the property.

* 9 Stat. at Large, 631.

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The formal grant then issued; in it the governor recited the petition, and then stated that the "necessary steps having been taken, and inquiries made," he had, by a decree of that day in the exercise of the powers with which he was invested by the supreme government in the name of the Mexican nation, declared, and did then declare the petitioners "owners in full property" of the land, describing it as in the petition, in conformity with the law of the 18th of August, 1824, and the regulations of November 21st, 1828, "subject to the approval of the departmental assembly, and under the following conditions:

"1st. They (the grantees) may inclose it without injuring the passes, roads, and servitudes, and may enjoy it fully and exclusively, appropriating it to such use as may suit them.

"2d. They shall solicit the proper judge to give them juridical possession by virtue of this decree, and he shall mark the boundaries with the proper landmarks.

"3d. The land hereby granted is nine leagues of the largest size, and is situated in the surplus or vacant lands of the ranchos of Don Carlos Weber and Don Jose de Jesus Bernal, including the lands of the Cerro Colorado towards the valley. The judge who shall give the possession, shall have it measured in conformity to law, in view of the map which will be presented by the parties interested."

Traced copies of the petition, the marginal order, the decree of concession, and of the draft of the grant, from the archives of the Department of California, in the custody of the Surveyor-General of the United States for California, and the original grant issued to the petitioners, were produced before the board of land commissioners, and in the District Court. No question appears to have been made in either tribunal as to their genuineness. The grant issued bore the signatures of the governor, Pio Pico, and of the acting secretary of state at the time, Moreno. The genuineness of these signatures was proved by a witness produced by the claimants before the commissioners; but they rejected the claim on the ground that there was no evidence that the grant was ever approved by the departmental assembly, or

that juridical possession was ever given, or that the grantees were ever in possession of the land, or occupied it in any manner; and that the description of the land was too vague and indefinite to enable the commissioners to describe it with any degree of certainty. The commissioners, without making the fact a distinct ground of rejection, also observed, in their opinion, that the governor, the day following the receipt of the petition, had, "without, so far as appears from the record, making any inquiries or investigations in relation to the matter, entered a decree of concession, and directed the title to be issued and delivered to the interested parties."

From the decree of the board of land commissioners an appeal was taken to the District Court. Whilst the case was pending in that court, the parties entered into a stipulation that certain depositions of Pio Pico, of Moreno, and of Rufus C. Hopkins, taken in another case in which Roland was also a claimant, might be used in this case. In his deposition thus used, Pico testified to the genuineness of his signature to the grant in this case, and also that it was customary to take *informés* (that is, to have an official report upon the subject) as to the qualifications of applicants and upon the land solicited before making a concession, but that it was not indispensable, and that it was not unusual for a petition to be signed, a marginal order and a decree of concession made, and a title issued on the same day; that often a number of concessions were made on the same day; and in the assembly a number of concessions were often confirmed on the same day.

Moreno, in his deposition, also testified to the genuineness of his own signature, and that of Pico, to the grant in this case.

Hopkins, the keeper of the Mexican archives in California, in his deposition, testified that he had made the archives of the former Spanish and Mexican governments in California his special study for the then last preceding seven years; that there was no book of record in the archives showing petitions presented for land, and grants made *with maps of*

the lands granted, as required to be kept by the regulations of November, 1828, and that there was no trace whatever amongst the archives of the existence of any such book at any former time; that the nearest approach to any such record were the espedientes on file in the archives; that these espedientes were the various proceedings in reference to individual grants, written upon sheets of paper and stitched together, and, when concluded, indorsed and numbered by the secretary, and filed in the archives.

In answer to the question as to what evidence, if there was no record, did the archives furnish of the fact of the issue of any grant whatever since 1828, the witness stated, "That the only evidences to be found in the archives of the issuance of grants since 1828, are 1st, the espedientes already referred to; 2d, a book in which *titles* (the grants) are recorded, which were issued in 1833, '34, and '35; 3d, the index known as the 'Jemino Index,' embracing grants made from 1833 to 1844, inclusive; 4th, a Toma de Razon, or registry of grants issued in 1844, '45; 5th, an index known as the 'Hartnell Index;' 6th, Toma de Razon, kept by prefects in 1843; 7th, journals of the departmental assembly, from 1829 to 1846; 8th, official correspondence in which grants are referred to; 9th, some loose maps and borradors in reference to grants." He continued:

"The record I have referred to, of 1833 to 1835, contains a copy of the entire grant or titulo—*without the previous proceedings or maps;*" and with respect to grants issued in 1846, he testified that "the only evidence the archives furnish of grants made in 1846, are the espedientes referred to, journals of the departmental assembly, the Hartnell index, and official correspondence, borradors, &c."

The District Attorney of the United States admitted in writing in the District Court, that the grant in this case was issued by Governor Pico on the 6th of May 1846; and that the extent of the surplus lands for which it was issued had not then been ascertained.

The District Court affirmed the decree of the board of land commissioners and rejected the claim, but the district

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judge states in his opinion below, that the genuineness of the papers produced from the archives and of the title produced by the claimants, was not disputed by the counsel of the United States. The rejection of the claim was placed on the ground that no investigation was had by the governor as to the condition of the land, or the qualification of the parties; that the whole proceeding was commenced and consummated within two days; and that no evidence was offered to show that either of the grantees ever settled or attempted to settle on the land, or that any surplus lands existed for which the grant called.

Of the regulations for the colonization of the territories of Mexico, adopted November 21st, 1828, the following are those which bear upon the questions raised in this case.*

1st. The governors (Gefes Politicos) of the territories are authorized (in compliance with the law of the General Congress, of the 18th of August, 1824, and under the conditions hereafter specified) to grant vacant lands, in their respective territories, to such contractors (*empressarios*), families, or private persons, whether Mexicans or foreigners, who may ask for them, for the purpose of cultivating and inhabiting them.

2d. Every person soliciting lands, whether he be an *empressario*, head of a family, or private person, shall address to the governor of the respective territory a petition, expressing his name, country, profession, the number, description, religion, and other circumstances of the families, or persons, with whom he wishes to colonize, describing, as distinctly as possible, *by means of a map*, the land asked for.

3d. The governor shall proceed immediately *to obtain the necessary information*, whether the petition embraces the requisite conditions, required by said law of the 18th of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to; *or, if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant or not.*

4th. This being done, the governor will accede, or not, to such

* Taken from the translation in Rockwell's Spanish and Mexican Law in relation to mines and titles to real estate, vol. i, p. 453.

petition, in exact conformity to the laws on the subject, and especially to the before mentioned one of the 18th of August, 1824.

5th. The grants made to families, or private persons, shall not be held to be *definitively valid* without the previous consent of the territorial deputation, to which end the respective documents (espedientes) shall be forwarded to it.

6th. *When the governor shall not obtain the approbation of the territorial deputation, he shall report* to the supreme government, forwarding the necessary documents for its decision.

7th. The grants made to *empressarios*, for them to colonize with many families, shall not be held to be definitively valid, until the approval of the supreme government be obtained, to which the necessary documents must be forwarded along with the report of the territorial deputation.

8th. The definitive grant asked for being made, a document signed by the governor shall be given to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws, in virtue whereof possession shall be given.

9th. *The necessary record shall be kept in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the lands granted,* and the circumstantial report shall be forwarded quarterly to the supreme government.

Messrs. M. Blair and F. A. Dick, for the appellants.

Mr. Wills, contra.

Mr. Justice FIELD delivered the opinion of the court.

As we have had occasion to observe in several instances,* grants of the public domain of Mexico, made by governors of the department of California, were of three kinds: 1st, grants by specific boundaries, where the donee was entitled to the entire tract described; 2d, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by out-boundaries, where the donee was entitled out of the general tract only to the quan-

* Higueras *v.* United States, 5 Wallace, 828; Alviso *v.* United States, 8 Id. 339.

tity specified; and 3d, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence.

The greater number of the grants which have come before this court for examination have belonged to the second class. They have usually designated the land ceded by the general name of the valley or locality where situated, with a clause annexed that the concession was limited to the specific quantity mentioned, and that the magistrate of the vicinage, of whom possession was to be solicited, should cause the same to be surveyed, and that any surplus existing should be reserved for the use of the nation.

When the first grant of this kind was presented for the consideration of this court, in the Fremont case,* which was for ten leagues within a tract of much greater extent, it was objected that the grant was void for uncertainty of description, and that no interest passed to the grantee until the quantity was surveyed and severed by known boundaries from the public domain; but the court held the objection untenable, and that, as between the government and the grantee, the latter had a vested interest in the quantity of land mentioned. "The right to so much land," said the Chief Justice, in delivering the opinion of the court, "to be afterwards laid off by official authority in the territory described, passed from the government to him by the execution of the instrument granting it." And in support of the principle asserted, the court cited the case of *Rutherford* v. *Greene's Heirs*, reported in 2d Wheaton,† which arose upon an act of the State of North Carolina, passed in 1782, providing that twenty-five thousand acres of land should be allotted and given to General Greene and his heirs, within the bounds of a tract reserved for the use of the army, to be laid off by commissioners appointed for that purpose. The commissioners, in pursuance of the act, allotted the twenty-five thousand acres, and caused the quantity to be surveyed

* 17 Howard, 542, 558.

† Page 196.

off, and the survey to be returned to the proper office, and the question upon which the case turned related to the validity of the title of General Greene, and the date at which it commenced. The court held that the general gift of twenty-five thousand acres lying in the territory reserved, became by the survey a particular gift of the quantity within the survey, and concluded an elaborate examination of the title by stating, that it was the clear and unanimous opinion of the court, that the act of 1782 vested a title in General Greene to the twenty-five thousand acres to be laid off within the boundaries designated, and that the survey, made in pursuance of the act, gave precision to that title, and attached it to the land surveyed.

And this court, in deciding the Fremont case, observed in reference to this case of *Rutherford* v. *Greene's Heirs*, that "it recognizes as a general principle of justice and municipal law, that such a grant for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain territory, vests in the grantee a present and immediate interest. In the language of the court, the general gift becomes a particular gift when the survey is made; and when this doctrine has been asserted in this court, upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican government, where a controversy arises between the United States and the Mexican grantee."*

Under Mexico the measurement and segregation from the public domain of the quantity, specified in this class of grants, could only be made by the officers of the government. A measurement by the grantee was inoperative for any purpose. Although a general possession of the land ceded was permitted in California before the official measurement, the grantee acquired by such possession no absolute right to the tract occupied, or any interest which could control the action of the officers of the government in the segregation of the

* 17 Howard, 559.

land. A private survey was as ineffectual under the former government as under the present government. The right, which the former government reserved to itself over the survey, passed, with all other public rights, to the United States upon the cession of the country, and is now to be exercised in pursuance of their laws.*

Now, if we consider the present case in the light of these views, we shall find little difficulty in its disposition. The grant here, like the one in the Fremont case, is a grant by quantity. It was made under the same law and regulations, and like that, was subject to the approval of the departmental assembly, and has certain conditions annexed. It was issued to Luis Arenas and John Roland, on the sixth of May, 1846, by the then governor of California. A petition for the land had been presented by them to him on the fifth of May, and the same day he made an order on its margin directing a decree of concession, and the issue of a grant to the parties. On the subsequent day, the sixth, a formal decree was signed by him declaring the petitioners owners of the land, and directing a grant to be issued, which would secure to them the property. The grant followed. The petition, the marginal order, the decree of concession, and the draft of the grant, are in the Mexican archives now in the custody of the Surveyor-General of the United States for California. Traced copies of these instruments, and the original grant issued, were produced by the claimants before the land commissioners and in the District Court. Their genuineness and authenticity were not disputed in either tribunal. The issue of the grant by the governor was admitted in the written stipulation of the counsel of the government.

Several years previous to the issue of this grant to Roland and Arenas, a grant of two square leagues in the place called Las Animas had been made to one Thomas Brown, from whom the property by various mesne conveyances had passed to one Charles Weber; and a grant of about the same quantity in the place called Cañada de Pala had been

* 17 Howard, 565.

made to José Bernal and others. For the surplus land remaining in these places, after satisfying the previous grants, including lands of the Cerro Colorado within the jurisdiction of the same pueblo, to make up the amount of nine leagues, the petition of Roland and Arenas was presented, and the grant to them was issued. No map of the land solicited accompanied the petition, but the petitioners offered to furnish a map to the governor at a convenient time, that is, whenever there might be occasion for its use.

The grant, after reciting the petition, and that the necessary steps had been taken and inquiries made, proceeds to state, that the governor, by a decree of that day, in the exercise of the powers with which he was invested by the supreme government, and in the name of the Mexican nation, had declared and did declare the parties owners in full property of the land solicited, describing it as in the petition, in conformity with the law of 1824 and the regulations of 1828, subject to the approval of the departmental assembly and certain conditions annexed.

The instrument purports on its face to transfer a full title to the property solicited. If valid when issued, it passed, according to the decision in the Fremont case, to the grantees a present and immediate interest in the quantity of land specified, to be subsequently laid off by official authority. And this brings us to the questions, whether there was anything in the action of the governor or of the grantees previous to its issue, which impaired its validity; and if the instrument was valid when issued, whether there was any such subsequent disregard of its conditions as to work its forfeiture.

That the governor, under Mexico, was authorized to make grants of land in the department of California is not questioned; and that the instrument produced in this case is genuine and was issued by him is admitted. But it is said that the grantees did not accompany their petition with a map of the land solicited, and that the governor did not make any inquiries as to the qualifications of the petitioners, and the condition of the land, as required by the regulations

of 1828, which were adopted to carry into effect the colonization law of 1824.

It is true, that the regulations provided that a map of the land solicited should accompany the petition, but a compliance with the provision was not exacted in all cases. The governors exercised a discretionary power of dispensing with it under special circumstances. No motive existed for insisting upon its presentation when the information, which it was designed to impart, was already in the public archives open to the inspection of the governor; and such information existed there in the present case. At any rate, the governor was satisfied with the offer of the petitioners to furnish a map at the proper time subsequently. As was said in the Fremont case, in answer to an objection of a similar character, "the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution."*

It is also true that the regulations provided that the governor, upon receiving a petition for land, should proceed to obtain the necessary information as to the qualifications of the petitioner and the character of the land. But they did not prescribe any particular mode by which this information should be acquired. It might have been obtained by the governor from his own investigations, or he might, as stated in the regulations, if that course were preferred, consult the appropriate municipal authority, which was that of the district, whether any objection existed to making the grant. In some instances, as in the case of Sutter, the character of the petitioner, and of the land solicited, were matters of general notoriety.† The objection appears to proceed upon the idea that a formal reference to the local magistrate, and a report from him, were essential to give the information required. This course was usually adopted, but it was not

* 17 Howard, 561.

† United States v. Sutter, 21 Id. 172; The Sutter Case, 2 Wallace, 563.

essential. The grant in this case recites that the necessary steps had been taken, and inquiries made, and something more than mere surmises at this day are necessary to show that the recital is false.*

There is nothing in these objections which touches the validity of the instrument at the time it issued. And the clause subjecting the grant to the approval of the departmental assembly did not prevent the title from passing to the grantees upon the execution of the instrument. Such approval was not a condition precedent to the vesting of the title. According to the regulations of 1828, the authority to make grants of land in California was lodged solely with the governor. It was not shared by him with the assembly. That body only possessed the power to approve or disapprove of grants made by him. Until such approval the estate granted was subject to be defeated. With such approval the grant became, as it was termed in the regulations, "definitively valid," that is, it ceased to be defeasible, and the estate was no longer liable to be divested, except by proceedings for breach of its other conditions.

Besides it was the duty of the governor, and not of the grantee, to submit to the assembly grants issued by him for their approbation. His neglect in this respect suspended the definitive validity, as it was termed, of the grants; that is, it prolonged the liability of the estate to be defeated by the action of the assembly, and of the supreme government thereon, to which the matter was referred in case the approval of the assembly was not obtained; and no other consequence followed. His neglect was not permitted to operate to divest the grantees of the estate already vested in them.† In many instances years elapsed before the approval was obtained, although the grantees were in the meantime in the possession and enjoyment of the property; and in many instances no approval was had previous to the conquest.

* United States *v.* Johnson, 1 Wallace, 329.

† United States *v.* Reading, 18 Howard, 4; United States *v.* Vaca, 1b. 556; United States *v.* Larkin, Ib. 558; United States *v.* Cruz Cervantes, Ib. 553; United States *v.* Johnson, 1 Wallace, 329.

Opinion of the court.

The grant being valid at the time of its issue, has there been any such disregard of the conditions annexed as to work its forfeiture? The objection taken is that the grantees never applied to the proper magistrate for official delivery of possession, as provided in the second condition; and that they never entered upon the land. The objection applies only to the period intervening between the date of the grant, and the time when the country passed under the jurisdiction of the United States. The question is, what right did the grantees acquire in the land from the Mexican authorities. The court cannot inquire into any acts or omissions by them since those authorities were displaced. It is not authorized to pronounce a forfeiture for anything done, or anything omitted by them since that period. Now the military forces of the United States took possession of Monterey, an important town of California, on the 7th of July, 1846, and within a few weeks afterwards occupied the principal portions of the country; and this occupation continued until the treaty of peace. On that date, therefore, the authority and jurisdiction of Mexican officials are considered as having terminated. The political department of the government, at least, has designated that day as the period when the conquest of California was completed, and the judiciary in this respect follows the action of the political department.*

Between the date of the grant under consideration, and the period thus designated, only sixty-one days elapsed. There are very few instances of grants in California where a juridical possession was delivered to the grantees within a period as limited as this after their issue. In many instances years elapsed before this proceeding was had; and in many instances no juridical possession was ever delivered previous to the conquest.

In the case at bar it was impossible for the magistrate to deliver such possession until the previous grants to Weber and Bernal, in the same general locality, had been surveyed

* United States v. Yorba, 1 Wallace, 423.

and severed from the public domain. It was for the surplus in that territory, remaining after the quantities granted to them had been satisfied, that the present grant called. What part of the general tract occupied by the previous grantees would be finally set apart to them, could not be known until the official measurement. The grantees in this case were therefore necessarily compelled to await the action of the elder grantees; and no action was ever taken by them to segregate the quantity granted to them previous to the conquest.

This want of segregation of the quantities claimed by the previous grantees furnishes also an excuse to the grantees here for not entering upon the land without the delivery of juridical possession. To have made such entry would have been to intrude upon the possessions of others. They could not of themselves have undertaken to determine what part of the general tracts should be set apart to the earlier grantees, and appropriate the balance as the surplus to which they were entitled.

But independent of the considerations stated, it is a sufficient answer to the objection to say, that mere neglect to comply with the condition did not of itself work a forfeiture of the grantees' right under the Mexican law. The neglect of a grantee to apply for or to take possession, if unreasonably prolonged, only left the land open to denouncement by other parties. The interest of a grantee could not be divested under the Mexican law any more than at the common law, upon mere allegations or surmises. Some formal and regular proceedings were required to effect such divestiture, and under the Mexican law these had their inception in what is termed a denouncement by a party desirous of obtaining the land. An investigation then followed whether or not the condition had been complied with or so disregarded as to justify a decree of forfeiture. Without such inquisition and decree the title did not revert to the government, nor was the land subject to be regranted.

The object of the colonization laws and regulations of Mexico was the settlement of the vacant lands of the re

public, and grants were usually made to accomplish this purpose without other consideration. But the public, as observed in the Fremont case, "had no interest in forfeiting them even in these cases, unless some other person desired, and was ready to occupy them, and thus carry out the policy of extending its settlements."*

The several cases cited by counsel, where the absence of possession and the omission of proceedings usually taken in obtaining concessions of land, are noticed and made grounds of objection to a confirmation, have no application. They are cases, where the grants produced were unaccompanied by any archive evidence, and the attempt was made to uphold them by evidence of the recollections of witnesses. Thus, in the Cambuston case,† the alleged grant produced was unknown to any person beside the grantee and an interested party until July, 1850, although bearing date in May, 1846, and no trace of its existence was found in the archives of the country. So in the Castro case,‡ the instrument produced as a grant first made its appearance in June, 1849, though dated in April, 1846, and was not sustained by a single document in the archives. The absence of all traces of the grants, where evidence would usually be found, if it had existed, naturally created a strong presumption against their validity, which could not be overcome by testimony resting on the uncertain recollections of Mexican officials.

There having been no forfeiture of the grantees' interest in the present case, nor any such disregard of the conditions annexed to their grant as to have justified a forfeiture, the claimants under the grant are entitled to a confirmation. The interest which passed by the grant, whether it be regarded as a legal title, imperfect in its character, and to be perfected by a subsequent official survey and segregation of the quantity designated, or as a mere equitable or inchoate title, constituted property which the United States were bound to protect by the stipulations of the treaty of cession. That treaty provides for the protection of the rights of prop-

* 1 Howard, 561. † 20 Id. 59. ‡ 24 Id. 346.

erty of the inhabitants of the ceded territory. And, independent of the treaty, they were entitled to such protection by the law of nations, according to which, as said by this court in *Strother* v. *Lucas*,* "the rights of property are protected even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect."

By the term property, as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this court in the case of *Soulard* v. *The United States*,† when considering the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of that territory should be protected in the enjoyment of their property. "It comprehends," said the court, "every species of title, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."

It follows from the views we have expressed that the appellants possessed under the grant in this case, at the date of the cession of California to the United States, a right of property in the land granted, and, as a consequence, that their claim is valid and should be confirmed.

The decree of the District Court must, therefore, be REVERSED, and the cause remanded, with directions to enter a decree

CONFIRMING THE CLAIM OF THE PETITIONERS.

Mr. Justice DAVIS, with whom concurred CLIFFORD and SWAYNE, JJ., dissenting.

I am unable to concur in the decree of the court in this case, and as the claim embraces a large tract of country which is a part of the public domain, if this claim is not

* 12 Peters, 436.

† 4 Id. 511.

sustainable, I think it proper to state as briefly as possible the grounds of my dissent. Similar claims have been so frequently before the court, that any extended discussion of the general rules of law applicable to them is not necessary, as these rules have been so often explained in our reported decisions. It is clear that valid claims should be confirmed, and equally clear that those of a contrary character should be rejected. Tested by the rules of law established by this court in analogous cases, I am of opinion that the claim of the appellants is invalid. The Mexican authority was overthrown in California on the 7th of July, 1846, but the history of the times made it clear to every intelligent man for a considerable period before this date, that the country would pass to the jurisdiction of the United States. During this period grants of land were made very freely by Pio Pico, the acting governor, and the records of this court show that many of these grants were invalid and fraudulent. Doubtless, grants were made by him within that time which were valid, but all must agree, I think, that every grant which bears his signature should be examined with the most careful scrutiny. By the record in this case, it appears that the petition for this grant is dated the 5th day of May, 1846, and the grant, if any were made, was on the following day, and did not comply with the requirements of the law conferring power on the Governor of California to grant lands. The Mexican law, to make a title valid, required it to be evidenced by certain written instruments which taken together constitute an expediente. The expediente, when complete (as decided by this court), consisted of a petition, with a diseno or map annexed; a marginal decree referring the petition to a local officer to report whether the land was vacant and grantable, and the petitioner a proper person to obtain the bounty of the government; the report of that officer on these subjects, called an informe; the decree of concession and the copy or duplicate of the grant, as the original was delivered to the petitioner. It was in express terms required by the Mexican law, that the petitions for lands, and the grants, with maps annexed,

should be recorded.* It was insisted that the papers which were produced in this case before the commissioners, constituted such an expediente, but if it be conceded the papers are of Mexican authority, they do not contain any diseno or map, or reference to the local officer, or his report thereon. There *could* be no record of the petition and grant with the map of the land granted, because no map of any kind was annexed to the petition, and there is no evidence in the record that any part of the expediente was recorded as required by Mexican law. Grants of this kind were made subject to the approval of the departmental assembly, but there is nothing to show an attempt, even, to comply with this requirement. On the contrary, there is every reason to conclude that it never was presented to that assembly, as it is well known that there were a large number of grants made about that time which were presented and approved, and as this one was not approved, the inference is fair and reasonable that it was never presented for approval. It also appears that no judicial measurement of the land was made, nor possession of it taken by the supposed grantees, as required by the Mexican law, and the conditions of the grant.

The documents offered in evidence are not shown by any competent proof to be Mexican documents. The court in its opinion describes them as having been produced from the public archives, and this statement might create the impression that the expediente under consideration came from the Mexican archives. This cannot be so, as the number of the expediente proves beyond a doubt that it is one of those papers found in the custom-house at Monterey the latter part of the year 1847, or the fore part of the year 1848, which were subsequently included in Hartnell's Index.

This index is not, and never has been regarded as a Mexican document.† Since the decision of Castro's case,‡ this court, until now, as I suppose, has adhered to the principle, that whoever claims title to land in California under a grant

* Knight's Case, 1 Black, 228.

† Knight's Case, *supra*.

‡ 24 Howard, 349.

from a Mexican governor, must, as a general rule, produce the grant and show that it came from the public archives of land titles in the proper office of that department, or that it was found in Jimeno's Index, or that it was recorded in the Toma de Razon. It is true, in that case, Chief Justice Taney said that secondary evidence could be received, when it appeared that the grant had been properly made, and that the papers, or some of them, in the office where they were kept, had been lost or mislaid, but the court held, that a party setting up a grant by such proofs, must also show that there was a judicial survey of the land, and that the supposed grantees took actual possession of it, and exercised acts of ownership over it, before the change of jurisdiction. There are a number of cases in which the same rule is laid down (some of earlier and others of later date than Castro's case), and it seems to me they ought to control the decision of this case.*

No possession of any kind is proved in this case, and the authenticity of this grant, covering an area of over forty thousand acres of land, depends on the testimony of a single witness, unsupported by any proof, except the imperfect or mutilated expediente, found among a mass of loose papers on the floor of one of the rooms of the custom-house at Monterey, after the Mexican officials had fled, on the approach of our forces.

Possession is essential in such a case to establish an equity, and as none is proved, the claimant has no equity, and in my judgment the decree ought to be affirmed.

* The United States *v.* Cambuston, 20 Howard, 59; United States *v.* Fuentes, 22 Id. 445; United States *v.* Bolton, 23 Id. 341; White *v.* United States, 1 Wallace, 660; United States *v.* Pico, 2 Id. 279.

THE COLUMBIA.

A steamer crossing another so as to involve risk of collision, condemned in a case of collision:

1st. For violation of the regulation, then existing, that when steam-vessels were so crossing, the one which had the other on her own starboard should keep clear.

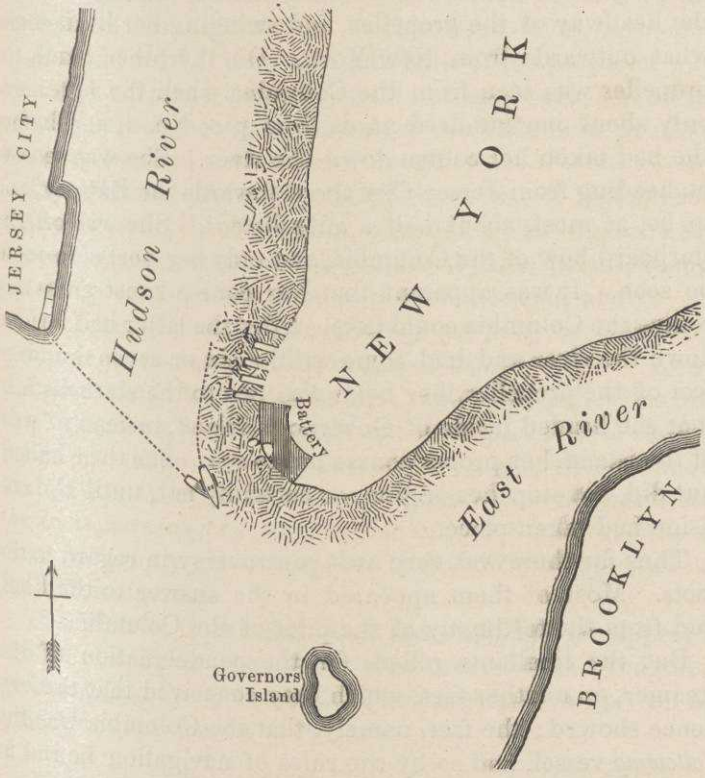
2d. For not keeping clear, being the following vessel.

APPEAL from the Circuit Court for the Southern District of New York.

The owners of the propeller Jersey Blue libelled the steamship Columbia, one of the Charleston line of steamers, in the District Court for the Southern District of that State, on account of a collision which occurred in the harbor of New York, on the afternoon of the 7th of January, A.D. 1860. The case, as assumed by the court on the testimony, was thus:

The propeller started on a voyage from the coal docks in Jersey City across the Hudson to the East River. The tide was strong ebb, and there was very little wind. From her start her course was nearly towards the Battery, New York, somewhat south of east, and she kept on that course until almost immediately before the collision. Her rate of speed was probably not far from six miles an hour. Soon after she left the docks the steamship Columbia pushed out from pier No. 4, on the New York side of the Hudson, to commence her voyage to Charleston. There was at that time a body of floating ice, extending outward from the piers six or eight hundred feet, but beyond the ice the river was clear. As the ship hauled out into the stream her bow was swung by the tide downward, and her helm was put to the starboard. Whether she had cleared the ice-fields before she headed down the bay, was a matter somewhat disputed, but not one of importance. If she had not entirely cleared it, she had so far done so as that only her port wheel was in the ice-field when she met the propeller. All was open on her starboard side. She proceeded down the river, in a course nearly parallel with the outer ends of the piers, prob-

ably just on the outer edge of the ice-field, and at the rate of not less than four miles an hour. When she came to a point nearly opposite Castle Garden, and a little below the Battery, she collided with the propeller, her starboard wheel



mounting the deck of the propeller about midships, on the larboard side, and walking over it forty or fifty feet, doing considerable damage. There were other important circumstances preceding the collision. The Columbia was seen from the propeller soon after she hauled out from the pier and commenced swinging down the river. The propeller then blew one whistle, which was not answered. When the vessels approached each other and danger of collision appeared, the propeller again blew one whistle, thus signalling that she intended to pass on the right. This second signal

was not answered. But when they came within six or seven hundred feet of each other the pilot of the Columbia hailed that he could not stop, and the engine of the propeller was immediately reversed, and she commenced backing. The backing was continued until the collision, entirely stopping the headway of the propeller, and swinging her head somewhat outwards from New York. On the other hand, the propeller was seen from the Columbia when the latter was only about one hundred yards from pier No. 4, and before she had taken her course down the river. She was seen to be heading from Jersey City about towards the Battery, and to be, at most, about half a mile distant. She was off the starboard bow of the Columbia, and only her port side could be seen. It was apparent that her course must cross any course the Columbia could take. After the latter had headed down the river and had come within six or seven hundred feet of the propeller, her helm was put to the starboard, so that she headed inside of Governor's Island, instead of west of the island, her proper course out to sea. She then hailed, but did not stop her engine, or certainly not, until the collision had taken place.

Thus far there was very little controversy in regard to the facts. Most of them appeared in the answer to the libel, and from the testimony of the pilot of the Columbia.

But the libellants relied, for the condemnation of the steamer, on another fact, which they conceived that the evidence showed; the fact, namely, that the Columbia was the *following* vessel, and so by the rules of navigation bound to keep out of the propeller's way. On this part of the case, Chadsey, the captain of the Jersey Blue, testified that he first saw the Columbia when his own vessel was south of pier No. 1, and two or three hundred yards distant; that he saw her over his left shoulder as he was standing at the wheel; that she was then just coming out of pier No. 4, and swinging down the river. This was evidently before she had straightened on her course. If this was so, the Columbia must have been above, namely, further up the river, and the following vessel. Captain Chadsey's testimony was corrob-

orated by that of Green, the engineer, Taylor, a deck hand, and by the testimony of Klickner and Pritchard, shipwrights, who repaired the propeller after the collision. The shipwrights both testified that "the character of the injuries showed that the steamship must have struck her and worked forward on her;" "that the motive force must have come from aft forward;" that the chain-bolts of the propeller were bent forward; and that this could not have been, but on the contrary, the exact reverse, unless the Columbia overtook the propeller and struck her from aft.

The evidence offered to rebut this was that of Hutchinson, the engineer of the Columbia, who stated that when he saw the propeller she was some two hundred yards distant, headed obliquely to the Columbia, and *as he thought*, above. He added immediately: "*However, my not being on the deck to notice the compass, everything appeared abeam to me.*" Kelso, the pilot, stated that when he first saw the propeller (his own ship being one hundred yards out from pier No. 4) she was half a mile distant, and his *impression* was that she was above at the time, though he adds, "*I cannot swear she was above; the boats were angling towards one another.*" There was no other testimony given to prove that the Columbia was not the following vesse

The District Court dismissed the libel, but on appeal to the Circuit Court the decree was reversed, and judgment given against the Columbia. The case was now here on appeal from that decree.

Mr. Benedict, for the appellant; Mr. Donohue, contra.

Mr. Justice STRONG, having stated the case, delivered the opinion of the court.

From those facts which appear in the answer to the libel, and from the testimony of the pilot of the Columbia, and about which there is very little controversy, it is not difficult to determine where the fault of the collision in this case lies. The propeller was all the time, from the moment she was first seen, off the starboard side of the Columbia. It was

therefore the duty of the latter to keep out of the way. The regulations then existing required that when two steam vessels were crossing, so as to involve risk of collision, the one which had the other on her own starboard should keep clear. Plainly she had no right to expect the propeller to change her course. It was therefore a fault in the Columbia that she did not port her helm and go astern of the other vessel. And the fault was the more inexcusable because she knew, even before she had settled on her course, that the course of the propeller must take her across any line the Columbia could take in going directly out to sea. There was nothing, then, to prevent her adopting such a course as would have avoided all danger of a collision. Instead of that she went straight down the river, in a line nearly parallel with the ends of the piers and very near to them, and, as the vessels approached each other on converging lines, she swung to port, so as to come more directly into the line of the propeller's course. This was the exact opposite of what she should have done.

We think also the evidence establishes that the Columbia was the following vessel, and, if she was, another regulation required her to keep out of the way of the propeller. There is no satisfactory evidence to rebut the testimony of Captain Chadsey as to the positions of the vessels, and it is corroborated by the testimony of Green, the engineer, Taylor, a deck hand, and of both the shipwrights who repaired the propeller. They both testify that the force of the collision must have come from aft forward. The chain-bolts of the propeller were bent forward, which could not have been unless the Columbia overtook the propeller and struck her from aft. The testimony given to prove that the Columbia was not the following vessel manifestly tends to prove the contrary. Maps have been exhibited to us describing the situation of the piers and the course of the propeller from the coal docks to the place of collision. If they are to be relied upon, and if the propeller was not more than a half mile from the Columbia when Kelso (the pilot) saw her, she must have been below pier No. 1, as the evidence for the

libellant shows she was, when the Columbia was only one hundred yards from pier No. 4. It seems to be satisfactorily established, therefore, that the Columbia was the following vessel. Of course the fault of the collision was hers. She had two courses before her, either of which would have avoided the disaster. Had she put farther out from her pier, where she had clear water, before heading down the river, or if, after heading down, she had ported her helm, as the regulations required, instead of starboarding, or even if she had stopped when she saw danger of collision, she would have passed astern of the propeller and no injury would have been done. By so doing she would have pursued her most direct course out to sea. But she did neither. She made no attempt to slacken her speed when the danger became imminent, and by starboarding she precipitated herself directly upon the libellant's vessel.

DECREE OF THE CIRCUIT COURT AFFIRMED, WITH INTEREST AND COSTS.

DEMING'S APPEAL.

Motion to reinstate a supposed legal tender case denied on the ground chiefly of laches; notwithstanding consent of the other side, the United States.

LATHAM and Deming being entitled, each of them, to recover a certain sum of money from the United States for work done prior to the act of February 25th, 1862, known as the first of the "Legal Tender Acts," appealed, after the passage of the acts, to the Treasury for payment. They demanded coin, but were offered and accepted paper; "protesting," when receiving the paper, against such mode of payment. They then brought, each of them, a suit in the Court of Claims against the government to recover the difference in value between the coin which they had asked for and the paper which they accepted. The Court of Claims decided against them, and they both appealed to

this court. The cases were supposed to involve the question of the constitutional validity of the paper circulation issued by the United States under the acts of Congress named, and known as *legal tender notes*. And as *Mr. Hoar, then Attorney-General*, had asked for the argument of them in order expressly that the question adjudged against the notes in *Hepburn* v. *Griswold** might be reconsidered, the argument of them both was a matter to which public and professional attention was largely directed.

On the 1st of April last, the argument was fixed for the 11th of that month. When the 11th came, the hearing, owing to the engagement elsewhere of the appellants' counsel, was adjourned till the 18th, and on the 18th, another case being then on, till the 20th. On the 20th, Wednesday, Mr. Chatfield, of New York, counsel for Latham, and Mr. Merryman, of Washington, D. C., counsel for Deming, appeared, and "feeling no desire," as they stated in a paper filed and signed by them, "to trouble this court any further with the consideration of the cases, took the occasion to withdraw them from the docket, and respectfully asked that they might be dismissed." Mr. Hoar, who stated that he had come to the court all ready to argue the cases, opposed the dismissal. But the court, after a short conference, decided, unanimously, that an appellant had the right to withdraw his own suit, and the appeals were accordingly dismissed. The Chief Justice immediately afterwards, on that Wednesday, 20th, announced that the court would not hear arguments after the following Tuesday (the 26th); that motions for the only Friday (regular motion day) remaining would be heard on that Tuesday, and that the court would adjourn on Saturday the 30th. All the proceedings were published under the ordinary head of "The Courts," in the Washington and some other newspapers of the next day. On Tuesday, the 26th, the court adjourned till the 30th, and then it met on the 30th, delivered opinions and adjourned till Monday, October 31st.

* 8 Wallace, 603.

Statement of the case.

On the 5th of May, the mandate issued to the Court of Claims to carry the judgment into execution.

The court having met again on Monday, 31st of October, *Mr. Lander*, new counsel in the matter, now, Friday, the 4th November, stated his desire to appear as counsel for the purpose of moving to reinstate Deming's appeals, and asked leave to appear for that purpose. The court held the motion under advisement until Monday, 7th. On that Monday it gave him leave to appear; and having appeared, he immediately moved the reinstatement. Mr. Merryman, the former counsel, by note to Mr. Deming filed in the case, expressing his unwillingness, "under the peculiar circumstances of the case, to remain counsel any longer in the matter," suggesting the employment of Mr. Lander, and withdrawing personally from the case.

The ground of the motion now made by Mr. Lander to reinstate was an affidavit *ex parte* by Deming to the effect that his former counsel, Mr. Merryman, had been ill for some time prior to the already mentioned 20th April; that he went to court on that day in order to argue the case, but was met by Latham and persuaded by him to sign the motion to dismiss; that Latham had a power of attorney from him, Deming, to sell and assign his (Deming's) claim, and informed Mr. Merryman that his own (Latham's) counsel had resolved to dismiss that claim, and desired Deming's to be also dismissed, "saying that he had made such arrangements as would secure a successful prosecution of the said two claims in Congress," and that Deming's claim would certainly be paid; that Mr. Merryman not being able to see him (Deming), and believing that Latham from his supposed relations with the said claim of Deming also represented his wishes in the matter, signed the motion for dismissal; that while it was true that a power had been given to Latham to sell and assign the claim, yet "that the purpose for which the same was given had failed," and that Latham had no right to "dictate" as to the appeal then pending, and that the order of dismissal was made without the knowledge or consent of the affiant.

The affidavit further stated that the affiant was informed of the dismissal "soon thereafter" by his attorney, who upon hearing the true state of facts and the wishes of the affiant to have a decision of this court on the case, made application to the then Attorney-General, Mr. Hoar, for his consent to an application to rescind the order of dismissal, which consent was obtained upon the proviso that the cause could *then* be argued, but that as that was not practicable, by reason of the close approach of the adjournment of the court for the summer, the motion had been necessarily postponed till now.

The consent of the now Attorney-General, Mr. Akerman, to the restoration was given by him in person, and also by writing filed.

No depositions of Mr. Merryman, or of Latham, or of Deming, were taken, nor was the power of attorney from Deming to Latham produced, or evidence given that it had been inquired for.

Mr. Lander, in support of his motion, adverting to the questionable power of an attorney to dismiss in this way, under any circumstances, and to the admitted power which every court had over its own proceedings during the term, relied on the facts set forth in the affidavit; and the fact (obvious as he conceived by the minutes of the court), that Deming was guilty of no laches; not a week having passed between the dismissal (on the 20th), unknown to him until some time afterwards, and the *actual* adjournment, the adjournment for business purposes (on the 26th), and he having proceeded at this the adjourned session at the very earliest moment practicable; Fridays being the only regular or proper motion days.

Even if there had been laches, the consent of the Attorney-General to restore, given personally and by writing, cured them. The party interested to set up laches, if there was any, admitted that there was none; that there had been a mistake. But there were no laches. On the contrary, Deming had been as prompt as possible.

Mr. Justice SWAYNE delivered the opinion of the court.

A motion has been made on behalf of Deming to reinstate

this case upon the calendar. The suit was originally instituted in the Court of Claims. A judgment was rendered in favor of the United States, and the plaintiff brought the case into this court by appeal. That case and the case of *O. B. and O. S. Latham* v. *The United States*, also brought into this court by appeal from the judgment of the Court of Claims, were supposed to involve the question of the constitutional validity of the paper circulation issued by the United States, known as *legal tender notes*. On the 1st of April, during this term, both these cases were set for argument on the 11th of that month. On that day the argument was postponed until the 18th of April. The hearing was further postponed to the 20th of April. On that day the counsel for the Lathams and the counsel of Deming united in a written motion that both appeals should be dismissed.

The court recognizing the right of the counsel to have this done, thereupon dismissed the appeals. No reason was given for this step, and no explanation was made by either counsel, except the statement that they did not wish further to trouble the court in relation to the cases. The court continued to sit until the 30th of April. The long vacation then commenced. No motion was made prior to that time by Deming, to set aside the dismissal of his appeal. On the 5th of May the mandate of this court was sent to the Court of Claims to carry the judgment into execution. This motion was filed on the 7th of November, instant. It appears by the affidavit of Deming that he was aware of the dismissal very shortly after the order was made. This must necessarily have been so. It was announced in the proceedings of the court published the next day. Nothing is produced from his counsel who made the motion. Deming states in his affidavit, that the counsel acted without his knowledge or consent. Granting this to be so, his silence after the facts came to his knowledge, must be held to amount to acquiescence and ratification. The dismissal of the appeal left the judgment of the Court of Claims in favor of the United States in full force. They can sustain no

prejudice by the overruling of this motion. We therefore lay out of view, as an element to be considered, the consent of the Attorney-General that the order of dismissal shall be rescinded.

The motion is addressed to the discretion of the court. Under the circumstances, we are all of the opinion that it ought to be

DENIED.

NEW ORLEANS RAILROAD *v.* MORGAN.

The appellee filed his petition in the Circuit Court of the United States averring that he was the holder of a large amount of bonds and coupons, secured by mortgage executed by the appellant. He prayed for executory process. Execution was awarded, and the appellant was ordered to pay the amount of said bonds and coupons.

The appellant failing to pay on demand, the railroad and its appurtenances were sold by the marshal, and the appellee became the purchaser.

The appellant then filed his petition in the said court, in the nature of an *auditâ querelâ*—averring that the award of execution had been made without notice; that the executory process, as recognized by the practice of Louisiana, could not be enforced in the courts of the United States; and that the appellee's claim could only be enforced on the equity side of the court.

The record showed the following entry:

"The court having duly considered the 'petition and exhibits submitted by the petitioner in this cause, and being satisfied that the prayer thereof cannot be granted, it is ordered and decreed that the said petition be dismissed with costs.' Judgment rendered June 14th, 1869. Judgment signed June 18th, 1869. E. H. DURELL, Judge."

On motion to dismiss the writ of error, *held*, that this was sufficiently formal, and that it was a final judgment to which a writ of error would lie.

ON motion to dismiss writ of error.

The New Orleans, Opelousas, and Great Western Railroad Company issued, on the 1st April, 1859, two thousand bonds, redeemable in 1889, for $1000 each, with interest, payable semi-annually; and to secure the payments a mortgage was executed upon the road (eighty miles), together with the depots and lands appertaining to them, &c.

On 23d February, 1869, Charles Morgan filed his petition

in the Circuit Court of the United States for Louisiana, averring that he was the holder of a certain number of these bonds, and of coupons on them overdue.

On this petition an order was made, 30th March, 1869, directing the company to pay, on three days' notice, $316,840, and in default of payment the mortgaged property to be seized and sold for the whole debt.

[The reader will observe that this proceeding, known in the civil code of Louisiana as executory process, is wholly *ex parte*. The mortgage is held to be in the nature of a confession of judgment, and the judge grants the execution, upon the application of the party, as a matter of course, upon the production of authentic evidence of the mortgage, and bonds or notes.]

The company, being in a great state of embarrassment, was unable, thus summarily called on, to pay the large amount required by the order, and a seizure of their property was made by the marshal, and notice thereof served on the 5th April.

On the same day the company filed its bill on the equity side of the said Circuit Court, asking that for causes therein assigned the proceedings in the executory process should be stayed, and Morgan be required to file a bill on the chancery side of the court, to which all the creditors might be made parties, &c.

The motion for the injunction on this bill was heard 27th April, 1869.

The property was advertised to be sold under a writ of seizure, on 25th May, 1869, and it was not until the day before this sale, to wit, on 24th May, 1869, that the judge entered the following order:

"For reasons orally assigned, it is ordered and decreed that the prayer for an injunction be denied, with costs."

At the sale on the 25th May, Morgan, in the absence of the other creditors, became the purchaser of this very large property.

Argument in support of the motion.

On the 1st June, 1869, the company for the first time appeared on the law side of the said Circuit Court, and filed its petition in the nature of an *auditâ querelâ;* averring that the executory process could not be legally ordered without notice; that the order was made without notice; without proper evidence and parties; that the subject of the suit was only cognizable in chancery, &c., and prayed an award of "a writ to Charles Morgan, expressing a willingness to hear this complaint," that the validity of the said proceedings might be examined, and that they be restrained and suspended by writ until a final order herein.

Exceptions were filed on the 8th June by Morgan, and on the 14th June the following order and entry was made:

> The court having duly considered the petition and exhibits submitted by the petitioner in this cause, and being satisfied that the prayer cannot be granted, it is ordered and decreed that the said petition be dismissed with costs.
>
> Judgment rendered 14th June, 1869. Judgment *signed* 18th June, 1869. E. H. DURELL, *Judge.*

From this judgment the present writ of error was prosecuted in this court.

The Judiciary Act, as most readers will remember, gives this court power to re-examine on writs of error, and reverse or affirm "*final* judgments *in civil actions or suits*" rendered in a Circuit Court, where the matter in dispute exceeds the sum or value of $2000.

Mr. Jenckes now moved to dismiss this writ, chiefly on the following grounds:

1. Because the record contained no bill of exceptions; nor any agreed statement of facts; nor any special verdict; demurrer to a material pleading, or demurrer to evidence.

2. Because the judgment exhibited in the record was not a final judgment.

In support of his motion, Mr. Jenckes argued, that unless a bill of exceptions was tendered to the judge for his rulings

thereon, and allowed; or unless an agreed statement of facts, or a special verdict, or demurrer to a material pleading, or demurrer to evidence be shown, there was nothing disclosed for this court to review.* And as there was thus no case made here upon which the judgment of the court could be given, and no *final judgment* of the court below set forth which could be affirmed, the proper course was to dismiss the writ of error.†

Mr. P. Phillips, contra:

Want of jurisdiction and irregularity of the writ, are the only grounds for a dismissal. Wherever error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions or otherwise. In the present case the judgment is passed upon the allegations of the petition and exhibits, as though a formal demurrer had been filed by the defendant, and the action of the court, in either sustaining or overruling a demurrer, may be examined by writ of error, without a bill of exception.‡

The proceeding instituted on the 1st June, 1869—a petition in the nature of an *auditâ querelâ*—is beyond controversy a "civil action," or "suit," and the judgment rendered on 14th, and *signed* 18th June, was obviously *final*, inasmuch as it entirely disposed of the claim to relief set up in said "civil action" or "suit" and decreed costs. The motion is, therefore, plainly unfounded every way.

Mr. Justice CLIFFORD delivered the opinion of the court.

Two principal causes are assigned in support of the motion to dismiss the writ of error:

1. That the record contains no bill of exceptions nor any agreed statement of facts or any special verdict, demurrer to a material pleading, or demurrer to evidence.

* Per Clifford, J., Pomeroy's Lessee *v.* Bank of Indiana, 1 Wallace, 592; Thompson *v.* Riggs, 5 Id. 663.

† Burr *v.* The Des Moines Company, 1 Id. 99.

‡ Rogers *v.* Burlington, 3 Wallace, 661.

2. That the supposed judgment exhibited in the record is not a final judgment.

Express jurisdiction is conferred upon this court by the twenty-second section of the Judiciary Act to re-examine, upon writ of error, and reverse or affirm final judgments in civil actions rendered in a Circuit Court, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, whether the same was brought there by original process or was removed there from courts of the several States, or from a District Court.*

Such a writ of error, when issued to a Circuit Court, removes the whole record into this court, and if all the proceedings in the suit were correct, it follows, if not from the very words of the section, certainly from the necessary construction of the same, that the judgment must be affirmed.†

Error may be shown in such a case by a bill of exceptions or by a demurrer to the declaration, or a material pleading, or it may appear by an agreed statement of facts, if made a part of the record, or in a special verdict, if put in due form; but even when all these are wanting it is no cause for dismissing the suit, because the writ of error issued to a Circuit Court under that section brings up the whole record, and their absence only shows that there is no error in the proceedings; and if there is no error in any part of the record the prevailing party in the Circuit Court is entitled to an affirmance of the judgment.‡

Cases brought here by writ of error to a State court, issued under the twenty-fifth section of the Judiciary Act, stand upon a very different footing, as in such a case it must appear on the face of the record in express terms or by necessary implication, that some one, at least, of the questions described in that section did arise in the State court, and that the question so appearing in the record was decided in the State court, as required in that section; and if it does not so appear in the record, then this court has no jurisdic-

* 1 Stat. at Large, 84. † Taylor v. Moreton, 2 Black, 484.

‡ Minor et al. v. Tillotson, 1 Howard, 287; Stevens v. Gladding, 19 Id. 64.

tion of the case, and in that event the writ of error must be dismissed; as this court, under those circumstances, has no power either to reverse or affirm the judgment rendered in the State court.*

Certain errors in judicial proceeding can only be examined in an appellate court when they are shown by a bill of exceptions,—as where proper testimony is rejected or where improper testimony is admitted,—but there may be error in the proceedings of a subordinate court apparent in the record for which the judgment will be reversed in an appellate tribunal, although they are not shown by a bill of exceptions and do not appear in an agreed statement of facts or by demurrer or in a special verdict,—as where the original process was unauthorized by law, or where the defendant was not served with process, or where the proceedings under the process were irregular and void. Such were the rules of the common law, and they have been adopted and applied in this court in repeated cases.†

Whatever the error may be and in whatever stage of the cause it may have occurred it must appear in the record or proceedings, as before explained, or be shown by a bill of exceptions, agreed statement of facts, demurrer, or special verdict.‡

Two thousand bonds for the sum of one thousand dollars each were, on the first of April, 1859, issued by the plaintiffs in error, falling due in thirty years, with interest at eight per cent. payable semi-annually in coupons for the proper amount. Their road was completed at that time from Algiers, opposite the city of New Orleans, to Berwick Bay, a distance of eighty miles, and they mortgaged the same, together with the road-bed of the main track and branches

* Suydam *v.* Williamson, 20 Id. 440; Taylor *v.* Moreton, 2 Black, 483; 1 Stat. at Large, 85.

† Slacum *v.* Pomeroy, 6 Cranch, 221; Garland *v.* Davis, 4 Howard, 131; Bennet *v.* Butterworth, 11 Id 669; Cohens *v.* Virginia, 6 Wheaton, 433; Suydam *v.* Williamson, 20 Howard, 433.

‡ 1 Chitty on Pleading, 431; 1 Tidd's Practice, 586; United States *v.* Eliason, 16 Peters, 291.

and the depots and the lands appertaining thereto, to secure the payment of the bonds. On the twenty-third of February, 1869, Charles Morgan filed his petition in the Circuit Court, averring that he was the holder of a certain number of these bonds and of a large number of coupons which were past due, and an order was made on that petition, on the thirtieth of March following, that the corporation plaintiffs, on three days' notice, pay to the petitioner, the defendant in error, two hundred and sixteen thousand dollars, and the cost of the proceedings, and that in default of such payment the mortgaged property might be seized and sold according to law for the whole of the debt secured by the mortgage. Payment, as thus summarily ordered, was not made, and thereupon a writ of seizure was issued by the court, and the whole of the mortgaged property was seized by the marshal and sold, and the petitioner became the purchaser of the same at the sale.

It is contended by the plaintiffs that the process and all the proceedings in the Circuit Court were irregular and void and that the same should be set aside, but the court will not determine that question at this stage of the controversy, because it is clear that if the views of the plaintiffs are correct, and the judgment is a final one, it must be reversed. Questions of reversal or affirmance appertain to the merits of the controversy, and will not be determined upon a motion to dismiss.

But the defendant insists that the judgment is not a final one, and that the writ of error should be dismissed on that ground.

On the first of June, 1869, the plaintiffs for the first time appeared on the law side of the Circuit Court, and filed their petition in the nature of an *audita querela*, averring that the executory process could not be legally ordered without notice; that the order was made without notice and without proper evidence and parties; that the subject of the suit was only cognizable in equity, and prayed that the validity of said proceedings may be examined, and that they be restrained and suspended by a writ until a final order herein.

Syllabus.

Hearing was had on the petition and the court having duly considered the petition and exhibits submitted by the petitioner in this cause, and "being satisfied that the prayer thereof cannot be granted, it is ordered and decreed that the said petition be dismissed with costs."

Judgment rendered June 14th, 1869. Judgment signed June 18th, 1869.

The forms of verdicts and judgments, it is true, are not controlled, even in Louisiana, by the State law, but there must be some variation from the form of a judgment as at common law to render it appropriate to the form of the process adopted in that circuit. Common law suits as well as suits in equity are commenced in that court by petition, and the judgment in this case is in a form not unusual in that court. It is called a judgment in the record and treated as such by the court and the parties, and in our opinion the writ of error ought not to be dismissed for either of the reasons assigned in the motion.

MOTION DENIED.

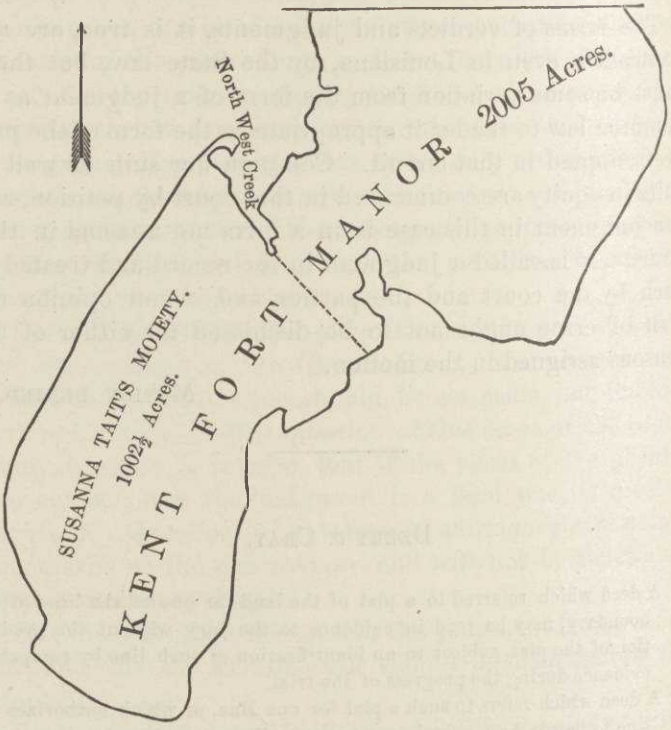
DEERY v. CRAY.

1. A deed which referred to a plat of the land for one of the lines of the boundary, may be read in evidence to the jury without the production of the plat, subject to an identification of such line by competent evidence during the progress of the trial.
2. A deed which refers to such a plat for one line, or which authorizes the line to be run by a certain person according to such a plat, is not void for uncertainty on its face.
3. In case of such a deed made a great many years ago, though the plat is not produced, it is competent to show by other proof, written or parol, or both, that such a line existed and where it was located.
4. This may be shown by long possession on each side of the line evidenced by a fence, by the parol declarations of the parties holding under the deed on each side of the line, or by any facts which clearly establish the existence of such a line and its location.
5. The erroneous instruction of the court in regard to the effect of a deed of mortgage on the plaintiff's title, is no ground for reversal, when this

court can see that the plaintiff had no title on which the jury could have found in his favor.

ERROR to the Circuit Court for the District of Maryland.*

Eliza Deery brought ejectment October 12, 1863, in the court just mentioned, to recover from one Cray an undivided fifth part of the southern half of Kent Fort Manor, an



ancient manor in Kent County, Maryland. This manor was an irregularly shaped piece of land, whose longest direction is mainly north and south, surrounded entirely by water except on the northern line, which crosses a rather narrow

* This case had been under the consideration of the court once before on error to the same court as now (5th Wallace, 795). It was then sent back for a second trial. The present writ of error was directed to the rulings of the court on that new trial.

neck of land. The diagram illustrates roughly, and without various indentations from the waters which run up into the body of the manor, its outline forms and will make obvious the fact—a fact necessarily belonging to the division of a piece of land thus shaped—that, if the manor were divided into two nearly equal parts by a line running from the western water-boundary to the eastern, all of the southern half would be surrounded by water, except the short line separating it on the north from the other half.

The plaintiff having established on the trial a title to the whole of the manor in Samuel Lloyd Chew, one of her ancestors, further traced the title by descent to Lowman Chew, who died in 1862 childless and intestate, leaving five heirs of whom she is one. The defendants, on the other hand, introduced conveyances from Samuel A. Chew, the father of Lowman Chew, for a large part of the northern half of the manor, and, it was conceded that the plaintiff had no controversy with the tenant in possession of the remainder of the northern half not conveyed by Samuel A. Chew.

The controversy was thus limited to the southern half, of which, as already said, the plaintiff claimed an undivided fifth part, and to which she had shown a *primâ facie* title.

To defeat this the defendants introduced a deed dated October 22d, 1787, from the said Samuel Lloyd Chew (from whom the plaintiff derived title) to his mother, Elizabeth Chew, which was asserted to be a conveyance of the fee of this south half of the manor.

The description of this land in this deed was in these words:

"All that moiety or half part of a tract of land called Kent Fort Manor, lying and being in Kent Island, in Queen Anne's County, being all that part of said tract of land which lies to the southwestward of a line beginning on Northwest Creek and running an easterly course, agreeable to the plat of said land made by William Brown, of Anne Arundel County, in such manner as to comprehend one-half of the number of acres of the whole tract, the said line to be run and ascertained under the direction of John Thomas, Esquire, of Anne Arundel County."

The plaintiff—objecting to this deed that the description of the land conveyed by it was so uncertain, as to render the deed void—excepted to the introduction of it, unless the plat which the deed referred to as made by Brown was produced and its lines shown. The court, however, permitted the deed to be read, subject to the right of the plaintiff to exclude the same hereafter, if upon the closing of the testimony it should not have been legally and sufficiently applied by the defendants to the maintenance of the issue on their part.

The defendant then, in order to apply it, or in other words, show that this northern line had an existence, so as to enable one to determine what was the south half of the manor, introduced certain evidence, as follows:

A map of the Kent Fort Manor, which was admitted to be part of a record of a chancery suit in Maryland, filed in 1802, and the location on the said map of Susanna Tait's moiety, admitted to be a correct location of the share of said manor assigned in said court to Susanna Tait, as sister, and one of the heirs of Arthur Bryan, in the partition of his real estate. This map had figures and lines on it showing a division of the manor into two equal parts of 1002½ acres each, and that the division was made by a straight line from a point on Northwest Creek, projecting far into the body of the tract, in a course a little south of east, to the eastern shore of the island.

Deeds showing conveyances of Elizabeth Chew (grantee in the deed whose admission in evidence we have already stated was objected to) to one T. M. Foreman, from Foreman to Philip Barton Key, and from Key to Arthur Bryan, of the same land, describing it either as the land on the said manor, purchased by Elizabeth Chew of her son Samuel, or as Elizabeth Chew's half part of the manor.

Proof by a witness over seventy years old that he knew Robert Tait, the husband of Susanna, and Kent Fort Manor, since he was eleven years old. That a fence then divided the north and south part of the manor, and said Tait held up to that fence. That after Samuel A. Chew, the father of

Statement of the case.

Lowman Chew, came to live on the north half of the manor, he and Robert Tait changed the location of the fence, and that both recognized it as the boundary between them. And there was other testimony showing the holding under these parties by this line from that day to this.

Upon the deed thus admitted and the evidence just mentioned, the court below charged (the plaintiff excepting) that the defendants were entitled to the verdict if they should find that during the life of Samuel Lloyd Chew, or after his son Samuel A. Chew acquired the interest in the tract, and before his death, and more than twenty years before suit brought, a division line or fence or boundary between the upper and lower moieties of the tract was established by the common consent, or with the common acquiescence of the said Samuel Lloyd, or Samuel A., and Elizabeth Chew, or those claiming under her, and that the said line, fence, or boundary was so established and recognized by and between the parties as and for the upper line of the lands intended to be conveyed to the said Elizabeth, by the said Samuel Lloyd, and had thenceforward and for more than twenty years before suit brought so continued to be, and that possession had ever since been continuously held by the parties possessing and claiming title on both sides of the line in recognition of and in conformity with said decision.

The introduction of the deed of 1787 from Samuel Lloyd Chew to Elizabeth Chew, and these instructions of the court on the effect of it and the title under it, made the principal point in the case; the plaintiff's position being that the deed ought not to have been admitted and that the charge was wrong.

And there was a minor matter. The defendants gave in evidence a deed of mortgage from the plaintiff Eliza Deery to one Scott of "all her undivided interest in a tract of land lying in Queen Anne's County, and containing six hundred acres, more or less, *being the same land and all the lands of which Lowman Chew died seised*, the said Eliza being one of the heirs of said Chew." This mortgage was executed Feb

ruary 7th, 1863, that is to say, ten months before the institution of this suit, and contained no provision for possession by the mortgagor till default. The instrument being thus in evidence the defendant asked the court to charge, that by its execution the plaintiff had parted with her legal title to the real estate on Kent Island, of which Lowman Chew died seised prior to the institution of the suit, and could not recover; which charge the court gave, the plaintiff excepting.

Verdict and judgment having gone for the defendant, the other side brought the case here.

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

1. As to the principal point of the case; the admission of the deed of 1787 and the instructions given upon it. If we assume that the separating and essential line was marked on Brown's plat, and had already been run and located, leaving on its south side precisely one-half of the acres in the whole tract, and that this pre-existing line was merely to be run out and ascertained by John Thomas, so as to avoid all dispute touching its location, then the court was in error in admitting the deed before the plat of Brown, so indispensable to its location, was produced and identified, or if lost, its contents proved by secondary evidence. The defendant, while offering his paper title in evidence, is to be assumed to rely on it exclusively "*pro hac vice*," and therefore its admissibility is to be tried as if the deed were executed recently.

The Maryland authorities require this proof of all lines called for in a deed, because it is a material part of the instrument without which its legal operation cannot be determined, and they are equally conclusive against the reservation made by the court below, to the effect that the plaintiff might move "to exclude the same hereafter, if upon closing of the testimony it shall not have been legally and sufficiently applied by defendants to the maintenance of the issue on their part." Whatever they may be in other States, the land laws of Maryland are stringent and technical. The principles which we maintain are settled by the Court of

Appeals of Maryland in the cases of *Fenwick* v. *Floyd's Lessee*,* of *Thomas's Lessee* v. *Turvey*,† and especially by that of *Hammond* v. *Norris*.‡

2. In regard to the minor point, the instruction about the effect of the mortgage to Scott, the court ruled, that a legal title passed as matter of law by the execution and delivery of the deed of mortgage to all the land of which Lowman Chew died seised, and yet it did not require the jury to find the recording of the mortgage nor the identity of the land conveyed.

Mr. S. T. Wallis, contra.

Mr. Justice MILLER delivered the opinion of the court.

The objection to the deed of 1787, from Samuel Lloyd Chew to his mother, Elizabeth Chew, is, that the description of the land conveyed is so uncertain as to render the deed void.

The plaintiff excepted to the introduction of this deed, unless the plat therein referred to as made by Brown was produced and its lines shown; but the court permitted the deed to be read, subject to the right of the plaintiff to exclude the same hereafter, if upon the closing of the testimony it should not have been legally and sufficiently applied by defendants to the maintenance of the issue on their part.

Now, unless the deed is so fatally defective as that no subsequent competent evidence could make it good in point of description, the court did not exceed its just discretion in permitting it to be read. In other words, if the uncertainty was a patent ambiguity, an uncertainty which inhered in the essence of the description, rendering it incapable of being applied to the subject-matter, then the deed was void absolutely, and should not have been admitted. Otherwise it was well admitted.

But this does not seem to us to be the character of the instrument. All the boundaries given are well known and easily identified, except one. This one is to separate the

* 1 Harris & Gill, 172. † Ib. 437. ‡ 2 Harris & Johnson, 130.

southwestern half of the manor from the other half. The division is to be into moieties exactly equal in quantity. Now, it is entirely clear, that if you give a surveyor the number of acres of the whole tract, and the point on the Northwest Creek where the division line is to commence, he can then determine mathematically the course, the distance, and the terminus of a straight line running an easterly direction which will divide the manor equally.

It may be conceded that if there was nothing referred to in the deed by which the commencement of this line, or any other part of it, could at the date of the deed have been fixed, that it would have presented a patent ambiguity. But if there was anything by which either the beginning or the end of the line could have been located, then the whole of it could have been located. On this point the deed seems sufficiently clear in two particulars. First, the line was to be run agreeable to the plat of land made by William Brown, of Anne Arundel County. Second, it was, with this aid, to be run under the direction of John Thomas, of said county. Now what is the meaning of this, fairly construed? It is that the grantor conveys one-half in quantity of the land. It is to be divided by a line running from the creek eastwardly, and there is a plat of this land made by William Brown, which shows this line, which is to be run out on the ground according to the plat, under the direction of John Thomas. The deed, therefore, refers perspicuously to the means which renders certain the description. "*Ambiguitas patens*," says Lord Bacon, "is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."

So here the deed on its face presented no apparent uncertainty. It is only when we come to apply it, and are unable to find or identify the plat made by Brown or the line run by Thomas, that there is any difficulty.

The cases relied on by counsel for the plaintiff to show

that the courts of Maryland have established a different doctrine, are not inconsistent with what we have said.

In *Fenwick* v. *Floyd's Lessee*, the land was described as "part of Resurrection Manor, containing 251 acres more or less." Resurrection Manor was a large tract of 4000 acres, and the sheriff levied on and sold 251 acres of it, with no other description than that just stated. Nothing else was shown by which this quantity could be located or identified, and the description was clearly a patent ambiguity on which the levy and sale was rejected as evidence.

In *Thomas's Lessee* v. *Turvey*, three levies and execution sales were rejected, the schedules of which described the land as "part of Borough Hall, containing the supposed quantity of 130 acres of land, more or less." Borough Hall was a tract of 500 acres, and there was nothing by which the location of the 130 acres could be shown, nor any evidence that it had ever been located.

In *Hammond's Lessee* v. *Norris*, the description in the deed was, "all these two parcels of land, being parts of a tract of land called Wood's Enclosure, and sold to said John Howard by Joseph Wood, one parcel containing 86 acres, the other 94 acres, as by deed duly made and recorded in Frederick County appears." The court overruled plaintiff's objection, and permitted the deed to be read in evidence, but, as it subsequently appeared that there was no such deed as that referred to on record in Frederick County, and as no other satisfactory proof was made of the location of these tracts within the larger tract of Wood's Enclosure, the court finally held that it conveyed no title.

That is just in accordance with the action of the court on this case in admitting the deed to be read in evidence, subject to the effect of it as to title, when all the evidence should be in.

This leads us next to inquire whether defendants have shown by satisfactory and competent evidence that this northern line had an existence, so as to enable us to determine what is the south half of the manor.

Upon this point it does not seem to us there can be any doubt, for though the plat of William Brown is not produced, nor is it proved expressly that the line was ever run under the direction of Mr. Thomas, yet there is as much evidence as can possibly be expected to be produced after the lapse of eighty years, that such a line was run, and that with such slight changes as the holders of the title on each side of it made by consent and for their mutual convenience, a fence has been standing along that line ever since.

And this does not depend solely upon parol evidence. The map in the chancery suit in Maryland, filed in 1802; the deeds produced, and the proof made by the ancient witness, with the other testimony produced,* we think quite sufficient to show that the line mentioned in the deed of Samuel Lloyd Chew to his mother was run and established; that with the change made by Tate and Samuel A. Chew for convenience, it has remained the line to the present time, and that the parties claiming the north and south parts of the manor have recognized that fence for over thirty-five years as the line dividing their estates.

We add further, that, as this testimony is uncontradicted, it is conclusive against the claim set up by plaintiff of any title derived from Samuel A. Chew, and of her case.†

It is unnecessary to inquire into the effect of the mortgage given by plaintiff on her title, as we have already stated that she had none on which the jury could have found a verdict in her favor, and the error, if there was one in the instructions of the court on that subject, could work her no injury.‡

JUDGMENT AFFIRMED.

* See statement of the case *supra*, p. 266, for the nature of this map, the deeds, and other proof.—REP.

† Sargent *v.* Adams, 3 Gray, 72; Bertsch *v.* The Lehigh Coal Co., 4 Rawle, 139; Munroe *v.* Gates, 48 Maine, 463; Reed *v.* Proprietors, &c., 8 Howard, 289; Noonan *v.* Lee, 2 Black, 499.

‡ Ryder *v.* Wombwell, Law Reports, 4 Exchequer, 32; Giblin *v.* Mullen, Id., 2 Privy Council Appeal, 317.

Syllabus.

SLAUGHTER-HOUSE CASES.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS *v.* THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

SAME DEFENDANTS *v.* SAME PLAINTIFFS.

HOTAIR IMBAU ET AL. *v.* THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

THE LIVE-STOCK DEALERS' AND BUTCHERS' ASSOCIATION OF NEW ORLEANS *v.* THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

PAUL ESTEBEN ET AL. *v.* THE STATE OF LOUISIANA, EX RELATIONE.

1. A writ of error has the effect to remove the record into the court granting the writ, and when the conditions prescribed in the 23d section of the Judiciary Act are complied with, the jurisdiction of the subordinate court is suspended until the cause is remanded from the appellate tribunal.
2. Neither appeals nor writs of error become a supersedeas and stay execution by virtue merely of process issued by this court; but this effect is derived from the Judiciary Act on complying with its conditions.
3. When these conditions are complied with, if the subordinate court proceeds thereafter to issue final process, it is competent for this court, in the exercise of its appellate power, to correct the error by a supersedeas, and this may be done though the application for the supersedeas is made before the return day of the writ of error.
4. Where injunctions had been granted in the District Court of the State of Louisiana, and suspensive appeals had been taken to the Supreme Court of the State, where the decrees granting the injunctions had been affirmed, and a writ of error under the 25th section of the Judiciary Act sued out to that judgment of affirmance, the writ of error and bond, though filed within ten days of the affirmance, did not authorize this court to enjoin or supersede the action of the District Court in giving effect to the said injunctions subsequent to the issuing of the writ of error. The supersedeas of the act operated alone upon the Supreme Court of the State to which the writ of error is directed under the said 25th section.
5. The appeals from the District to the Supreme Court of the State operated as a stay of execution, and suspended all jurisdiction to proceed further until the cause was remanded. But when the Supreme Court rendered

its final judgment and perpetuated the injunction, whatever conditions were annexed to the appeal were abrogated, as the appeal was then fully executed.

6. A writ of error to a State court cannot have any greater effect than if the judgment or decree had been rendered or passed in a Circuit Court; and neither an injunction nor a decree dissolving an injunction passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

THESE were motions made at the close of this term (December, 1869), in behalf of several plaintiffs in error, to enforce the *supersedeas* on writs of error which had issued in five several cases to the Supreme Court of the State of Louisiana, returnable to the term now coming (December, 1870), of this court.

The case was this:

By the 25th section of the Judiciary Act of 1789, this court has power, on writ of error, to re-examine a *final* judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of such their validity." By this same section the writ of error to such Supreme Court of the State "shall have the same effect as if the judgment or decree complained of had been rendered or passed *by a Circuit Court.*"

By a prior section of the act (the 22d) it is enacted that "*final* judgments and decrees in civil actions and suits in equity *in Circuit Courts* . . . may be re-examined, and reversed or affirmed in the Supreme Court, a citation to the adverse party being in such case signed by a judge of such Circuit Court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice." The same section proceeds:

"And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. And every justice or judge signing a citation on any writ

of error, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect," &c.

A following section (the 23d), declaring the *effect* of a writ of error to a judgment in a *Circuit* Court, says:

"That a writ of error, as aforesaid, *shall be a supersedeas and stay execution* in cases only where the writ is served, by a copy thereof being lodged for the adverse party in the clerk's office, within ten days after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days execution shall not issue in any case where a writ of error may be a supersedeas."

The same act of 1789 provides, by its fourteenth section, that this court "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statutes, *which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law.*"

An act, however, of March 2d, 1793, entitled "An act '*in addition*' to the act" above quoted, of 1789, thus declares:

"Writs of *ne exeat* and injunction may be granted by any judge of the Supreme Court in cases where they might be granted by the Supreme or a Circuit Court; but no writ of ne exeat shall be granted unless a suit in equity be commenced and satisfactory proof made that the defendant designs quickly to depart from the United States; *nor shall a writ of injunction be granted to stay proceedings in any court of a State.*"

These statutory enactments being in force, the legislature of Louisiana, A.D. 1869, in professed exercise of its power to protect the health, promote the cleanliness, and regulate the police of the city of New Orleans, passed an act by which it ordered all animals imported for consumption in the city to be landed at certain places, and all intended for food to be slaughtered there, and for the purpose of executing this law conferred on seventeen persons, as a company, the exclusive right to maintain landings for cattle and to erect slaughter-houses, &c., chartering them under the name of

The Crescent City Live-stock Landing and Slaughter-house Company.

The plaintiffs in error, being different individuals and companies, undertaking or continuing to maintain *other* landings and slaughtering houses, in opposition to those of the chartered company, that company filed petitions in certain of the District Courts of the State asserting their right to the monopoly conferred by the act, and obtained preliminary injunctions against these different parties and associations prohibiting the use of the landings and the exercise of the business of slaughtering as infringing upon the exclusive right which the new company claimed under the act. These injunctions, upon the hearing of exceptions and answers, were perpetuated.

In other of the District Courts of the State, those who asserted that the act was a violation of their rights also filed petitions against the company, upon which preliminary injunctions were perpetuated in favor of the petitioners.

The ground maintained against the act was, that it violated the fourteenth amendment of the Constitution of the United States, which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These conflicting decrees in the District Courts were all taken by what are known in Louisiana as "suspensive appeals" to the Supreme Court of the State, where judgment in all was given in favor of the new company, which asserted the validity of the act. And to these judgments of the Supreme Court of the State writs of error were taken from this court under the already-mentioned 25th section of the Judiciary Act; the writs of error, service citation, bond, &c., being all regularly taken and made, and filed within the ten days prescribed by the 23d section, which prevents the writ of error from operating as a supersedeas and stay of execution unless these be taken within that time.

Statement of the case.

Before the judgments here complained of were rendered in the Supreme Court of Louisiana, the legislature of that State created a new court, known as the Eighth District Court of New Orleans, giving to *it* exclusive original jurisdiction in cases of injunction, and authorizing the removal of such cases into it from other courts.

The parties denying the rights of the new company to the exclusive privileges granted to it by the act of 1869, being, after the writ of error from this court to the Supreme Court of the State, about to proceed to the landing and killing of cattle, &c., in disregard of the injunction, which, as they asserted, was superseded by the writ of error taken from this court, the attorney-general of Louisiana, now intervening on what till now had been a litigation between citizens in a question of private right, moved in this new court in one of the cases here the subject of writ of error to enforce the judgment rendered on appeal to the Supreme Court of the State making perpetual the injunction originally granted by the court from which the cause was removed; but the new court refused to grant this motion on the ground that the writ of error sued out to this court (the Supreme Court of the United States) operated as a supersedeas under the 23d section of the Judiciary Act. But it did enforce the *preliminary* injunctions granted by those District Courts which thought that injunctions ought to be granted; and, in addition, upon a petition in proceedings of an original character, instituted by the new corporation, and afterwards adopted by the attorney-general as representing the State, to which proceedings none of the plaintiffs in error in these present cases were parties, but which were directed against the corporation of New Orleans and the board of metropolitan police there, the new court ordered the city and the board of police to prevent all persons except the new company from landing or slaughtering cattle or selling animal meat for food.

In this state of things the plaintiffs in error in the five several cases (here designated generally and by their popular name as "The Slaughter-house Cases," but of which

the specific names are also given at the beginning of the case, on p. 273) filed petitions in this court setting forth the general history of things below, the fact that they had obtained writs of error, &c., within ten days, so as to remove the causes to this court and to be a *supersedeas to any execution;* that after this had been done the defendants in error, to defeat the operation of the writs and in disobedience of the supersedeas, applied to the Eighth District Court for orders of the sort already described to prevent all persons (except the defendants) from landing, keeping, or slaughtering any cattle; that the orders were granted as asked for, and had been executed so as to prevent the plaintiffs in error from having any benefit of the supersedeas to which they were entitled, and so far as the orders were on the original proceedings had in effect turned the corporation of New Orleans and the metropolitan board of police into sheriffs to enforce the judgments of courts which had been superseded by the writs of error. All of which would appear, the petitioners asserted, from the record of the proceedings in the Eighth District Court, and the affidavits on file with the same, submitted with the petition.

The motion in this court therefore was for an order of injunction and supersedeas to command the defendants in error and the city of New Orleans, the metropolitan board of police, in no manner to hinder or to prevent the plaintiffs in error from landing or slaughtering animals, or of having, keeping, or establishing landings or slaughter-houses, or for vending animal food in the markets of New Orleans, as fully as they could before the passage of the act of 1869, incorporating the defendants, or as the defendants were allowed to do by the said act, and that a suitable order might be made to the said Eighth District Court to prohibit it from further proceeding in the premises.

Messrs. J. A. Campbell, P. Phillips, and J. Q. A. Fellows, in support of the motion:

In England the *allowance* of the writ of error suspends all further proceedings in a cause, and on motion such proceed-

ings will be set aside. The service of notice of the allowance is only material to bring the party into contempt if he proceed subsequently.* In one case† it was held to be a contempt in the attorney in taking out execution against bail to the action, though this was merely collateral to the judgment on which the pending writ of error operated.

The effect of an appeal, though taken from a mere *interlocutory order*, was originally maintained by the House of Lords to suspend all proceedings whatever until the decision of the Lords on the appeal. In 1772 this was so far modified as to allow the appeal to be a supersedeas only as to the matter appealed from; and the Chancellor was permitted, during the recess of Parliament, to take such proceedings pending the appeal as were requisite for the preservation of the rights of the parties. In 1807, the rule, as it now exists, was adopted, to wit, that the appeal did not operate, of itself, a suspension of *any* proceedings. But this suspension was allowed, in whole or in part, by the appellate court, or by the Chancellor, according to the exigency of the case.‡

The Judiciary Act of 1789 found the rule, as established in England in 1772, in full operation, and has dealt with the whole subject. The writ may be sued out at any time within five years from the rendering of the judgment or decree; but when taken within ten days thereafter, the statute declares that it "*shall be a supersedeas and stay execution.*"

The supersedeas thus given will be protected and enforced by this court by virtue of its inherent powers as an appellate tribunal. The motion to quash an execution issued after the allowance and filing of the writ of error might be made in the court below. But it is equally competent for this court, in the furtherance of justice, to do the same

* Miller *v.* Newbald, 1 East, 662; Sampson *v.* Brown, 2 Id. 439; Meagher *v.* Vandyck, 2 Bosanquet and Puller, 370; Dudley *v.* Stokes, 2 W. Blackstone, 1183; Jacques *v.* Nixon, 1 Term, 280.

† Throckmorton *v.* Church, 1 Peere Williams, 685.

‡ Hart *v.* Mayor, 3 Paige, 383.

thing. The supersedeas order is directed not only to the parties and the executive officers, but also to the *judges* of the court.*

"It is a well-settled rule," say the Supreme Court of Louisiana,† "that after a cause is sent to this court by regular appeal, the court of the first instance can no longer take any steps in the case except such as may be necessary to transmit the record to the court above."

Decisions in Louisiana demonstrate that the cases now before this court were proper cases for suspensive appeals. In one case‡ the petitioner, asserting himself to be chief of police, in another§ to be sheriff, filed his petition for injunction against the incumbents. The petitions were granted, and orders restraining the parties incumbent from a further performance of official duties, and for delivery up of books, &c., pertaining to their offices, were made a part of the injunctive orders. Suspensive appeals were prayed for and denied in the court below, but on petition for mandamus the Supreme Court of the State made the rule peremptory, holding that the right to such an appeal had been constantly recognized; and a careful examination of the Code of Practice shows that the right to a suspensive appeal is the rule, and that it stays proceedings, save in cases specially excepted.

It would seem to be a mere conceit (though this was the idea of the Court of the Eighth District), that the matter appealed from was the perpetuated injunction, and that the appeal did not reach the preliminary injunction. Of what consequence to the defendant is his suspensive appeal, what rights does it preserve, if this be its true operation? The *ex parte* order for injunction is subsequently declared to be perpetuated. It is one and the same injunction. The right of the defendant, under the suspensive appeal, is the right

* Stockton *v.* Bishop, 2 Howard, 74; Hardeman *v.* Anderson, 4 Id. 648; Ex parte Milwaukee, 5 Wallace, 188; Railroad Company *v.* Bradleys, 7 Id. 577.

† State *v.* Judge, 19 Louisiana, 168.

‡ Ex rel. Ingram *v.* Judge, 20 Annual, 530.

§ Ex rel. Cain *v.* Judge, Ib. 574.

not to be disturbed until he can get the judgment of the appellate court; and if, notwithstanding the appeal, he can be ousted, of what consequence is it that this is done on the preliminary, and not on the final order? If the appeal does not protect his possession, then it is not suspensive.

In a judicial sense the judgment below was not affirmed, for this was the question which the law had transferred for decision to this court. In other words, the case stood as if the Act of 1789 had brought the case up from the decree of the District Court directly.

The Eighth District Court, of whose action we complain, admits that the judgment of the Supreme Court was superseded, and refused a motion on that ground to make that judgment executory, and yet gave execution on the preliminary order on what we have attempted to show was an unfounded distinction. If, therefore, the writ of error had been directly addressed to the District Court, and pending the cause in this court the court of first instance had proceeded to execute the injunction, we cannot doubt that the motion to set aside such proceedings would be granted. It would seem to follow that the same motion must be granted when the Supreme Court is intermediary.

Messrs. Black, Durant, Carpenter, and Allen, contra:

1. Writs of error to reverse judgments at law rest on a different basis from writs of error brought for the purpose of obtaining a revision of a case by the Supreme Court of the United States. Supersedeas is a law term, and has no application to a chancery proceeding.

2. In the English chancery practice the question whether an appeal shall stay proceedings rests much in the discretion of the tribunal from which the appeal is taken; and it is common to make special application to that tribunal, either to stay further proceedings or to pass an order that proceedings shall not be stayed. Such was the course in the recent English case, *Barrs* v. *Fewkes*.* The application was made

* 1 Law Reports (Eq.), 392. See, also, Harrington *v.* Harrington, Ib 3 Chan. 564.

to the court appealed from. The general rule is, that an appeal will not stay proceedings.*

3. Under the practice by which causes are removed from State courts to this court, the removal is in the nature of an appeal. It is a continuation of the same litigation, not a new suit, as a writ of error at common law. The mode of removal is only a matter of form. The substance of the matter is, that the cause is brought before a supervising tribunal for revision; and the jurisdiction of the United States Court is in its nature appellate.† The writ of error, therefore, is only a new stage in the cause; and accordingly an injunction should continue in force until the determination upon the writ of error, which is the ultimate determination of the original suit.‡

4. It is impossible to suppose that there should not be authority in a court of equity, by a decree, to hold matters in a certain fixed position until the ultimate determination of the cause. In many cases, where, if the injunction is suspended while the appeal or writ of error is pending, all the mischief will be done which is sought to be prevented: as, *ex. gr.*, in an injunction to stay waste by cutting down trees, the trees will be cut; in an injunction to restrain a nuisance affecting health, to abate and suppress a source of disease, disease and death will prevail; in an injunction to restrain the marriage of a ward, an irretrievable mischief may occur at once; in an injunction to restrain the publication of pri-

* See General Order in House of Lords in 1807, copied in 15 Vesey, 184; Gwynn *v.* Lethbridge, 14 Id. 585; Willan *v.* Willan, 16 Id. 216; St. Paul's *v.* Morris, 9 Id. 316; Waldo *v.* Caley, 16 Id. 209; Hart *v.* Mayor, &c., of Albany, 3 Paige, Ch. 381, where there is some account of the English practice; also, Walburn *v.* Ingilby, 1 Mylne & Keene, 61.

† Martin *v.* Hunter, 1 Wheaton, 349, 350; Cohens *v.* Virginia, 6 Id. 410; Nations *v.* Johnson, 24 Howard, 204, 205; Bryan *v.* Bates, 12 Allen, 213.

‡ Hart *v.* Mayor, &c., of Albany, 3 Paige, 381; Graves *v.* Maguire, 6 Id. 381; Stone *v.* Carlan, 2 Sandford's Sup. Ct. 738; Merced Mining Co. *v.* Fremont, 7 California, 131; Spring *v.* South Carolina Ins. Co., 6 Wheaton, 519; Thompson *v.* McKim, 6 Harris and Johnson, 302, 331–334; Williamson *v.* Carnan, 1 Gill and Johnson, 184, 202, 203, 209, 210; Boren *v.* Chisholm, 3 Alabama, 513; Garrow *v.* Carpenter, 4 Stewart and Porter, 336; Coleman *v* Albany Bridge, 5 Blatchford, 58.

vate letters, or any libellous matter, or to restrain the disclosure of secrets, the knowledge of which was gained in the course of a confidential employment, or anything else, the doing of which consists of a single act, if the injunction is suspended, then the whole equitable remedy is in vain.

5. So in cases at law, suppose articles have been seized on a search warrant; stolen goods, counterfeit coin, forged bank notes, implements for counterfeiting, which State laws may authorize to be seized and held for condemnation and forfeiture; and a restoration to the owner (in case of stolen goods), or a condemnation and forfeiture and destruction of them, have been decreed. If a writ of error is sued out, that supersedes the final order of restoration to the owner, or condemnation; but shall the articles therefore be given up to the person who had the guilty possession of them, or shall they still be held in the custody of the law?

6. It must be the case that there is power in a court of equity, and also, when necessary, in a court of law, to pass orders which shall have the effect to hold things as they are, and prevent any subsequent change in the situation of things which shall be disastrous to the plaintiff, or to the public, and fatal to the relief which is sought. The law of Louisiana is very explicit in this regard.*

7. What power, then, has the Supreme Court of the United States in the premises?

It has power to take such measures as may be necessary to preserve the condition of things which existed just prior to the passing of the final decree in the court below. The supersedeas attaches to so much of the final sentence as determines the ultimate rights of the party.†

8. Only *final* judgments and decrees can be re-examined and reversed on writs of error. The cases are numerous where this court has refused to entertain any application to

* See Louisiana C. P., art. 307; Delacroix *v.* Villere, 11 Louisiana Annual, pp. 39 to 41; White *v.* Cazenave, 14 Id. 57; Knabe *v.* Fernot, 14 Id. 847.

† Bryan *v.* Bates, 12 Allen, 213; Nauer *v.* Thomas, 13 Id 574; Fleming *v* Clark, 12 Id. 191.

deal with preliminary decrees. A striking case, in some respects analogous to the present, was that of *Gibbons* v. *Ogden*.*

9. The 23d section of the Judiciary Act of 1789 recognizes that preliminary injunctions shall stand. The statute provides that a writ of error shall be "a supersedeas and stay of execution, in case," &c. Executions are not to issue; that is, precepts to enforce the final judgment of the State courts are not to issue. It is only the final and ultimate rights, and not the incidental rights of parties, that writs of error are designed to vindicate.

10. The present motions are premature; for the writs of error are not returnable till the first day of next term.

11. The Act of 1793 forbids the granting of injunctions "to stay proceedings in any court of a State."†

Reply: 1. Delaying a motion for a supersedeas till the return day of the writ of error would frequently render the application fruitless. Such is not the practice.‡

2. The power given to this court by the Act of 1789 to issue all writs necessary for its jurisdiction is not taken away by the Act of 1793, which limits the writ of *ne exeat*, and restrains the issuing of an injunction to a State court to stay proceedings. There are no repealing words in this statute, and repeals by implication are not favored.§ The title of the act shows that no repeal was intended.

Mr. Justice CLIFFORD stated the case in detail, and delivered the opinion of the court.

All persons and corporations, except the Crescent City Live-stock Landing and Slaughter-house Company, are prohibited, by an act passed by the legislature of the State of

* 6 Wheaton, 448; see, also, Verden *v.* Coleman, 18 Howard, 86; Boyle *v.* Zacharie, 6 Peters, 656.

† See *supra*, p. 275.

‡ Ex parte Milwaukee, 5 Wallace, 188; Railroad Co. *v.* Bradleys, 7 Id. 577.

§ Ex parte Yerger, 8 Wallace, 105.

Restatement of the case in the opinion.

Louisiana, to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landings, yards, pens, slaughter-houses, or abattoirs at any point or place within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard, or at any place on the east bank of the river within the corporate limits of the city, or at any point on the west bank of the same above the railroad depot therein mentioned and designated.

Said act was passed on the eighth day of March, 1869, and is entitled An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate "the Crescent City Live-stock Landing and Slaughter-house Company." Though approved on the day mentioned, still the act did not go into operation till the first day of June following, but it appearing that the company created and organized under the act intended to enforce the prohibition, the plaintiffs in the suit first mentioned, on the twenty-sixth of May of that year, filed a petition or bill of complaint in the Sixth District Court of New Orleans against that company, alleging that for more than thirty years past there had existed in the parish of Orleans and the adjacent parishes the lawful trade of butchering domestic animals to supply with meat the markets of the city and the adjacent parishes, and that the regular pursuit of that trade involved the necessity of collecting, feeding, and sheltering such animals before they were slaughtered, and of preparing and preserving their meat for use or sale for food, and their hides, tallow, and other valuable parts of the animals for the market; that a thousand persons throughout that period have been engaged in that trade without interruption and unmolested prior to the organization of that company by any ordinance, regulation, or enactment from any public authority; that they, the petitioners, are duly incorporated under a law of the State, and that for more than two years they have been and are in the lawful exercise of that trade and employment, and that they have constructed and erected for that pur-

pose, and now hold within those parishes, places for landing cattle and for sheltering the same, and slaughter-houses for butchering the animals for market, and have secured stalls and such other privileges in the market-places as are necessary and convenient to the prosecution of the business; that the respondents, though they must well know that the act is in violation of the Constitution of the United States, openly declare that it is their intention to execute its provisions and to compel the complainants to abandon the objects of their incorporation, and to destroy the value of their investments, and render it necessary for them to relinquish their lawful pursuit and the prosecution of their legitimate business.

Wherefore they pray that the respondents may be enjoined from any such interference with the petitioners, and from interfering, directly or indirectly, by suit or otherwise, with their customers in purchasing, slaughtering, or butchering animals of any kind used for meat, during the pendency of the suit, and also for process, and that they, the complainants, may have judgment against the respondents in damages for the sum of ten thousand dollars.

On the same day the respondents in that suit instituted in the Fifth District Court of New Orleans a counter suit against the complainants in the suit commenced against them in the Sixth District Court of the same municipality. They allege in their petition that "the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business in that city and its environs is vested in their company, as is fully set forth in the act of their incorporation; that the corporation named in their petition, as respondents, are about to land, shelter, and protect cattle, &c., intended for slaughter, and to conduct and carry on the live-stock landing and slaughter-house business within the limits of the city as prohibited by law and in violation of their exclusive rights and privileges. Wherefore they pray that the respondents, the complainants in the suit pending in the Sixth District Court, may be enjoined and prohibited from landing, stabling, and sheltering cattle,

&c., and other animals destined for sale and slaughter in that city, and from conducting and carrying on the live-stock landing and slaughter-house business within the limits of the parishes described in their charter, and from molesting and interfering with the petitioners in the exercise and enjoyment of their exclusive rights and privileges; and they also claim damages in the sum of four thousand dollars, and for general relief."

Judgment in the first suit was rendered for the petitioners, and it was ordered that the injunction previously issued in the case against the respondents should be made perpetual. Pursuant to the suggestion of the respondents in that case, that there was error to their prejudice in the final judgment of the Sixth District Court, it was ordered "that a suspensive appeal be granted herein to the defendants, returnable to the Supreme Court of the State."

Hearing was also had in the suit commenced in the Fifth District Court by the Crescent City Live-stock Landing and Slaughter-house Company against The Butchers' Benevolent Association of New Orleans, and it was ordered, adjudged, and decreed in that case that there be judgment in favor of the petitioners, and that the corporation respondents, their president and members, be forever enjoined and prohibited, as prayed in the petition.

Exceptions having been filed to certain rulings of the court, it was also ordered, on motion of the respondents, that they, the respondents, be allowed a suspensive appeal to the Supreme Court of the State, as in the preceding case.

Separate suits were also commenced in the Seventh District Court of the city against the Crescent City Live-stock Landing and Slaughter-house Company by Hotair Imbau et al., and by the Live-stock Dealers' and Butchers' Association of New Orleans, as appears by the transcripts filed here in those cases. Injunctions were prayed and granted against the respondents in both of those cases, and they, the respondents, were allowed suspensive appeals to the Supreme Court of the State from the respective judgments.

Suit was also commenced in behalf of the State by the

Attorney-General against Paul Esteben et al., in which it is alleged that they have, without authority of law, formed themselves into a corporation by the name of the Live-stock Dealers' and Butchers' Association of New Orleans; that they, as such corporation, are about to lease or purchase a certain tract of land partly in the city and partly in the parish of St. Bernard, and that they are about to commence the erection of buildings and structures thereon for the purpose of collecting, landing, and sheltering beef-cattle designed for food, to be sold in the parishes of Orleans, Jefferson, and St. Bernard, contrary to the act of the General Assembly of the State. Wherefore the petitioner prays that a writ of injunction may issue restraining and enjoining the respondents from using that tract of land for the purpose set forth in the petition and from slaughtering any beef-cattle or any other animals intended to be sold for food in those parishes. Final judgment in the case was rendered in favor of the State, and it was also ordered, adjudged, and decreed that the respondents be forever enjoined and restrained, as prayed by the petition. Attempt was made by the respondents to secure a rehearing, but the motion was denied, and on their petition it was ordered that they be allowed a suspensive appeal to the Supreme Court of the State, as in the preceding cases.

These several appeals, together with one other which it is unnecessary to describe, were duly entered in the Supreme Court of the State, and were, by the written agreement of the parties, submitted for decision at the same time. They were submitted on the twenty-eighth of January, 1870, and the opinion of the appellate court was delivered on the eleventh of April following. Pursuant to that opinion the judgment of the Sixth District Court, as rendered in the first case, was reversed, and the directions of the Supreme Court of the State were that the injunction granted by the subordinate court should be dissolved, and that the demand of the petitioners should be rejected with costs in both courts. They also rendered a judgment of reversal in the same form and with the same directions in the third and

fourth cases, being the two appeals from the judgments rendered in the Seventh District Court. Judgments of affirmance were also rendered on the same day in the second and fifth cases, in the order herein adopted, with costs of appeal.

Where the decision in the court below sustained the pretensions of the Crescent City Live-stock Landing and Slaughter-house Company the judgment of the subordinate court was affirmed, but the judgment of the subordinate court was reversed in each case where the decision of the subordinate court was adverse to those pretensions, and the injunctions in those cases were dissolved.

Petitions for rehearing were filed by the losing parties, on the twenty-sixth of April, 1870, and on the ninth of May following an entry was made in each case, that the petition for rehearing was refused. Writs of error to the State court were subsequently prayed by the same parties, and on the thirteenth of May last the writs of error were allowed by the Associate Justice of this court allotted to that circuit, and they were duly filed on the sixteenth day of the same month, as appears of record.

Filed, as the writs of error were, within ten days from the date of the entry refusing the petition for rehearing, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas and stay execution, under the twenty-third section of the Judiciary Act. Doubts were at one time entertained upon that subject, but since the decision in the case of *Brockett* v. *Brockett*,* the question must be considered as settled, in accordance with the views of the plaintiffs.†

Sufficient bonds were given in each of these cases, which is necessary in every case, in order that the appeal or writ of error may operate as a supersedeas and stay execution on judgments removed into this court for re-examination. What is necessary is that the bond shall be sufficient, and when it is desired that the appeal or writ of error shall operate as a supersedeas the bond must be given within ten days from the date of the decree or judgment.‡

* 2 Howard, 238. † Rubber Co. *v.* Goodyear, 6 Wallace, 155. ‡ Ib.

Suppose the writs of error were seasonably sued out and that they operate in each case as a supersedeas and stay execution, as provided in the twenty-third section of the Judiciary Act, still the court is of the opinion that the several motions under consideration must be denied upon other grounds, and for reasons which are entirely satisfactory.

Controversies determined in a State court which are subject to re-examination in this court, are such, and such only as involve some one or more of the questions enumerated and described in the twenty-fifth section of the Judiciary Act, and which have passed to final judgment or decree in the highest court of law or equity of a State in which a decision in the suit could be had, as provided by the constitution and laws of the State. Appeals were taken in the cases before the court from the respective District Courts, where they were commenced, to the Supreme Court of that State before the writs of error granted by this court were sued out, and the decrees or judgments brought here for re-examination are the final decrees or judgments of the Supreme Court of the State in those cases.

Writs of error issued under the twenty-fifth section of the Judiciary Act have the same effect as if the judgments or decrees were rendered in a Circuit Court, and they operate as a supersedeas and stay execution only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, from the date of the judgment or decree.*

Such a writ of error is in the nature of a commission by which the judges of one court are authorized to examine a record upon which a judgment or decree was given in another court, and on such examination to reverse or affirm that judgment or decree. When regular in form, and duly served, the writ of error operates upon the record of the court to which it is addressed in the case described in the writ, and it has the effect to remove that record into the

* 1 Stat. at Large, 85.

court granting the writ of error and to submit it to re-examination, and the twenty-third section of the Judiciary Act provides to the effect that where all the conditions prescribed in that section concur in the case the jurisdiction of the court where the record remained when the writ of error was sued out and served shall be suspended until the cause is determined by or remanded from the appellate tribunal.*

Exceptional cases arise where the judgment or decree given on appeal in the highest court of a State is required by the law of the State to be returned to the subordinate court for execution, and in such cases it is held that the writ of error from this court may operate as a supersedeas, if granted and served at any time within ten days from the return entry of the proceedings in the court from which the record was removed, but in all other cases the writ of error must be issued and served within ten days from the date of the judgment or decree, in order that it may operate as a supersedeas and stay execution.†

Appeals and writs of error do not become a supersedeas and stay execution in the court where the judgment or decree remains by virtue of any process issued by this court merely as such, but they are constituted such by the act of Congress when the conditions prescribed in the twenty-third section of the Judiciary Act are fulfilled. Where those conditions are complied with the act of Congress operates to suspend the jurisdiction of the court to which the writ of error is addressed, and stay execution in the case pending the writ of error and until the case is determined or remanded.‡

Power to issue a supersedeas to a judgment rendered in a subordinate court does not exist in this court where the writ of error is not sued out and served within ten days from the

* Cohens *v.* Virginia, 6 Wheaton, 410; Suydam *v.* Williamson, 20 Howard, 427; Barton *v.* Forsyth, 5 Wallace, 192.

† McGuire *v.* Commonwealth, 3 Wallace, 386; Gelston *v.* Hoyt, 3 Wheaton, 246; Green *v.* Van Buskerk, 3 Wallace, 450.

‡ Hogan *v.* Ross, 11 Howard, 296; United States *v.* Addison, 22 Id. 183; Hudgins et al. *v.* Kemp, 18 Id. 535; Adams *v.* Law, 16 Id. 148.

date of the judgment, except where the aggrieved party is obliged to sue out a second writ of error in consequence of the neglect of the clerk below to send up the record in season, or where the granting of such a writ is necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the district.*

Undoubtedly the writs of error in these cases were seasonably sued out and served, and it is equally clear that the parties in whose favor they were granted complied in each case with all the conditions prescribed in the act of Congress as necessary to give the writ effect as a supersedeas and stay execution, as contended by the plaintiffs in the pending motions. Such proceedings operate as a stay of execution, and it is well settled that if the subordinate court, under such circumstances, proceeds to issue final process, it is competent for this court to issue a supersedeas, as an exercise of appellate power, to correct the error.†

Doubt upon that subject cannot be entertained where it appears that the court to which the writ of error was directed has made the return of the same to the proper term of the court, pursuant to the commands of the writ, and the same has been duly entered on the calendar. Objection is made, however, that the motions before the court are premature, as the return day of the writ of error is the first day of the next term, but we are of the opinion that the court possesses the power to grant a remedy in such a case even before the return day of the writ of error, where it appears that the court to which it was addressed has made return to the same, and that the plaintiff has filed in the clerk's office a copy of the record duly certified as required by law.

Except in a case of urgent necessity the court, in the ex-

* Hogan *v.* Ross, 11 Howard, 296; Ex parte Milwaukee Railroad Co., 5 Wallace, 188; Stockton et al. *v.* Bishop, 2 Howard, 74; Wallen *v.* Williams, 7 Cranch, 279; Saltmarsh *v.* Tuthill, 12 Howard, 389; Hardeman *v.* Anderson, 4 Id. 640.

† Stockton et al. *v.* Bishop, 2 Howard, 75.

ercise of a proper discretion, might well decline to exercise the power before the return day of the writ, but the better opinion, we think, is that the jurisdiction for such a purpose attaches from the time the party in whose favor the writ of error is granted has complied with all the conditions prescribed in the act of Congress to make the writ of error operate as a supersedeas and stay of execution.*

Grant all this, still the court is of the opinion that the motions cannot be granted, as it is conceded that nothing has been done by the Supreme Court of the State since the writs of error were served and became a supersedeas, inconsistent with the prohibition contained in the act of Congress which gives the writs of error that effect. Argument upon that topic is unnecessary as the affidavits filed in support of the motions affirm nothing of the kind, nor do the plaintiffs set up any such theory.

Incorporated as the respondents in the motions are by the General Assembly of the State, they claim the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits described and the privileges granted in the act giving them corporate powers. On the other hand, the plaintiffs contend that the act granting them such exclusive privileges is in violation of the Constitution of the United States, and void, and that they, the plaintiffs, have equal right to establish a live-stock landing, and to erect slaughter-houses, and to conduct and carry on that business as if no such special privileges had been granted to the respondents.

Injunctions were obtained by each party against the other in the courts where the suits were commenced, but appeal was taken, in each case, by the losing party, to the Supreme Court of the State, where the injunctions previously granted against the respondents in the motions were dissolved and those previously granted against the plaintiffs were made perpetual. Judgments of reversal on the one side and of affirmance on the other were accordingly rendered by the

* Railroad Co. v. Bradleys, 7 Wallace, 575.

Supreme Court of the State in the respective causes, as before explained, and it is to those judgments and to that court that the writs of error in question were directed and addressed. Those judgments remained in the Supreme Court of the State when the respective writs of error were sued out and became a supersedeas and stay of execution, and the records show that that court has neither reversed nor modified the judgments, nor any one of them, nor has that court done anything to vary or impair the rights of the parties or to carry the judgments into effect.

Subsequent to the commencement of these several suits, but before the judgments were rendered in the Supreme Court, the General Assembly of the State created another court in that city, called the Eighth District Court, and conferred upon that tribunal the exclusive original jurisdiction of injunction causes, and also made provision in the same act for the removal of such causes from other courts to that jurisdiction.

Supersedeas writs of error having been sued out by the plaintiffs to the respective judgments rendered in the Supreme Court, they claimed that the injunctions against them granted by that court were inoperative, and their theory was and still is that the writs of error had the effect to dissolve or suspend the injunctions granted by the Supreme Court of the State and to restore and render operative the injunctions decreed in the subordinate courts.

Governed by these views, the plaintiffs denied that the respondents could claim to exercise any such exclusive privileges as those described in their charter, and proceeded to make the necessary preparations for carrying on the same business. Opposite views were entertained by the respondent corporation and by the State authorities, and especially by the attorney-general, and for the purpose of testing the question he moved in the Fifth District Court that the fifth case embraced in the motions, as here classified, should be removed into the Eighth District Court, and the motion was granted.

Application was then made by him to the latter court to

enforce the judgment rendered on appeal in that case by the Supreme Court of the State, making perpetual the injunction originally granted by the court from which the cause was removed, but the court refused to grant the motion, because, as the court held, the writ of error sued out in the case operated as a supersedeas.

Attempt is not made to call in question the correctness of that decision, but the attorney-general on the same day obtained a rule in that court against all the respondents in that case, except one, to show cause, if any, why they should not be punished for contempt, as having violated the injunction granted in the case before the same was appealed to the Supreme Court of the State. Service was made under the rule and the respondents appeared, and were fully heard, but it appearing that the respondents had acted under the advice of counsel, the court refused to inflict any punishments. Directions, however, were given to the sheriff in the form of an order to enforce the preliminary injunction granted by the Fifth District Court.

Proceedings of an original character were also instituted by the present respondents in the same District Court, in which they prayed that the board of metropolitan police might be enjoined to prevent all persons, except the petitioners in that case, from conducting or carrying on the live-stock landing and slaughter-house business within their chartered limits. Accompanying that petition was an affidavit of merits, and upon that petition and affidavit an injunction was granted as prayed.

Three days later, to wit, on the sixth of June last, the attorney-general intervened for the State in the suit and adopted the petition and prayed that the injunction might be made perpetual. Various motions were made by parties opposed to the proceedings to dissolve or modify the injunction, but they were all overruled and denied by the court. No appeal was taken to the Supreme Court of the State, nor does it appear that any attempt was made by the respondents, in any form, to cause the proceedings to be re-examined in the court of last resort. They regarded it as unnecessary

to seek any such revision of the proceedings, as they insist that the legal effect of the writ of error issued from this court to the Supreme Court of the State was to vacate the injunction granted by the latter court and to continue in force the suspensive features of the appeals allowed by the subordinate courts.

Beyond doubt, the appeal in the form granted by the subordinate court operated as a stay of execution, and suspended the jurisdiction of the court to proceed further in the cause until the same should be determined or remanded, but the Supreme Court rendered a final judgment in the case and granted a perpetual injunction.

Whatever conditions were annexed to the appeal in the subordinate court were abrogated by the final judgment of the appellate tribunal, as the appeal was then fully executed. Had no writ of error been granted by this court the plaintiffs, it is presumed, would admit the correctness of that rule, but they insist that the effect of the writ of error, if made a supersedeas, is that it suspends the judgment of the Supreme Court and leaves the judgment of the subordinate court in full operation during the pendency of the writ of error.

Independent of statutory regulations, the term supersedeas has little or no application in equity suits, as the rule is well settled in the English courts that an appeal in chancery does not stop the proceedings under the decree from which the appeal was taken without the special order of the subordinate court.*

Proceedings are stayed in the courts of New York by appeal in a chancery suit to the extent that if the party desires to proceed, notwithstanding the appeal on the point from which the appeal was taken, he must make application to the chancellor for leave.†

Different rules upon the subject prevail in different jurisdictions, but the act of Congress provides that appeals in the Federal courts shall be subject to the same rules, regula-

* General Order, 15 Vesey, 184; Waldo *v.* Caly, 16 Id. 209; Willan *v.* Willan, 16 Id. 216; 2 Daniels's Chancery Practice, 1547.

† Green *v.* Winter, 1 Johnson's Chancery, 80.

tions, and restrictions as are prescribed in law in case of writs of error.*

Appeals do not lie from a State court to this court in any case, as the act of Congress gives no such remedy. Rules and regulations prescribed by law of course control and furnish the rule of decision, but it seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court denying an application for an injunction does not operate as an injunction or stay of the proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity.†

Separate examination of the several cases before the court as respects the effect of the writs of error upon the judgments removed into this court, may well be omitted, as the plaintiffs were the losing party in all the appeals from the courts of original jurisdiction to the Supreme Court. They prevailed in three of the suits in the District Courts, but they were defeated in the Supreme Court in all the cases.

Viewed in any light it is clear that a writ of error to a State court cannot have any greater effect than if the judgment or decree had been rendered or passed in a Circuit Court, and it is quite certain that neither an injunction nor a decree dissolving an injunction passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

Judgments and decrees of the Circuit Court are brought here for re-examination, and so are the judgments and decrees of a State court, and the only effect of the supersedeas is to prevent all further proceedings in the subordinate court

* 2 Stat. at Large, 244.

† Hart *v.* Mayor, 3 Paige, 381; Graves *v.* Maguire, 6 Id. 380; Merced Mining Co. *v.* Fremont, 7 California, 131; McGarrahan *v.* Maxwell, 28 Id. 91; Louisiana Code of Practice, art. 307; Delacroix *v.* Villere, 11 Louisiana Annual, 39; White *v.* Cazenave, 14 Id. 57; Knabe *v.* Fernot, 14 Id. 847.

except such as are necessary to preserve the rights of the parties.

Reference is also made to the fifth section of the act of the second of March, 1793, as conferring power upon this court to enjoin the proceedings in the Eighth District Court, but the conclusive answer to that suggestion is that there is no appellate relation between a subordinate State court and the Supreme Court of the United States, and where no such relation is established by law the prohibition of that section—"*nor shall a writ of injunction be granted to stay proceedings in any court of a State*"—applies to the Supreme Court as well as to the Circuit Court.*

Final judgments or decrees in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, may be removed here for re-examination if they involve some one or more of the questions specified in the section conferring the jurisdiction, and otherwise come within the rules which regulate that jurisdiction. Appeals lie, it is conceded, from the District Courts of that State to the Supreme Court, as fully appears also from the records in these suits, which shows to a demonstration that this court possesses no power to grant any relief to the plaintiffs under the act of Congress on which these motions are founded.

MOTIONS DENIED.

Mr. Justice BRADLEY, dissenting.

I dissent, with some diffidence, from the opinion of the court, on the following grounds:

1st. That notwithstanding the act of Congress declares that a writ of error shall be a supersedeas if certain conditions are performed, the judgment of the court has the effect of leaving many classes of decrees and judgments *in equity*, though appealed from, entirely effective and operative between the parties, whereas the writ of error ought to sus-

* 1 Stat. at Large, 335.

pend the effect and operation thereof until the case is heard in this court.

2d. That the judgment of this court will have the effect to allow subordinate State courts to evade the supersedeas of a writ of error in all cases where the court of last resort remits the record to them for execution. The judgment of this court disclaims all jurisdiction over the acts of the subordinate State courts, and thereby, in my judgment, surrenders a very important power necessary to the effective support of its appellate jurisdiction.

3d. That the judgment of the court remits the practice on this subject substantially back to the practice of the English courts of equity, in which it is conceded that an appeal does not suspend proceedings nor act as a supersedeas on the proceedings in the court appealed from: and, in effect, departs from the act of Congress, which declares that a writ of error or an appeal in the Federal courts *shall* be a supersedeas.

4th. That the effect of the judgment of the court is to disclaim its just control over the *parties to the record.*

WASHINGTON RAILROAD *v.* BRADLEYS.

1. It is a gross irregularity to hear a case without some terms imposed, on an amended bill filed after replication, without leave of the court.
2. So it is an irregularity to go to hearing without replications to answers.
3. A petition by "way of cross-bill," which makes nobody defendant, which prays for no process, and under which no process is issued, is a nullity.
4. A decree on such a bill, praying the reverse of what the original bill prayed, is fatally erroneous. Nor will the fact that objection was not made below, cure a combination of errors so large and so grave as above indicated.

APPEAL from the Supreme Court of the District of Columbia, in a case of a bill by the Washington, Alexandria, and Georgetown Railroad Company, against the City of Wash-

ington, and J. H. and A. T. Bradley and others, amended by the addition of new defendants; and of a *petition* "by way of cross-bill," made by one of the respondents in the case, referring to the case by title, and stating that "the facts fully appear in the case," praying the reverse of what the complainant had prayed, but not making anybody defendant, nor praying process, and under which no process was obtained; the decree appealed from having been a decree in accordance with the prayer of this "cross-bill." The particulars of the case, which was argued here by Messrs. *Bartley, Bradley, and Davidge, for the appellants; and by Messrs. Brent, Crittenden, and Durant, contra*, are perhaps sufficiently indicated by

Mr. Justice SWAYNE, who thus gave them and delivered the opinion of the court:

The appellants are the complainants in the case. The original bill made the corporation of Washington and Joseph H. Bradley and A. Thomas Bradley only, defendants. The prayer of the bill was that the defendants, Joseph H. and A. T. Bradley, should be enjoined from selling, under a deed made to them as trustees for the security and benefit of the corporation of Washington, the railroad described in the deed of trust, and that the deed should be ordered to be delivered up and cancelled. The defendants answered. The complainants filed a replication. A preliminary injunction was granted forbidding the sale of the road. Subsequently the complainants filed an amended bill, whereby they made George W. Riggs and A. T. Keickover, partners, under the name of Riggs & Co., James C. McGuire, D. P. Lengham, and James P. Kibbreth, defendants, in addition to those made by the original bill. All the defendants were duly served with process except Lengham and Kibbreth. McGuire answered. Kibbreth also answered, and thus became a party to the record. Lengham did not appear. The corporation of Washington and J. H. and A. T. Bradley failed to answer the amended bill. Riggs & Company also failed to answer, and it was ordered, as to them, to be taken as confessed. No such order was made as to the corporation of Washing-

ton and the trustees in the deed of trust. No further replication was filed by the complainants. Testimony was taken on behalf of the corporation of Washington. The case was referred to an auditor. In this condition of things the defendant Kibbreth filed a cross-bill, wherein he alleged that he was the holder of certain securities indorsed by the corporation of Washington and secured by the deed of trust, and prayed that the preliminary injunction should be dissolved, and that the trustees should be required to proceed to sell the trust property for the benefit of the *cestui que trusts*. This bill makes no defendants, and asks for no process. None was issued. It appears by the record that the cause came on to be heard upon this cross-bill, and was reserved to the court in bank. In that court it appears that the case came on to be heard on the answer and cross-bill of Kibbreth, the original and amended bills of the complainants, the answers, exhibits, and testimony, and that the court decreed that the preliminary injunction should be dissolved; that the trustees should proceed to sell the trust property in the manner prescribed by the deed of trust, and bring the proceeds of the sale into court, and that all further questions arising in the case should be reserved for future consideration and adjudication. This appeal is prosecuted to reverse that decree.

The record is voluminous; we have adverted to its contents only so far as is necessary to develop the points which we think must control the determination of the case. Several important questions involving the merits of the controversy, have been argued by the counsel, both in the briefs submitted and at the bar. In our view of the case it is needless to examine them. We have, therefore, given them no consideration.

The reference to the auditor was not revoked and he made no report. For aught that appears to the contrary, the case is still before him for the purposes specified in the order.

The amended bill was filed without the leave of the court,

after the cause was regularly at issue. This was in violation of the 29th rule of equity practice prescribed by this court. That rule provides as follows:

"After replication filed the plaintiff shall not be permitted to withdraw it, and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introducud into the bill, and upon the plaintiff submitting to such other terms as may be imposed by the judge for speeding the cause."

If the defendants, without laches on their part, had moved the court to strike this bill from the files, it must have been done. After the testimony was taken, without the objection having been made, the case presented a different aspect. But even then such action should have been taken and such terms imposed as would have vindicated the rules of practice by which the court was governed and the regular order of proceeding. To hear the case without any order on the subject was a gross irregularity.

If the amended bill is to be considered as in the case, the omission to file replications to the answers of McGuire and Kibbreth was also an irregularity. The 66th rule is explicit on the subject. The replication is necessary to put the cause at issue. If the complainant omit to file it within the time limited the defendant is entitled as of course to an order for the dismissal of the suit, unless the court or a judge thereof, upon cause shown, shall allow it to be filed *nunc pro tunc* upon such terms as it may be deemed proper to impose.

Parties defendants are as necessary to cross-bills as to original bills, and their appearance in both cases is enforced by process in the same manner.* Without the aid of a cross-bill the court could not have decreed the sale of the property covered by the trust deed. It could only have dis-

* 3 Daniell's Chancery Practice, 1747.

missed the bills of the complainants and have denied the relief sought.* But the cross-bill was a nullity. It was not before the court, and should have been stricken from the files. The complainants prayed for an injunction forbidding the trustees to sell. The court, upon the cross-bill, and according to its prayer, decreed a sale. This error is inevitably fatal to the judgment given.

It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross-bill the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills. That is what was done by the decree under consideration.

There is a large class of cases in which it has been held that objections not taken in the court below will not be allowed to be taken in this court. We do not intend to impugn this doctrine or to narrow the limits of its just operation. But where there is such a combination of errors, and errors of so grave a character as those which mark the record in the case before us, this principle can have no application.

DECREE reversed, and the cause remanded for further proceedings

IN CONFORMITY TO THIS OPINION.

* Wickliffe *v.* Clay, 1 Dana, 589; Canochan *v.* Christie, 11 Wheaton, 446; Eyre et al. *v.* Potter et al., 15 Howard, 56; Price *v.* Berrington, 7 English Law and Equity, 254.

GUNNELL *v.* BIRD.

1. In stating partnership accounts, where one partner has had entire charge of the business, he is to be debited with the whole capital placed in his hands, as well as with the proceeds of sales realized by him.
2. If part of the capital consisted of stock, which has been used in the business, or disposed of and the proceeds charged against him, he should be credited with such stock as a disbursement, to the amount at which it was originally charged against him.
3. An allegation in an answer entirely impertinent to the bill cannot be used as evidence for the defendant, even though the plaintiff neglect to file a replication.

APPEALS from the Supreme Court of the District of Columbia; the case, as clearly proved, or admitted by the parties, being thus:

On the 1st of May, 1845, Gunnell on one side and Bird and Hepburn on the other, entered into copartnership in the lumber business as equal partners, entitled to an equal share of the profits. Gunnell was the active partner, and put in, as his part of the capital, a stock of lumber valued at $6627.56, and Bird and Hepburn put in $7775.65 in cash, making a joint capital of $14,403.21. The business was carried on for four years, during which period the gross amount of sales was $93,471.11, and the disbursements were, for lumber purchased of others, $55,146.55; for general expenses, $12,242.95; for lime, $732.18; and for rent, not contained in the other accounts, $111, making a total of $68,232.68. At the termination of the partnership the stock on hand, books, and unsettled accounts, were turned over by Gunnell to Bird and Hepburn, who collected $7775.68 (including what they had previously received), and retained in hand bad and uncollected debts to the amount, in 1852, when, as hereafter mentioned, the case came before the auditor, of $5461.56.

The parties were unable to agree upon a settlement of the partnership accounts, and Bird and Hepburn filed their bill in August, 1850, against Gunnell to obtain an adjustment. After answer an auditor was appointed, who reported in

Statement of the case.

August, 1852, that Gunnell was indebted to Bird and Hepburn in the sum of $3001.56, with interest from the 1st of May, 1849, the time of the dissolution of the partnership. The auditor stated the account thus:

The total sales during the partnership made by the defendant, .			$93,471 11
The total amount of lumber and other articles purchased by the defendant for carrying on the business, ...	$55,146 55		
And as increased by lime purchased, not included in the above amount,	732 18		
		$55,878 73	
Amount of the expenses of conducting the business, ...	$12,242 95		
And as increased by rent still unpaid, and not included in the above, ...	111 00		
And by interest on the difference of capital, ...	183 52		
		12,537 47	
Amount of bad and outstanding debts, property, &c., . . .		5,461.56	
			73,877 76
			$19,593 35
Gunnell's capital, ...		$6,627 56	
Bird and Hepburn's, . . .		7,775 65	
			14,403 21
Net profit, ...			$5,190 14
Half to each, ...			$2,595 07
Gunnell's capital, ...	$6,627 56		
His share of the profits, . . .	2,595 07		
		$9,222 63	
Bird and Hepburn's capital, . .	$7,775 65		
Their share of the profits, . .	2,595 07		
Interest on difference of capital, .	183 52		
		10,554 24	

Capital and profit and interest due Bird and Hepburn:

Bird and Hepburn, ...	$10,554 24
Collected by them since the dissolution, and amount of their individual accounts on the books of the complainants, as shown, ...	7,552 68
Balance of cash due to the complainants in the defendant's hands, ...	$3,001 56

Both the complainants having died, a bill of revivor was afterwards filed; a pure bill of revivor, stating only the facts necessary to have the cause revived, and the proceedings continued from the point reached when the complainants died, and concluding with the prayer for a writ to the defendant *to show cause* why the suit should not be revived.

Rule No. 56, regulating equity proceedings, provides in such case that if no cause to the contrary be shown by next rule-day, "the suit shall stand revived, as of course." The subpœna was served in June, 1859. No answer was made by the defendant until October following, and so the suit stood revived on the first Monday of August at latest.

Then the defendant, in October, filed an answer to the bill of revivor, admitting the facts stated in the bill, but going on to state new matter as to the conduct of the complainants in regard to the books, &c., and setting up that Bird and Hepburn should be charged with all the bad and uncollected debts, because by the use of due diligence they could have collected them, but had failed to do so.

To this answer no replication was put in. The matter being referred again to the auditor, he simply affirmed his old report.

Exceptions were taken to the report by both parties, but it was confirmed by the special term of the court, whose decision was affirmed by the general term. From that decision an appeal was taken to this court, and the question now before this court was, whether the auditor's report was correct.

Mr. J. H. Bradley, in support of it.

Messrs. Carlisle and McPherson, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The opinion of the court is that the auditor committed an error, and we should refer the cause back for a further report if we deemed it necessary to do so; but the facts are confined within such narrow limits, and are so clearly ascer-

tained by the proofs and admissions of the parties before the auditor, that we deem it a useless formality.

The error of the auditor consists in not charging Gunnell with the capital contributed by the partners and placed in his hands, and not crediting him with the cost of the lumber originally contributed by himself.

Being the active managing partner, it is plain that he should be charged with—

First, the whole capital, ...	$14,403 21
Secondly, the proceeds of sales, ...	93,471 11
Amounting in all to	$107,874 32

He received these amounts, and he should be charged with them.

On the other hand, it is equally plain that he should be credited with—

First, the lumber on hand when the business was commenced, he having disposed of it, and being charged with the proceeds instead.

This, as charged to him, was	$6,627 56
Secondly, the amount paid out by him to others for lumber, which was	55,146 55
Thirdly, the general expenses of the business, . .	12,242 95
Fourthly, the item paid for lime, ...	732 18
And the item paid for rent, ...	111 00
Amounting in all to	$74,860 24
And leaving a balance in hand, at the conclusion of the business, of	$33,014 08

The original capital had been increased to this sum, and had the assets all been good, there would have been a clear profit of $18,610.87. But the bad and uncollected debts being deducted, the profit is reduced to $13,149.31; one-half of which, besides his or their original capital, belonged to each party.

Gunnell's capital was	$6,627 56
His half of the profits was	6,574 65
Total amount due to Gunnell, ...	$13,202 21
Bird and Hepburn's capital was . .	$7,775 65
Their half of the profits was	6,574 66
Total amount due to Bird and Hepburn, . . .	$14,350 31

There remains to be adjusted a question of interest due to Bird and Hepburn for having contributed more capital than Gunnell whilst the business was being carried on. The auditor makes this interest $183.52, one-half of which should be deducted from the share of Gunnell, and added to that of Bird and Hepburn. This would reduce the former to $13,110.45, and raise the latter to $14,442.07.

Now the books show that Bird and Hepburn drew and collected only $7552.68. This left a balance still due them of $6889.39 to be accounted for by Gunnell.

In this account neither party is charged with the bad and uncollected debts. They are simply deducted from the profits, and the loss is thus equally divided. It is claimed by the defendant that Bird and Hepburn should be charged with the whole of this loss because they had the securities and failed to collect them, when, by the use of due diligence, they might have done it. This fact does not appear in the case except by the unsupported allegation of the defendant, made in his answer to the bill of revivor. This portion of the answer was entirely impertinent to the bill, which was strictly and purely a bill of revivor. No formal replication was required to avoid its effect as evidence in the cause.

The result is that the complainants are entitled to a decree against the defendant for the sum of $6889.39, with interest from the 1st day of May, 1849, and costs. The decree of the District Court must be REVERSED, and a decree rendered

FOR THE COMPLAINANTS ACCORDINGLY.

COOPER v. REYNOLDS.

1. It is an axiom of the law that when a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court that rendered it.
2. Proceedings to enforce a debt or demand by attachment of the defendant's property partake of the character of suits, both *in rem* and *in personam*.

Statement of the case.

3. If there is personal service of process on the defendant or personal appearance by him the case is mainly a personal action; but if in the absence of either of these his property is attached and sold, it becomes essentially a proceeding *in rem* and is governed by principles applicable to that class of cases.
4. In this class of cases the court cannot proceed without a levy on the property of the defendant, and the judgment binds nothing but the property attached.
5. The seizure of the property of the defendant under the proper process of the court is therefore the foundation of the court's jurisdiction, and defective or irregular affidavits and publications of notice, though they might reverse a judgment in such case for error in departing from the directions of the statute do not render such a judgment or the subsequent proceedings void.
6. Where there is a valid writ and levy, a judgment of the court, an order of sale, and a sale and sheriff's deed, the proceeding cannot be held void when introduced collaterally in another suit.

ERROR to the Circuit Court for the Eastern District of Tennessee, the case being thus:

The code of Tennessee of 1857–8, under its chapter on ATTACHMENTS, thus provides:

§ 3455. Any person having a *debt* or *demand* due *at the commencement of an action;* or a plaintiff *after action for any cause* has been brought, and either before or after judgment, may sue out an attachment at law or in equity against the property of a debtor or defendant in the following cases:

2. Where he is about to *remove* or has *removed* himself from the State.
5. Where he *absconds* or is absconding or concealing himself or property.

§ 3462. Attachments sued out in aid of a suit already brought shall be made returnable to the court or justice before whom the suit is pending.

§ 3469. In order to obtain an attachment the plaintiff, his agent or attorney, shall make oath in writing, stating the nature and amount of the debt or demand, and that it is a just claim, and also that *one or more of the causes enumerated in section* 3455 *exists.*

§ 3470. It is no objection to the attachment that the bill, affidavit, or attachment states, in the alternative or otherwise,

more than one of the causes for which an attachment may be sued out.

§ 3471. The officer to whom application is made shall, before granting the attachment, require the plaintiff . . . to execute a bond in double the amount claimed to be due, . . . payable to the defendant and conditioned that the plaintiff will prosecute the attachment with effect, or in case of failure pay, &c.

§ 3472. The affidavit and bond shall be filed by the officer taking them in the court *to which the attachment is returnable, and shall constitute a part of the record in the case.*

Subsequent sections of the chapter provide for publication for a fixed time in a newspaper published in the county where the suit is brought of a memorandum or notice of the attachment, and declare:

§ 3522. This memorandum or notice shall contain the names of the parties, the style of the court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which the defendant is required to appear and defend the attachment suit.

§ 3524. The attachment and publication are in lieu of personal service upon the defendant, and the plaintiff may proceed upon the return of the attachment duly levied, as if the suit had been commenced by summons.

With these enactments of the code in force, W. G. Brownlow, on the 26th September, 1863, sued out a writ of summons in trespass, in the County Court of Knox County, Tennessee, against Reynolds and others, for false imprisonment, for ejecting him from the State, &c.; damages $25,000. To this writ the sheriff returned that "he had made search and that none of the defendants were to be found in his county." On the same day that he applied for the summons, and before the same person, one M. L. Hall, who, as clerk, had issued the summons in the trespass suit, Brownlow filed an affidavit, for an attachment against the property of Reynolds and the others. The affidavit, after giving the names of the parties to the summons, ran thus:

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"The plaintiff makes oath that he has a good cause of action against the defendants herein named in which he will be entitled to recover a very large sum. He further swears that all of defendants have *fled from this State* OR that they so *abscond or conceal* themselves that the ordinary process of law cannot reach them; that he has this day instituted an action of trespass against them claiming $25,000. Plaintiff therefore prays for an ancillary attachment against their property in aid of this his suit."

An attachment bond being given in double the amount ($50,000) the attachment issued; the bond and attachment being, like the affidavit and summons had been, both dated September 26th. The attachment recited the above-given affidavit substantially as made, and directed the sheriff to attach so much of the property of Reynolds and the others as should be sufficient to satisfy the said amount of $25,000, and such estate so to secure that the same might be subject to further proceedings thereon at a court to be held on a day subsequent and specified. The sheriff returned to this last writ that he had attached all the right and title of Reynolds in and to one hundred and sixty acres of land in Knox County. Publication was ordered by the court to be made in the Knoxville Whig (a paper of the county), notifying to the defendants to appear and plead, answer or demur, or that the suit would be taken as confessed and proceeded in *ex parte* as to them. The record did not, however, set forth the notice which was published, if any was; though it did set forth the order for publication, which was entitled, "Order of publication, and *the publication as made in the Knoxville Whig;*" making it appear, perhaps, that the omission to set forth the notice was a clerical error.

The record of Brownlow's suit went on to say that the defendant, Reynolds, and the others being solemnly called to come into court, came not, but made default, and it appearing—the record proceeded—that the attachment had been duly levied on the defendant's property, and *that publication had been made according to law*, it was ordered that the plaintiff should recover his damages. These were assessed at

$25,000, and for this sum execution was ordered to issue, and that the sheriff should sell the one hundred and sixty acres of land attached. The land was accordingly sold under a *venditioni exponas*, and a deed made by the sheriff to one Cooper, by order of the purchaser. Cooper was put into possession by a writ of *haberi facias*, issued from the same court in the same proceeding. Being thus in possession, Reynolds, the original owner, brought ejectment in the court below against him. Cooper asserted title under the judicial proceedings above described. It was admitted that Reynolds had title to the land unless it had been divested by those proceedings. The record of the proceedings having been obtained from the Knox County Court, and put in evidence below, the defendant asked the court to instruct the jury:

"That the Court of Knox County had jurisdiction of attachment cases and actions of trespass, and that as it is declared in the judgment in the suit of *Brownlow* v. *Reynolds et al.* that the attachment was duly levied on the property of the defendants, and that publication had been made according to law, this adjudication was conclusive upon parties and privies, until the same should be reversed by a court of error; that the sheriff's deed to the defendant made, by virtue of the sale under and by virtue of the judgment of the Court of Knox County, communicated a good title to the premises in controversy to the defendant as against the plaintiff, and that the regularity of the proceedings in the said suit of *Brownlow* v. *Reynolds et al.* could not be collaterally inquired into in this cause."

This instruction the court refused to give, but charged the jury:

"That the summons issued in the case of *Brownlow* v. *Reynolds et al.* was not served upon the plaintiff in this suit, and that the question was whether the attachment would bring him into court; that the affidavit upon which the attachment was issued, was not made in conformity to the attachment laws of Tennessee; that it did not show the court in which suit was brought, or state specifically the cause of action or nature thereof, as required under the decisions of the Supreme Court of Tennessee, so as to connect itself with the summons in the

action of trespass; that it did not appear that any publication was in fact made, and that the Court of Knox County acquired no jurisdiction of the cause; that the attachment and proceedings thereon were not sufficient to bring Reynolds before the court; that there was no authority for rendering the judgment, and that the levy of the attachment, the judgment of the court, the sale by the sheriff, and the sheriff's deed, were null and void, and conveyed no title."

Verdict and judgment having gone accordingly for the plaintiff, the question now here, on error by the other side, was whether this instruction was correct.

Mr. Horace Maynard, with whom was Mr. T. A. R. Nelson, for the plaintiff in error:

1. The affidavit is in substantial conformity to the requirements of the code (section 3469 and section 3455, subsections 2, 5). Its words "have fled from the State," are equivalent to the words "removed from the State," in subsection 2. If not, its words "they so abscond or conceal themselves that the ordinary process of law cannot reach them," are equivalent to the words in sub-section 5, "where he absconds, or is absconding or concealing himself or property." This construction is sustained by section 3470, which provides that "it is no objection to the attachment that the bill, affidavit, or attachment states in the alternative, or otherwise, more than one of the causes for which an attachment may be sued out."

The instruction, "that the affidavit does not show the court in which suit was brought, or state specifically the cause of action or nature thereof, as required under the decisions of the Supreme Court of the State, so as to connect itself with the summons in the action of trespass mentioned," was erroneous, because it is provided in section 3472, in regard to the affidavits and bond mentioned in section 3469, that "the affidavit and bond shall be filed by the officer taking them in the court to which the attachment is returnable, and *shall constitute part of the record in the cause.*" Now in this case the affidavit was made before M. L. Hall, clerk of the

court, who issued the summons and the ancillary attachment; and the affidavit, bond, and attachment, being thus parts of the record, should be construed together and in connection with the summons, which is part of the same record. The summons, affidavit, bond, and attachment all bear the same date, viz., 26th September, 1863. The court is the same; the parties are the same; the amount of damages specified in the summons, affidavit, and ancillary attachment is the same. It is true that the affidavit does not specifically name the court in which the suit was brought, but, in view of the facts just referred to, and in view of the fact that the affidavit was deposited in and formed part of, and was brought from the records of the Court of Knox County, is it possible to doubt that it was part of the proceeding by summons and attachment?

2. The "order of publication and the publication as made in the Knoxville Whig," meant to be set out in the record, were a full compliance with the law. In addition to this it is expressly stated *in the judgment* that it appeared to the court *that the attachment had been duly levied, and that publication had been made according to law.* This is sufficient.*

3. But, however the preceding points may be, still as the general laws of the State confer jurisdiction in cases like this suit of Brownlow's was, all that the court below could properly do was to ascertain from the general laws whether the case tried in the Court of Knox County was within those laws; and having ascertained that it was, it should have presumed, *in a collateral inquiry*, and especially in reference to the action of a State tribunal, that the jurisdiction was rightfully exercised, and that the plaintiff in error acquired a valid title under the proceedings in the Circuit Court and by virtue of the sheriff's sale and deed.

Mr. J. W. Moore, contra:

The instructions asked for were rightly refused, and those

* Kilcrease *v.* Blythe, 6 Humphreys, 378; Hopper *v* Fisher, 2 Head, 253; and Cornelius *v.* Davis, Id. 97; Davis *v.* Jones, 3 Id. 603; Birdsong *v.* Birdsong, 2 Id. 289; Gunn *v.* Mason, 2 Sneed, 637.

which were given were the proper ones to give. No service was made of the summons. It is not pretended that appearance was ever made. Then the affidavit was defective every way. It don't follow, in its terms, the code. Again, in *Woodfolk* v. *Whitmore*,* the Supreme Court of Tennessee say:

"An auxiliary writ of attachment is void, unless it is stated in the affidavit and alleged in the attachment that a suit has been brought by the plaintiff against the defendant, the nature thereof, the tribunal in which it is depending, the amount of damages laid in the action, and that the cause of action is just."

Yet further: there was no publication notifying to the defendants to appear. This the code requires. In short, everything is wrong in every part of the proceeding: and deriving vitality only from statute, the judgment and sale founded on it is void. A *void* sale can be the foundation of no title, whatever one merely irregular may be.

Mr. Justice MILLER delivered the opinion of the court.

The objections taken to the proceeding in attachment under which Cooper, the defendant below, claimed title, are, 1st, that by the law of Tennessee the attachment could not be issued at the beginning of the suit where the action was *ex delicto*, but could only be issued after suit commenced; 2d, that the affidavit was defective; 3d, that there was no publication of notice, as required by the statutes.

The question of the conformity of these proceedings to the requirements of the statutes under which they were had, has been very fully discussed by counsel, and if we were sitting here as on a writ of error to the judgment of the State court under which the land was sold, we might not find it easy to affirm or reverse the judgment on satisfactory grounds, notwithstanding the abundant citation of authorities from the Tennessee courts. But we occupy no such position. The record of this case is introduced collaterally as evidence of

* 5 Coldwell, 561. And see Thompson *v.* Carper, 11 Humphreys, 542; Morris *v.* Davis, 4 Sneed, 453; Smith *v.* Foster, 3 Coldwell, 140; Haynes *v.* Gates, 2 Head. 598.

title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law. But that its applicability to the present case may be thoroughly understood, reference is made to the most important of the decided cases in this court and in the Supreme Court of Tennessee.*

It is necessary, therefore, in the present case to inquire whether the errors alleged affect the jurisdiction of the court.

It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

Jurisdiction of the person is obtained by the service of

* Kempe's Lessee *v.* Kennedy, 5 Cranch, 173; Thompson *v.* Tolmie, 2 Peters, 157; Voorhees *v.* Bank of United States, 10 Id. 449; Grignon *v.* Astor, 2 Howard, 319; Harvey *v.* Tyler, 2 Wallace, 328; Florentine *v.* Barton, Id. 210; McGoon *v.* Scales, 9 Id. 23; Stevenson *v.* McLean, 5 Humphrey, 332; Britain *v.* Cowen, Id. 315; Lee *v.* Crossna, 6 Id. 281; Kilcrease *v.* Blythe, Ib. 378; Reams *v.* McNail, 9 Id. 542; McGavock *v.* Bell, 3 Cold-

process, or by the voluntary appearance of the party in the progress of the cause.

Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.

It is to be observed that in reference to jurisdiction of the person, the statutes of the States have provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute. So also while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court.

When we come to the application of these principles to the case before us, that which leads to some embarrassment is the complex character of the proceeding which we are to consider.

Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant,

and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued, and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached properly is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction,

though the publication may have been duly made and proven in court.

Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment.

But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice.

We do not deny that there are cases which, not partaking of the nature of proceedings *in rem*, when the judgment is to have an effect on personal rights, as in divorce suits, or in proceedings to compel conveyance, or other personal acts, in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the

suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction.

It is not denied that the court had authority to issue writs of attachment against the property of persons absconding the State, and that such writs could issue in actions for torts. The court has a general jurisdiction as to torts, and attachment is one of its remedial agencies in such cases. Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction. If it is, any other error which affected a party's rights, could as well be held to affect the jurisdiction.

Such departures from the rules which should guide the court in the conduct of a cause are not errors which render its action void.

The case of *Voorhees* v. *The Bank of the United States*,* was much like this, and required stronger presumptions in favor of the jurisdiction of the court to sustain its acts than the one before us.

The defendant there, as here, held land under attachment proceedings against a non-resident who had never been served with process or appeared in the case. No affidavit was produced, nor publication of notice, nor appraisement of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of the court, all of which are specially required by the act regulating the proceedings in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects we have mentioned, and that they were not fatal in a collateral proceeding.

In the present case there is a sufficient writ of attachment, its levy and return, the judgment of the court, on trial by jury, the order to sell the property, the sale under the venditioni exponas, the writ of possession, sheriff's deed and

* Cited *supra*, p. 316, note.

actual delivery of possession under order of the court. To hold them void is to overturn the uniform course of decision in this court, to unsettle titles to vast amounts of property, long held in reliance on those decisions, and, in our judgment, would be to sacrifice sound principle to barren technicalities; and, after a careful examination of the reported cases on this subject, we believe this to be the law, as held by the courts of Tennessee.

JUDGMENT REVERSED, AND A NEW TRIAL ORDERED.

Mr. Justice FIELD, dissenting.

I dissent from the judgment in this case. I am of opinion that the State court of Tennessee never acquired jurisdiction in the case of *Brownlow* v. *Reynolds*.

SMITH v. STEVENS.

1. Under the act of Congress of May 26th, 1860, referring to the treaty of June 3d, 1825, between the United States and the nation of Kansas Indians (which reserved certain tracts of land for the benefit of particular half-breed Kansas Indians named), and granting "the title, interest, and estate of the United States," to the reservees mentioned in that treaty, and providing that the Secretary of the Interior, when requested by any one of the Indians named, "is hereby authorized" to sell the piece reserved for such Indians; the reservees had no authority to sell the lands independently of assent by the Secretary of the Interior; and any such sale was void.
2. A statute granting pieces of lands to Indians, and prescribing a specific mode in which they may sell, forbids by implication a sale independently of the mode.

ERROR to the Supreme Court of the State of Kansas, the case being thus:

By treaty of June 3d, 1825,* the United States concluded a treaty with the Kansas Indians, containing mutual cessions of territory. The sixth article of the treaty contained a pro-

* 7 Stat. at Large, 244, 245.

vision that there should be reserved for the benefit of each of the half-breeds of the Kansas Indians named in it (Victoria Smith being one of them), a certain specified allotment of land out of the quantity ceded by the nation to the United States; to be located, &c.

By the eleventh article of the treaty it was stipulated that "the said Kansas *Nation* shall never sell, relinquish, or in any manner dispose of the lands therein reserved to any other nation, person or persons whatever, without the permission of the United States, for that purpose first had and obtained, and shall ever remain under the protection of the United States and in friendship with them."

The lands were afterwards surveyed, located, and numbered according to the treaty, and the half-breed Indians took possession each of his own reservation.

Subsequently to this, that is to say, May 26th, 1860,* Congress passed an act which, referring to the treaty of 1825, and reciting that the land reserved "had been surveyed and allotted to each of the said half-breeds in the order in which they are named in, and in accordance with, the provision of the said sixth article," enacted:

"That *all the title, interest, and estate of the United States is hereby vested* in the said reservees, who are now living on the land reserved, set apart, and allotted to them respectively by the said sixth article of said treaty; . . . but nothing herein contained shall be construed to give any force, efficacy, or binding effect to any contract in writing or otherwise, for the sale or disposition of any lands named in this act *heretofore* made by any of said reservees, or their heirs."

The second section of this act provides that

"In case any of the reservees now living or any of the heirs of any deceased reservees shall not desire to reside upon or occupy the lands to which such reservees or such heirs are entitled by the provisions of this act, the Secretary of the Interior, when requested by them or either of them so to do, is hereby

* 12 Stat. at Large, 21.

authorized to sell such lands belonging to those so requesting him for the benefit of such reservees or such heirs, . . . in accordance with such rules and regulations as may be prescribed by the Commissioner of Indian Affairs and approved by the Secretary of the Interior; and patents in the usual form shall be issued to the purchasers of the said land, in accordance with the provisions of this act."

Section third provides, that the proceeds of the sales "shall be paid to the parties entitled thereto, or applied by the Secretary of the Interior for their benefit in such manner as he may think most advantageous to the parties."

These statutes being in force, Victoria Smith, one of the half-breeds named in the treaty of 1825, being in possession of her tract, executed on the 14th of August, 1860, a deed to one Stevens, purporting to convey it to him, and Stevens went into possession.

About two years after this deed was made, that is to say, on the 17th of July, 1862,* Congress by joint resolution repealed the above-mentioned second and third sections of the act of 1860.

Victoria Smith now brought an action of ejectment against Stevens in a local State court in Kansas, to recover possession of the tract. Stevens in bar of the suit offered in evidence Victoria's deed of the 14th August, 1860, for the same land, but the court excluded the deed from the jury on the ground that the plaintiff by virtue of the Indian treaty of 1825 and the act of Congress on the subject, was prohibited from executing the deed. The Supreme Court of the State, on appeal, affirmed the ruling of the lower court, and the case was brought here to test the correctness of that decision.

Messrs. Denver, Bradley, and Hughes, for the plaintiff in error:

1. Upon the survey and location of the sections of land respectively, and the delivery of possession to the respective

* 12 Stat. at Large, 628.

reservees, they were by the terms of the treaty of 1825, and though there were no words of perpetuity in the reservations, respectively clothed with a fee-simple title in those reservations. No patent was necessary to complete the title.*

2. But if the title did not pass by the treaty, it did pass in fee by the act of Congress, 26th May, 1860, and the reservees after that act had the right to make a deed in fee. The words of conveyance are very comprehensive. The statute is a grant and is to be taken most favorably for the grantees. There is nothing left in the United States which could draw to it the reversion. Words of perpetuity in such an instrument, made with such full intent, were not needed.

If they "vested" the fee in the grantees, any restraint upon alienation would have been void. They took freed from such condition, if there was one. And so Congress seem to have considered it, for they do not prohibit *future* alienation.

Since, then, to allow the second and third sections of this act to be restraints on the disposing power of the grantees, and to limit that power to an application to the Secretary of the Interior, by whom the sale was authorized to be made, would be a plain violation of one of the canons of the law regulating real estate, no such construction can be given unless the intent is too clear to admit of doubt, such construction cannot prevail.

Those two sections are susceptible of a different construction, in harmony with the construction already put upon the first section. The government had already conveyed the lands to the Indians with an unincumbered title. But they desired to protect the Indians against their own improvidence, and to do so imposed this trust on the secretary, to be exercised on the application of the owner of the lands. It was a new duty assigned to the secretary, but neither in terms nor by necessary intendment does it fetter the right of the Indian to dispose of his lands as he may see fit. This

* United States *v.* Brooks, 10 Howard, 442; Doe *v.* Wilson, 23 Id. 457, 463, 464.

view reconciles the act with the established principle of law. And this view is strengthened by the terms of the eleventh article of the treaty, prohibiting the sale of the lands reserved to the *nation*, but not prohibiting the sale of the private reservations.

Again. There is no prohibition in either the treaty or the act of 1860 against future sales. The Indian had clearly a title to the possession with an inchoate title to the fee. Being in such possession, Victoria conveyed whatever title she had. Congress, by the joint resolution of July 17th, 1862, repealed the second and third sections of the act of 1860. This repeal operated by relation to vest in the purchaser the full title which was vested in her by the first section of the act of 1860.

Mr. J. S. Black, contra, citing Goodell *v.* Jackson, 20 Johnson, 694, 718, 733; Shawnee County *v.* Carter, 2 Kansas State, 115; Hunt *v.* Knickerbacker, 5 Johnson, 332–34; St. Regis Indians *v.* Drum, 19 Id. 127; Jackson *v.* Wood, 7 Id. 290; Pettit's Administrators *v.* Pettit's Distributees, 32 Alabama, 288; Lee *v.* Glover, 8 Cowen, 189.

Mr. Justice DAVIS delivered the opinion of the court.

The eleventh article of the treaty of 1825 contains a stipulation, that the nation shall not sell the specified allotment of lands reserved for the benefit of each of the half-breeds named in it (Victoria Smith being one of them) without the permission of the government; and it would seem that the contracting parties intended this prohibition to apply to the individual members of the tribe, for, if it were not so, the policy which dictated the restriction would be in danger of being defeated altogether.

It is, however, not necessary, for the purposes of this suit, to decide this point, as the deed in question was made after the passage of the act of Congress of the 26th day of May, 1860, which relieves the subject of all difficulty. This act vested the title of the United States to the lands which the treaty had set apart for the use of the half-breeds, in the

reservees, if living, or, if dead, in their heirs, and declared void all prior contracts for their sale, and forbade any future disposition of them, except by the Secretary of the Interior on the request of the party interested. There is no ambiguity in the act, nor is it requisite to extend the words of it beyond their plain meaning in order to arrive at the intention of the legislature. It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, cannot be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors. It was, manifestly, the purpose of Congress, in conferring the authority to sell on the Secretary of the Interior, to save the lands of the reservees from the cupidity of the white race; and, if the provisions of the treaty were not enough for the purpose, the speedy action of Congress was demanded by the rapid settlement of the adjacent country. In 1825, when the treaty was made, it was not regarded as a probable event that these Indians, owing to the remoteness of the country to which they were removed, would suffer from the encroachments of our people, but in 1860 the same population that had demanded their removal from organized communities, followed them to Kansas. In this condition of things Congress acted, and the necessity for legislation on the subject, if, indeed, there were need for any, is shown by the defence which is interposed to this suit.

It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication, prohibited their sale

Syllabus.

in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.

It appearing, then, that by the treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale, or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser.

It is hardly necessary to say that a joint resolution passed nearly two years after this transaction, removing the restriction on alienation, cannot relate back and give validity to a conveyance which, when executed, was void, nor have we any reason to suppose that Congress contemplated that any such effect would be claimed for its legislation on the subject.

JUDGMENT AFFIRMED.

JONES v. ANDREWS.

1. Allegation of citizenship is sufficiently made when it appears fairly, and in such a way as to leave no room for reasonable doubt, from the bill or declaration, of what States the respective parties are citizens.
2. By the Judiciary Act of 1789, in a case where jurisdiction of the Circuit Court depended on citizenship, every defendant must have resided, or been served with process, in the district where the suit was brought; but by the act of 1839 this is not necessary: a non-resident defendant may either voluntarily appear, or, if not a necessary party, his appearance may be dispensed with.
3. Appearing by counsel and moving to dismiss the bill for want of jurisdiction and also for want of equity, is a waiver of a non-resident's privilege, and amounts to a voluntary appearance.
4. A bill for injunction to restrain proceedings of garnishment against the complainant's property instituted in the Circuit Court, and also praying the benefit of a set-off against the garnishing creditor's demand, is not an original suit, but is a defensive or supplementary suit, in which the jurisdiction of the court does not depend on the citizenship of the parties, but on the cognizance of the original case.

Statement of the case.

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

The Judiciary Act of 1789* gives the Circuit Courts jurisdiction where the suit is between a citizen of the State where the suit is brought and a citizen of another State; and enacts that no civil suit shall be brought in them against an inhabitant of the United States by original process in any other district than that whereof he is an inhabitant, or in which he may be found at the time of serving the writ.

By the act of February 28, 1839,† it is, however, enacted

"That where in any suit in law or equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, *or shall not voluntarily appear thereto*, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein, shall not conclude or prejudice other parties not regularly served with process, or *not voluntarily appearing to answer*," &c.

These provisions as to jurisdiction being in force, one Joseph J. Andrews, owner of a hotel in Memphis, leased it for five years, from 1st of January, 1859, to P. Reed and H. W. Bryson; these last giving their notes for the amount of the rent. After Reed and Bryson had possession for some time, they sub-let it to a certain Stephen M. Jones, at the same rent which they had paid, and took his notes to themselves for the same sum that they were bound to pay Andrews by their own. The troubles of the rebellion coming on, matters got disarranged. Jones, *according to his own account*, having left Memphis, temporarily got shut out of the town by the Federal army, and during this enforced absence was dispossessed of the hotel and greatly injured by Andrews, who seized and sold very valuable personal property of his left on the premises. However these facts

* Sec. 11.

† Sec. 1, 5 Stat. at Large, 321-2.

Statement of the case.

(which Andrews denied) might have been, it was admitted that the rent not being long paid in form, Andrews sued Reed and Bryson on their notes given to him, and got judgment by default. On this judgment so got, he sued out a writ of garnishment for the professed purpose of seizing in their hands the notes of Jones. Hereupon Jones filed a bill in the same court, the court below, alleging that Reed and Bryson had transferred *his* notes (Jones's), given to them for the sub-lease, to Andrews in payment of their own notes to him for the lease in chief; that Andrews had thus no claim against Reed and Bryson when he sued them; that the judgment recovered by him against them was by collusion, and was contrived for the purpose of garnisheeing his, Jones's, notes, pretended to be in their hands, and that all this was done to avoid on the part of Andrews a direct suit against him, the complainant, Jones, by reason of the fact that as against Andrews, he, the complainant, Jones, had a good defence to the notes and a set-off (on account of the seizure and sale of his furniture, and expulsion of him from the premises), that would largely exceed the amount of the notes. His bill accordingly prayed for an injunction against the garnishee proceedings, for the delivery up of his notes, and for the establishment of his set-off against Andrews.

The suit was entitled at the beginning,

"Stephen M. Jones, *citizen and resident of* Richmond County, *Georgia*,

vs.

Joseph Andrews, *citizen and resident of* City and County and *State of New York;* P. Reed and H. W. Bryson, *both citizens and residents of* Shelby County, *Tennessee.*"

And the *prayer* of the bill began thus:

"The premises considered, complainant prays that Joseph Andrews, *a resident and citizen of the* city, county, and *State of New York*, and the said Reed and Bryson, both of *whom are residents of* Shelby County, in *the State of Tennessee*, be made parties defendant, by due process and publication," &c.

Argument against the jurisdiction.

Andrews (the resident of New York) was not served with process; but, as the record stated,

"Comes and moves the court here to dismiss the bill of the plaintiff for want of jurisdiction, apparent on the face of it;" and for causes for such motion showed (among others),

(1.) The bill does not aver the citizenship of the plaintiff, nor does it show such facts in regard to the citizenship or residence of the defendant as gives the court jurisdiction.

(2.) The plaintiff shows by his bill that he has an adequate remedy at law.

The court below dismissed the bill for want of jurisdiction over the parties, as well as for want of equitable jurisdiction over the subject-matter of the bill; but without prejudice to the right of the complainant to institute proper proceedings to assert his rights. And from the decree of dismissal, this writ was taken.

Messrs. Albert Pike and R. W. Johnson, in support of the action of the court below, in dismissing the bill for want of jurisdiction over the parties, contended on this point:

1st. That the citizenship of the parties was not sufficiently alleged in the bill. That a mere incidental and sidewise mention of citizenship in a caption of the bill—the only presentation of citizenship of all the parties here—was no averment or allegation of citizenship; that it could not be regarded as traversable, or an allegation for the falseness of which the party thus incidentally mentioning it would be responsible.

2d. That, if sufficiently alleged, the court had no jurisdiction over Andrews, the principal defendant, who was a citizen of New York, and not a citizen of Tennessee, where the suit was brought. That under the Judiciary Act of 1789, it was certain that if there were more than one plaintiff, or more than one defendant, the Circuit Court could not take jurisdiction unless each of the parties was competent to sue or liable to be sued there; and that the act of February 28, 1839, wrought no change in the jurisdiction of

the court, as respects the character of parties; that it only obviated the difficulties arising from inability to join or serve those, of several defendants, who might not reside or be found within the district, or should not choose voluntarily to appear.

Mr. P. Phillips, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

On the question of jurisdiction over the parties, the appellees contend, 1st. That the citizenship of the parties was not sufficiently alleged in the bill. 2d. That, if sufficiently alleged, the court had no jurisdiction over Andrews, the principal defendant, who was a citizen of New York, and not a citizen of Tennessee, where the suit was brought.

Although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit to sustain the jurisdiction of the court, if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than the allegation in the case of *Express Company* v. *Kountze Brothers*,* which was sustained by the court. All that is necessary is, that it fairly appear by the bill of what States the respective parties are citizens. In this case the form of the allegations leaves no room for reasonable doubt.

The other exception, that Andrews, the principal defendant, was not a citizen of the State where the suit was brought, is entitled to more weight. Though the Constitution declares that the *judicial power* of the Federal government shall extend to controversies between citizens of different States, which would embrace the case before us (the plaintiff being a citizen of Georgia, and Andrews a citizen of New York), yet Congress has not established any *court*, except the Circuit Court, to take cognizance of such cases; and, by the Judiciary Act of 1789, which establishes that court, Congress only invested it with jurisdiction of cases where the suit is

* 8 Wallace, 342.

between a citizen of the State where the suit is brought, and a citizen of another State,* and moreover declared that no civil suit should be brought before said court against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The case is certainly not within the purview of this statute. The suit is brought in West Tennessee, and neither Jones, the complainant, nor Andrews, the defendant, is a citizen of that State. Besides, the suit is brought against Andrews in a district of which he is not an inhabitant, and in which he was not found at the time of serving the writ. Under the act of 1789, and the ruling of the early cases, the court would, *primâ facie*, be without jurisdiction. According to those cases the plaintiff, or each of the plaintiffs, if more than one, must be able to sue each of the defendants, if more than one.

But the act of February 28, 1839, by implication, confers jurisdiction over non-residents of the district where the suit is brought, if they voluntarily appear therein. The suit can proceed against them if they voluntarily appear, or without them if they are not necessary parties. If, however, they are necessary parties, and do not voluntarily appear, the difficulty remains the same as before the act of 1839 was passed.† In this case Andrews *was* a necessary party, and he was not a resident of the district, and was not served with process, but he did voluntarily appear. It is true that as soon as he appeared, he moved a dismissal of the bill on two grounds, (1.) That it did not show such facts in regard to the citizenship or residence of the defendants as to give the court jurisdiction. (2.) That it contained no equity. Whether, if he had made the motion on the first ground alone he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill. After this the question of jurisdiction

* § 11. † Tobin *v.* Walkinshaw, 1 McAllister, 26.

over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed.

But the case is stronger than this. The jurisdiction of the court did not depend on the residence or citizenship of the parties. The suit is, in its nature, not an original but a defensive or supplementary suit, like a cross-bill, or a bill filed to enjoin a judgment of the same court. The bill is filed for an injunction against the garnishee proceedings under the suit at law for the delivery up of the complainant's notes, and for the establishment of his set-off against Andrews. This is, in substance, its character, and if the facts charged furnish a sufficient ground of equity for the relief asked, as to which the court refrains from expressing any opinion, the complainant had a right to file it against the defendants, and the court had a right to take cognizance of it as a defensive or supplementary proceeding, growing out of, and having direct reference to, the proceedings of the defendants in the same court against him. The case, in this respect, as before said, is analogous to that of a cross-bill or bill of review, or a bill for injunction against a judgment at law in the same court, of which the court has jurisdiction irrespective of the residence of the parties.* As to bills for injunction against judgments at law rendered in the same court, Justice Story, in *Dunlap* v. *Stetson*, says: "I believe the general, if not universal, practice has been, to consider bills of injunction upon judgments in the Circuit Courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress, as equity and good conscience required."

* Logan *v.* Patrick, 5 Cranch, 288; Simms *v.* Guthrie, 9 Id. 25; Clarke *v.* Mathewson, 12 Peters, 164; Dunlap *v.* Stetson, 4 Mason, 349.

Statement of the case.

Let the decree of the Circuit Court be REVERSED, and the cause remitted for further proceedings, each party to pay his own costs on this appeal.

DECREE ACCORDINGLY.

THE FARRAGUT.

The usually obligatory rule of navigation, which requires a special look-out, does not apply to a case where the collision or loss could not have been guarded against by a look-out, and where it is clear that the absence of a look-out had nothing to do in causing it.

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

Clark libelled the steamer Farragut for causing the destruction of the canal-boat Ajax and her cargo on the 8th of March, 1866. The Buckeye Mutual Insurance Company having paid Clark $1500 insurance on the canal-boat, came in by petition, and were made parties libellant, and subrogated to Clark's rights in the cause to the amount thus paid. The principal charges of the libel were, that the steamer Farragut, being engaged in running between Beardstown, Illinois, and St. Louis, Missouri, on the Illinois and Mississippi Rivers, on the 7th of March, 1866, took the canal-boat Ajax, loaded with wheat, corn, and oats, in tow at Beardstown; that the owner or master of the Farragut contracted to tow the Ajax safely to St. Louis and return for $130, and caused it to be lashed to the side of the steamer, and proceeded safely down the Illinois River until about four o'clock in the morning of the 8th of March, when, in attempting to pass through the railroad bridge at Meredosia, the steamer was so carelessly and negligently managed that she caused the Ajax to come in contact with the pier of the bridge, whereby boat and cargo sank and became a total loss.

The answer alleged that the canal-boat was unsound and rotten; that the only contract between the parties was a verbal contract to tow the Ajax to St. Louis for $65, made

Argument for the appellant.

with reference to the general usage on the Illinois and Mississippi Rivers, by which contracts for towing, in the absence of special agreements, are contracts to tow safely, except the usual dangers and hazards of river navigation, and do not involve the liabilities of a common carrier. The answer denied that the steamer was carelessly and negligently managed, or that the loss of the Ajax was attributable to the unskilfulness, negligence, or fault of any person having charge of her, and alleged that it was due to the usual dangers of river navigation; that the bridge in which the loss occurred is located at a bend in the river, which there changes its course from southeast to southwest; that this bend rendered it difficult to pass the draw of the bridge at any time without striking the eastern pier; that this difficulty was greatly enhanced at high water by a cross-current which strikes it diagonally across the draw, and that at the time of the loss complained of this current was at its worst; that the captain of the steamer himself, one Ebaugh, who was a skilful pilot of the river, took the helm on this occasion, and was steering the vessel when the accident occurred; but that, by the strength of the diagonal current, she was forced towards the piles protecting the east pier, with which the canal-boat came into contact and was stove and sunk, without any want of care or skill on the part of the owner or those in charge of the steamer. It was further alleged that the said piles formerly yielded to pressure, so that a sound boat rubbing against them received no serious damage therefrom; but that, during the preceding winter, the piles had been stiffened up with braces, so that when the unsound and rotten timbers of the Ajax came in contact with them they were crushed.

Both courts below were of opinion that the defence was sustained by the evidence, and decreed against the libellant. That party now brought the case here.

Mr. Laurence Proudfoot, for the appellant:

Captain Ebaugh was in the wheel-house, and acted in the capacity of wheelsman and look-out. Now the law says that

there must be a man specially detailed, to have a trustworthy and constant look-out *stationed at the part of the vessel best adapted for that purpose*, and whose *whole* business is to keep such look-out; that an omission in case of collision would be *primâ facie* evidence of fault; that the wheel-house is not a proper place for such look-out, nor the hurricane-deck, and that the captain of the watch is not such a look-out as is required by law.*

These requirements of the law extend to all classes of steamers and vessels, including especially those of steamers engaged in towing.†

It is asserted by the steamer that, in order to recover, it must be shown affirmatively by us (though the steamer violated the law in regard to a look-out) that the want of the look-out was the cause of the collision. We look in vain in *any* of the already quoted decisions for such a qualification of the law. No such qualification can be found. Certainly, we having made a *primâ facie* case against the steamer, it devolves on *it* to show by largely preponderating evidence, that the neglect to have a look-out did not in the slightest degree tend to the collision and loss.

The Ottawa,‡ one of the latest cases on this subject, goes further in our favor. Clifford, J., there says, in giving the court's opinion, what had been said many times before, as follows:

Steamers are required to have constant and vigilant look-outs

* New York *v.* Rea, 18 Howard, 225; St. John *v.* Paine, 10 Id. 585; Chamberlain *v.* Ward, 21 Id. 570; James Gray *v.* John Fraser, Ib. 191; Haney *v.* Baltimore Packet Co., 23 Id. 287; New York and Baltimore Trans. Co. *v.* Philadelphia and Savannah Steam Nav. Co., 22 Id. 471; The Ottawa, 3 Wallace, 273.

† Sturgis *v.* Boyer, 24 Howard, 118, 120; Goslee et al. *v.* Shute's Executor, 18 Id. 467; Culbertson *v.* Shaw et al., Ib. 587; New York *v.* Rea, Ib. 225; New York and Baltimore Trans. Co. *v.* Philadelphia and Savannah Steam Nav. Co., 22 Id. 461; Fretz et al. *v.* Bull et al., 12 Id. 471; Pearce *v.* Page, 24 Id. 228; Steamer New Philadelphia, 1 Black, 62, 74; Wells *v.* Steam Navigation Co., 4 Selden, 375; Ashmore *v.* Penn. Trans. Co., 4 Dutcher, 180; Alexander *v.* Greene, 7 Hill, 533.

‡ 3 Wallace, 273.

stationed in proper places on the vessel, and they must be actually employed in the performance of the duty to which they are assigned. Proper look-outs are competent persons *other than the master and helmsman*, properly stationed for that purpose on the forward part of the vessel.

After repeating the same idea several times, and citing cases for each presentation of it, he says, in reference to the particular case (where the question was, whether the master, who was then engaged in navigating the vessel, was a competent look-out):

It is clear that the propeller did not have any proper look-out.

And in reference to the cases cited:

We adhere to those decisions, *without abatement or qualification.*

If this is true, if the statement was correct that the court would adhere, "without abatement or qualification," to the decisions cited in that case, then the court decided that the rule about look-outs was one so very important that they would hold to it in all cases as a general rule, and not regard evidence to show that in the particular case the presence of a special look-out would not have altered the result.

Mr. Trumbull, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The District and Circuit Courts were both satisfied that the evidence in the case fully supported the defence, and this court concurs in that conclusion, unless the position strenuously insisted on here by the appellants' counsel can be maintained, to wit, that the absence of a special look-out is evidence of negligence, which renders the owners of the steamer *primâ facie* liable.

It is undoubtedly true that the absence of a special look-out would, in many cases, perhaps in most cases, be regarded as evidence of great negligence. The last rule prescribed

by Congress by the act of April 29, 1864,* declares that "nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a *proper look-out*," &c.; thus intimating that "a proper look-out" is one of the ordinary precautions which a careful navigation involves. But it would be against all reason to contend that the master or owners of a vessel should be made liable for the consequences of an accident by reason of not having a special look-out where the collision or loss could not have been guarded against by a look-out, or where it is clear that the absence of a look-out had nothing to do in causing it. Suppose that a sunken rock, dropped from a cargo of quarried stone, and unknown to the navigators of the channel, were the cause of the accident, could the presence of a look-out have the least tendency to guard against it? A hundred such instances might be suggested where the presence or absence of a look-out would have no influence whatever on the happening of the catastrophe. We are not to shut our eyes and to accept blindly an artificial rule which is to determine, in all cases, whether the navigator is liable to the charge of negligence in causing any loss or damage that may happen. A look-out is only one of the many precautions which a prudent navigator ought to provide; but it is not indispensable where, from the circumstances of the case, a look-out could not possibly be of any service. The object of a look-out is to discover dangers that are unknown, the advance of an approaching vessel, the appearance of a light on the coast, the discovery of a dangerous object, and many other things, the existence and presence of which could not be so easily and quickly known to the pilot as to a person whose sole business it was to make and communicate such discoveries. The cases referred to, taken in connection with the particular circumstances of each, cannot receive a different interpretation.

In the case before us no look-out could have been of any

* 13 Stat. at Large, 61.

possible advantage. No look-out would have ventured, or presumed, to interfere with the captain, who had the helm at the time. It would probably have been rather an interference and a hindrance to the safe management of the boat for any third person in such an exigency to have diverted his attention. The obstacle was there in plain sight. Its position was better known to the captain than to any other person. No look-out could have aided him in the emergency. But, if a look-out were needed, we have the evidence of the mate that he was on the hurricane-deck watching the course of the steamer at the time; and, had it been possible for any look-out to have been of any service, he would have rendered it. Clark, the captain of the canal-boat, was also on the watch as well as Nolte, the ship's carpenter, and one of the owners of the steamer. It is perfectly evident that the absence of a special look-out had nothing at all to do with the happening of the accident, and therefore it can have nothing to do with fixing the liability of the parties.

It is also evident that the loss was occasioned by the violence of the cross-current, which was due to the great height of water prevailing at the time, and was therefore the result of one of the ordinary dangers of river navigation.

DECREE OF THE CIRCUIT COURT AFFIRMED WITH COSTS.

MARBLE COMPANY *v.* RIPLEY.

1. Equity will enjoin one partner from violating the rights of his copartner in partnership matters, although no dissolution of the partnership be contemplated.
2. Where a person makes an entry on land owned by others jointly interested with him in working it, but which is held by these last subject to a right of entry and possession in him, for failure or refusal by them to fulfil certain conditions and stipulations about the products of the land, which they have covenanted to fulfil, so that *primâ facie* his entry is a deforcement of the owners and an invasion of their rights

as such, the burden is on the party entering to show that his entry was justifiable.

3. Where a deed from one owner conveyed quarry lands to his co-owners, reserving a right in the grantor, if the grantees did not furnish marble from them, to enter and keep possession and take the marble himself, till the grantees should be ready and willing to fulfil the conditions of the contract on their part, an injunction which, after unwarrantable and illegal entry for alleged condition broken, enjoined the grantor from hindering the grantees from retaking possession and occupying and using the premises *until the further order of the court*, was held too broad, and on appeal was modified so as only to enjoin against an entry for any cause *theretofore* existing; thus leaving the grantor to enjoy his reserved right *thereafter* untramelled.

4. Where a corporation, by its own voluntary act, has bought lands charged by covenants inseparable from the deed by which the land was originally conveyed, and which were part of the consideration of the grant, a court of equity cannot strike out a part of the covenants, because though originally intended to operate for the equal benefit of both parties, they have become in progress of time oppressive and burdensome to the grantee; or because the purchase would make the corporation partners with the grantor in working the land, whether they would or not, contrary to their duties as a corporation, and the contract would thus become one restraining the alienability of property.

5. Specific performance of a contract will not be decreed:

(*a*) Against one party in favor of another who has disregarded his own reciprocal obligations in the matter; as *ex. gr.*, against a grantee of land charged with certain duties in regard to it, in favor of a grantor who has made a re-entry both unlawful and fraudulent.

(*b*) Nor where the duties to be fulfilled by the grantee are continuous and involve the exercise of skill, personal labor, and cultivated judgment; as *ex. gr.*, to deliver marble of certain kinds, and in blocks of a kind that the court is incapable of determining whether they accord with the contract or no:

(*c*) Nor where there is a want of mutuality in the contract; as *ex. gr.*, where it is stipulated that one of the parties may abandon the contract at any time on giving a year's notice:

(*d*) Nor where the party (a grantor) has a complete remedy at law; as *ex. gr.*, in a grant of quarry land, the grantee agreeing to quarry and deliver to the grantor certain sorts of marble from it, and the grantor reserving a right of re-entry in case of non-performance, in order to supply himself, and having moreover a remedy by an ordinary suit at law on the contract.

6. A restriction upon absolute ownership in a grant of land having on it a quarry, where the grantees agree to deliver to the grantor, his heirs, &c., so long as they might want, a certain number of feet, per annum, of stone of certain kinds, for a partnership purpose (the grantor reserving a right of re-entry and of taking the stone himself, if the

Statement of the case.

grantees do not fulfil their agreement) is not to be raised by implication. Hence, in the case of such a grant, where there is no obvious restriction upon the quantity of stone which the grantees may take out, it cannot be inferred that the grantees were meant to be limited to taking out no more stone than that which they have agreed to deliver to the grantor.

7 Such a grant and reservation as that described in paragraph No. 3, *supra*, limited however in the extent to which the grantees were bound to furnish marble, does not leave in the grantor a corporeal interest in the marble "*in situ*," and hence his interest is not exclusive of the right of the grantees to take marble on their own account "*ad libitum*."

THESE were appeals from the Circuit Court for the District of Vermont, in two decrees, one of them on a bill filed by the Rutland Marble Company against a certain Ripley and one Barnes, and the other one a cross-bill filed by the same Ripley against the company just named. The case was this:

On the 22d of January, 1850, the said Ripley and the said Barnes together owned a tract of land in Rutland township, Vermont, containing about twenty-one acres, in which was a valuable marble quarry. On that day Ripley, by his deed, released and quit-claimed unto his co-tenant, Barnes, in fee simple, the tract of land. The deed contained a reservation to the releasor, his heirs, executors, administrators, and assigns, of "the right to enter upon and take possession of the said twenty-one acres, for the purpose of digging, quarrying, and carrying away all the marble he or they might want, according to the stipulations and conditions of a contract that day made and concluded between the said Ripley and Barnes, in case the said Barnes, his heirs, executors, administrators, and assigns, should refuse, or fail on their part to fulfil the conditions and stipulations of the said contract." By the contract referred to, which was made on the same day, Barnes agreed, "for himself, his heirs, executors, administrators, and assigns, to quarry marble from the marble quarry, and draw and deliver at the mill of the said Ripley, in Rutland, from the *layers of marble usually denominated the white layers* in said quarry, all the marble that the said Ripley

might want to saw, manufacture, and sell, in good sound blocks, of suitable size, shape, and proportion, and to quarry to order as might be wanted to keep the mill *fully supplied at all times*, the amount to be not less than 75,000 feet per annum, and for so long a time as the said Ripley, his heirs, executors, administrators, and assigns might want." It was also agreed that should Ripley, his heirs, &c., at any future time desire to increase the business, Barnes, his heirs, executors, administrators, and assigns, should furnish the blocks, as aforesaid, to the extent of 150,000 feet per annum of two-inch marble slabs, on receiving one year's notice to that effect. It was also agreed that Ripley, his heirs, &c., or his or their agents, might have the privilege of dividing each lot of blocks, as taken and drawn from the quarry, taking an average share as to quality, size, and shape, before any blocks should be taken from the lots by any other person, the first choice always being taken by Ripley, or for his mill. It was also stipulated that Ripley *might abandon the contract at any time on giving one year's notice.* The contract further stipulated that if Barnes, his heirs, executors, administrators, or assigns should fail or refuse to fulfil its conditions, Ripley, his heirs, executors, administrators, or assigns, or his or their agents, *might enter upon the quarry and the premises attached to, and connected with it, and might quarry and dig, take and carry away, as much marble as they might want;* and might have the use of, and enjoy all the rights, privileges, and appurtenances belonging to, or connected with, the said quarry, without hindrance or obstruction, or in any way paying for the same, and might keep possession *until Barnes, his heirs, executors, administrators, or assigns, should be ready and willing to fulfil the conditions of the contract on their part;* it being also provided that if, after making an entry as aforesaid, Ripley, or his heirs, &c., should make an opening, or put the quarry in a better condition for getting out marble, Barnes, his heirs, executors, administrators, or assigns should not re-enter, or resume possession, until Ripley, his heirs, &c., should have had the benefit of the work done and money expended by them, unless

Barnes should make payment for the same. It was further provided that Ripley, his heirs, executors, administrators, and assigns should receive the marble blocks so delivered at the mill; should saw, trim, and prepare them for market; should sell them, advancing from time to time to Barnes, *as the blocks should be delivered*, twelve cents per foot of two-inch marble, as payment for drawing and quarrying, and retaining from the proceeds of sales of the marble an equal sum per foot, as payment for sawing and trimming, retaining also from the proceeds of sales the expenses of transportation to market, and all the necessary expenses of doing the business and collecting payment for the marble (not including payment for his own time and labor), and should divide the remainder of the proceeds of sale equally between Barnes and himself, as collected. Ripley further agreed to pay Barnes one cent per foot of two-inch marble for drawing and transporting the marble from the quarry to the mill, the payment to be made from his own funds. At the date of this contract the quarry had been opened at the north end only, though Barnes contemplated making an opening on the south end, for two persons named Allen and Adams. The contract contained accordingly still another provision, evidently an alternative; to wit, that if the marble contained in that part of the ledge which Barnes was about to open for Allen and Adams should prove to be of better quality than the marble from the quarry then opened and worked upon the land, Barnes should open on the south end of the lot conveyed to him, and furnish Ripley with marble from that place on receiving reasonable notice.

Barnes having thus become the owner in severalty of the land containing the quarry, conveyed it, on the 1st of June, 1854, to sundry persons, expressly excepting the right reserved by Ripley in his deed aforesaid, and reserving to himself a right of entry in case his grantees should fail to perform his contract with Ripley. By several mesne conveyances the property became vested in the Rutland Marble Company on the 31st of October, 1863. In all the deeds, including that to the company, the right of entry reserved

by Ripley in his conveyance to Barnes, and his rights under the contract, were expressly excepted, and the grantors reserved also a right of entry on the failure of their grantees to comply with the engagements of the contract of January 22d, 1850.

Soon after the contract was made, Ripley gave notice that he required his supply of marble under it to be increased from 75,000 to 150,000 feet, and on the 24th of July, 1854, he gave notice that he wanted the whole of his marble quarried from the south end of the ledge, next to the opening of Allen and Adams, according to the contract. On the 22d of August, 1855, he again gave notice that he claimed, under his contract of January 22d, 1850, to be *forever* thereafter supplied with marble from a proper opening of the ledge for the purpose, on the south end of the lot conveyed by his deed to Barnes. Accordingly an opening was made at the south end, necessarily at considerable expense, and he was supplied therefrom for years, until the spring of 1864, and until differences arose which resulted in these suits. Until that opening was made in 1854, or 1855, there was none on the land except the one which had been made at the north end before the contract between Barnes and Ripley was signed.

In the year 1854, while Barnes was still the owner of the land, a modification of the contract was agreed upon between him and Ripley, the particulars of which it is not necessary here to notice. The modification expired by its own limitation on the 1st of February, 1864, leaving the original agreement in full force. As already said, the marble company had, prior to that time, become the owners of the property; and they had fulfilled, so far as it appeared, the requirements of the modified contract. But very soon after its expiration, if not before, differences arose between them and Ripley respecting their rights under the agreement. On the 15th of February, 1864, he gave them notice that he claimed a right to divide every lot of blocks at all times thereafter, when taken from the quarry, insisting on a right to a first choice; and when this demand was resisted by the

marble company it was renewed by Ripley. Differences also arose between the parties respecting Ripley's obligation under the terms of the contract, calling for "layers of marble usually denominated the white layers," to receive certain kinds of marble called brocadilla, having in a basis essentially white considerable deposits of blue or green; differences also respecting his right to demand payment for unloading at his mill, and respecting his obligation to pay for quarrying and hauling.

In this state of things, on the 5th of April, or within a day or two after it, a strike took place among the workmen at the quarries. On its occurring Ripley advised the company to hold out, saying "that he would aid in whatever way he could; that the workmen had had their way long enough; that the company ought to resist the thing *now*, and ought to have done it years before." When replied to by the agent of the company that the difficulty to resistance was in the contract with him about the mill, he said "that the strikes affected his men and all the men at the mills, and that he would rather wait six months, or even twelve, and have the company get possession of the quarry and manage it as it ought to be managed." Evidence, however, showed that it was observed about the 13th or 16th of April, that Ripley himself was having drills made of the sort used in quarrying, and that he kept persons in ignorance of the purpose for which he meant to use them, and that when told by an agent of the company whom he had advised to hold out against the strike, "that the men understood that *he* was going to set them to work, and that he was thus helping the strike along as much as any one;" his reply was "that they did not know but that he was going to quarry somewhere else; that they did not know where he was making drills to be used." Whether the company had furnished to Ripley all the marble that he had a right to demand, under the contract of January 22d, 1850, was one of the matters in controversy. His mills had been enlarged after the date of that contract, so that they could saw 300,000 feet; and *so enlarged*, were perhaps not fully supplied at all times. It appeared, however,

by the testimony of Ripley himself, and by his cross-bill, that between the 1st of February, 1864, when the already-mentioned modification of the contract expired, and the 3d of April (about which time the strike began), the marble company had delivered at Ripley's mill about 26,687 feet of marble. Ripley, it appeared, was in arrears at this time with his payments; and quarrying in the winter, it was proved, is a sort of work which in a latitude so high as that of Vermont, where frost necessarily pervades a quarry, is performed with injury to the quarry worked on.

On the 26th of April, soon after the strike was complete, Ripley, without giving any notice of his intended action, caused an entry to be made upon the entire property, as well the southern opening as the northern. The entry was made about three o'clock in the morning, by Barnes, acting for Ripley, and a large number of men were set at work, to the exclusion of the marble company.

The company hereupon filed a bill in the court below, setting forth various alleged pretensions of Ripley, which it said were unfounded; the strike and his complicity with the workmen; that his mill was always sufficiently supplied, &c.; and praying

That Barnes and Ripley might be enjoined against further unlawful interference with, or occupation of the then, the complainants' said property:

That the contract might be decreed rescinded and terminated, or, if not, that various questions respecting its construction might be settled by the decree of the court, and that the defendant, Ripley, might be required to account for the money of the complainants in his hands.

To this bill answers were put in by the defendants, and a cross-bill was filed by Ripley. The answer of Ripley, more material than Barnes's, after a general history of things, denied most of the important allegations of the bill. It admitted, however, the strike, as stated in it, and after saying that he had expressed the opinion that the company should at once have refused all further employment of the laborers when the men struck, and have employed a new set of men,

which he believed might have been done long before April 26th (the date of his entry), he proceeded to answer that the company totally disregarded his said opinions, and wholly neglected, so far as he could learn, to make any arrangement to substitute new laborers or to renew the business of quarrying, and being reliably informed and believing that no arrangement *would ever be made with the laborers for their return to work, and the use and possession of the quarries having been to all appearance entirely vacated from the time of the strike (which was April 5th or 6th), he entered.*

The cross-bill, after setting forth the same sort of a general history, and an account of the disputes that had arisen, &c., went on to represent that the marble company were working the quarries to an enormous excess over and above the quantity authorized or required by the contract of 1850, or any reasonable or proper expectation of the parties under the same, and were supplying other parties, and the trade n general, with great quantities of marble taken from the quarries, in violation of the rights of Ripley; that the whole mass and quantity of marble of the kind and description mentioned in the contract contained on the land, was limited and not inexhaustible, and that a continuance by the company in their then present rate of exhaustion and supply of the general market therefrom, would in a short time so exhaust the quarry as to render the performance of the contract of 1850 impossible, whereby he, the defendant, Ripley, would be entirely deprived of his beneficial interest in the quarry arising under the contract, and the whole profit and advantages thereof would be absorbed and exhausted by the company. The cross-bill prayed accordingly that the company might be decreed to perform specifically the contract by furnishing the marble as therein required, or deliver up the possession of the quarry and property to the said cross-complainant, free and discharged from all claim, right, or title which the said company ever had, or then had, in and to the same; and that in the meantime they be restrained from operating or working the quarry, or selling any marble taken therefrom; that they be decreed to pay such damages

as the complainant might have sustained in consequence of their not having supplied his mill with marble as required by the contracts of 1850 and 1854, and pay the same by a specified day, and that the quarry be held as security therefor, and in default of such payment the company should be foreclosed of all equity of redemption or claim in and to said quarry and property.

The answer to the cross-bill, denying many other allegations, denied upon belief, that the quarry was likely to be exhausted, at least within a century, by any amount of work within the power of the company to give, or justified by their interests, and it insisted that the contract did not secure to Ripley the exclusive product of the quarry, but that the company had a right to work it for their own benefit independently of the arrangement; and admitting that they were taking from the quarry, and were disposing of more marble than was required to supply Ripley under the contract.

The grounds upon which the marble company rested their prayer that the contract might be rescinded and cancelled were, that Ripley had not performed the duties which it imposed upon him; that though it was, when made, intended to operate for the equal benefit of both parties, it had become, in the lapse of time, with the increased demand for marble, the greatly enhanced cost of production, and the entire change in the character and results of the marble business, grossly unfair and unequal; so much so, indeed, that the defendant's net receipts under it had become more than twelve times as much as those of the complainants; to *him*, yielding a yearly revenue of $40,000; to *them*, resulting in a very great loss on the marble supplied, and a return barely sufficient to defray the expenses of executing the contract; an inequality which they alleged was not denied, and was plainly unconscionable; that in addition to this, the contract made the company partners with Ripley, or his successors, in title to the mill, whether they would or not; and that, if corporations could not enter into partnership, they could not purchase the lands subject to the obligation of

becoming partners, and therefore that the contract restrained the alienability of the property.

One of the grounds on which Ripley rested his claim to a decree for specific performance of the contract was a notice from the marble company, given to him on the 18th of June, 1864, that they would maintain that the facts set forth in their bill amounted *to a permanent breach and violation on his part of the contract, authorizing them to treat it as rescinded, and that they therefore rescinded it*, asserting that they had always performed it on their part until it was thus violated and broken by him.

The Circuit Court, after a hearing, granted an injunction in accordance with the prayer of the Rutland Marble Company, restraining the defendants, Ripley and Barnes, from the further occupation or possession of the premises and property described in the bill, and from any interference therewith, and enjoining them against hindering or disturbing the complainants from taking possession of, occupying, and using the same *until the further order of the court.* But the court refused to decree a rescission and cancellation of the contract itself.

The court also, in effect, decreed a specific performance of the contract, as prayed in the cross-bill, and made several decretal orders respecting the manner in which the contract should be performed, but the injunction asked for in the cross-bill was denied.

Among the decretal orders was one, that Ripley should pay over *monthly* to the company its share of the money received by him from the marble business; and there was none, as he by this cross-bill had prayed for, that the court would enjoin the company from selling and disposing of marble taken from the quarry. From the decrees above mentioned, and the decretal orders, appeals were taken to this court; Ripley, in *his* appeal, specifying as a second ground for it, the manner in which, as above stated, he was required to account with the company; and as a sixth ground,

"The omission and refusal of the court to enjoin the company from selling or disposing of marble taken from the quarry."

The matters considered by the court, accordingly, were:

I. *Upon the bill by the marble company.*

1. Whether the case was one for the injunction prayed for by the company against Ripley and Barnes.

2. Whether the case was one for the cancellation of the contract of January 22d, 1850.

II. *Upon the cross-bill by Ripley.*

1. Whether, it being decided that the contract was not to be cancelled, Ripley was entitled to a decree for specific performance of it by the company.

2. Whether the decretal orders above quoted and objected to by Ripley were erroneous.

The case, of which the transcript filled 904 printed pages, was elaborately argued by *Messrs. B. R. Curtis and E. J. Phelps, for the Rutland Marble Company; and by Messrs. George F. Edmunds and W. M. Evarts, contra.*

Mr. Justice STRONG, having stated the case, delivered the opinion of the court.

The first question presented for our consideration is whether the pleadings and proofs exhibited a proper case for an injunction upon the defendants, Ripley and Barnes, against disturbing the complainants in their right to take possession, occupy, and use the property entered upon by the said defendants, and against continuing the occupation which they had commenced of the quarries and other property, real and personal, of the company. The solution of this depends upon another question, which is, whether the entry made by Ripley, through his agent, Barnes, on the 26th day of April, 1864, was lawful under the circumstances in which it was made.

It is to be observed that the contract of January 22, 1850, between Ripley and Barnes, was in a very practical sense a contract of partnership, and that to Barnes's position under

it the complainants have succeeded. By its terms each of the parties was bound to contribute to a common enterprise. Each had his own duties to perform. Barnes was to furnish the marble needed for the mill, and Ripley was to bestow his own labor and care in manufacturing it for the market and selling it. When this had been accomplished the net proceeds of sale were to be equally divided. Neither of the parties had a right to interfere with the specified duties of the other so long as that other discharged his obligations under the contract. But they had a common interest in the business carried on, quite as truly as if theirs had been an ordinary partnership. Any unauthorized attempt by one to oust the other from the position and rights assigned to him by the contract was, therefore, not only a breach of their agreement, but a fraud upon the relation they had assumed to each other. Such a wrong it is the province of a court of equity to prevent. A chancellor will interfere by injunction to restrain one partner from violating the rights of his copartner, even when a dissolution of the partnership is not necessarily contemplated.*

Primâ facie, the entry of Ripley upon the quarry property and the consequent deforcement of the complainants was an invasion of their rights as owners of the land, and as jointly interested with him in the marble business. The burden is upon him, therefore, to show that his entry was justifiable. Has he shown it? Under the reservation in Ripley's deed, and under the contemporaneous agreement, his right to enter existed only in case Barnes, or his successors in the title, should fail or refuse to fulfil the conditions and stipulations of the contract; that is, should fail or refuse to deliver the marble as required by it. A right to enter for any other cause is not claimed. After a careful examination of the evidence we do not find that there had been any such failure on the part of the complainants to deliver marble prior to April 26, 1864, as justified Ripley in entering upon their possession. They were not bound to keep in full supply

* Story's Equity, § 669.

the mill which he then had. The contract had reference to a supply of the mill as it was in 1850, when its capacity was less than 150,000 feet per annum. And when, afterwards, he enlarged his mill so that he could saw 300,000 feet, nothing in the contract required Barnes, or his alienees, to keep the enlarged mill supplied. The obligation was only to furnish 150,000 feet per annum, as it might be wanted to supply the old mill. Nor did the contract require that any defined portion of the whole quantity should be delivered at any specified season of the year. Undoubtedly its spirit demanded that the deliveries should be reasonable. But it is in evidence that quarrying marble must be principally in moderate or warm weather, when there is no frost. It is, therefore, a reasonable construction that the parties intended the deliveries should be greatest in the summer and fall. Yet the evidence is, that the complainants delivered at his mill, during the months of February, March, and April of 1864, more than 26,000 feet, besides other blocks which he refused to receive. In fact a considerably greater quantity was delivered. All this was between February 1st (when the modification of the contract before mentioned expired) and the 3d of April. This was in excess of a ratable proportion of what the company was bound to quarry and deliver. After the 2d of April there was an interruption of deliveries, caused by a general turn-out of the workmen at the quarries, of which we shall have more to say hereafter. But what is most significant and convincing that there was no failure on the part of the company is Ripley's own sworn answer to their bill. It appears from what he himself states in this answer, that the reason for his entry was, not that there had been any failure or refusal to supply his mill with marble, so far as he had a right to claim it, but that the marble company disregarded his opinions, and he was apprehensive they would not be able to induce the laborers to return to work. It is plain that for such reasons neither the reservation in his deed nor the provisions of the contract gave him any right of entry. His intrusion upon the complainants' possession was, therefore, entirely unjustifiable, and a

wrong the continuance of which a court of equity may well restrain.

We are also of opinion that his entry was not made *in good faith*, merely to supply himself with marble. Very soon after the modified contract came to an end he set up claims, some of which, at least, had no foundation in the contract. On the 15th of February he gave notice that he claimed a right to divide every lot of blocks, at all times thereafter, when taken from the quarry referred to in his deed and in the contract, insisting upon a right to the first choice; and this, though he had elected forever to take all his marble from the south opening, which he had required to be made under the alternative provision of the contract. This was either claiming inconsistently with his demand for all his marble from that opening, or it was, in effect, requiring the company to take therefrom twice as much as was necessary to supply the 150,000 feet for his mill. When the demand was resisted it was renewed, though without right. Differences of opinion also arose between the parties respecting Ripley's obligation to receive particular kinds of marble, respecting his right to demand payment for unloading it at his mill, and respecting his obligations to pay for quarrying and hauling. We do not enter now upon any consideration of the inquiry which of the parties was right. It is sufficient to notice that there were differences. It was while they existed, early in April, the strike of the laborers occurred. The evidence establishes beyond any reasonable doubt that Ripley advised the agents of the company to hold out against the strike, and that when told the mill contracts made a difficulty, he said he would rather go without marble six months, or a year, than that the company should submit to the strikers. Yet at this time when giving this advice and making these professions, he was preparing secretly to make an entry on the property. He was having drills made at least a week or ten days before he made his entry at night, concealing the purpose for which they were made, and his design to enter. When told that he was aiding the strike, as the men understood he was intending to set them at work,

he replied the men did not know but that he was going to quarry somewhere else. Meanwhile he was himself refusing, or at least neglecting to pay what he was bound to pay, at the time when it was due. It is impossible to read the evidence without being convinced that he intended to secure the possession of the property by surprising the complainants, and thereby force them to assent to his demands and his interpretation of the contract. Such being the conclusions to be drawn from the evidence, we cannot doubt that the injunction decreed by the Circuit Court was correctly awarded.

It was, however, too broad. It restrained the defendants, Ripley and Barnes, not only from the further occupation or possession of the premises and property described in the bill, and from any interference therewith, but it enjoined them against hindering or disturbing the complainants from taking possession of, occupying and using the same, *until the further order of the court.* The effect of this is to deny to Ripley the right of entry reserved in his deed, and forbid his exercising it, though the complainants should hereafter wholly refuse to deliver any marble, unless the court by a future order shall allow an entry. This is probably more than was intended. The decree should be modified so as only to enjoin against an entry for any cause heretofore existing, leaving Ripley to enjoy his reserved right hereafter entirely untrammelled.

We proceed next to inquire whether there is any sufficient reason for decreeing a cancellation of the contract of January 22, 1850, as prayed for by the marble company. This is a call for an exercise of the highest chancery power, a power most frequently exerted in cases of fraud, accident, or mistake. The grounds upon which the company rest their claim that the contract may be decreed to be rescinded and cancelled are, that Ripley has not performed the duties which it imposed upon him; that though it was, when made, intended to operate for the equal benefit of both parties, it has become, in the progress of time, oppressive and burden-

some to the complainants, or, as they denominate it, unconscionable; that it makes them partners with Ripley, or his successors in title to the mill, whether they will or not; and that, if corporations cannot enter into partnership, they cannot purchase the lands subject to the obligation of becoming partners, and therefore the contract restrains the alienability of the property.

Before proceeding to a consideration of these it is proper to remark that the agreement is inseparable from the deed for the land made by Ripley to Barnes. They were made at the same time, and they are parts of one arrangement. What is asked, therefore, is, not to rescind an entire contract, but to strike out of it a part which has become onerous to one of the parties. It is clear that the rights secured to Ripley by the agreement were a part of the consideration for his grant of the land, and so it was understood at the time his deed was made. If there were nothing else to show this, it is made apparent by the reservation in the deed of a right of entry to secure the fulfilment of the stipulations of the agreement. But the deed was an executed contract. It conveyed the title to the grantee. If, therefore, the agreement is rescinded by a decree of the court, the consideration of the grant is taken from the vendor after his conveyance has taken effect, and yet his grant is enforced. It is believed that such action by a court of equity is quite unprecedented. It has been ruled that when a party seeking to set aside a conveyance made by him has received part of the consideration, he must return it before a court of equity will cancel the conveyance.* That one party to an executory contract, partly executed, has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled. Certainly it is not in the present case. If the contract has been broken by Ripley, the marble company has an adequate remedy at law. Nor is it any reason for rescinding the contract that it has become more

* Miller v. Corten, 5 Georgia, 341; Story's Equity, § 707.

burdensome in its operation upon the complainants than was anticipated. If it be, indeed, unequal now, if it has become unconscionable, that might possibly be a reason why a court should refuse to decree its specific performance; but it has nothing to do with the question whether it should be ordered to be cancelled. It is not the province of a court of equity to undo a bargain because it is hard. Nor have the other reasons assigned in support of the complainants' prayer for cancellation any more weight in view of the circumstances of the case. The marble company have, by their own voluntary act, placed themselves in the position they occupy. With a full knowledge of the reservation in Ripley's deed to Barnes, and of the contract, the performance of which the reservation was intended to secure, they purchased the quarries. They purchased expressly subject to the rights guaranteed to Ripley, and they undertook with their grantors to perform the promises Barnes had made, so long as they held the land. At the time when they purchased, the contract had been in operation for years, and they knew its effect. It is fair to presume that the burden of the contract was considered in fixing the price they paid. They are, therefore, not in a condition to ask for its rescission, and the Circuit Court rightly refused to decree a cancellation.

The next question is, whether Ripley, the defendant, was entitled, upon his cross-bill, to a decree against the marble company for a specific performance of the contract. The court below substantially directed such performance, and from that decree the marble company have appealed, and they now urge that the contract, though supposed to be fair and equal when made, has, in the lapse of time, and by the operation of unforeseen causes, arising from changed circumstances, become exceedingly unfair, unreasonable, and unconscionable, so that a decree for its specific performance would tend to their oppression and ruin. It may be doubted, however, whether the hardship of the contract is any greater than must have been contemplated when it was made. It is

not unconscionable because Ripley obtains a larger profit from it than was at first expected, or because the other party obtains less. Those were contingencies, the possibility of which might have been foreseen. It could not have escaped the thought of the contracting parties that the expense of quarrying might possibly increase, and that the expense of sawing and preparing for market might either increase or diminish in the progress of time. Of that they took their chances. Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events. Mr. Fry, in his work on Specific Performance,* asserts that "the question of the hardship of a contract is generally to be judged of at the time at which it is entered into; that if it be then fair and just, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except when these subsequent events have been in some way due to the party who seeks the performance of the contract." Judge Story, indeed,† states the rule somewhat differently, and there are some cases that support his statement; but the rule as stated by Mr. Fry must be applicable to contracts that do not look to completed performance within a defined or reasonable time, but contemplate a continuous performance, extending through an indefinite number of years, or perpetually.

There are other objections, however, to a decree for a specific performance in this case which are more serious. Such a decree is not a matter of right. It rests in the sound discretion of the court, and generally it will not be made in favor of a party who has himself been in default. In Story's Equitable Jurisprudence,‡ it is said that "in cases of covenants and other contracts, where a specific performance is sought, it is often material to consider how far the reciprocal

* Page 116, and see entire chapter 6.

† Equity Jurisprudence, §§ 750 and 776. ‡ § 736.

obligations of the party seeking the relief have been fairly and fully performed. For, if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from their nature they have ceased to have any just application by subsequent events, or it is against public policy to enforce them, courts of equity will not interfere." To the same effect are Smith's Principles of Equity;* *Thompson* v. *Tod*,† *Lewis* v. *Wood*,‡ and many other cases. Applying these principles to the case in hand, it would appear that the conduct of the cross-complainant has not been such as to justify the court in decreeing a specific performance, at his suit, against the marble company. Without relying upon his alleged unfounded claims set up from time to time, or his alleged refusals or failures to make the payments due from him at the times required by the contract, or his alleged comfort given to the turn-out of the workmen, and his advice that the company should resist it, his unlawful and unwarranted entry and ouster of the marble company was such an invasion of the contract as leaves him no standing as a complainant asking for its performance in a court of equity.

Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been

* Page 220.

† Peters, Circuit Court, 380.

‡ 4 Howard's Mississippi, 86.

delivered, but whether every block was from the right place, whether it was *sound*, whether it was of *suitable size*, or *shape*, or *proportion*. Meanwhile the parties may be constantly changing. The marble company are liable so long as they hold the land, and Ripley's rights exist only while he holds the mill. It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder.* Many of the difficulties in the way of decreeing specific performance of a contract, requiring, as this does, continuous personal action, and running through an indefinite period of time, are well stated in *The Port Clinton Railroad Company* v. *The Cleveland and Toledo Railroad Company*.†

Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.‡

But what is a still more satisfactory reason for withholding a decree for specific performance is, that the party who asks for it has an entirely adequate remedy provided by the reservation in his deed, and by the contract itself. In addition to his remedy by suit at law, he has a right of entry and the privilege of supplying himself with marble, as much as he may want, if the owners of the land do not fulfil the

* Ogden *v.* Fossick, 9 Jurist, N. S. 238.

† 13 Ohio, 544.

‡ Fry on Specific Performance, § 286.

conditions and stipulations of the contract. He may take marble without making payment for it, and in case of such entry he may hold possession until the tenants of the fee are ready and willing to carry out the agreement, and until he has been compensated for all his expenditure. This is a remedy more adequate and full than any decree for specific performance could give him, and it renders such interference of a court of equity entirely unnecessary.

For these reasons we are of opinion that the Circuit Court should not have decreed performance in specie of the contract, but should have left the cross-complainant to his action at law, or to the remedy reserved in his deed.

It is true that the marble company, on the 18th of June, 1864, gave notice to Ripley that they would claim that the facts set forth in their bill amounted to a permanent breach and violation on his part of the contract, authorizing them to treat it as rescinded, and that they therefore rescinded it, asserting that they had always performed it on their part until it was thus violated and broken by him. But this was after his wrongful entry, which certainly relieved them for a time from delivering marble, and the notice in no way interferes with any remedy he may have at law, or with any right he has to enter under the reservation in his deed.

The decree, so far as it orders specific performance, will therefore be reversed, as also all the decretal orders that direct the mode of performance.

We have thus disposed of all the questions raised by the appeal of the complainants, The Rutland Marble Company, and of most of those raised by the appeal of the defendant, Ripley. Two or three questions remain to be considered. It is sufficient to say, in answer to the second specification of his appeal, that we do not perceive that he was required to pay the company's share of the money received by him from the marble business any more rapidly than the contract, giving to it a reasonable construction, demanded.

In the sixth specification it is averred that the decree is

erroneous, in that it omits to order and direct that The Rutland Marble Company, their agents, servants, and assigns, be enjoined from selling or disposing of marble taken from said quarry of said company. Though the appeal is in these broad terms, it is presumed the appellant does not mean to be understood as claiming that the marble company should be enjoined against selling as much marble as the quantity furnished by them for the mill. If this is not so, then the construction he would have given to the contract is that the tenants of the fee must quarry every year 300,000 feet, and deliver one-half thereof at the mill, leaving the remainder unsold and undisposed of. This is a construction so unreasonable and so at variance with the words of the contract, that it needs only mention to show its inadmissibility. Assuming, then, it to be meant that the court should have enjoined against a sale of marble from the land greater in quantity than that which was required by the contract to be delivered at the mill, we are of opinion the claim cannot be maintained. It has been argued in support of it that the evidence shows the quarry to be exhaustible within a definite number of years; that the contract contemplated a perpetual supply for the mill, or a supply so long as the marble shall last, while the quarry shall be worked in the manner contemplated and prescribed by it; and hence that taking out marble and disposing of it in greater quantities than the mill requires, with a right of choice of blocks in Ripley, is an invasion of his right.

The argument is faulty in several particulars. It assumes that the contract prescribed a mode of use of the quarries exclusive of any other. Such is not the agreement. It bears upon its face the evidence that supplies of marble to other consumers than Ripley's mill was contemplated. There certainly is no express restriction of the quantity which the owners of the land may take out, and restriction upon the absolute rights of ownership in fee is not to be raised by mere implication. When Ripley required, under the last provision of the agreement, all his marble to be furnished from the south opening on the lot, and when, in obedience

to his demand, the opening was made by Barnes, it should require unambiguous language to satisfy a court that Barnes and his successors in the title were excluded from taking marble from any other opening for the purpose of sale.

The argument also misapprehends the nature of such a right as Ripley's, even though it be conceded that it was intended to provide for a perpetual enjoyment of a marble supply. Neither the contract nor the reservation in his deed gave him a corporeal interest in the marble *in situ.* It was not a grant to him of the marble, or a grant of a right to quarry and take it all. If his interest was real in any sense, which may be doubted, it was incorporeal. Of course it was not exclusive of the right of the owners of the land to take marble on their own account *ad libitum.* In Lord Mountjoy's case, reported by Godbolt,* by Leonard,† in Coke Littleton,‡ by Moore,§ and more fully by Anderson,‖ a leading case, the words of the reservation were:

"Provided always, and it is covenanted, granted, concluded and agreed between the said parties to this indenture, and the said John Brown and Charles (the grantees), *and their heirs* covenant and grant to and with the said Lord Mountjoy, his *heirs and assigns,* by these presents, in form following, that is to say, that it shall be lawful for the said Lord Mountjoy, *his heirs and assigns,* at all times hereafter, to have, take, and dig in and upon the heath ground of the premises, from time to time, sufficient ores, heath, turves, and other necessaries for the making of alum and copperas."

Here was a reservation from grantees and their heirs to a grantor, his heirs and assigns, quite as large as in the present case. Yet it was held an incorporeal hereditament, and not a grant of an exclusive right. It was likened to a grant of common *sans nombre,* leaving the grantors a right to dig and take ore, though their so doing might exhaust it. *Chetham* v. *Williamson,*¶ is another case equally decisive to the same effect. Other decisions asserting the same doctrine

* Case 24. † 4 Leonard, 147. ‡ Page 104.
§ Page 174. ‖ Page 307. ¶ 4 East, 469.

are at hand: *Caldwell* v. *Fulton*,* *Johnston Iron Company* v. *The Cambria Iron Company*,† *Gloninger* v. *The Franklin Coal Company*.‡ In all of them the covenants ran with the land. The grants were of undoubted real interests. They contemplated a perpetual supply to the grantees as plainly as it was contemplated in this case. The rights of the grantees were not limited, as here, to any defined quantity, and yet it was held they did not interfere with the right of the grantors to take ore, coal, &c., from the property out of which the incorporeal interests issued, and to take it without stint. The appeal of the cross-complainant cannot therefore be sustained.

Nor, under the circumstances of the case, can the marble company be decreed to account for failures to supply the marble required by the contract to be delivered at the mill, if there have been such failures. Holding as we do that there can be no decree for a specific performance, and that Ripley is not entitled to an injunction against selling marble from the quarry, the substantial basis of the defendant's cross-bill fails, and having disturbed the plaintiffs' possession wrongfully, and thereby interfered with their power to perform the contract, he is not in a situation to invoke equitable aid. If he has any claim to damages for a breach of the contract, it must be asserted at law, and there his remedy is complete.

It remains only to add, what must now be apparent, that that part of the decree which directed Ripley to pay the taxable costs, except such as accrued from the portion of the complainants' bill which sought to annul the contract, was correct.

DECREE REVERSED, and the cause remitted with directions to enter a decree in accordance with the opinion above given. The costs of the appeals to be divided, and one-half be paid by each of the parties.

* 31 Pennsylvania State, 482. † 8 Id. 241. ‡ 55 Id. 9.

HANRICK *v.* NEELY.

Where a party having a good title in fee to lands gives a power of attorney to sell them, and the person having the power executes in proper form in behalf of his principal a conveyance, the facts that he was compelled to make the conveyance by a decree of court on a litigation consequent on a difference between himself and persons to whom he had contracted to sell, as to the terms of the contemplated sale, and on the trial gives no proof of the decree in connection with the deed, is no ground for rejecting the deed on a question between subsequent parties.

IN error to the Circuit Court for the Western District of Texas.

This was an action of trespass, according to the local practice of Texas, to try the title to several leagues of land, in Falls County, in that State.

On the trial of the case before a jury the plaintiff proved title in one Pedro Zarsa to the lands in controversy, and gave in evidence a letter of attorney, executed in 1831, from Zarsa to McKinney, authorizing him to sell the lands or to substitute another person in his stead for that purpose. McKinney did not execute the power conferred on him, but, in 1833, delegated it to one Williamson by a letter of substitution, which was also received by the court in evidence. In further derivation of title the plaintiff offered in evidence a deed of the property made in the name of Zarsa, in 1851, by Williamson, under the substituted power, to Hanrick, the plaintiff.

It appeared, from the evidence, that Williamson, on behalf of Zarsa, had contracted to sell the several tracts of land to Hanrick, and that the sale was not completed, owing to differences concerning it, which had arisen between the parties. These differences produced litigation, in the District Court of the United States for the Eastern District of Texas, which resulted in the court decreeing that Williamson, on behalf of his principal, should convey to Hanrick.

This deed, offered as above stated, by the plaintiff, was rejected by the court below on the ground that as it was made and delivered in pursuance of a decree of the District

Court, the decree was necessary to support the deed, and without proof of it (which was not furnished) the deed could not be read in evidence to the jury. The court also apparently based its rejection of the deed on the ground that it was delivered by the clerk to Hanrick in obedience to the decree of the court, and that therefore proof of the decree was necessary to support the delivery. There was other evidence offered, rejected, and exceptions taken, but the only point in the case which the court deemed it necessary to notice related to the ruling of the court, excepted to at the time, excluding this deed from the consideration of the jury. The main question was whether the deed was good without the decree?

Mr. W. G. Hale, for the plaintiff in error. No opposing counsel.

Mr. Justice DAVIS delivered the opinion of the court.

It may be true that the deed which the court below rejected was executed because of the decree made by the District Court for the Eastern District of Texas, and that it would not have been made if the decree had not been rendered, but it does not follow that the decree was necessary to its validity. The fee of the lands was in Zarsa, and the power of Williamson, his attorney in fact, to sell and convey them to Hanrick, was plenary, and did not require, to be employed, that a court of justice should act on it. If Williamson was stimulated by the decree to exercise the power thus vested in him by Zarsa, what right have the defendants to question his action or complain of it? They are not concerned with the reasons that induced him to act, nor with the nature or result of the litigation with Hanrick. All that they are interested to know is, that Zarsa had title to the lands, that he authorized Williamson to sell, and that the conveyance to Hanrick was in due form of law. The decision by this court in *Games* v. *Stiles** is a direct authority against the position taken by the court below. In that case, Buchanan, the purchaser from the United States of lands in

* 14 Peters, 322.

Ohio, sold them to Sterling, but recited in his deed, that the conveyance was made in pursuance of a decree of the Circuit Court of the United States for the District of Virginia. The court held that it was not necessary to prove the decree to sustain the deed; that as Buchanan was the patentee of the land, although he made the deed under the authority of the decree, yet the deed was good without the decree, which could add nothing to its validity. If anything, the case at bar is stronger than the case just cited, because Zarsa does not recite in the body of the deed that the conveyance is made in consequence of the decree, and we only learn the fact that it was so, by an indorsement on the back of the deed.

One other point remains to be noticed. It seems that the court based its rejection of the deed also on the ground that it was delivered by the clerk to Hanrick in obedience to the decree of the court, and that therefore proof of the decree was necessary to support the delivery. But the deed was not complete without delivery, and the decree of the court was no more essential to give validity to the delivery than it was to any other formality necessary to the full execution of the instrument. Williamson authorized the delivery, and has acquiesced in it, and no one else can object to the mode by which the act was accomplished. All that the defendants are interested in, is the fact of delivery, and about this there is no dispute. They are no more concerned with the considerations that induced Williamson to deliver the deed to Hanrick, through the clerk of the court, than they are with the motives that prompted him to affix his signature and seal to the instrument.

Apart from this, Hanrick, the grantee, being in possession of the deed, which upon the face of it is regularly executed, and, having had it recorded, the presumption is that it was duly delivered.*

It is, therefore, clear that the Circuit Court erred in rejecting the deed, and on that account its judgment is

REVERSED AND A VENIRE DE NOVO AWARDED.

* Carver *v.* Jackson, 4 Peters, 84; Ward *v.* Lewis, 4 Pickering, 520.

Syllabus.

RAILROAD COMPANY *v.* TRIMBLE.

1. A deed by which a party conveys "all his property and estate, whatsoever and wheresoever, of every kind and description," carries patent rights and extensions, if the party own any.
2. A decree in equity in one of the loyal States against a party who, having been engaged in the rebellion, was at the time a prisoner of war of the United States, outside of the State, and against whom there was no service of process, or any step taken to bring him before the court, is void; and any sale under it is also void.
3. Where there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it, is entitled to great consideration; but where its meaning is clear, an erroneous construction of it by them will not control its effect.
4. A deed by which a patentee of an invention conveys all the right, title, and interest which he has in the "said invention," as secured to him by letters patent, and also all "right, title, and interest, which *may* be secured to him from *time to time*," the same to be held by the assignee for his own use and for that of his legal representatives, "to the full end of the term for which said letters patent *are* OR *may be* granted," carries the entire invention and all alterations and improvements, and all patents whensoever issued and extensions alike, to the extent of the territory specified.
5. A grant by a patentee of an extension of a patent, before any extension has issued, will carry, if the terms of the grant be proper ones, the legal as well as the equitable interest in the patent.
6. Where the owner of a patent granted the portion of his interest in it to another person in consideration of certain payments to be made by such person to third parties, and certain promises and agreements then made by him; and such person never made any of the payments which he was thus required to make, and by common consent of the grantor and grantee, the contract never went into operation in any way, because the grantee was unable to comply with any of his engagements, so that the grantor was compelled to pay, and did pay, the money which the grantee had agreed to pay; and the grantee during his lifetime never claimed any interest in the contract, but, on the contrary, always recognized the grantor's exclusive right, and acted as his agent in the patent, under a power of attorney, paying him a part of the profits for the privilege:

   Held, after the grantee's death, that the agreement did not prevent the grantor's bringing suit for the infringement of the patent without naming the grantee.

ERROR to the Circuit Court for Maryland, the case being thus:

The Patent Act of 1836* thus enacts:

"*Section* 11. That every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use, and to grant to others to make and use the thing patented within and throughout any specified part or portion of the United States, shall be recorded, &c.

"*Section* 14. Damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name of the person or persons interested, whether as patentees, assignees, or grantees of the exclusive right within and throughout a specified part of the United States."

Section 18 of the act authorizes, under certain circumstances, an extension of the patent beyond the term of its limitation, and thus continues:

"And thereupon the said patent shall have the same effect in law as though it had been originally granted for a term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interest therein."

These statutory provisions being in force, a certain Howe obtained, on the 3d of August, 1840, a patent for an improvement in the manner of constructing the truss frame of bridges. He had previously, on the 10th of July, of the same year, obtained a patent on the same account, which was merged practically in that of August 3d. On the 9th of July, 1844, he assigned to one Isaac R. Trimble all his right in these two patents for certain States, including Maryland. This assignment (duly recorded) conveyed Howe's rights in these words:

"All the right, title, and interest which I have *in said invention*, as secured to me by said letters patent; and *also all right, title, and interest* which *may* be secured to me for *alterations* and

* 5 Stat. at Large, 121, 123.

improvements in the same *from time to time; . . .* the same to be held and enjoyed by the said I. R. Trimble, &c., to the full end of the term for which said letters patent are or *may* be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not have been made."

Afterwards, on the 28th of August, 1846, another patent was granted to Howe, for an *improvement* in the manner of constructing these truss frames; and on the 18th of September, 1854, Howe having died meanwhile, his administrator, one Joseph Stone, in order to "secure to I. R. Trimble more perfectly his legal rights, and tend to a more speedy adjustment of any disputed claim," assigned to Trimble the same interest in the patent of 1846 which he held in the others. The assignment recited that the alterations and improvements secured by the patent of 1846 already belong to Trimble, "who has used and paid for the same since the year 1846, as understood at the time."

On the application of the same administrator, Stone, the patent of 1846 was extended for seven years from the 28th of August, 1860.

On the 30th of May, 1861, Trimble executed a deed, duly recorded, of "all his property and estate, whatsoever and wheresoever, of every kind and description," to Anne Trimble (his wife) and Georgiana Presstman, in trust, &c.

The Philadelphia, Wilmington, and Baltimore Railroad Company during the years 1864, 1865, and 1866, that is to say, during the term of the extension, having built certain bridges in Maryland, adopting Howe's improvement, Trimble, his wife, and Presstman brought suit for damages. Plea not guilty, &c. There was no question as to the validity of the patent, the only point being whether the assignment of July 9th, 1844, from Howe to Trimble passed Howe's interest in the extension of 1846.

The plaintiffs having put the case, as already stated, before the jury, the defendant gave in evidence an assignment dated April 1st, 1861, from Howe's administrator, Joseph Stone, to a certain Daniel Stone, of Philadelphia, of all the

administrator's interest in the patent of 1846, and its extension, for the State above mentioned. This was followed by proof of an agreement between Trimble and Daniel Stone, dated 30th September, 1846. This agreement, which was not recorded until July 27th, 1864, and after Stone's death, which event took place in December, 1863, recited the agreement between Trimble and Howe and the payments thereby stipulated to be made by Trimble. Stone covenanted to pay one-half of the instalments still unpaid as they should mature.

This clause follows:

"And the said Isaac R. Trimble, in consideration of the said *payments, promises, and agreements* on the part of the said Daniel Stone as aforesaid, for and on the part of himself, the said Isaac R. Trimble, and his heirs, executors, and administrators, covenants and agrees, and by these presents doth covenant and agree, to sell and transfer, *and doth hereby sell and transfer* unto the said Daniel Stone, his heirs, executors, and administrators, *the one equal moiety* or half-part of all the right, title, claim, and interest of him, *the said Isaac R. Trimble*, of, in, and to the patent-right aforesaid, which he purchased as aforesaid of the said William Howe."

A copartnership between the parties in the business of building bridges under Howe's patents was then made by the agreement, and it was stipulated that if either party should at any time desire a dissolution, Trimble should name a sum which he would be willing to give or take for a moiety of the rights which he acquired from Howe, including the payments to Howe, and that Stone should thereupon decide whether he would buy or sell; and, further, that the contract might be dissolved at the expiration of six months after notice from either party.

The defendants then gave in evidence a transcript of the record in an equity proceeding in the Supreme Court of Pennsylvania, instituted March 10th, 1864, by this same Joseph Stone, administrator of Daniel Stone, against Trimble, as "formerly of said city of Philadelphia." It alleged

a partnership between Daniel Stone and Trimble, and that the same was carried on in Philadelphia, and it produced what it charged was a copy of the articles of partnership of September 30th, 1846. It then charged that Trimble, "on or about the 29th day of April, 1861, absconded to parts unknown, abandoning the said copartnership business, and took up arms against the government of the United States, became a major-general in the so-called Confederate States army, was afterwards captured, and is now held at Johnston's Island, on Lake Erie, as a prisoner of war by the United States." It further charged that since April 29th, 1861, Trimble had taken no part in the management of the partnership business; that Daniel Stone died on November 26th, 1863, and that the complainant had administered on his estate; that no settlement of the business had ever been had; that a large amount was due from Trimble to Daniel Stone's estate; that the assets of the firm consisted in part of an interest in Howe's patents, *which had been extended for seven years from August 28th*, 1860; that great loss would result from lapse of time and non user, &c., unless the rights of the copartnership should be disposed of, &c. The bill then required the defendant to answer as to whether "the property of the partnership does not principally consist of a partial right under letters patent originally granted to Howe, on the 28th of August, 1846, *and afterwards extended for seven years from the 28th of August*, 1860;" and it prayed an account, injunction, receiver, &c., and a subpœna against Trimble. It was sworn to by Joseph Stone. No subpœna was ever issued, but on the production of two affidavits, sustaining the allegations of the bill as to Trimble's having gone into the Confederate army, and being then in prison at Johnson's Island, the court, March 26th, 1864, sixteen days after the filing of the bill, appointed one John E. Shaw, receiver, and ordered him to sell the partnership property. He filed an inventory, in which the Howe patent, as extended, was set down as the only assets of the partnership, and a sale of it for $300, to one Burton, was reported. He then filed a petition for the confirmation of the sale of the

patent and extension to Burton, and on June 11th, 1864, the sale was absolutely confirmed, and the receiver directed to execute the assignment to Burton of the Howe patent "to the full end of the time for which said letters patent have been extended."

[The articles of copartnership between Trimble and Stone, filed by the complainant, in the equity suit in Pennsylvania, as an exhibit with his bill, though in all other respects identical with the instrument filed in the Patent Office, and produced by the defendants on the trial, did not contain the words of actual sale, which were contained in the latter instrument, to wit: the words, "*and doth hereby sell and transfer*," but confined themselves to an agreement to sell.]

Next followed an assignment dated June 11th, 1864, from this Shaw, receiver, to Burton, of all the interest of Daniel Stone and Trimble, as partners in the Howe patents.

Next was produced an assignment from Joseph Stone, administrator of Daniel Stone, to the same Burton, dated March 6th, 1865, in which he transfers to the assignee all the interest of the deceased in the Howe patents and extension.

The plaintiffs, by way of rebutting evidence, then proved by Trimble that Daniel Stone never made any of the payments stipulated to be paid by him in the agreement offered in evidence by the defendant; that by common consent, the agreement never went into operation in any way, because Stone was unable to comply with any of his engagements made in said agreement, and left their witness to pay, and the witness was compelled to pay, the instalments still due on the original purchase, which the witness himself did; that Stone never claimed any right or interest whatever during his life under that agreement, nor did he ever pretend to act under it; but, on the contrary, always recognized the witness's exclusive right to the interest referred to in said agreement, and acted as the witness's agent under a power of attorney, in constructing bridges thereunder, paying the witness a part of the profits as a compensation for the privi-

leges. The witness further proved that he never was a resident or citizen, nor were any of the plaintiffs, at any time, residents or citizens of Pennsylvania.

The evidence being closed, the plaintiffs presented their prayer for instructions, as follows:

"That if the jury believe, that the agreement offered in evidence by the defendant, executed by and between Trimble and Daniel Stone, and bearing date the 30th September, 1846, never went into effect and operation between the parties thereto, because of the inability and failure of the said Stone to comply with the terms thereof on his part, and that the partnership therein contemplated was, for the same reason, abandoned by the common consent of the said parties; and the said agreement was held and treated by and between them, in all particulars, as inoperative and of no effect; and further believe that the said Trimble, by reason of the failure of said Stone to pay the moneys due on the purchase of the original patent, as in said agreement stipulated, was compelled to pay, and did pay, the same altogether himself; and that said Stone always, after the execution of the said agreement, and notwithstanding the same, recognized the said Trimble as the sole owner of the patent right therein referred to, and acted only as his agent and attorney in regard thereto, and in recognition of his sole right therein, and not otherwise, and never caused or procured or intended the said agreement to be recorded, but died in 1862 or 1863, before the recording of the same, and without setting up the same or pretending to have acquired any rights thereunder, then the said agreement is not to be regarded by the jury as passing any right or title to the said Stone, which the defendant is entitled to set up in connection with any other evidence in the cause, as a bar to the right of the plaintiffs to recover; provided the jury find the execution and delivery to the plaintiffs, Ann Trimble and Georgiana Presstman, of the deed of the 13th of May, 1861, produced by the plaintiffs, and that the same was recorded, &c."

This instruction the court gave.

The defendant presented eight prayers, of which the court granted the first and seventh, and refused the rest.

The second was to the effect, that Trimble did not acquire

Argument for the plaintiff in error.

by Howe's assignment, or that of his administrator, a legal title to the extension of the patent, and that the deed of trust executed by Trimble passed no legal title to the grantees.

The third maintained that the articles of copartnership between Trimble and Stone passed Trimble's title to a moiety of his interest in the patents, and that in the absence of any proof of a reconveyance in writing Trimble had no exclusive legal right in the extended term of the patent.

The fourth affirmed the validity of the receiver's deed to Burton, and that the proceedings in Pennsylvania, and that deed divested Trimble's entire interest.

The fifth was a corollary to the fourth, and assumed that as the deed of trust was not recorded in the Patent Office when the proceedings in Pennsylvania took place, it cannot operate to Burton's prejudice if neither he, the complainant, nor the receiver had any knowledge of it.

The sixth asserted that the assignment by Howe's administrator to Daniel Stone, passed the legal right under the extension to said Stone.

The seventh, touching limitations, was granted.

The eighth asked an instruction that there was no evidence in the case from which the jury could find that the plaintiffs had an exclusive legal title to the use of the Howe improvement at the time of the infringement.

Under these instructions, excepted to by the defendant, the jury found a verdict of $12,500 for the plaintiff, and after judgment the case was brought here on error.

Messrs. W. Schley and T. Donaldson, for the plaintiff in error:

1. The alleged infringements occurred during the extended term of the patent, but the plaintiffs below did not adduce any evidence of title in that term. There is nothing in the agreement, nor in the assignment, relied on by them, which would justify the conclusion, that the parties had in contemplation the possible *extension* of the patents, or any of them. *Wilson* v. *Rousseau*,* seems in point. There a covenant by

* 4 Howard, 682.

the patentee, prior to the Patent Act of 1836, whose 18th section authorized extensions, that the covenantee should have the benefit of *any* improvement in the machinery or *alteration* or *renewal* of the patent, did not include an extension by an administrator under that act; and other cases favor that view.* The defendant's second and eighth prayers ought to have *been* granted.

2. Even if there had been, in the agreement or assignment, or in both, a covenant, providing for an interest in any extension, it would, *as respects third parties*, have vested but an equitable right. By estoppel, the subsequently accruing right feeding the estoppel—it might, in a suit *inter partes*, even at law, have clothed the covenantee with a legal right. But, however this might be in such case, it could not create a legal right, to be enforced by the covenantee, or his assigns, in an action at law, against a stranger to the covenant.

3. But even if Trimble had an inchoate right, in the possible extension of the patent of 1846, his agreement with Daniel Stone passed to Daniel Stone *one-half* of such right; and, of course, the plaintiffs (assuming the agreement to be operative), would not have such exclusive title, as would enable them to maintain this suit.

4. The evidence of Trimble, as a witness, is not competent legal evidence to destroy the agreement; or to revest in him the moiety, which he had transferred to Stone. An assignment of a legal interest in a patent, or of an interest therein, can, under the 11th section of the Patent Act of 1836, only be made by writing. Even if the facts, stated by the witness, would avail in equity, as a ground for a decree setting aside the deed, still, in a suit at law, they cannot annul the agreement.†

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* Wilson *v.* Simpson, 9 Id. 109; Bloomer *v.* McQuewan, 14 Id. 539; Hartshorn *v.* Day, 19 Id. 220; Chaffee *v.* Boston Belting Company, 22 Id. 223; Day *v.* Union Rubber Company, 3 Blatchford, 491, 504.

† Philadelphia and Trenton Railroad Company *v.* Stimpson, 14 Peters, 461; Hartshorn *v.* Day, 19 Howard, 220; Troy Iron and Nail Factory *v.* Corning, 1 Blatchford, 472.

5. Without entering into any discussion of the merits of the suit in the Supreme Court of Pennsylvania, it was shown that it was still pending; and that the court, by a receiver, had taken possession of the interest of Trimble in the patent right, long before the commencement of this suit. Coming into question, collaterally, in this suit, comity requires that the action of that court should not be declared a nullity in law. It was a proceeding in a court of equity; and partnership matters are properly cognizable in equity. It was a case in a matter within its jurisdiction. The appointment of a receiver is an ordinary exercise of power, for the purpose of preserving property, pending litigation; and it is the province of every court, having possession of a cause, to decide for itself, whether, upon the state of case before it, it is expected to exercise the power. The averments of the bill presented a strong case for prompt interference.

Messrs. B. C. Presttman and S. T. Wallis, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The controversy between the parties in this court is confined to questions relating to the title of the defendants in error under the extended patent of August 23, 1860, alleged to have been infringed by the plaintiffs in error. The instruction given, and those refused by the court below, which are brought under review, must be examined in the light of the facts which the bill of exceptions discloses. Before proceeding to consider the main questions in the case, we deem it proper to dispose of others arising upon the record in regard to which we have found no difficulty and entertain no doubt.

The deed of Isaac R. Trimble of the 30th of May, 1861, conveyed all his rights under the patent, whatever they may have been, to the grantees in that instrument. If his title was sufficient, theirs is so. This was not controverted by the counsel for the plaintiffs in error, and needs no further remark.

The assignment of the 11th of June, 1864, to Aaron E. Burton, made by John E. Shaw, as receiver appointed in the

case in equity in the Supreme Court of Pennsylvania, wherein Joseph Stone, administrator of Daniel Stone, was complainant, and Isaac R. Trimble defendant, was a nullity, and as such may be laid out of view. Looking into the record we find no evidence of the issuing of any process against Trimble, or that he was notified of the pendency of the suit by publication or otherwise. It does not appear that there was any step whatever taken to bring him before the court. The entire proceeding, as disclosed, was *coram non judice* and void. It may be added that Trimble's deed to his co-plaintiffs was prior in date to the filing of the bill, and that the title of the grantees in that deed could not be affected by a proceeding to which they were not parties.

If Trimble at the date of that deed held the title under the extended patent, which the defendants in error insist he had, the deed of confirmation to him from Howe's administrator, of the 18th of September, 1854, touching the patent of 1846, extended by the one in question, was inoperative and useless. It was referred to in the argument, as showing the construction put by the parties upon the deed of Howe to Trimble of the 9th of July, 1844. Where there is doubt as to the proper construction of an instrument, this feature of the case is entitled to great consideration. But where its meaning is clear in the eye of the law, the error of the parties cannot control its effect. In this view of the subject, conceding that Trimble took this conveyance, *not* out of abundant caution and to solve in his favor a doubt which might otherwise possibly arise against him, *but* because he deemed it necessary to give him a title which he did not already possess, his legal rights in this controversy are just what they would have been if that instrument had not been executed.

If the construction given to the deed of Howe by the counsel for the defendants in error be correct, and no part of the title vested in Trimble by that deed passed to Daniel Stone by the agreement of the 30th of September, 1846, between him and Trimble, as the counsel for the defendants in error insist, there was nothing for the deed of Howe's

administrator to Stone of the 1st of April, 1861, nor for the deed of Stone's administrator of March 6, 1865, to Burton, to operate upon, and both of them were also without effect upon the rights of the parties in this litigation.

This brings us to the examination of the deed of Howe to Trimble, and of the agreement between Trimble and Stone. They are the hinges upon which the controversy turns. The stress of the argument on both sides was properly confined to these subjects in their several aspects of fact and of law.

The deed from Howe recites that he had obtained from the United States two patents for new and useful improvements in the construction of truss bridges and other structures, one dated on the 10th of July, the other on the 3d of August, in the year 1840. The instrument is a deed poll. After setting out the consideration, it proceeds as follows: "I have assigned, sold, and set over, and do hereby assign, sell, and set over, all the right, title, and interest which I have *in said invention*, as secured to me by said letters-patent, *and also all right, title, and interest* which may be secured to me for alterations and improvements on the same *from time to time*, for, to, and in the following states, viz.," &c. . . . "the same to be held and enjoyed by the said I. R. Trimble for his own use and behoof, and for the use and behoof of his legal representatives to the full end of the term for which said letters-patent are *or may be granted*, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not have been made." A careful analysis of these provisions eliminates the following results: Howe assigns to Trimble all his title and interest in the inventions secured to him by the two patents mentioned, in respect to the territory specified, and also all the right and title which should be secured to him for alterations and improvements in the inventions, *from time to time* thereafter, for the same territory, to be held and enjoyed by Trimble to the full end of the terms for which patents had been theretofore, or might be thereafter, granted, in all respects as they would have been held and enjoyed by the assignor if the assignment had not been made.

Opinion of the court.

The language employed is very broad. It includes alike the patents which *had been* issued and all which might be issued thereafter. No discrimination is made between those for the original inventions and those for alterations and improvements, nor between those which were first issues and those which were reissues or renewals and extensions. The entire inventions and all alterations and improvements, and all patents relating thereto, whensoever issued, to the extent of the territory specified, are within the scope of the terms employed. No other construction will satisfy them. Upon the fullest consideration we have no doubt such was the meaning and intent of the parties.

The effect of such a contract, we think, has been settled by this court in *Gayler* v. *Wilder and others.** Fitzgerald, the inventor, before the patent was issued, assigned his entire right to Enos Wilder. The assignment contained a request that the patent should be issued to the assignee, and was duly recorded in the Patent Office. This brought the case within the terms of the 6th section of the act of 1836. Fitzgerald made no assignment after the patent was issued to him. Enos Wilder, his assignee, assigned to Benjamin Wilder, who was the plaintiff in the action. The defendants insisted that Enos Wilder had not the legal, but only an equitable title. Upon the question whether an assignment subsequent to the issuing of the patent was necessary to pass the former to the assignee, this court said: "We do not think the act of Congress requires it, but that when the patent issued to Fitzgerald, the legal right to the monopoly and the property it created was, by the operation of the assignment then on record, vested in Wilder." The argument which controlled the judgment of the court may be thus stated: Fitzgerald had an inchoate right at the time of the assignment, the invention being then complete and the specification prepared. It appeared, by the language of the assignment, that it was intended to operate upon the perfect legal title, which he then had a lawful right to ob-

* 10 Howard, 477.

tain, as well as upon the inchoate right which he then possessed. There was no sound reason for defeating the intention of the parties by restricting the assignment to the latter interest, and compelling the parties to execute another transfer, unless the act of Congress required it, which, in the opinion of the court, it did not. The act of 1836 declares that every patent shall be assignable in law. The thing to be assigned is not the mere parchment on which the grant is written, but the monopoly which the grant confers—the right of property which it creates. "And when the party has acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the assignment of his whole interest, whether executed before or after the patent issued, is equally within the provisions of the act of Congress." We concur in these views. The rule laid down is the law of this tribunal upon the subject. There the patent was an original one, here it is an extension. The question before us arises under the 11th and 18th sections of the act of 1836. But the arguments which controlled the decision in that case apply in this with equal force. The same considerations are involved in both. There is no substantial ground of distinction. The application of the same principle to the assignment of an extended patent, made before the extension, is an inevitable corollary from the reasoning and ruling of the court. Without, in effect, overruling that adjudication, we cannot hold that Trimble had not a legal title under the extended as well as under the original patent. In our judgment he had such a title.

In this connection our attention has been called by the counsel for the plaintiffs in error to *Wilson* v. *Rousseau*,* and several other cases. None of them turned upon the question we have been considering, and neither of them contains anything in conflict with the proposition established by *Gayler* v. *Wilder*.

It remains to consider the contract between Trimble and Daniel Stone.

* 4 Howard, 682.

It recites the agreement between Trimble and Howe, and the payments thereby stipulated to be made by Trimble. Stone covenants to pay one-half of the instalments still unpaid as they should mature.

This clause follows:

"And the said Isaac R Trimble, in consideration of the said *payments, promises, and agreements* on the part of the said Daniel Stone as aforesaid, for and on the part of himself, the said Isaac R. Trimble, and his heirs, executors, and administrators, covenants and agrees, and by these presents doth covenant and agree, to sell and transfer, *and doth hereby sell and transfer* unto the said Daniel Stone, his heirs, executors, and administrators, *the one equal moiety* or half-part of all the right, title, claim, and interest of him, *the said Isaac R. Trimble*, of, in, and to the patent-right aforesaid, which he purchased as aforesaid of the said William Howe, the sale heretofore made to Reading excepted."

A copartnership between the parties in the business of building bridges under Howe's patents was then entered into, and it was agreed that if either party should at any time desire a dissolution, Trimble should name a sum which he would be willing to give or take for a moiety of the rights which he acquired from Howe, including the payments to Howe, and that Stone should thereupon decide whether he would buy or sell. It was further provided that the copartnership might be dissolved at the expiration of six months after notice by either party.

Trimble was examined as a witness, and testified as follows: Stone never made any of the payments which he was required to make by the contract. By common consent of the parties, the contract never went into operation in any way, because Stone was unable to comply with any of his engagements. Trimble was compelled to pay, and did pay, the full amount of the instalments still due on his contract with Howe. Stone during his lifetime never claimed any right under the contract; but, on the contrary, always recognized Trimble's exclusive right to the interest referred to in the agreement, and acted as Trimble's agent in building

bridges, under a power of attorney, paying Trimble a part of the profits for the privilege. There was no other evidence on the subject. Trimble's testimony was uncontradicted.

The agreement was recorded in the Patent Office on the 27th of July, 1864, after Stone's death, and more than eighteen years after the date of its execution.

The words, "and do hereby sell and transfer," found in the copy from the Patent Office, which was used in evidence in the court below, are not in the copy annexed to the bill filed in the Supreme Court of Pennsylvania. But, conceding that they were in the contract as executed, and that the contract had the same effect in transferring to Stone a moiety of Trimble's rights and interests, which Trimble's contract with Howe had in transferring the whole to Trimble, then a question arose for the jury as to the effect of the facts disclosed in Trimble's testimony. Upon the trial the court, at the request of the plaintiffs, charged the jury in effect, that if they found the facts to be as testified by Trimble, the contract between Trimble and Stone "was not to be regarded as passing any title to Stone, which the defendant was entitled to set up in connection with any other evidence in the cause as a bar to the right of the plaintiffs to recover," provided they found also the execution and delivery of Trimble's deed to his co-plaintiffs. To this instruction the plaintiffs in error excepted.

If the facts were as alleged by Trimble, his contract with Stone was stillborn. It never had any vitality. Neither the legal representative of Stone nor any one in privity with him asserts its validity in this litigation. It is vicariously put forward by the plaintiffs in error. They seek to give it life and vigor, and invoke its aid for their protection.

If a deed of real estate be executed and recorded, *primâ facie* it conveys the legal title; but if it be shown it was not delivered, that destroys its effect.* A judgment may be assigned without written evidence of the transfer.† A party

* Maynard *v.* Maynard et al., 10 Massachusetts, 456.

† Ford *v.* Stuart, 19 Johnson, 342.

may waive a constitutional provision which applies in his favor.* Fraud or mistake in the execution of a deed may be shown at law.† The most solemn contracts under seal, where the statute of frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied; and a contract within the statute may be taken out of it by the conduct of the parties.‡ If Stone's administrator were to sue Trimble, and the facts should be established as Trimble alleges them to be, the action would be barred by *estoppel in pais*. We think the instruction was correct, and that it properly submitted this part of the case to the jury.

The plaintiffs in error submitted eight prayers for instructions. The 2d, 3d, 4th, 5th, 6th, and 8th, were refused. The refusal was excepted to. Some of the points which they present were not insisted upon in the argument at the bar. The others are sufficiently answered by what has already been said.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY dissented, on the ground that there was not enough language in the assignment of Howe to Trimble to show that a transfer of the extension was intended.

BARNARD *v.* KELLOGG.

A wool broker in Boston sent to a dealer in wool at Hartford samples of foreign wool in bales which he had for sale, on commission, with the prices, and the latter offered to purchase the different lots at the prices, if equal to the samples furnished. The wool broker accepted the offer, provided the wool dealer in Hartford would come to Boston and examine the wool on a day named, and then report if he would take it. The wool dealer went to Boston, and after examining certain of the bales as fully as he desired, and being offered an opportunity to examine all the remaining bales and to have them opened for his inspection (which

* Baker *v.* Braman, 6 Hill, 48.

† Hartshorn, Executor, *v.* Day, 19 Howard, 223.

‡ Emerson *v.* Slater, 22 Howard, 41.

offer he declined) purchased. The wool proved, the vendor knowing nothing of it, to have been deceitfully packed, rotten and damaged wool and tags being concealed by an outer covering of fleeces in their ordinary state. On action brought to recover damages, *held*—

1. That the sale was not one by sample: and there having been no express warranty that the bales not examined should correspond with those which were, nor any circumstances from which the law could imply such a warranty, that the rule of *caveat emptor* applied.
2. That proof could not be received to control the said rule, that by the custom of merchants and dealers in wool in bales at Boston and New York, the two principal markets of the country for foreign wool, there is an implied warranty of the seller to the purchaser that the same is not falsely or deceitfully packed; especially where the parties did not know of the custom.
3. The office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it.

ERROR to the Circuit Court for the District of Connecticut, the case being this:

In the summer of 1864, Barnard, a commission merchant residing in Boston, Massachusetts, placed a lot of foreign wool, received from a shipper in Buenos Ayres, and on which he had made advances, in the hands of Bond & Co., wool brokers in Boston, to sell, with instructions not to sell unless the purchaser came to Boston and examined the wool for himself. These brokers sent to E. N. Kellogg & Co., merchants and dealers in wool, in Hartford, Connecticut, at their request, samples of the different lots of wool, and communicated the prices at which each lot could be obtained. Kellogg & Co., in reply, offered to take the wool, all round, at fifty cents a pound, if equal to the samples furnished, and Bond & Co., for their principal, on Saturday, the 6th day of August, by letter and telegram, accepted this offer, provided Kellogg & Co. examined the wool on the succeeding Monday and reported on that day whether or not they would take it. Kellogg & Co. acceded to this condition, and the senior member of the firm repaired to Boston on the day

named and examined four bales in the broker's office as fully as he desired, and was offered an opportunity to examine all the bales, and have them opened for his inspection. This he declined to do, and concluded the purchase on the joint account of all the plaintiffs. Some months after this, on opening the bales it was ascertained that a portion of them were falsely and deceitfully packed, by placing in the interior rotten and damaged wool and tags, which were concealed by an outer covering of fleeces in their ordinary state. This condition of things had been unknown to Barnard, who had acted in good faith. It was, however, communicated to him, and he was asked to indemnify the purchaser against the loss he sustained in consequence of it. This he declined to do, and the purchaser brought this suit. The declaration counted:

1st. Upon a sale by sample.

2d. Upon a promise, express or implied, that the bales should not be falsely packed.

3d. Upon a promise, express or implied, that the wool inside of the bales should not differ from the samples by reason of false packing.

The court below, trying the cause without the intervention of a jury, held that there was no express warranty that the bales not examined should correspond to those exhibited at the brokers' store, and that the law under the circumstances could not imply any. But the court found as matters of fact, that the examination of the interior of the bulk of bales of wool generally, put up like these, is not customary in the trade; and though possible, would be very inconvenient, attended with great labor and delay, and for these reasons was impracticable; and that by the custom of merchants and dealers in foreign wool in bales in Boston and New York, the principal markets of this country where such wool is sold, there is an implied warranty of the seller to the purchaser that the same is not falsely or deceitfully packed, and the court held as a matter of law, that the custom was valid and binding on the parties to this contract, and gave judgment for the purchaser.

This writ of error was taken to test the correctness of this ruling.

Mr. N. Shipman, in support of it:

1. While it is true, to a limited extent, that courts will not recognize customs directly contrary to a well-settled rule of law, yet courts are continually, and of necessity, upholding customs not in conformity with the common law. Indeed, as Lord Kenyon says, it is of the very essence of a custom that it should vary from the common law.*

Neither can there be a precise and definite rule established as to the admission of customs. Each custom must stand or fall by itself. If the custom and the common law can both exist, and the custom does not entirely abrogate the law, and is proved by strong testimony, then the custom stands and the common law yields.

Indeed, within its proper sphere, that is to say not destroying the common law, but modifying it in accordance with the suggestions of practical experience, courts regard usage as entitled to the highest consideration. Baldwin, J., in *Wilcocks* v. *Phillips*,† says:

"Its influence is universal. It attaches to nations and individuals. It creates obligations. It interprets laws. General custom is a general law, and forms the law of contracts, and this sometimes, though it be at variance with their terms. It controls even the principles of law. Thus the right to the way-going crops, days of grace, and time of protest, are regulated by the usage of the place or bank, and affect even those who have no notice of the custom. The ancient, established, uniform, and known custom of persons engaged in any trade, makes a law for that trade, though it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade, are understood to consent. It makes, supplies, and regulates their contracts. Known and settled usage ought to be respected by courts and juries, unless such usages are against the law or policy of the country, otherwise our deal-

* Horton *v.* Beckman, 6 Term, 764. † 1 Wallace, Jr., 63.

ings with foreigners in foreign lands will fall into disorder and confusion."

2. The custom of warranty against false packing of wool in bales, is not contrary to the rule of *caveat emptor*, but is based upon, and is a part of a well-known and established exception to the rule; for when there is no opportunity to inspect the commodity, the maxim *caveat emptor* does not apply.* Now the interior of wool in bales is in fact as much concealed from the buyer as if the bale was in the hold of a vessel on the ocean. The court below finds that the inspection of the interior of the bale is "impracticable." As matter of fact it is known that foreign wool or cotton comes into market packed in bales of about one thousand pounds each, secured by iron hoops, and having been subjected to very great pressure. From the nature of the commodity, the difficulty and expense of opening the bales, the lack of machinery with which to repack them, the delay and labor incident to an attempt to examine the interior of the bulk, a personal inspection of the contents of each bale and of each fleece is impossible. Fraudulent packing is thus rendered easy and difficult of detection. Pecuniary redress for the fraud is impracticable unless there is a general rule of warranty extending from the consumer to the original packer or grower. For it would be well-nigh impossible for each successive person through whose hands the goods passed, from the parties in South America to the manufacturer in the United States, to take a special warranty against false packing. A general and universal rule prevents fraud, and renders the rights and liabilities of all parties certain and easy of enforcement. Courts have therefore been constrained to decide that on every sale of cotton or wool in bales, there is an implied warranty, that substances foreign to the article sold were not concealed in the interior of the package.†

* Gardiner *v.* Gray, 4 Campbell, 144; Hyatt *v.* Boyle, 5 Gill & Johnson, 110.

† Oneida Manufacturing Co. *v.* Lawrence, 4 Cowen, 444; Beebee *v.* Robert, 2 Wendell, 413; Boorman *v.* Johnson, Ib. 566; Gallagher *v.* Waring, 9 Wendell, 20; Manufacturing Co. *v.* Dixon, 3 Cushing, 407.

3. The customs, contravening the rule of *caveat emptor*, which have been disregarded by the courts, are of a different nature from the one now under consideration. The former were customs whereby the seller impliedly warranted his wares to be "merchantable," and were thus directly at variance with the common law. This custom is not a warranty in regard to character or quality, but is in effect a warranty against fraud; that "material foreign to, and not properly belonging to or with" the article sold has not been secretly placed within the bale.

Mr. Charles E. Perkins, contra.

Mr. Justice DAVIS delivered the opinion of the court.

No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample, is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of *caveat*

emptor in this country, that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina), sanction it.

Applying this acknowledged rule of law to this case, it is easy to settle the rights of the parties, and to interpret the contract which they made. That the wool was not sold by sample clearly appears. And it is equally clear that both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased. Barnard expressly stipulated, as a condition of sale, that Kellogg should examine the wool, and he did examine it for himself. If Kellogg intended to rely on the samples as a basis of purchase, why did he go to Boston and inspect the bales at all, after notice that such inspection was necessary before the sale could be completed? His conduct is wholly inconsistent with the theory of a sale by sample. If he wanted to secure himself against possible loss, he should either have required a warranty or taken the trouble of inspecting fully all the bales. Not doing this, he cannot turn round and charge the seller with the consequences of his own negligence. Barnard acted in good faith, and did not know or have reason to believe that the wool was falsely packed. The sale on his part was intended to be upon the usual examination of the article, and the proceeding by Kellogg shows that he so understood it, and it is hard to see what ground of complaint even he has against Barnard. It will not do to say that it was inconvenient to examine all the bales, because if inconvenient it was still practicable, and that is all, as we have seen, that the law requires. The case of *Salisbury* v. *Stainer*, reported in 19th Wendell,* is similar in its facts to this case, and the court applied to it the rule of *caveat emptor*. There bales of hemp were sold which turned out to be falsely packed. The purchaser wished to treat the sale as a sale by sample; but the court said to him, "You were told to examine for yourself, and having opened one bale, and at liberty to open all, and omitting to do it, you cannot be per-

* Page 158.

mitted to allege that the sale was a sale by sample, nor to recover damages as on an implied warranty." It is, therefore, clear by the general principles of law, adopted in the interests of trade and commerce, that the seller in this instance was not answerable over for any latent defects in the bales of wool.

But the learned court below having found that by the custom of dealers in wool in New York and Boston there is a warranty by the seller implied from the fact of sale, that the wool is not falsely packed, and having held Barnard bound by it, the inquiry arises whether such a custom can be admitted to control the general rules of law in relation to the sale of personal property.

It is to be regretted that the decisions of the courts, defining what local usages may or may not do, have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them, and on this account mainly the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle, as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it.* Usage, says Lord Lyndhurst, "may be admissible to explain what is doubtful; it is never admissible

* See Notes to Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, 498; 2 Parsons on Contracts, § 9, 535; Taylor on Evidence, 943, and following.

to contradict what is plain."* And it is well settled that usage cannot be allowed to subvert the settled rules of law.† Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine, says the court, in *Thompson* v. *Ashton*,‡ "would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels."

In Massachusetts, where this contract was made, the more recent decisions on the subject are against the validity of the custom set up in this case. In *Dickinson* v. *Gay*,§ which was a sale of cases of satinets made by samples, there were in both the samples and the goods a latent defect not discoverable by inspection, nor until the goods were printed, so that they were unmerchantable. It was contended that by custom there was in such a case a warranty implied from the sale that the goods were merchantable. But the court, after a full review of all the authorities, decided that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject, and therefore void. If anything, the case of *Dodd* v. *Farlow*,‖ is more conclusive on the point. There forty bales of goat skins were sold by a broker, who put into the memorandum of sale, without authority, the words "to be of merchantable quality and in good order."

It was contended that by custom, in all sales of such skins, there was an implied warranty that they were of merchant-

* Blackett *v.* Royal Exchange Assu. Co., 2 Crompton & Jervis, 249.

† See Note to 1st Smith's Leading Cases, *supra*.

‡ 14 Johnson, 317. § 7 Allen, 29. ‖ 11 Allen, 426.

able quality, and, therefore, the broker was authorized to insert the words, but the court held the custom itself invalid. They say, "It contravenes the principle, which has been sanctioned and adopted by this court, upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the subject." It is clear, therefore, that in Massachusetts, where the wool was sold and the seller lived, the usage in question would not have been sanctioned.

In New York there are some cases which would seem to have adopted a contrary view, but the earlier and later cases agree with the Massachusetts decisions. The question in *Frith* v. *Barker** was, whether a custom was valid that freight must be paid on goods lost by peril of the sea, and Chief Justice Kent, in deciding that the custom was invalid, says: "Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law." In *Woodruff* v. *Merchants' Bank*,† a usage in the city of New York, that days of grace were not allowed on a certain description of commercial paper, was held to be illegal. Nelson, chief justice, on giving the opinion of that court, says: "The effect of the proof of usage in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York;" and adds, "if the usage prevails there, as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." And, in *Beirne* v. *Dord*,‡ the evidence of a custom that in the sale of blankets in bales, where there was no express warranty, the seller impliedly warranted them all equal to a sample shown, was held inadmissible, because contrary to the settled rule of law on the subject of chattels. But the latest authority in that

* 2 Johnson, 327. † 25 Wendell, 673. ‡ 1 Selden, 95.

State on the subject, is the case of *Simmons* v. *Law*.* That was an action to recover the value of a quantity of gold-dust shipped by Simmons from San Francisco to New York on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, say: "A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined."

In Pennsylvania this subject has been much discussed, and not always with the same result. At an early day the Supreme Court of the State allowed evidence of usage, that in the city of Philadelphia the seller of cotton warranted against latent defects, though there were neither fraud on his part or actual warranty.† Chief Justice Gibson, at the time, dissented from the doctrine, and the same court, in later cases, has disapproved of it,‡ and now hold that a usage, to be admissible, "must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

It would unnecessarily lengthen this opinion to review any further the American authorities on this subject. It is enough to say, as a general thing, that they are in harmony with the decisions already noticed. See the American note to *Wigglesworth* v. *Dallison*, 1 Smith's Leading Cases, where the cases are collected and distinctions noticed.

The necessity for discussing this rule of evidence has often occurred in the highest courts of England on account of the great extent and variety of local usages which prevail in that country, but it would serve no useful purpose to review the cases. They are collected in the very accurate English note

* 3 Keys, 219.

† Snowden *v.* Warder, 3 Rawle, 101.

‡ Coxe *v.* Heisley, 19 Pennsylvania State, 243; Wetherill *v.* Neillson, 20 Id. 448.

to *Wigglesworth* v. *Dallison*, and are not different in principle from the general current of the American cases. If any of the cases are in apparent conflict, it is not on account of any difference in opinion as to the rules of law which are applicable.

These rules, says Chief Justice Wilde, in *Spartali* v. *Benecke*,* "are well settled, and the difficulty that has arisen respecting them, has been in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved." But this difficulty does not exist in applying these rules to the circumstances of this case. It is apparent, that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty, which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly. This they had the right to do, and by the terms of the contract the law placed on the buyer the risk of the purchase, and relieved the seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose on the seller a burden which the law said, on making his contract, he should not carry. By this means a new contract is made for the parties, and their rights and liabilities under the law essentially altered. This, as we have seen, cannot be done. If the doctrine of *caveat emptor* can be changed by a special usage of trade, in the manner proposed by the custom of dealers of wool in Boston, it is easy to see it can be changed in other particulars, and in this way the whole doctrine frittered away.

It is proper to add, in concluding this opinion, that the conduct of the parties shows clearly that they did not know of this custom, and could not therefore have dealt with reference to it.

* 10 Common Bench, 222.

Statement of the case.

JUDGMENT REVERSED, and the cause remanded with directions to award a

VENIRE DE NOVO.

BRADLEY and STRONG, JJ., dissented.

UNITED STATES *v.* HODSON.

1 Revenue statutes being remedial in their character are to be construed liberally to carry out the purposes of their enactment; and the rule of construction applicable to statutes generally, that what is implied in them is as much a part of the enactment as what is expressed, holds in regard to them. This principle of construction applied to the 53d and 57th sections of the Internal Revenue Act of June 30, 1864.

2. Where a statute directs a bond to the government to be given by persons exercising certain employments, and to be conditioned for the performance of several particular acts which it specifically states, and the agent of the government takes a bond conditioned, not in the specific way that the statute directed, but for the parties' compliance with "*all* the provisions" of the act, "and such *other* acts as are now or as may hereafter be in this behalf enacted," the bond, if it have been voluntarily given, and is not contrary to law or public policy, is valid as against a party who has enjoyed benefits under it. And this, although the statute which required the bond to be conditioned in a particular way, contain numerous other provisions, which it makes the duty of persons exercising employments under it, to comply with, but for which it does not contemplate the giving of any bond.

3 On such a bond, suit in the present case was sustained for breaches which the court adjudged to be within the conditions that the statute enacted that the bond should contain; the opinion of the court, however, asserting the validity of the bond on grounds more broad than it declared necessary to the judgment; that is to say, more broad than to the extent of the breaches assigned.

4. A bond which a statute says that a party whom it requires to be licensed as a distiller, "shall" give before his license is issued, and which makes it a penal offence for him to exercise the business of a distiller without taking out such license, is a voluntary bond.

IN error to the Circuit Court of the District of Wisconsin, the case being thus:

The Internal Revenue Act of June 30, 1864,* makes it

* 13 Stat. at Large, 242.

obligatory on persons meaning to be distillers to take out a license, and makes the business of distilling without a license an offence punishable by fine and imprisonment. And the 53d section of the statute enacts

"That any person required by law to be licensed as a distiller SHALL, *in addition to what is required by other provisions of law*, make an application therefor to the assessor of the district, and before the same is issued, the person so applying shall give bond to the United States in such sum as shall be required by the collector, with one or more sureties to be approved by said collector, 'conditioned'—

in effect—

"(1.) That if he shall use any additional still he will report the fact to the assessor.

"(2.) That he will from day to day enter in a book to be kept for that purpose the number of gallons that may be distilled, and the quantity of grain he may use; and that the book shall be open at all times to the inspection of the assessor.

"(3.) That he will render to the assessor, on certain days of each month, an exact account in writing of the number of gallons distilled, of the number placed in warehouse, and of the number sold or removed for consumption and sale, and also of the quantities of grain used for the fractional part of a month next preceding the report, and the proof thereof, which report is to be verified by affidavit.

"(4.) That he will not sell, or permit to be removed for consumption and sale, any spirits distilled under his license until they have been inspected, gauged, proved, and entered upon his books, as aforesaid.

"(5.) That he will, at the time of rendering his account to the collector, pay the duty imposed by law upon such spirits."

"And the said bond," the act proceeds, "may be renewed or *changed* from time to time *in regard to the amount and sureties* thereof, according to the discretion of the collector."

The statute, which is entitled "An Act to Provide Ways and Means for the Support of the Government and for other Purposes," is a statute of 182 sections, many very long, and contains a great variety of provisions on a great variety

of subjects; some being matters enjoined, and some matters forbidden; some enforced by penalties, fine, and imprisonment; and some not so made operative. The statute, however, obviously not contemplating that the bond shall be conditioned for the performance of any duties but those for which it says that it shall be.

In section 57th, separated both as to place and by intervening topics from that one (the 53d), which sets out in what the bond of the distiller is to be conditioned, it is enacted

"That . . . every person who shall use any still, boiler, or other vessel as aforesaid, . . . shall from *day to day make true and exact entry, in a book to be kept for that purpose, the number of gallons of spirits distilled, and also the number of gallons placed in warehouse, and also the number sold and removed for consumption and sale, and the proof thereof.*"

But it is not enacted that the distiller's doing this shall be incorporated among the conditions of the bond which the 53d section declares that he shall give.

With this statute in force, the United States took from one William Hodson, a distiller, to whom license had been granted, a bond precedent to the grant of license. The bond was not conditioned in the way that the already quoted 53d section prescribes, nor conditioned for the doing of specific things at all. The language of the condition was thus:

"That whereas the said William Hodson has made application to the collector of internal revenue for the second collection district of the State of Wisconsin for a license as a distiller at Turtleville. Now, therefore, if the said William Hodson shall truly and faithfully conform to *all* the provisions of *an act entitled* 'An act to provide internal revenue,' approved June 30, 1864, AND *such other acts as are now or may hereafter be in this behalf enacted*, then the above obligation to be void and of no effect, otherwise it shall abide and remain in full force and virtue."

The United States sued for the penalty of the bond, and assigned various breaches, and among them this as part of

a first one, "that the defendant Hudson did manufacture a large quantity of distilled spirits, to wit, 100,000 gallons, and *did not from day to day make a true entry in a book kept for that purpose of the number of gallons by him distilled, and also of the number of gallons by him placed in warehouse, and of the number of gallons by him sold and removed for consumption and sale, and the proof thereof.*"

Several other breaches were assigned, which were not denied to be breaches of acts for the performance of which the statute requires the bond to be conditioned.

The defendants traversed each of the breaches, including of course the part of the first above given one.

Upon the trial the United States offered in evidence the bond and proof of the several breaches. The defendants objected to the evidence on the ground that the conditions were not required by, and were not in conformity with, the statutes of the United States. The court sustained the objection. And the correctness of this ruling was the matter now here for review.

Mr. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States:

1. It nowhere appears that the bond in question was exacted or extorted by the collector in the particular form in which it was given. Accordingly, the rule that a bond taken by a public officer *colore officii*, who has illegally exerted his authority, and thereby compelled the obligor to enter into an obligation not required by law is void, has no application here.

The condition of the bond embraces two separate and distinct matters, which make it divisible into two parts. The latter part, we admit, does not come within the requirements of the act directing the bond to be taken. Yet, even as a statutory bond, it is not to be regarded as ineffectual on that account. For if a bond taken under a statute contain, in addition to the condition prescribed by the statute, a condition not required by it, such condition may be void; but unless the statute provides that the

bond shall be void if it contain any other condition than that required, the bond will be valid and binding for the performance of the legitimate condition.* So where part of the condition of a bond taken under a statute is prescribed by the statute, and part is not, if the condition be divisible, a recovery may be had for breach of the former.† The several parts of such a condition are as much independent of and unaffected by each other as if the obligors had become bound thereto severally by separate instruments.‡

2. That part of the condition which requires the principal obligor to "truly and faithfully conform to all the provisions" of the act of 1864, *ex vi termini* includes the various duties enumerated in the section describing the particulars in which the bond shall be conditioned; and the instrument, being thus in substantial though not in literal compliance with the statute, is good as a statutory bond. Now in such bonds, where there is a substantial compliance with the law the want of a rigid conformity with its letter is not a fatal objection to the bond.§ And when the substance of a bond is prescribed by statute, if the bond be so drawn as to include all the obligations imposed by the statute, and to allow every defence given by law, it will be valid, though variant from the form prescribed.‖

It is true, the phraseology of the condition of this bond, viz., to "conform to *all* the provisions" of the act, may, in its generality, include more than the statute required to be inserted in the condition. But the bond being given with reference to the statute, must be construed by the statute,¶ so that the unnecessarily comprehensive language of the

* Anderson *v.* Foster, 2 Bailey, 500; Walker *v.* Chapman, 22 Alabama, 116; United States *v.* Brown, Gilpin, 155.

† The Ordinary *v.* Executors of Smith, 2 Green, 479; United States *v.* Bradley, 10 Peters, 343.

‡ Harrison *v.* Seymour, 1 Law Rep., C. P. 518.

§ Central Bank *v.* Kendrick, Dudley, 66; Gardener *v.* Woodyear, 1 Ohio, 170; Yale *v.* Flanders, 4 Wisconsin, 96; Nunn *v.* Goodlett, 5 English, 89.

‖ Rhodes *v.* Vaughan, 2 Hawks, 167; Cobb *v.* Commonwealth, 3 Monroe, 391.

¶ Baker *v.* Morrison, 4 Louisiana Annual, 373.

condition will be restrained in its operation to what may be lawfully included therein. Accordingly, no breaches are properly assignable thereunder for anything not within the requirements of the statute.*

The case of *Ohio* v. *Findley*,† which arose under a law of that State, passed in 1831, prescribing the duties of county treasurers, is in point. One section of that act required "that each county treasurer, previous to entering on the duties of his office, shall give bond . . . conditioned for the paying over, according to law, all moneys which shall come into his hands for State, county, township, or other purposes." Subsequent sections prescribed various *other* duties to be performed by the county treasurer. The court held that a bond given by a county treasurer under that act conditioned that he should "faithfully and impartially discharge *all* the duties of his said office agreeably to law," is a good statutory bond *for so much as is prescribed by the statute and comprehended in the condition*, even though it may be void for the residue.

But if the bond is not good as a statutory bond, yet having been voluntarily given, and being neither prohibited by the statute nor against the policy of the law, it is valid as a common law obligation.

Story, J., giving an opinion of the court, fully admits, and indeed asserts this doctrine in *United States* v. *Tingey*.‡

In *Bank of Brighton* v. *Smith*,§ it is said by Bigelow, C. J.:

"The rule of law is well settled, that a bond given for the faithful performance of official duties, or in pursuance of some requirement of law, may be valid and binding on the parties, although not made with the formalities or executed in the mode provided by the statute under which it purports to have been given. This rule rests on the principle that, although the instrument may not conform to the special provisions of a statute or regulation in compliance with which the parties executed it, nevertheless, it is a contract voluntarily entered into upon a

* Hall *v.* Cushing, 9 Pickering, 395. † 10 Ohio, 51.

‡ 5 Peters, 115; and see United States *v.* Linn, 15 Id. 290.

§ 5 Allen, 415.

sufficient consideration, for a purpose not contrary to law, and therefore it is obligatory on the parties to it in like manner as any other contract or agreement is held valid at common law."

In support of this doctrine additional authorities may be cited:*

The 57th section of the act does in fact require no more than what the united conditions of the bond, as prescribed by the 53d section, do. He is to keep "books" as to all the matters mentioned in the conditions, so that assigning breaches in the language of the 57th section is, in truth, assigning them in what would have been the language of the condition of the bond in this case if the condition had been in literal compliance with the words of the statute.

Mr. M. H. Carpenter, contra:

The bond sued on was void. By the act under which it was given, no person could carry on the business of a distiller without giving a bond conditioned in a mode particularly prescribed. And it is plain that in regard to the condition prescribed, Congress meant that the collector should not make a change. Why otherwise is the condition minutely and with such pains prescribed? and why in regard to amount and sureties is the collector authorized to make a change? The act expressly refers to other duties "required by other provisions of law," which are "in addition" to those which the bond is meant to enforce. But these former it enforces not by bond with sureties, but by penal or other sanctions. Such is the system which Congress, in its wisdom, saw fit to adopt. The collector here, has, therefore, taken a bond which no law required, one which supersedes the system of Congress and adopts a new system of the collector's own instead. The bond is thus one which "under color and pretence of an act of Congress, and under color of

* Morse *v.* Hodsdon, 5 Massachusetts, 314; Burroughs *v.* Lowder, 8 Id. 373; Sweetser *v.* Hay, 2 Gray, 49; Dunbar *v.* Dunn, 10 Price, 54; Justices *v.* Smith, 2 J. J. Marshall, 473; Hoy *v.* Rogers, 4 Monroe, 225; Lane *v.* Kasey, 1 Metcalfe (Ky.), 410; Gathwright *v.* Callaway County, 10 Missouri, 663; Horn *v.* Whittier, 6 New Hampshire, 88.

Recapitulation of the case in the opinion.

office was required and extorted against the form and effect of a statute." Such a bond is *adjudged* in *United States* v *Tingey*, cited on the other side, to show it good, to be void; the nullity of the bond being in truth, the only point adjudged in the case, and the various remarks relied on by the other side, about the difference between such a bond and voluntary bonds being mere *dicta* of Story, J., extra-judicial, and irrelative, and *from* the purpose of the judgment which declared the bond bad.

That a bond was required, or exacted, or extorted, is certain. The distiller had to give it or give up his vocation. He "shall" give it, is the language of the act of Congress, before he gets his license. Certainly no distiller gives voluntarily such a bond as distillers are required by the statute to give, or gives it otherwise than because he is required by the law, which commands obedience from all, to give it, and because if he don't give it he can get no license, and will be fined and imprisoned for exercising his business. Is a bond thus given, voluntarily given—given by choice? Certainly not. If it were, a statute requiring it—declaring that the party SHALL give it, and visiting him with a loss of his license if he does not—would be useless. A bond may be exacted or extorted by influences, having nothing in them of duress of person. When the law speaks it compels, it forces. The collector presents his bond ready drawn. *He* is particularly bound to know what sort of security the government requires. The distiller can rarely know. Independently of which the collector is "in office," and "obeyed," of course. The bond is presented for the distiller's signature, and he must sign or forfeit his right to exercise his calling. He acts at his peril if he misjudges as to the right of the government to have the exact bond put before him for his signature. And he does not presume to judge at all, but signs it as of course.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Wisconsin. The action was debt

Recapitulation of the case in the opinion.

upon a penal bond in the sum of five thousand dollars. The condition was not set out and no breaches were alleged in the declaration. The declaration was framed to recover the penalty. The defendants craved oyer of the condition, and it was given. It is set out in the record, and is substantially as follows:

That William Hodson had applied to the collector of internal revenue for the second collection district in the State of Wisconsin for license as a distiller at Turtleville, in that State, and that if the said William Hodson should faithfully conform to all the provisions of an "act to provide internal revenue to support the government, and to pay interest on the public debt, and for other purposes," approved June 30th, 1864, and such other acts as now are or may be hereafter in this behalf enacted, then the above obligation to be void, otherwise to remain in full force.

The defendants pleaded performance. The plaintiffs thereupon replied and assigned the following breaches in their replication:

(1.) That the defendant, Hodson, did manufacture a large quantity of distilled spirits, to wit: 100,000 gallons, and did neglect to make a true entry and report of the same, and did not from day to day make a true entry in a book kept for that purpose of the number of gallons by him distilled, and also of the number of gallons by him placed in warehouse, and of the number of gallons by him sold and removed for consumption and sale, and the proof thereof, and that he did not cause the same to be done.

(2.) That the said Hodson did not conform to the provisions of said act and acts in this, to wit: that he did sell and remove from his distillery, for consumption and sale, a large quantity of distilled spirits manufactured by him, to wit: 50,000 gallons, and did neglect to render to the assessor or assistant assessor of the said second collection district, &c., a true account in duplicate, taken from his books, of the number of gallons of spirits distilled by him, and also of the number of gallons sold and removed for consumption and sale.

Recapitulation of the case in the opinion.

(3.) That the said Hodson did not conform to the laws aforesaid in this, to wit: that he did remove from his distillery a large quantity, to wit: 100,000 gallons of spirits, then and there by him manufactured, upon which duties were by law imposed, and which duties he neglected to pay.

(4.) And that the said Hodson did not conform to the provisions of the laws aforesaid in this, to wit: that he did manufacture a large quantity of spirits, to wit: 100,000 gallons, and did remove the same from his distillery for consumption and sale, before the same were inspected, gauged, and branded by an inspector appointed to perform such duties, and did neglect to cause the spirits so removed to be inspected, gauged, and branded before the same were removed, as aforesaid.

The defendants filed a rejoinder, specially traversing each of the breaches assigned, and concluded to the country. This put the cause at issue. Upon the trial the United States offered in evidence the bond and proof of the several breaches. The defendants objected to the evidence upon the ground that the conditions were not required by, and were not in conformity with, the statutes of the United States. The court sustained the objection and excluded all the evidence. A verdict and judgment were thereupon rendered for the defendants. The United States excepted, and have brought this ruling here for review.

The only inquiry presented for our consideration is the validity of the bond upon which the suit was founded.

It would have been more regular to raise the question by a demurrer after oyer, or by a motion in arrest of judgment. But if the bond were void it was competent for the defendants to raise the objection at any stage of the trial. The court was not bound to proceed further, when it became clear that, whatever the verdict, the plaintiff could not recover. To proceed with the trial under such circumstances would have been idly to waste the time of the court and trifle with the forms of justice.

The bond was taken under the 53d section of the act of

June 30th, 1864, ch. 173.* That section required a bond to be given by every licensed distiller, and prescribes its conditions. They are substantially:

That if the distiller shall use any additional still he will report the fact to the assessor.

That he will from day to day enter in a book to be kept for that purpose, the number of gallons that may be distilled, and the quantity of grain he may use; and that the book shall be open at all times to the inspection of the assessor.

That he will render to the assessor, on the 1st, 11th, and 21st days of each month an account in writing of the number of gallons distilled, of the number placed in warehouse, and of the number sold or removed for consumption and sale, and also of the quantity of grain used for the fractional part of a month next preceding the report, and the proof thereof, which report is to be verified by affidavit.

That he will not sell, or permit to be removed for consumption and sale, any spirits distilled under his license until they have been inspected, gauged, proved, and entered upon his books, as aforesaid.

And that he will at the time of rendering his account to the collector pay the duty imposed by law upon such spirits.

It is not denied that all the breaches are within the requirements of the statute touching the bond, except that part of the first one, which is, that the licensee did not, from day to day, "make true and exact entry thereof in a book to be kept for that purpose, of the number of gallons by him placed in warehouse, and the number of gallons by him sold and removed for consumption and sale, and the proof thereof." It is said the statute required him to do this, but did not require him to give a bond that he would do so. The statute required the bond to be conditioned that he would, from day to day, enter in a book to be kept for that

* 13 Stat. at Large, 242.

purpose, the number of gallons distilled; that the book should be open to the inspection of the assessor; that he would render, at the time specified, "an exact account in writing" of the number of gallons sold, or removed for sale and consumption, and the proof thereof; and that he would not sell, or permit to be sold or removed, for consumption or sale, any spirits distilled by him until the quantity had been "duly entered upon his books, as aforesaid." Considering these provisions together, we think the implication clear, that they require such an account to be kept as the breach alleges was not kept, and that if the conditions, as prescribed, had been set out at length in the bond, such would have been their legal effect. The first part of the 57th section is silent as to the bond, but is explicit as to the account, and strongly supports the conclusion at which we have arrived. The question must be considered in the light of the entire context bearing upon the subject. What is implied in a statute is as much a part of it as what is expressed.*

Revenue statutes are not to be regarded as penal, and therefore to be construed strictly. They are remedial in their character, and to be construed liberally, to carry out the purposes of their enactment.†

We hold this, like all the other breaches, to be within the conditions which the statute enacts the bond shall contain.

In one view of the case, this fact is important; in another and perhaps more important one, it is no wise material. Both will be presently considered.

The record is silent as to any coercion or duress. The bond is, therefore, to be considered a voluntary one.‡ A bond in this form is not prohibited by the statute, nor is it contrary to public policy. It was founded upon a sufficient consideration, and was intended to subserve a lawful purpose.

In *The United States* v. *Tingey*,§ the suit was upon the bond

* United States *v.* Babbit, 1 Black, 55.

† Cliquot's Champagne, 3 Wallace, 145.

‡ United States *v.* Bradley, 10 Peters, 345. § 5 Peters, 127.

of a purser in the navy. The statute declared "that every purser, before entering on the duties of his office, shall give bond, with two or more sufficient sureties, in the penalty of two thousand dollars, conditioned faithfully to perform all the duties of purser in the navy of the United States."* The court said "it is obvious that the condition of the present bond is not in the terms prescribed by the act, . . . and it is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser or otherwise." The bond was held to be valid. The decision was put upon the grounds that the government had the capacity to make the contract, that the United States were a body politic, and that, as incident to its general right of sovereignty, it was competent to enter into any contract not prohibited by law, and found to be expedient in the just exercise of the powers confided to it by the Constitution. *Dugan* v. *The United States*† was referred to as sustaining this proposition. It was remarked that a different principle would involve a denial to the General and the State governments of the ordinary rights of sovereignty. In conclusion, it was said, in relation to the bond there in question, "The United States have a political capacity to take it. We see no objection to its validity in a legal or moral view." Tingey, who was a surety, pleaded, among other things, in the court below, that the bond "was under color and pretence of said act of Congress, and, under color of office, required and extorted from the said Deblois, and from the defendant, as one of his sureties, against the form and effect of the said statutes, by the then secretary of the navy." The United States demurred. The court overruled the demurrer, and gave judgment for the defendant. The United States prosecuted a writ of error. This court held the plea sufficient and affirmed the judgment.

In the case of *The United States* v. *Bradley*,‡ the views of

* Act of March 30, 1812, 2 Stat. at Large, 699, ch. 47.

† 3 Wheaton, 172.

‡ 10 Peters, 343.

the court expressed in *The United States* v. *Tingey* were restated and, upon the fullest consideration, were reaffirmed.

The United States v. *Linn*,* was an action against a receiver of public moneys and his sureties. The statute in that case required that the receiver should "give *bond*, with approved security, in the sum of ten thousand dollars, for the faithful discharge of his trust." The instrument given was without seal, and was, therefore, not the security required by the statute. The counsel for the defendants insisted that the instrument was void for the reasons, among others, that it was not the form of security required by the statute; that the prescribing of one security was an implied prohibition of all others, and that if the instrument in question could be sustained, the statute might in all cases be disregarded and a mortgage of realty or personalty or any other imaginable security might be substituted for that which the statute required. The court responded: "If this is a contract, entered into by competent parties and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law." "A mortgage, or any other approved security voluntarily given, would no doubt be valid."

These cases are conclusive of the question before us. Their authority has not been shaken by any later adjudication; we think they rest upon the soundest principles, and are in accordance with a wise and salutary policy. We feel no disposition to re-examine the propositions they affirm.

A narrower view of the instrument in question may be taken, which will also maintain its validity to the extent of the breaches assigned in the declaration. It is a settled principle of law that where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced. Applying this principle to the case before us, all which this instrument contains with reference

* 15 Peters, 290.

to statutes other than the act of 1864, under which it was taken, may be rejected, and the generality of the reference to that act may be so limited as to include only what is covered by the conditions prescribed by the statute, as if those conditions were incorporated and set out in the bond *in hæc verba.* An authority exactly in point, for this construction, is found in the well-considered case of *Ohio* v. *Findley and others.** The principal in the bond in that case was a county treasurer. The bond was conditioned that he should perform his official duties according to law. The statute, as in the case before us, was specific in its requirements as to what the bond should contain, and the condition, it was admitted, largely exceeded them. The court said: "That part which is legal is marked out in the statute-book itself, and is therefore as completely severable from the rest as if the two parts were separated in the condition of the bond."

But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defence. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors.

Judgment REVERSED, and the cause remanded with an order to issue a

VENIRE DE NOVO.

* 10 Ohio Rep. 51.

DUCAT *v.* CHICAGO.

The case of *Paul* v. *Virginia* (8 Wallace, 168) affirmed and applied to a case where the State by certain statutes authorized the State officers to grant to foreign insurance companies, upon complying with certain terms, a license to transact the business of insurance within the State, and then, by other statutes incorporating cities, made it obligatory on such foreign companies transacting business within those cities to pay them a *pro rata* on all their premiums, and declaring it unlawful in the companies otherwise to do business in them, authorized those cities to sue and recover it from the companies for the city's use.

ERROR to the Supreme Court of the State of Illinois; the case being thus:

Statutes passed by the legislature of Illinois in 1853 and 1857, "to regulate the agencies of insurance companies not incorporated by the State of Illinois," required the agents of all such insurance companies, desirous to transact business in the State, to take out a license from the auditor of the State; and, before obtaining it, to furnish him with a statement, under the oath of the president or secretary of the company, showing its name and locality, the amount of its capital stock, the portion paid in, the assets of the company, and to furnish also a written instrument, under the company's seal, authorizing the agents to accept service of process, and agreeing that service on them shall be valid. Upon all this being done, and $5 paid for filing and examining the statement, and $1 for the certificate, a license authorizing the agent applying for it "to transact the business of insurance in this State," is then allowed to be granted from year to year.

By another act, passed a few years later (1863), incorporating the city of Chicago, the legislature of the State enacted that all foreign insurance companies engaged in effecting insurances in that city should pay to the city treasurer the sum of $2 upon the $100, and at that rate upon the amount of all premiums which shall have been received; designating the time and mode of payment. The law, also,

in case of default of payment, provided that it should be unlawful for the company to transact any business of insurance in the city until the payment was made, and that the rates might be recovered of the company, or of its agent, in the name and for the use of the city.

With these laws in force, one Ducat, residing in the city of Chicago, and the agent there of several insurance companies chartered in the State of New York, took out licenses in 1865, authorizing him to carry on the business of insurance as agent of said companies. He paid the State for his license, but refused to pay anything to the *city of Chicago*, on the ground chiefly that corporations were citizens within the meaning of that clause of the Constitution which declared that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and the city thereupon brought this suit to recover the rates which he thus refused to pay.

The court below decided in favor of the city, and Ducat brought the case here chiefly for the purpose of having the point above raised decided, the parties and counsel to the present case not knowing of the then pendency of the case of *Paul* v. *Virginia*,* in which it was soon afterwards decided that corporations were not "citizens" within the above quoted clause of the Constitution, and decided also that each State may prescribe the terms on which corporations created in other States may be allowed to carry on their corporate business, especially when it is that of insurance, within that State.

Mr. S. W. Fuller, for the plaintiff in error:

Paul v. *Virginia* decides the main point which we brought this case here to raise. But the facts of our case may perhaps take it out of the scope and effect of the decision in that.

This license here granted by the State is, in form and substance, a license to foreign insurance companies to trans-

* 8 Wallace, 168.

act their business in the State of Illinois, as domestic companies may do. The disclosures and statements made to the auditor, the stipulations as to service of process, and the fee paid that officer for each license, must be regarded as a good consideration paid by the companies for such permission. By taking out the licenses issued by the auditor the companies become, as it were, naturalized, and legally domiciled in the State. No doubt the State might, under *Paul* v. *Virginia*, have excluded them altogether; but having enacted general laws permitting, if not inviting, them to come there and to do business under them, the privilege thus granted ought not to be diminished or impaired by unequal and discriminating taxes, levied by the cities in which the agencies are established; taxes not levied on domestic companies.

The sections of the city charter which provide for the collection of this tax are a part of the revenue system of the city, and the tax cannot be regarded as the price paid for the privilege of coming into the State and doing business, because the auditor issued the license under the general law, and, pursuant to that license, the companies commenced business in Chicago, and received the premiums, two per cent. of which are now demanded by the city of Chicago. This is a tax levied upon property; a tax, too, of a most oppressive character; for a tax on gross receipts is a tax upon that in which the company may not have any interest after paying the losses sustained upon the risks for which the premiums were paid, for there may be nothing left to it after paying those losses.

It is true that the amount of its tax or its fairness does not affect the question of the power to levy it; but, if it is not a license fee, then it is a tax levied according to an arbitrary rule, and its unjust and unequal character is a proper subject of consideration in passing upon the validity of the law imposing it.

Paul v. *Virginia* hardly concludes this case. There Paul refused to comply with all the terms required by the law of Virginia of foreign insurance companies, upon establishing agencies for the transaction of insurance business in that

State, and therefore did not have a license for carrying on the business. For this violation of the law he was prosecuted by the State to recover the penalty imposed upon persons guilty of its violation; and this court decided that the law was valid, and that he was liable to the penalty; but it did not decide, that if he had obtained the license, the property of the companies represented by him could be *taxed* by the State of Virginia, at a greater rate than the like property of the citizens of that State, merely because it belonged to foreign insurance companies. *That* question was not presented by the facts of the case.

A license to foreign companies is required on grounds of public policy, to protect the community against loss from irresponsible insurance companies, and a license has here been had. We have now a tax in addition levied upon the company's property; an unequal, and as we maintain, an invalid tax.

Mr. M. F. Tuley, city counsel, contra:

This court decided, in *Paul* v. *Virginia*, not only that corporations are not "citizens" in the sense set up, but decided also that "corporations created in one State had not even an absolute right of recognition in other States, but depend for that and for the enforcement of their contracts upon the assent of those States, which may be given accordingly on such terms as they — the other States — please." Counsel endeavor to avoid this by the proposition that "by taking out licenses issued by the auditor, the companies become, as it were, naturalized and legally domiciled in the State." In other words, that the company becomes a *quasi* citizen. But the Constitution does not recognize *quasi* citizens, or their rights.

The State, through its legislature, prescribed the terms upon which the State will give recognition to foreign corporations; upon which it will permit them to do business in the State, and upon which it will recognize their special privileges, and enforce contracts made by them. These terms are that they shall file the sworn statement, and obtain the

certificate (or license) from the auditor of the State, in accordance with the acts of 1855 and 1857, *and that they shall also* render to the city—if they transact business in it—the account required of them, and pay $2 upon the $100 of their gross receipts to the city treasurer, as provided in the act of 1863.

If these corporations are merely creations of the local law which created them; if they are not citizens; if they have no "privileges or immunities" which other States are bound to recognize; and if the other States may prohibit them doing business—their very existence—within the limits of such other States respectively (all of which has been decided in *Paul* v. *Virginia*), then it follows that the State of Illinois has the right to provide, as in the acts of 1855, 1857, and 1863, that any foreign corporation, as a condition to its doing business in the city of Chicago, shall not only take out a State license, but shall also pay a pro rata of their premiums received from business transacted in the city to the city treasurer.

Counsel argue, that having received the certificate (or license) from the auditor, the foreign corporation thereby acquires the right to transact its business anywhere in the State, on an equality with local or domestic corporations. The proposition assumes, that the only terms exacted of the foreign companies are the filing of the statement with the auditor, and the obtaining the certificate or license from him. But this is a false assumption. If the acts of 1855, 1857, and the act of 1863 are not inconsistent, and can all stand together, then there is a very important limitation or condition which the counsel has omitted; which is, that if the foreign company desires to do business *in the city of Chicago*, it must, in addition to filing the statement with the auditor, and obtaining the license from *him*, pay to the city treasurer $2 on every $100 of its gross receipts, and render its account to the city controller, as required by the act of 1863. The *terms* which the State has pleased to prescribe are, compliance with all three of the acts of 1855, 1857, and (the city charter) 1863.

Opinion of the court.

Mr. Justice NELSON delivered the opinion of the court.

This case was pending here when that of *Paul* v. *Virginia* was argued and decided; the decision in which, as is admitted by the learned counsel for the plaintiff in error, has already disposed of all the principal questions involved.

Paul, the agent of the insurance companies in that case, refused to comply with some of the conditions annexed by the law of Virginia to the granting of the license, on the ground: 1, that the corporations he represented were entitled to all the privileges and immunities of citizens of the several States, and that the law imposing discriminating conditions against foreign corporations was void as repugnant to this clause of the Constitution; and 2, that it was void as against the commercial power. Both these grounds of defence were overruled for the reasons assigned in the opinion of the court, which need not be repeated, and the agent held liable to the penalty imposed for a violation of the act. The principle of that case must govern the one before us. The only difference between the statute of Virginia and that of Illinois is, that the latter is more onerous to the companies than the former. The difference is in degree, not in principle.

The power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to, as it also had been in the previous case of *Augusta* v. *Earle*.* As to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. We find no such limitations in this case.

JUDGMENT AFFIRMED.

* 13 Peters, 519.

MASTERSON *v.* HERNDON.

1. All the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dismissed, except sufficient cause for the nonjoinder be shown.
2. In writs of error where one of the parties refused to join in the writ, the remedy was anciently by summons and severance, which barred such party from suing out the writ afterwards, and allowed the judgment to be enforced against him, while the other prosecuted the writ of error.
3. The same effect will be given by this court to the allowance of a writ of error or an appeal, when one of the parties has been notified or requested in writing to join in the writ of error or appeal, and refuses to do so.

APPEAL from the Circuit Court for the Western District of Texas; the case being thus:

Howard and others filed in the court below a bill of peace and for conveyance of pretended title to a tract of land described, against *S. A. Maverick* and J. H. Herndon, and on that bill the court decreed that the complainant "have and recover of the said *S. A. Maverick* and the said J. H. Herndon the tract of land in the bill described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by the said defendants."

From this decree *Herndon* appealed. In regard to Maverick, the petition, which was signed by counsel only, and was not sworn to, was thus:

"Your petitioner *says* that his co-defendant, Maverick, refuses to prosecute this appeal with him."

Mr. P. Phillips, for the appellees, now objected that there was no valid appeal in the case, because the decree being a joint decree against Herndon and Maverick, Herndon alone had asked for an appeal.

Mr. W. W. Boyce, contra.

Mr. Justice MILLER, after stating that a careful examination of the record satisfied the court that the decree was a joint decree, and that the appeal was clearly taken by Herndon alone, delivered its opinion as follows:

It is the established doctrine of this court that in cases at

law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record.*

In the case of *Williams* v. *Bank of the United States*,† the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of Todd *v.* Daniel,‡ it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature.§ This remedy was applied to cases

* Williams *v.* Bank of the United States, 11 Wheaton, 414; Owings *v.* Kincannon, 7 Peters, 399; Heirs of Wilson *v.* Insurance Co., 12 Id. 140.

† The case first cited, *supra*. ‡ 16 Peters, 521.

§ Brooke's Abridgment, 238, tit. "Summons and Severance;" 2 Rolle's Abridgment, same title, 488; Archbold's Civil Pleadings, 54; Tidd's Practice, 129, 1136, 1169.

of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the Circuit Court for an appeal, that Maverick refused to prosecute the appeal with him.

We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with the less regret, as there is still time to obtain another on proceedings not liable to the objection taken to this.

APPEAL DISMISSED.

THE MABEY.

1. When a motion is made by an appellant to examine witnesses in this court in an appeal in admiralty, the appellant should show some excuse satisfactory to this court, for the failure to examine them in the courts below, such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpœnaed and failed to appear, and could not be reached by attachments, and the like.
2. Hence, where, on such a motion, his affidavit stated only that the witnesses were material ones, without whose testimony he could not safely proceed to the hearing, as he was informed and believed, and as he was advised by his counsel after a full statement to him of the facts which he expected to prove by the persons whom it was proposed to examine, the motion was denied.

ON motion. Atkins had libelled the steam tug Mabey in the District Court at New York, for injury done by the Mabey to a vessel of his, then in New York harbor. The District Court decreed in his favor, and the Circuit Court affirmed the decree. The owner of the Mabey appealed to this court; and *Mr. T. M. Wheeler, in his behalf*, now moved the court for a commission to take further evidence to be read in this court on the hearing. The affidavits on which the motion was founded gave the names of several witnesses represented as residing in New York and Brooklyn, and swore that "they were material and necessary witnesses in the action on behalf of the appellant, without the benefit of whose testimony he could not safely proceed to trial, as he is informed and believes, and as he is advised by his counsel therein, after a full and fair statement of the facts which the appellants expect to prove by the said witnesses."

Mr. Justice NELSON delivered the opinion of the court.

No excuse is shown in the papers, on which the motion is founded, why the witnesses named, and proposed to be examined, were not examined in some one of the courts below before the hearing there. The affidavit simply states that the testimony of these witnesses is material, as advised by counsel.

This is not in accordance with the practice of the court. Some excuse, satisfactory to this court, should be shown for the failure to examine them in the courts below, such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpœnaed and failed to appear, and could not be reached by attachments, and the like.*

Many of the cases bearing on this subject are cases of amendment in the appellate court by adding new allegations and giving new proofs.† But they involve the practice applicable to motions simply to examine witnesses in the appellate court. There can be no substantial amendment in this court; but if the pleadings or evidence are so defective that no decree can be founded upon them, and the case appear to have merits, the court will reverse the decree and remand the cause to the court below with directions to permit amendments and further proofs.‡

It is quite apparent, if commissions were to be allowed by this court to issue as a matter of course, on a formal application under the twelfth rule, without requiring any excuse for not taking the evidence in the usual way before the courts below, the privilege would be open to great abuse, disturbing the orderly proceedings in courts of admiralty. Instead of taking proofs in the cause in the courts below, and there thoroughly trying it, much of the evidence could safely be omitted, relying on the new evidence in this court. There is no hardship upon the parties in guarding against this abuse with great care and strictness, as they have two opportunities to procure the attendance and examination of the witnesses before they come here on appeal: first, before the District Court, and again before the Circuit.

MOTION DENIED.

* The Boston, 1 Sumner, 328, 331; Coffin *v.* Jenkins, 3 Story, 108; The William, 7 Irish Jurist, 354; Jarvis *v.* Chandler, 1 Turner & Russell, 319.

† Parsons on Shipping, 2 vol., pp. 429, 430, 431, and note; Conklin's Admiralty, pp. 418, 419; Lamb *v.* Parkman (2d Circuit, per Curtis, J.), 21 Law Reporter, 589.

‡ Brig Caroline, 7 Cranch, 496–500; Mary Anne, 8 Wheaton, 380.

Statement of the case.

CAMPBELL *v.* WILCOX.

1. Under the act of July 13th, 1866 (14 Stat. at Large, 142), which requires promissory notes to be stamped, making them void only when the stamp is omitted with intent to defraud the government of the stamp duty, a fraudulent omission cannot be taken advantage of on demurrer.
2. An averment in a declaration that the defendants had made and delivered to the plaintiffs their promissory notes, implies that the instruments were at the time in the form and condition required by law.
3. The filing of a plea to the merits after a demurrer is overruled, operates as a waiver of the demurrer.
4. Judgment affirmed with 10 per cent. damages, where a party brought a writ of error here denying such points as those above stated.

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

A statute of July 13th, 1866,* enacts, that any person who shall accept, negotiate, or pay, or cause to be accepted, negotiated, or paid, any promissory note, without the same being duly stamped, or having an adhesive stamp for denoting the tax chargeable thereon, and cancelled, &c., "*with intent to evade the provisions of the act*," shall forfeit $50, and that *such* instrument or note "not being stamped according to law, shall be deemed invalid and of no effect." A mode is provided in the act by which instruments may be stamped after being issued.

These provisions being in force, Wilcox sued A. & L. Campbell in the court below, declaring upon four promissory notes of theirs, dated 4th August, 1866. The declaration contained the usual averments according to the established precedents in such cases, but did not aver that the notes were stamped as required by the act of Congress, either at their date or at any subsequent time. The defendants demurred generally. The demurrer was overruled, and they pleaded to the merits. The case being submitted by consent to the court without the intervention of a jury,

* 14 Stat. at Large, 142, § 158; amending the Internal Revenue Act of June 30th, 1854.

judgment was given in favor of the plaintiffs for $10,805 On error the only question was on the demurrer.

Mr. Stanbery, for the plaintiff in error:

The English precedents of declaration upon instruments subject to stamp duties, do not indeed contain an averment that they were stamped at their date, or at any subsequent time, but they are not in point, for the want of a stamp does not in England invalidate the instrument, but only excludes it from being used in evidence *until* stamped. Our statutes declare the unstamped instrument *invalid* until a stamp is affixed by an application to an internal revenue officer. If the stamp is necessary to give *validity* to the instrument, it would seem that the declaration should aver that the note was stamped.

Mr. W. Cornell, contra.

Mr. Justice FIELD delivered the opinion of the court.

The only question in this case arises upon the demurrer to the declaration. The action is upon four promissory notes of the defendants, and the declaration contains the usual averments according to the established precedents in such cases, but does not aver that the notes were stamped as required by the act of Congress, either at their date or at any subsequent time. The demurrer is general, that the declaration does not set forth facts sufficient in law to constitute a good cause of action; but the omission of an averment, in the particular mentioned, constitutes the special ground of objection presented in the brief of counsel.

To the objection there are several answers. In the first place, the act of Congress which requires promissory notes and other instruments to be stamped, only declares that they "shall be deemed invalid and of no effect" when the stamp is omitted "with intent to evade the provisions" of the act—that is, with intent to defraud the government of the stamp duty. It is a fraudulent and not an accidental omission at which the penalty of the statute is levied. Such

fraudulent omission, if available at all to the maker of the note, can only be set up by special plea or urged on the trial. It cannot be taken advantage of on demurrer.

In the second place, if a stamp were essential to the validity of paper of this kind, the averment in the declaration that the defendants had made and delivered to the plaintiff their promissory notes, would imply that the instruments were at the time in the form and condition required by law. It has been held that in a declaration upon a contract, some memorandum of which, under the statute of frauds, must be in writing, a compliance with the requisition of the statute is implied in the averment that the contract was made, and that such compliance need not be specifically stated, although it must be proved if denied by the defendant. So in this case the existence of a stamp upon the notes, as in the case stated, the existence of a writing, is a matter of evidence and not of pleading.*

In the third place, the filing of a plea to the merits after the demurrer was overruled, operated as a waiver of the demurrer. The pleading was thus abandoned, and ceased thenceforth to be a part of the record.†

The defence is without merit, and the writ of error appears to us to have been prosecuted merely for delay. The judgment will therefore be

AFFIRMED WITH TEN PER CENT. DAMAGES.

UNITED STATES v. VIGIL.

1. The court refused to dismiss an appeal by the United States from the Territory of New Mexico, though, contrary to the usually obligatory rule of practice, a transcript of the record had not been filed in this court until about two years after the end of the next term after the

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* 1 Chitty, Pleadings, 304.

† Clearwater *v.* Meredith, 1 Wallace, 42; Aurora City *v.* West, 7 Id. 92; Young *v.* Martin, 8 Id. 354; Brown *v.* Saratoga Railroad Company, 18 New York, 495.

allowance of the appeal; it appearing, in excuse for the delay, that an appeal had been properly prayed for in open court at the time that the judgment was rendered, and was then granted; but that the clerk, for some unexplained reason, had neglected to make an entry in his minutes of what was thus done; that the district attorney, on whose application the appeal was granted, not long after retired from office; that so soon as the omission of the clerk was brought to the notice of a new district attorney of the United States, succeeding, he made application to the court to amend the records so that it might appear in accordance with the facts that the appeal had been prayed for at the term in which the judgment was rendered, that the court granted the application and ordered an entry to be made *nunc pro tunc* of an appeal asked for at the term when the judgment was given, and that it be granted.

2. The court adverts to the fact that the government is obliged to trust the conduct of cases in remote parts of the country to subordinate agents; and that where the distance of the seat of government is so great from them as it was here, the difficulty of communication should be taken into view when considering the question of delay.

THIS was a motion to dismiss an appeal taken on the part of the United States from the Supreme Court of the Territory of New Mexico.

The suit was brought by Vigil and others to recover a parcel of land in that Territory, under a special act of Congress, passed 21st June, 1860, which gave the right of appeal to either party, if asked for within one year from the rendition of the judgment. A judgment was rendered against the United States in the court below, *at the January Term*, 1867, from which an appeal was sought to be taken. The only question was as to its regularity. It was maintained on the part of the government that the appeal was prayed for by the district attorney of the United States in court at the time already mentioned, when the judgment was rendered, and was granted, but that the clerk, for some unexplained reason, neglected to make an entry in the minutes of what was thus done.

This omission of the clerk did not appear to have been discovered by the district attorney *till January Term*, 1869. In the meantime this officer in the Territory had retired from the office, and when the omission was brought to his notice by his successor he expressed his surprise, and stated that he not only prayed for the appeal but charged the clerk

to make the entry, and, as he believed, gave him a memorandum to that effect. As soon as the omission came to the knowledge of his successor, he made an application to the court below to amend the record so that it might appear that the appeal had been prayed for, according to the facts, at the term in which the judgment was rendered.

The court granted the application and ordered that an entry be made, *nunc pro tunc*, of an appeal in the cause, asked for at the January Term, 1867, and that the same be granted. But, of course, no transcript of the record was returned and filed in this court before the end of the next term after the allowance of the appeal regarding it as of *that* date.

Messrs. Watts and Ewing, Jr., in support of the motion,

Adverting to the fact that the record showed no citation, insisted that although the proceedings finally taken below might establish the appeal and make it valid, as of the January Term, 1867, yet, according to the settled practice of the court, a transcript of the record in the court below must be returned by the clerk and filed in this court before the end of the next term after the allowance of the appeal; otherwise that it would be dismissed for want of jurisdiction, and that, in this respect, the appeal was defective.

Mr. Akerman, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice NELSON delivered the opinion of the court.

The action of the court below, granting the application made to it by the new district attorney, and ordering that an entry be made *nunc pro tunc* of an appeal in the cause, asked for at the January Term, 1867, and that the same be granted, completed the appeal, and we think it was well sustained by the proofs before the court.

The practice relied on for the present motion for dismissal, may be admitted,* but there are exceptions to the

* Castro *v.* United States, 3 Wallace, 46; Edmonson *v.* Bloomshire, 7 Id. 306.

rule. *The United States* v. *Gomez** is an instance. There the proceedings on the appeal had been suspended for the purpose of a motion in the court below to set it aside, and the clerk also had refused to return and file the transcript. These facts were regarded as a sufficient excuse for the delay in filing the record in this court at a subsequent term. *The United States* v. *Booth*† had already established an exception. That was the case of a writ of error and the clerk had refused to return or file the transcript, which occasioned the delay.

The same principle was adopted in the case of *Alviso* v. *The United States*.‡ The case had been dismissed at the December Term, 1866, for want of a citation. A motion was made at the succeeding term to reinstate it upon the docket on the production of proof that a citation had been signed by the judge and served on the United States district attorney in due time. Ojection was taken that the proof came too late, as, according to the settled practice of the court, the motion to reinstate must be made at the same term at which the motion to dismiss was granted. But it appearing from the proofs that the clerk's office, where the records were kept, had been partially destroyed by fire in July, 1866, which occasioned great confusion and some loss of the papers, the court regarded the facts as affording a sufficient excuse for the delay.

Now in the case before us the fault of the clerk in not entering the prayer for the appeal has mainly occasioned the delay in perfecting it. It is true the vigilance of the United States district attorney might have corrected the error, but unfortunately he labored under the conviction that the appeal had been prayed for, and allowed, at the time the judgment was rendered, and that nothing was left to be done but the return and filing of the transcript by the clerk, and was not undeceived till his attention was called to the case by his successor.

This neglect of duty by the clerk and inattention of the

* 3 Wallace, 762. † 21 Howard, 512. ‡ 6 Wallace, 457

district attorney led to the necessity of a motion to the court to amend the record, so as to make it appear thereon that the proper steps had been taken in due time to secure an appeal on the part of the government. The prayer for an appeal in due time, although not granted then by the court, secures this right, and no delay by the court in its allowance can impair it. The order *nunc pro tunc* contains the allowance. It is true some considerable delay has taken place in perfecting this appeal, but the court is of opinion that it has been sufficiently accounted for from the facts and circumstances appearing on the face of the record. The government is obliged to trust the conduct of cases, in remote parts of the country, to subordinate agents, and the distance in the present instance is so great from the seat of government that a very considerable lapse of time is required to communicate with the head of the department. In such cases some indulgence must be extended to the officers thus engaged, and this difficulty of communication should be taken into consideration in determining the question of delay in conducting the legal proceedings of the government.

The want of a citation was mentioned on the argument as another ground of dismissal, but the answer is, the appeal was taken in open court at the term in which the judgment was rendered. In such cases no citation is necessary.

MOTION DENIED.

TAPPAN *v.* BEARDSLEY.

1. It seems that, to establish the fact that a certain suit was brought, or the time of its commencement, the record of it may be used against one who was no party to it; but only so much as is necessary for that purpose is admissible.
2. Depositions which are incorporated into such a record are not admissible in another suit, where the witnesses are competent, and can be procured in the second suit.
3. The right and the opportunity in a person to cross-examine are essential to the use of such depositions against him.

Statement of the case.

4. Neither such depositions, nor the answer in chancery of the defendant, can be read in evidence as proof of their contents, in another suit against one who was neither party to the former suit nor privy to a party.

IN error to the Circuit Court for the Southern District of New York; the case being this:

John Beardsley and Horace Beardsley, merchants of Norwalk, Huron County, Ohio, brought an action in the court below against Lewis Tappan, of New York, for a libel.

Tappan was the proprietor of what is now generally known as a "Mercantile Agency," the purpose of which is to collect information of the standing, character, and credit of merchants all over the country, and to communicate such information for reward to the business houses who may need it in their dealings with the former. And it was a communication made by Tappan to one of his customers concerning the plaintiffs, Beardsley & Co., that constituted the alleged libel.

The substance of that communication was that Beardsley & Co. had been sued, that J. Beardsley's wife was about to sue him for a divorce and alimony, in consequence of which he had put his property out of his hands, and that their store would probably be closed at once if the suit was brought.

To a declaration setting this out as the foundation of the action the defendant pleaded the general issue, and gave notice under the practice in New York of special matter to be offered in evidence. This special matter presented two defences: 1st, an attempt to bring the publication of the libellous words within the rule which protects privileged communications; and 2d, an assertion of the truth of the words published. This latter plea alone was the important one in the case as finally here decided.

On the trial the *plaintiffs* offered in evidence and proposed to read the *whole* record of a suit for divorce, brought in the name of John Beardsley's wife, against him, in Huron County, Ohio; a suit, which it seemed had been commenced some four or five months after the alleged publication of the libellous matter for which the suit below was brought, and some

time also after the commencement of the suit itself. The petition of the wife in the record thus offered to be read, alleged adultery. An answer of Beardsley (not sworn to) followed, denying the adultery, and alleging that the suit was not instituted by his wife or for her benefit, but that it was instituted by Tappan himself and by his counsel (through one Kennan, who, it was alleged, had been the secret informer and agent in Norwalk, of Tappan and his commercial agency) for the sole purpose of making good the slander which Tappan had published against Beardsley on that subject. With this petition and answer were the depositions of several witnesses; most of the depositions tending to show that Beardsley's wife was a woman of most violent, jealous, and impracticable temper, partially insane, perhaps, and that there was no ground for her petition for divorce. Finally, as part of the record, came the order of court dismissing the petition.

The circumstances under which this dismissal was made, were thus disclosed in one of the depositions certified with the record in divorce, and offered with it:

"S. F. Taylor, the attorney for Mrs. Beardsley, moved a continuance of the cause on the ground that some of his material witnesses were not in attendance, and could not be found. The motion was opposed by John Beardsley, and he then stated to the court, as also to Mr. Taylor, that all the witnesses named in their subpœna, and particularly those whom Mr. Taylor said were absent, were then in court; that Beardsley said that he had good reason to believe that the suit was not intended to be brought to a hearing, and that at his own expense and trouble he had procured the attendance of all Mrs. Beardsley's witnesses, to prevent a continuance.

"The court then overruled motion for continuance, and said that if Mr. Taylor had no other reason for continuance, he must proceed to a hearing. Whereupon Mr. Taylor abandoned the suit, and it was ordered by the court to be discontinued."

Another of the depositions appended to this record in divorce, and taken in that proceeding, was that of Mr. S. F.

Taylor, the attorney for Mrs. Beardsley, above named, himself. It thus ran;

S. F. Taylor, of lawful age, being by me first duly sworn, as hereinafter certified, deposes as follows:

Question. Have you ever seen the complainant?

Answer. I cannot answer if it has any materiality in the case, without revealing what belongs to me exclusively, as counsel for complainant.

Question. I do not seek to draw out any confidential communications made to you as counsel; I simply want to know whether you have ever seen complainant?

Answer. I cannot answer without revealing such facts as might lead to the inference of other facts, that belong to me as counsel.

Question. Do you refuse to answer the question, "Have you ever seen the complainant?"

Answer. I do, as her attorney.

Question. By whom were you retained as attorney for the complainant?

Answer. By the complainant, and by nobody else.

Question. Did she retain you in person, or by a third person?

Answer. I cannot answer that question without revealing facts which I have no right to reveal, as counsel.

Question. Have you ever seen the complainant before or since, or since the commencement of this suit?

Answer. I have seen her, or seen a person called Mrs. Beardsley.

Question. Where did you see her, and when?

Answer. I saw a lady that was called Mrs. Beardsley some time ago, but cannot tell the time when.

Question. How long ago?

Answer. I think about two years ago.

Question. Did you speak to her?

Answer. I did not.

Question. Have you ever spoken to her?

Answer. I cannot say that I have.

Question. Do you now recollect to have ever seen her except on the occasion above referred to?

Answer. I do not.

Question. Did you frame the bill in this case?

Answer. I did.

Question. Were you employed by her personally, or by some other person for her as her agent?

Answer. I cannot answer this question, in my opinion, without revealing facts that belong to me alone as counsel, and which as an attorney I have no right to reveal.

Question. I do not ask you to reveal a single confidential communication. I simply wish to know whether you are retained by the complainant in this case in person, or by some other party having an interest therein?

Answer. I have not seen the complainant in person, and I know of no other person, and have heard of none other that has any interest in this suit.

Question. Were you requested by any person to file the bill in this case?

Answer. I was spoken to on that subject, and told that complainant wanted me to act as her attorney in this case. But I was never requested to act in the matter for or on account of any one else?

Question. By whom were you spoken to?

Answer. From the course taken in this examination, and from the declarations of defendant, I do not believe I can answer it without revealing facts that are my own property as counsel, and that I have no right to reveal.

Question. You say you were spoken to to file a bill in this case; was that request a verbal or a written one?

Answer. It was verbal.

Question. Was the request made by a man or a woman?

Answer. It was a man.

Question. Where does he reside?

Answer. In Norwalk.

Question. What is his profession?

Answer. I can answer no question tending to show his identity without, in my opinion, revealing facts that I have no right to reveal as attorney.

Question. Do you know whether the person who requested you to file this bill is now or ever has been the reporter of Lewis Tappan's Commercial Agency, or Cleveland's Commercial?

Answer. I do not know anything of either of these agencies.

Question. How do you know that the person was authorized by the complainant to employ you to file a bill in this case?

Answer. I have no positive knowledge that she did authorize him.

Question. How then can you swear that you were retained by the complainant?

Answer. I can only say from the facts that I have been retained by nobody else, except in doing an errand, as I supposed that at my request the dates and circumstances necessary to file the bill, and that I think could not have been supplied by anybody else since finished, and that I have since received the names of witnesses and the facts to which they would attest in handwriting said to be hers, as I believe.

When this record in divorce, with the answer, depositions, &c., was offered in evidence on the part of plaintiff, the counsel of defendant objected on several grounds, which were overruled; and then when the plaintiff's counsel proposed to read the whole record the counsel of the defendant objected, and insisted that only so much thereof as showed the nature of the suit and the time of the commencement thereof could be read, and especially that the answer of John Beardsley, the defendant therein, could not be read against the defendant in this action. The objections were overruled, and the whole of the record was read to the jury, to which action of the court the defendant's counsel excepted.

In the suit below, also, the plaintiffs called as a witness one of the clerks of Tappan's own Mercantile Agency, and proposed to ask him whether Tappan had at the time of this alleged libel an agent or correspondent in Norwalk, Ohio; and if so, who he was. Tappan's counsel objected to the question, on the ground of immateriality to the issue; but the court overruling the objection, the question was put to him. The witness now declined to answer, for the reason, among others, "that his answer would tend to accuse or criminate *him* [the correspondent?—REP.] in a charge of an indictable misdemeanor." The bill of exceptions proceeded:

"But the judge ruled that the witness was bound to answer the question; and on his still declining so to do, he was adjudged by the court to be guilty of a contempt of court in the face of

the court, and was sentenced to be committed to prison for his said offence, there to remain until discharged by due course of law."

The jury found a verdict for the plaintiffs $10,000, and judgment was entered accordingly. The case was now here; the questions presented for review to this court arising from a bill of exceptions taken on the trial, and relating to the objections taken by defendant to the admission of evidence, and to the ruling of the court in instructing the jury.

Messrs. C. O'Connor and William Allen Butler, for the plaintiff in error; Messrs. Casey and Bartley, contra.

Mr. Justice MILLER delivered the opinion of the court.

In the admission of evidence we are of opinion that the court committed an error that must have contributed very largely to swell the amount of the verdict, which, without such testimony, was perhaps unusually and unjustifiably large, and might possibly have been for the defendant.

The error referred to was in the introduction of the record of the suit for divorce. The record thus read to the jury consisted of the petition of the wife of Beardsley for divorce, the answer of Beardsley, the depositions of several witnesses taken by Beardsley in that suit, and the order of the court dismissing the bill. The influence of this record on the verdict of the jury will be at once understood by a slight reference to its contents. It seems that the suit was commenced some four or five months after the alleged publication of the libellous matter for which this suit was brought, and some time after its commencement. Beardsley in his answer alleged that the suit was not instituted by his wife or for her benefit, but by Tappan, and by counsel employed by him, for the sole purpose of making good the slander which he had published against Beardsley on that subject.

The testimony of S. F. Taylor, who was the attorney that brought the divorce suit, is also a part of the record so read, and having been taken by Beardsley is as artfully contrived

as it could possibly be made, to confirm the truth of Beardsley's answer, that the suit was brought at Tappan's request without the authority of the nominal plaintiff; and all this is confirmed by his final appearance and dismissal of the suit for want of prosecution.

In short, no one can read that record and believe it without being convinced that Tappan, having slandered Beardsley, and being called into account for it, entered into a still more disgraceful conspiracy to establish the truth of what he had said by using the name of Beardsley's wife in a suit against him for divorce without her authority, and without any shadow of justice.

The effect of this in aggravating the damages to be recovered is too plain to require comment. And yet Tappan was no party to that suit; had no right to control or influence the making of that record; could not cross-examine the witnesses, all of whom were Beardsley's, nor take any exceptions to or contradict Beardsley's answer. It is difficult to conceive upon what principle the record of that suit was admissible for any purpose whatever in the trial of this one. If the *defendant* had introduced any evidence to show that a suit for divorce had actually been brought, in support of his statement that there was a rumor that it would be done, then it might have been competent for the *plaintiff* to show when it was instituted, as some evidence that no such rumor existed when Tappan so reported. But it does not appear that Tappan attempted to show in this suit that the divorce suit had ever been instituted. All *that* comes from the plaintiff, and it is difficult to see what relevancy it had to any issue before the court. If, however, a state of case could possibly have existed to justify the introduction by the defendant of that record for that purpose, it could be used for no other, and the answer of Beardsley and the depositions of the witnesses were not only irrelevant to the issue then being tried, but they were forbidden by other well-established rules of evidence:

1. Beardsley's answer was not sworn to, and was made with a probable view to its use against Tappan in this suit,

and was made when Tappan could neither contradict his statements nor cross-examine him.

2. As to Taylor's deposition, the fact that he was a competent witness in the present suit and could have been used by the plaintiff as such, is sufficient to exclude his deposition taken in another suit, even if Tappan had been a party to that suit. Still more forcible is the objection when the deposition was taken in a suit to which Tappan was no party, and on an occasion of which he had no notice, and when he had no right to cross-examine him or to controvert the truth of what he said.*

Two inconsistent reasons are given in support of the ruling of the court on this point.

It is said first that the depositions do not constitute a part of the record of the divorce suit, and were, therefore, not read in the present suit. And it is true that such depositions not read on the trial of the divorce suit could in no just sense constitute a part of the record. But it is clear to us from examining the bill of exceptions of the present case that the depositions were read to the jury as a part of the record of the divorce suit, and were so read against the objection of the defendant.

It is said, on the other hand, that they should have been read because they were a part of the record, and that when one part of a record of a suit is read all must be read.

When one party introduces and reads from such a record that which suits his purpose, the other party may read for his own benefit all that relates to that subject, or require the party introducing the record to do so. But we know of no rule which, because a party may use a record or part of it to establish a fact that can only be established by record, authorizes the same party to use everything else which may be found in the record, however irrelevant to the issue on trial, or however it may violate other well-established principles of the law of evidence.

It is possible that the plaintiff had a right to show that the

* Rutherford v. Geddes, 4 Wallace, 220.

divorce suit against him was brought long after the publication of the slander and after Tappan had been sued for it; and that for this purpose the record was admissible. But this by no means establishes his right to bring before the jury the entire merits of the divorce suit, the depositions taken in that suit which bear hardly upon Tappan, who was no party to it, and the answer of Beardsley making charges against Tappan, when the latter could make no reply to them.

Upon this question the case of the *Marine Insurance Co.* v. *Hodgson*,* *Rutherford* v. *Geddes*,† and *Laybourn* v. *Crisp*,‡ are directly in point; and the authorities cited by Mr. Taylor in his work on Evidence,§ fully sustain the proposition laid down by him, that depositions in chancery can only be read when the bill shows that the cause was against the same parties, or those claiming in privity with them.

For this error the judgment of the Circuit Court is

REVERSED, AND A NEW TRIAL AWARDED.

KIMBALL *v.* THE COLLECTOR.

Under the proviso to the Act of March 3, 1857 (11 Stat. at Large, 192), which act allows an importer to make additions to the value of goods as given in the entry or invoice; and which proviso provides "that under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value, any law of Congress to the contrary notwithstanding;" and the act of the same day (Ib. 199), which enacts that unmanufactured sheep's wool above the value of 20 cents, shall pay an *ad valorem* duty of 24 per cent., but if "of the value of 20 cents or less, at the place of exportation, shall be exempt from duty," the invoice and entered value (which in this case was the actual cost), and not any lower market value of the goods at the date and place of exportation, is the value upon which the duty is to be assessed.

ERROR to the Circuit Court for Massachusetts; the case being this:

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* 6 Cranch, 206.
† 4 Wallace, 220.
‡ 4 Meeson and Welsby, 320.
§ § 1413.

Statement of the case.

The fifth section of an act of March 3, 1857,* "reducing the duties on importations and for other purposes," imposes an *ad valorem* duty of 24 per cent. on unmanufactured wool, but exempts from duty such wool (being sheep's) "of the value of 20 cents per pound or less, at the place of exportation."

Another act of the same day, amendatory of an act of 1846, allows the importer to make such addition in the entry to the cost or value of the imports, given in the invoice, as in his opinion may raise the same to the true market value in the country whence exported. The collector is then to have them appraised, and if the appraised value exceeds by 10 per cent. the value declared as above on entry, a duty of 20 per cent. *ad valorem* is to be added to the duty imposed by law. And the act concludes:

"*Provided*, nevertheless, that *under no circumstances* shall the duty be assessed upon an amount *less* than *the invoice or entered value*, any law of Congress to the contrary notwithstanding."

This enactment and this proviso being in force, Mr. Cobb, then Secretary of the Treasury, made in September, 1857, soon after the passage of them, a decision thus:

"In estimating the foreign value of wool, with reference to its exemption from or liability to duty, the appraisers can determine such value *independently of the invoice*, by prices current and other reliable means of information, of the value of the article in foreign markets, such as they employ in ascertaining the foreign values of other staple articles of import."

In this state of things, Kimball bought at Cape Town, Africa, a quantity of wool of the sort above mentioned, at 10 pence sterling (somewhat more than 20 cents Federal money) a pound. He did not, however, ship it at once, but kept it on hand at Cape Town. Some months, afterwards, that is to say in June, 1861, he shipped it to the United States; the price of wool at the date of shipment having

* 11 Stat. at Large, 192, 199.

fallen to 8½ pence per pound (less than 20 cents Federal money). The wool, however, was invoiced in accordance with the requirements of law, at its actual cost, 10 pence sterling per pound, and was entered according to the invoice value, which, of course, made it dutiable at the rate of 24 per cent. *ad valorem*.

The appraisers reported upon the invoice:

"*Value correct in English weight, April* 25, 1861."

This report was in accordance with a custom prevailing in their department to make invoices in this manner, in which the price stated is high enough to cover the market value; and the duties, $15,651, were accordingly assessed upon it at this value.

After the appraisers had made their report, and duties had been estimated on the wool, but before payment of them by the importer, the collector requested the appraisers to make a re-examination of this wool, and a formal appraisement of its value. The appraisers, in reply, declined to make any appraisement of it at less than the invoice price, giving as a reason that they could not do this by law; but, at the collector's request, they made to him a statement in writing, which they expressly declared was not an official appraisement, in which they stated the market value of this wool in the principal markets of the country from which it was exported, to have been at the time of its exportation, 8 pence 3 farthings per pound, less than 20 cents Federal money, and a rate at which the wool would, of course, have been duty free.

The decision of Mr. Cobb was not brought to the knowledge of the appraisers at the time of their appraisement of this wool.

The importer having complied with all the technical and formal requirements necessary to enable him to maintain an action under the act of Congress, against the collector, for the recovery of duties illegally exacted, brought the suit below to recover these; it being agreed by the parties that if, upon the case stated, the value of this wool, as far as the

laws of the United States were concerned, could be considered as less than its invoice price, then judgment should be for the importer; otherwise for the collector.

The court below gave judgment for the collector, and the importer brought the case here; the question, and the only question, being whether, taking into consideration the language of the first statute of 1857, and also that of the proviso to the other act of the same day, the collector should have allowed this wool to be entered free, when the price stated in the invoice was more than 20 cents, and its actual value was less.

Messrs. C. Cushing and W. E. Chandler, with a brief of Mr. W. E. Ingalls, for the importer, plaintiff in error:

1. The statement in the invoice, of the cost of the wool, was made as of course and in accordance with the law of Congress, of which the importer is obliged to state in the invoice the exact sum paid for the goods. But various other acts of Congress would indicate that it was the intention of that body that in determining whether wool was free or dutiable its actual value at the port and date of exportation should govern.

The act of 1832* is as follows:

"Wool unmanufactured, the value whereof *at the place of exportation* shall not exceed 8 cents per pound, shall be imported free of duty."

That of 1857, under which this importation arose, is to the same effect.

A third, that of 1861,† is thus: it exempts—

"Wool unmanufactured, the value whereof at the *last* port or place from whence *exported* to the United States shall be 18 cents or under per pound."

This court, in *Peaslee* v. *Sampson*,‡ decide that the day of sailing is the date when the value is to be taken.

* 4 Stat. at Large, 583. † 12 Stat. at Large, 196. ‡ 20 Howard, 571.

2. Mr. Cobb's decision shows that the practice of the department under this very act was in harmony with this interpretation. Another decision, not presented in the case as stated, was issued June 15th, 1857, thus:

"On a question submitted to the department, it is decided that the time at which the value of wool at the port of exportation is to be estimated with a view to its exemption from duty under the tariff act of March 3d, 1857, is the *date of exportation* from the foreign port for the United States, as provided by law in reference to the appraisement of imports for the assessment of duties."

Under these interpretations of the act by the Treasury Department, this importer acted, and the interpretation has been sustained as a true one in the 2d circuit (by Smalley, J.), in the case of *Davison* v. *Draper*.*

3. Is the intent of Congress, as expressed in the first act of 1857, controlled by the proviso in the later act?

It being the rule in the construction of statutes, as declared by Lord Mansfield,† that all which relates to the same subject must be taken to be one system and construed consistently—construed also, another well-known rule tells us, *ut res magis valeat quam pereat*—no conflict is to be allowed if it be possible to prevent a conflict. Now here no conflict will exist if we interpret things under the guidance of these rules, and reasonably.

The two statutes relate to entirely different matters. The proviso is to the 2d statute, and operates only on the class of cases which *it* embraces.

The first statute provides a way to determine whether an article is free or dutiable. If it is found to be free when tried by this test, then the proviso does not apply, for there is no duty to be assessed. If, on the other hand, the wool is found when tested by the first statute to be dutiable, then the last statute applies and says upon what that duty shall be assessed.

* Pamphlet Report, Concord, N. H., 1870, pp. 27.

† Rex *v.* Loxdale, 1 Burrow, 447.

For instance, suppose this wool had been invoiced at 22 cents, and when examined its value at the port and period of exportation had been found to be 21 cents. By this last report it was dutiable, and then by the proviso the dutiable value would be 22 cents, or the price stated in the invoice.

An opposite mode of interpretation involves us in great difficulties.

First. If the proviso does control the previous statute, then it practically defeats its operation, for the intention of Congress in the statute of 1857 is clear, as has been previously shown, that the *value* of the import shall govern. The court must avoid, if possible, a construction which makes Congress stultify itself.

Second. By holding that this proviso controls the previous statute you hold out an inducement to merchants to make fraudulent sales to avoid the effect of such a construction. If, for example, prices fall between the date of purchase and the date of exportation so far as to exempt from duty that which was charged with a heavy duty, the owner will make a fictitious transfer at the lower price to some friend, and the goods will be invoiced anew at the lower price. The court must avoid a construction which makes Congress guilty of legislation whose effect is to cause frauds on the revenue.

4. Every consideration of equity and justice is here upon the side of the importer, and this should have great weight when the law is doubtful.

5. But if the proviso is irreconcilable with the preceding statute, the proviso it is which must give way, not the enactment. The enactment is the principal thing; the proviso subsidiary and adjectitious.*

Mr. Akerman, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra:

1. It is not well argued, as argued by opposing counsel, that independently of the proviso, this wool should be assessed at its value at the date when exported.

The language of the statute of 1857, exempting certain

wool from duty, is almost identical with that of the statute of 1832,* exempting from duty wool not exceeding in value eight cents per pound. Under the statutes at that time in force, goods imported from the country of their production were appraised for the purpose of imposing duties at their value in that country "at the time when purchased," and this continued to be so until the statute of March 3d, 1851.†

By the statute of 1842,‡ it was enacted "that in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods," &c., "imported, and *in all cases where the duty imposed shall by law be regulated by or directed to be estimated or based upon the value* of any specified quantity or parcel of such goods," &c., "it shall be the duty of the collector . . . to cause the actual market value, or wholesale price thereof *at the time when purchased* in the principal markets of the country from which they shall have been imported, . . . to be appraised, estimated, and ascertained," and this value, with certain other charges specified, is made "the true value at the port where the same may be entered, upon which duties shall be assessed."

By the statute of 1851,§ it is enacted "that in all cases *where there is, or shall be imposed any* ad valorem *rate of duty on any goods*," &c., "imported into the United States, it shall be the duty of the collector . . . to cause the actual market value, or wholesale price thereof, *at the period of the exportation to the United States*, in the principal markets of the country from which the same shall have been imported, . . . to be appraised, estimated, and ascertained," and such value or price, with certain other specified charges, is made "the true value at the port where the same may be entered, upon which duties shall be assessed."

By this act, all acts and parts of acts inconsistent with its provisions are repealed.

Thus the statute of 1851 only applies to the first class of

* 4 Stat. at Large, 583.

† Chap. 38, § 1, 9 Stat. at Large, 629; Greely *v.* Thompson, 10 Howard, 225.

‡ Chap. 270, § 16, 5 Stat. at Large, 563. § Chap. 38, § 1.

cases mentioned in the statute of 1842; namely, those cases "where there is, or shall be imposed, any *ad valorem* rate of duty," and omits all reference to the other class of cases; namely, "those where the duty imposed shall by law be regulated by, or directed to be regulated by, or based upon the value of any specified quantity," &c., of the goods. This omission is significant, and would seem to show that, as to this latter class of cases (within which ours falls), the value at the time when the goods were purchased is to be considered the true value at the port of importation, and not the value at the time when they were exported.

2. But, however this may be, the invoice price must be here regarded as conclusive evidence of the value.

Under the customs laws, the invoice is generally conclusive evidence of value as respects the importer, though not as respects the government.

By the statute of 1823,* a true invoice, containing a just and faithful account of the cost of merchandise which has been purchased, and supported by oath, is required when goods are imported.

By section 17 of the tariff act of 1842,† a penalty of fifty per cent. additional duty was imposed when the appraised value exceeded by ten per cent. the invoice value; and it was not until the statute of 1846‡ that the importer was allowed "to make such addition in the entry to the cost of the value given in the invoice as in his opinion may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made: . . . *Provided, nevertheless*, that under no circumstances shall the duty be assessed upon an amount less than the invoice value, any law of Congress to the contrary notwithstanding."

This act was amended in certain respects immaterial to the present discussion by the act of 1857, but the above quoted proviso was re-enacted in the same language.

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* Chap. 21, 3 Stat. at Large, 727, *et seq.* † 5 Ib. 564.
‡ Chap. 74, § 8, 9 Ib. 43.

By our revenue laws, therefore, the invoice is regarded, not as a mere bill of parcels, but as a solemn statement of the importer, supported by oath. For a long time, an innocent difference between the invoice value and the true value of imported goods, by which the latter exceeded the former ten per cent., was made the occasion for imposing a penalty of fifty per cent. additional duty, and the statutes which relieve the importer from this harsh burden expressly provide that under no circumstances shall the duty be assessed upon an amount less than the invoice value.

There is no authority for the idea of the other side, of making one appraisement for the purpose of determining if merchandise be exempt from duty, and if it is found to be dutiable, then of making another appraisement for the purpose of determining the value upon which *ad valorem* duties are to be assessed, and it would seem to follow that the invoice must be as binding in the one case as the other.

Revenue systems are largely artificial. The values in reference to which duties are assessed are often arbitrary. There is no hardship in enacting that particular imports of such a value shall be duty free; provided, however, that nothing less than what the party has deliberately sworn to as their cost shall be taken to be such value. At all events the hardship is no greater than it is in any case where the invoice value exceeds the real value. But whether greater or less, courts cannot remedy it.

Mr. Justice CLIFFORD delivered the opinion of the court.

Import duties, illegally exacted, if paid under written protest "signed by the claimant," setting forth distinctly and specifically the grounds of objection to the payment, may be recovered back in an action of assumpsit against the collector.*

Recent enactments have annexed certain other conditions, of a very important character, to the right of action in such cases, but it is not necessary to enter into those details as

* 5 Stat. at Large, 727; The Assessor *v.* Osbornes, 9 Wallace, 571; Nichols *v.* United States, 7 Id. 126; Philadelphia *v.* Collector, 5 Id. 731.

none of the new provisions have any application in the case before the court.*

Four hundred and ninety-one bales of wool were imported in the month of June, 1861, into the port of Boston by the plaintiff or his intestate, and the agreed statement shows that the wool was duly entered at that port for consumption. Duties were assessed upon the same to the amount of fifteen thousand six hundred and fifty-one dollars and eighty cents, and the plaintiff or his intestate paid the same, having first complied with all the formal conditions to enable him to maintain the present action.

Wool unmanufactured, of the value of twenty cents per pound or less at the port of exportation, was at that time entitled to be admitted to entry free of duty, but wool unmanufactured, "imported from abroad," of greater value than twenty cents per pound at the port of exportation, was subject to an *ad valorem* duty of twenty-four per cent., as imposed by the act reducing the duty on imports and for other purposes.†

By the agreed statement it appears that the wool imported in this case was shipped in the barque Vatella, which sailed from Cape Town on the twenty-fifth of April prior to the importation, but it also appears that the wool was purchased by the shippers at that place several months before the barque sailed. They purchased it at ten pence sterling per pound, as stated in the invoice, and the parties agree that the price given in the entry at the custom-house is the same as that given in the invoice, and that both correspond with the actual cost of the wool at the place of exportation.

American ships bringing goods from any foreign port into the United States are required to have on board a manifest signed by the master describing the goods and the vessel, and giving the name of the port where the goods were shipped, and the name of the port to which they are consigned.‡

On arriving within four leagues of our coast the master

* 13 Stat. at Large, 214.

† 11 Stat. at Large, 192, 194.

‡ 1 Stat. at Large, 644.

of such ship is required, if the proper officer of the customs comes on board, to produce such manifest to such officer for his inspection, and he is also required, within twenty-four hours from the time the vessel arrives at a port of the United States where an officer of the customs resides, to report that fact to the collector or chief officer of the customs at that port.*

Goods imported from any foreign port or place are required to be landed in open day, and the act of Congress provides that such goods shall not be landed or delivered from the ship without a permit from the collector and naval officer, if any, for such unlading and delivery. Authority to grant such a permit does not exist, if the goods are intended to be entered for consumption, until the duties are paid or secured to be paid, and the duties are never paid nor are they ever secured to be paid in such a case before the importation is complete and the goods are entered at the custom-house. Such an entry, that is, an entry for consumption, must be in writing, and must be made by the owner, consignee, or agent, to the collector of the district, within fifteen days from the time the master reports the arrival of the vessel, and the person making the entry must also produce to the collector the original invoice or invoices, or other documents received in lieu thereof, or concerning the same, in the same state in which they were received, with the bills of lading.

Examination of the entry, as presented by the owner, consignee, or agent, is usually made by the entry clerk, and if found to be correct the collector proceeds *to estimate the duties* "*on the invoice value and quantity*," and if the *estimated* amount of the duties is paid or *secured* to be paid, as required by law, the collector is then authorized to grant a permit for the discharge and landing of the cargo. Until those acts are performed no one has any authority to grant a permit or to remove the hatches, but the inspector remains in charge of the vessel.

* 1 Stat. at Large, 649.

Import duties, it will be observed, are estimated in the first place, if they are *ad valorem*, on the invoice value and quantity as shown in that document, unless additions are made to the same by the owner, consignee, or agent, in the entry at the custom-house, and in that state of the case the duties are estimated on the invoice value and quantity together with those additions to the same, but in either event the duties are estimated at that stage of the proceedings without any appraisal.

Evidently it must be so, as the estimated duties are required to be paid or to be secured to be paid before the permit is granted to remove the hatches, and before the goods are landed from the vessel.

Such duties so estimated may be paid at the time, or, what is more usual, they may be secured to be paid by depositing the amount in gold with the collector, subject to an equitable adjustment when the duties are liquidated and the correct amount of the same is ascertained by such subsequent proceedings as are prescribed by law for that purpose.

Subsequent proceedings are essential to the ends of justice, as computations based solely on the invoice value and quantity will seldom prove to be correct, as the values expressed in the invoice may be less than the true market value of such imports in the principal markets of the country whence the importation was made, or articles imported may have been omitted in the invoice, or articles contained in the invoice may have been lost during the voyage, or the actual quantities as ascertained by the weighers, gaugers, or measurers may differ from those given in the invoice and entry. Corrections of the kind are frequently necessary, but they are never made until the goods are landed and appraised.

Collectors are required by law to cause the dutiable value of imported goods subject to an *ad valorem* rate of duty to be appraised, estimated, and ascertained, and the provision is that if the appraised value shall exceed by ten per centum the value so declared in the entry, the goods are subject to a duty of twenty per cent. *ad valorem* on such appraised value

in addition to the rate imposed where no such under-valuation is shown.*

Penalties of the kind, however, may be avoided if the under-valuation in the invoice is corrected in the entry at the custom-house, as the same section provides that it shall be lawful for the owner, consignee, or agent of imports which have been actually purchased, or procured otherwise than by purchase, on entry of the same to make such addition in the entry to the cost or value in the invoice as in his opinion may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made.

Additions may be made to the cost or value of the goods as given in the invoice to raise the same to the true market value, but the additions, in order that they may have effect to avoid the additional duty of twenty per cent., must be made before or at the time of the entry, as no such corrections can be made afterwards, or, in other words, the additions, if any, must be made before the permit is granted and before the goods are landed, because if they are not made before those acts are performed the additions made to the cost or value given in the invoice would not become a part of the dutiable value in estimating the duties prior to the appraisal, and if the appraisers should report that the invoice value was correct the amount of the additions would escape taxation altogether. Nothing remains to be done subsequent to the granting of the permit and the landing of the goods except such acts as are required by law to correct any errors in the invoice and to liquidate the duties, as the express provision in the principal collection act is that all the duties on goods, wares, and merchandise shall be paid or be secured to be paid before a permit shall be granted for landing the same.†

Before the permit is granted, it is the duty of the owner, consignee, or agent to present the invoice to the collector and make the entry in the form required by law, and there-

* 1 Stat. at Large, 673.

† 11 Stat. at Large, 199.

upon the collector certifies the invoice and grants the permit in due form for the discharge and landing of the cargo, first designating the packages, at least one in ten, to be sent to the public store, and marks the same on the entry, invoice, and permit.*

Packages intended for examination by the appraisers are usually sent to the public store for that purpose, but cumbrous articles may be examined on the wharf where they were landed, and samples may, in certain cases, be used for the same purpose instead of the packages from which they were selected by the sampler.

Pursuant to the usual practice the goods in this case were entered for consumption according to the invoice value, to wit, at ten pence sterling per pound, expressed in decimals, which made the wool dutiable at the rate of twenty-four per cent. *ad valorem*.

Tested by the facts of the case as given in the agreed statement, it is clearly to be inferred that the preliminary proceedings were correct; that the invoice was seasonably presented to the collector; that the entry of the goods was regularly made for consumption; that the duties were properly estimated on the invoice value and quantity; that the duties as thus estimated were duly paid or secured to be paid before the permit was granted; that the permit was subsequently granted in due form for the landing of the goods, and that one in ten of the packages was ordered to the public store for the examination of the local appraisers. Prior to that stage of the proceedings the appraisers have no jurisdiction of the case, and they have no duty to perform in the premises.

Beyond doubt, the collector may direct that all packages shall be examined, but he is required to designate on the invoice at least one package of the same, and one package at least of every ten packages of the importation, and the direction is that he shall order the same to the public stores to be opened, examined, and appraised. All those require-

* Waring *v.* The Mayor, 8 Wallace, 119; Gen. Reg. 1857, 145.

ments having been fulfilled, the appraisers are furnished with the original invoice which contains the marks of the collector, designating the packages sent to the public stores for their examination.

Briefly stated, their duty is to appraise, estimate, and ascertain the true market value of such imports in the principal markets of the country whence such importation was made, and to report their doings to the collector. They examined the packages sent to the public stores, and the agreed statement shows that they reported upon the invoice "value correct," in accordance with the prevailing custom to mark invoices in that manner in cases where the price given in the invoice was high enough to cover the market value.

Complaint is made that the custom does not allow the appraisers to reduce the invoice value when it is greater than the true market value, but the decisive answer to that complaint is that the act of Congress authorizing the appraisal of the importation expressly provides "that under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value" of the importation. Where the entered value is the same as the invoice value the legal effect of the requirement is the same as it was in the prior act which did not contain the words entered value, but in cases where the owner, consignee, or agent makes additions to the value expressed in the invoice to avoid the penalty of twenty per cent., the words "entered value" have a special application, and in those cases the duty cannot be assessed upon an amount less than the entered value, which includes the value expressed in the invoice and the additions made thereto by the owner, consignee, or agent before or at the time the goods were entered at the custom-house.

Ten pence sterling per pound was the actual cost of the wool at the time it was purchased, and the price actually paid for the wool is the value expressed in the invoice, and the same value is given in the entry made by the consignee, and the agreed statement shows that the appraisers reported that the invoice value was correct, and if the matter had

stopped there the case would be too plain to admit of any controversy, as it would show that every requirement of law had been followed without the least departure, and that nothing had been done to which the plaintiff or his intestate objected at the time the act was performed, as he made the entry and gave therein the value expressed in the invoice as the true market value of the imports in the principal markets of the country whence the importation was made.*

"Value correct," was the report of the appraisers when they returned the invoice to the collector, and the duties were liquidated and assessed upon that amount as the true dutiable value of the goods, but before the duties were paid by the consignee as liquidated, the collector requested the appraisers to make a re-examination of the wool and "a formal appraisement of its value," but they declined to make any appraisement of it at less than the invoice price, giving as a reason that they could not do so by law, evidently referring to the provision in the appraisement act that under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value. At the collector's request, however, they made a statement to him in writing, "which they expressly declared was not an official appraisement, in which they stated" that the market value of the wool at the time it was exported, in the principal markets of the country where it was purchased, was eight pence and three farthings per pound, at which rate the wool would have been entitled to entry free of duty. Prices of wool had declined at that port subsequent to the purchase in this case and before the barque sailed, so that the wool might have been purchased at the time it was exported at the reduced price named by the appraisers.

Ad valorem duties were always estimated, prior to the act of the 20th of April, 1818, by adding a prescribed percentage, including charges and commissions, to the actual cost of the goods at the place where the same were purchased and exported, the actual cost being ascertained by the invoice.†

* 11 Stat. at Large, 199.

† 1 Stat. at Large, 41, 673; 3 Id. 436.

Whenever, in the opinion of the collector, there was just ground to suspect that goods subject to an *ad valorem* duty, and imported into his district, had been invoiced below the true value of the goods in their actual state of manufacture at the place from which they were imported, the collector, by the act last cited, was authorized to direct that the goods should be appraised in the manner prescribed in the ninth section of that act, which was the first authority of the kind conferred in the acts of Congress in cases where the entry was accompanied by the invoice, as required by law. Such duties were required to be estimated, by the act of the first of March, 1823, by adding all charges except insurance and a prescribed percentage to the actual cost of the goods if the same were purchased, or by making the same additions to the actual value of the goods if they were procured otherwise than by purchase, or by making the same additions to the appraised value of the goods if the same were appraised, except in cases where the goods were subject to a certain penalty, and the express provision was that the rates of duties should be estimated on such aggregate amount. Goods imported from foreign countries could not be admitted to entry unless the invoice accompanied the entry, nor unless the invoice was verified by oath, and neither the act under consideration nor the first collection act gave the collector or the appraisers any authority to reduce the price or value of the goods as expressed in the invoice.*

Dutiable values of imported goods, subject to an *ad valorem* rate of duty, were required by the act of the thirtieth of July, 1846, to be estimated and ascertained by appraisement, adding costs and charges as therein prescribed, but the provision was that under no circumstances "shall the duty be assessed upon an amount less than the invoice value."†

Costs and charges, except insurance, were also required to be added to the appraised value by the act of the third

* 3 Stat. at Large, 732.

† 9 Id. 43; Shelton et al. *v.* Austin, 1 Clifford, 389.

of March, 1851; but the act vested no authority either in the collector or the appraisers to reduce the valuation of the goods below the invoice or entered value, and no such authority, applicable in this case, is found in any act of Congress passed prior to the time when the entry before the court was made at the custom-house.*

On the contrary, the act of Congress under which the appraisers acted in this case expressly provides, as before explained, that under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value, the substance of which provision has been in force for a quarter of a century.†

Importers are required to make an entry of their importations, which should always be accompanied by the invoice, duly verified by oath, and when the entry is made and the permit granted the packages for appraisement are designated on the invoice by the collector who orders one in ten of them to the public store for the purpose of appraisal. Examination of the selected packages is then made by the appraisers, who report their doings to the collector, and if no appeal is taken from their appraisement, either to the general appraisers or to the Secretary of the Treasury, their decision in the premises is final and conclusive as to the dutiable value of the importation.‡

Appraisers, it is said, are to appraise, estimate, and ascertain the true market value of such imports, whether of greater or less value than that expressed in the invoice and entry; but the decisive answer to that suggestion is that their duties are regulated by the act of Congress under which they act, and inasmuch as it is provided that the duties shall not under any circumstances be assessed upon an amount less than the invoice or entered value, it is clear that the appraisers have no authority to make any such appraisement as that which they were requested to make by the collector. Redress for such a grievance, if it be one, must be

* 9 Stat. at Large, 630. † 11 Id. 199.

‡ Belcher et al. *v.* Linn, 24 Howard, 521; Bartlett *v.* Kane, 16 Id. 272; Rankin *v.* Hoyt, 4 Id. 327; Stairs *v.* Peaslee, 18 Id. 524.

sought in Congress, as Congress and not the courts possesses the power to lay and collect taxes, duties, imposts, and excises, and to pass all laws which shall be necessary and proper to carry that power into execution.

Extended remarks respecting the case of *Rankin* v. *Hoyt** need not be made, as the statement of the fact shows that the appraisers in that case added to the value expressed in the invoice, and the decision was founded upon the act of the fourteenth of July, 1832, which did not contain the provision that the duties should not under any circumstances be assessed upon an amount less than the invoice or entered value, and consequently it is not an authority which controls the present case.

Comment upon the fifth section of the tariff act under which the goods were imported in this case may also be omitted for reasons of a like character, as the section must be construed in view of the proviso of the amendatory act passed on the same day, which prohibits both the appraisers and the collector from making any reduction in the invoice or entered value in the assessment of *ad valorem* duties.

JUDGMENT AFFIRMED.

THE CLINTON BRIDGE.

1. An act of Congress enacting that a certain bridge, already built over a river which divides two States, "shall be a lawful structure, and shall be recognized and known as a post-route," means not only that the bridge shall be a post-route, but also that, as built, with its abutments piers, superstructure, draw, and height, it should have the sanction of law, and be maintained and used in that condition. This, although the act was declared by its title to be simply an act declaring the bridge "a post-route."
2. A suit in chancery begun previously to the passage of the act, praying injunction against building of the bridge as a nuisance, is abated by such an act; though pleas and replication had been filed, proofs taken, and the case ready for hearing.
3. The act is constitutional.

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* 4 Howard, 327.

Statement of the case.

APPEAL from the Circuit Court for the District of Iowa.

Gray filed a bill in equity in the court below against the Chicago, Iowa, and Nebraska Railroad Company, to enjoin them from building a railroad bridge across the Mississippi River, at the town of Clinton, situate on its banks on the Iowa or western side, and extending to a point opposite on the eastern or Illinois side. Railroads in each State came to the *termini* of the bridge. After setting out the interest which the complainant had in the free and unobstructed navigation of the river, and the serious danger and obstruction to the navigation by the erection of the bridge, the bill concluded with a prayer for a temporary injunction against the defendants, enjoining them from building the bridge until the final hearing of the cause, and for a perpetual injunction on the final hearing. Answers and replications were put in, and a large amount of proofs were taken by both parties. When the cause came on for a final hearing the counsel for the defendants objected to the proofs of the complainant being read, on the ground that, since the erection of the bridge, Congress had passed an act declaring it a lawful structure.

The act of Congress thus relied on as concluding the case, and which was passed 27th February, 1865, was entitled "An Act declaring Clinton Bridge across the Mississippi River, at Clinton, in the State of Iowa, a *post-route*." It ran thus:

"SEC. 1. The bridge across the Mississippi River, erected by the Albany Bridge Company and Chicago, Iowa, and Nebraska Railroad Company, under the authority of the States of Iowa and Illinois, between the towns of Clinton, Iowa, and Albany, Illinois, *shall be a lawful structure, and shall be recognized and known as a post-route, upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for their transportation over the railroads or public highways leading to said bridge.*

"SEC. 2. The draw of said bridge shall be opened promptly upon reasonable signal for the passage of boats, whose construc-

tion shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening said draw during or after the passage of trains.

"SEC. 3. In case of any litigation hereafter arising from any alleged obstruction to the free navigation of said river, the cause may be tried before the Circuit Court of the United States of any State in which any portion of said obstruction or bridge touches.

"SEC. 4. The right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river, by the construction of said bridge, is hereby expressly reserved."

The bridge had been completed before the passage of the act.

The court below sustained the objection made to the reading of the plaintiff's proofs; holding that the act was conclusive of the case, and refused to hear any evidence going to prove that the bridge was a material obstruction to the navigation of the Mississippi, or to sustain any of the facts set out in the bill, and dismissed it accordingly. Thereupon the complainant brought the case here.

Mr. T. D. Lincoln, for the appellant:

The act did not intend to abate the suit. It is not usual for the legislature to pass statutes that shall dispose of particular cases pending. No act should be construed as doing this, unless no other fair construction can be given. And as here the third section of the very act provides for litigation thereafter to arise in reference to the bridge as an obstruction, the act can hardly be construed as preventing a right to litigate.

The statute did not intend to do more than to declare generally, that a bridge at the point named in it was a lawful structure for the purposes therein stated; the purposes, namely, of a post-route.

The object of the law, as declared by its title, was simply to provide that the bridge should be a post-route. Certainly,

if anything more was intended it was not expressed in the title, of which the object in all statutes is to tell what the purpose and intent of the statute is.

Numerous acts have been passed from time to time establishing post-routes upon common and plank roads, upon waters (river, lake, canal, and ocean); and, what is more pertinent, of late upon railways; all this being done sometimes by acts embracing general classes of routes;* sometimes by acts giving a description of the route by name.

One act respecting railroads was that of July 7th, 1838,† by which it was declared "that every railroad within the limits of the United States, which now is or hereafter may be completed, shall be *a post-route*, and the Postmaster-General shall cause the mail to be transported thereon," &c.

Examination of these numerous statutes will show that their object was simply to make it lawful for the Postmaster-General to establish post-offices and to contract for carrying the mail, and that they had no other purpose whatsoever. Now the words here are not inapt words to express the idea of these laws. They do not necessarily mean more, especially when it is observed that the words "lawful structure" are directly connected with the words "and shall be recognized and known as a post-route;" and with these words, "upon which also no higher charge shall be made for transmission over the same of the mails," &c., "than over the railroads and public highways leading to said bridge." It must be remembered, too, that the roads leading to the bridge had been made post-roads by other acts.

Suppose Congress had passed a law entitled "An act to establish post-roads," and had in the first section thereof declared that all roads, turnpikes, plank-roads, railroads, and canals, and all the rivers of the United States, over which any interstate commerce is carried, shall be lawful structures, and be known and designated as post-roads, and

* See act of May 8, 1794, 1 Stat. at Large, 357; of May 1, 1810, 2 Id. 549; of 27 February, 1815, 3 Id. 220; of March 3, 1847, 9 Id. 200, 645; of March 3, 1853, 10 Id. 255.

† § 2, 5 Id. 283.

that no greater toll should be paid than had heretofore been paid on the railroad from Washington to Baltimore,—such an act would not differ from the one in question. And would any one say that such an act was intended to legalize all the roads in the country (except to make them legal post-roads), and that the courts could not entertain a suit by an individual to abate some portion of one of these roads as a nuisance specially injurious to him; and that no judicial inquiry could be made as to the manner in which any of these roads had been constructed, or the bridges over the rivers made?

The sort of language which Congress employs when it wishes to make a bridge a lawful structure generally can be seen in the act respecting the Wheeling bridge. In that case this court had declared the bridge an obstruction to navigation upon the ground that the span over the main channel between Zane Island and Wheeling was too low to let the chimneys of steamers under, and it was ordered to be abated unless this span was raised to the given height.*

Thereupon Congress, by an act whose title was for a fiscal purpose, specified and "*for other purposes*," enacted in its sixth section that the said bridges

"Are hereby declared to be lawful structures *in their present position and elevation*, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding."

The seventh section provided that the said bridges should be post-routes for the passage of the mails, and then proceeded:

"And that the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation; and the officers and crews of all boats navigating the said river are required to regulate the use of said vessels and boats, and of any pipes and chimneys

* Pennsylvania *v.* The Wheeling, &c., Bridge Co., 13 Howard, 569, 573; S. C., 18 Ib. 421.

belonging thereto, so as not to interfere with the elevation and construction of said bridges."

Such language leaves no room for doubt that the act was intended to reach the very question decided by the court.

It is not intimated in our statute that the bridge was to be maintained *as it then was, or in its then condition*, or that navigators must conform their boats to it. The fourth section is a plain intimation to the contrary. It leaves open the right to amend the act so as to prevent and remove all material obstruction to the navigation of the river, by the construction of the bridge.

Now what are the consequences of the construction set up? One is, that no suit by any such person for loss or damage occasioned to his property by the bridge can be maintained. Private rights are in effect taken away without compensation. This is a consequence in violation of common and public law; a consequence which, if it may follow precise and unequivocal terms, such as were used in regard to the Wheeling bridge, can never follow doubtful ones. No court would construe any statute to have these effects where it could well avoid it.

In its more immediate consequence the construction set up makes the act the exercise of at least a *quasi* judicial function. It works an abatement of a pending suit, so as to put an end to any further prosecution of it, and so as to put an end to any further inquiry as to the obstruction caused by the bridge. Whether this is not the exercise of a complete actual judicial function, and whether, if it be, it is not unconstitutional, is a point which we consider hereafter. But if it be less, and can be sustained, such legislation goes to the verge of the Constitution. It is unusual, doubtful, inexpedient, and not to be presumed to have passed, except a purpose to pass it be clearly indicated.

Possibly enough some artful person, interested in maintaining the existence of the bridge, may have dictated the language of the act, and did intend slyly to produce the exact effect which is now sought to be maintained; but if

the words "lawful structure," relied on, have come into the law by the covert design of the draftsman, it needs no case to show of what value such an enactment is. The question is, what did *Congress* mean? Now, in the construction of laws, there are certain leading rules of interpretation. Among them are these:

1st. The title to the act may be resorted to in case of any doubt as to the true meaning of the law.

2d. The act shall be construed with reference to the laws upon the same subject, and to the declared purpose of the act.

3d. The whole statute must be construed together, and one part of it cannot be so construed as to be inconsistent with another part of it.

4th. The consequences of any given construction are to be considered where there is fair room for doubt.

5th. No act should be so construed as to take away private rights without compensation, if any other fair construction can be given it.

6th. No act should be so construed as to leave it of doubtful *constitutionality* where such construction can be fairly avoided.

Opposing counsel construe this statute so as to violate each one of these rules.

II. If our view in which the act is to be construed is wrong, and the construction set up on the other side is a right one, we deny that Congress had, constitutionally, power to pass such an act. Construed thus, it has found as a fact that the bridge, as it stands, is a lawful structure, in such sense as to prevent the plaintiff from prosecuting a suit which he had then pending against this railroad company. The law is not one affecting the jurisdiction of the court, or, as in the case *Ex parte McArdle** (a case which went to the verge of law), taking it away in a certain class of cases then pending. If it so finds the bridge a lawful structure as to put an end to this suit, it is the exercise of a judicial function, and in no sense a legislative act. A law is "a rule of

* 7 Wallace, 506.

action prescribed by the supreme power in a state."* Now, if this law is to be construed as finding that the bridge is, in fact, a lawful structure in such sense as to require the court below to dismiss the suit, what is it but the finding precisely what the court itself was asked by one of the parties to find in the case; in other words, the determining a legal question between the parties to a suit then pending in the court? Suppose the court had, in the sense here contended for, decreed that the bridge was a lawful structure, would not that necessarily have ended the suit? Can Congress step in and make such decree by the words, "shall be a lawful structure?" That is the exercise of a judicial function, which is placed by the Constitution in the courts of the United States. Such a decree Congress did make in effect;† and the court below, in obedience to that view of the act, ordered the bill dismissed upon the force of the statute, refusing to inquire into the merits.

The law cannot be sustained as a law regulating commerce among the States. It is not, in any fair sense, a regulation of commerce. It does not prescribe any rule by which commerce shall be carried on. It does not provide that it shall or shall not be carried on over this bridge at all, or the conditions upon which it shall be so carried on. The only condition in the law relates to the price to be charged for carrying the mails.

Nor is the bridge, in any fair sense, an instrument of commerce. It is not like the vehicle or vessel in which commerce shall be or is carried on. Nor is it any provision as to the mode or manner in which the vessel shall be built, or manned or navigated; nor as to the kind of goods to be passed over the bridge, or any regulation for bringing this commerce under the revenue system of the government.

* Blackstone's Commentaries, Introduction, § 2.

† De Chastellux *v.* Fairchild, 15 Pennsylvania State, 18; The State *v.* Fleming, 7 Humphrey, 152; Lewis *v.* Webb, 3 Greenleaf R. 326; Lanier *v.* Gallatas, 13 Louisiana Annual, 176; Holden *v.* James, 11 Massachusetts, 396; Merrill *v.* Sherburne, 1 New Hampshire, 203; Parmelee *v.* Thompson, 7 Hill, 80; Sanborn *v.* Commissioners of Rice County, 9 Minnesota, 279.

The court declined to hear argument from Messrs. J. H. Howe and E. Totlin, on the other side.

Mr. Justice NELSON delivered the opinion of the court.

The first section of the act of Congress provides, "that the bridge across the Mississippi River, erected by the Albany Bridge Company and the Chicago, Iowa, and Nebraska Railroad Company, under the authority of the States of Iowa and Illinois, &c., shall be a lawful structure, and shall be recognized and known as a post route."

We cannot doubt, upon a perusal of the section, but that it was the intention of Congress to legalize the bridge as then constructed across the river, and that the words used carry out fully this intent. It is declared "a lawful structure;" that is, the bridge as built, with its abutments, piers, superstructures, draw, and height, should have the sanction of law, and be maintained and used in that state and condition until the law was altered by the reserved power in the last section.

The act of Congress in the case of the Wheeling Bridge, whose language it is sought to distinguish from that used in the present one, was more explicit, but not more comprehensive. In the Wheeling Bridge case the court had rendered a decree, directing the obstruction to be removed by elevating the bridge, or if not, by abatement. No doubt the existence of this decree, which was in the process of execution, led to the very specific terms of the act. But with all its particularity it is not more comprehensive or decisive in legalizing the bridges than the one before us.

The questions, whether or not it was competent for Congress to interfere and legalize the bridge under the power to regulate commerce, and whether or not the act put an end to the pending suit, were questions examined and settled in the affirmative in the case already referred to.* The reasons for the conclusions arrived at will be there found, and need not be repeated.

The only difference between the case of the Wheeling

* 18 Howard, 429.

Bridge and the present one is, that in the former a decree had been rendered by the court against the bridge, in the latter the cause was pending undecided. It was, in the former case, insisted on behalf of the complainant, that the act of Congress could not invalidate the decree of the court. But it was answered that the decree of abatement of the obstruction was executory, a continuing decree, which required not only the removal of the bridge, but enjoined the defendants against any reconstruction. And that whether or not it would be a future existing obstruction depended upon the question whether it interfered with the right of free navigation, and that if, in the meantime, this right had been modified by competent authority, so that the bridge was no longer an unlawful obstruction, the decree of the court could not be enforced. There was no longer any interference with the enjoyment of the public right inconsistent with law no more than there would be if the complainant himself had given his consent after the decree.

In the present case the act of Congress having passed pending the suit, it gave the rule of decision for the court at the final hearing upon the same principle that the act in the Wheeling Bridge case staid the execution of the decree directing its abatement. The court say in that case that if the remedy had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the power of Congress. And if, in the present case, the action had been at common law for damages alleged to have been done to the property of the plaintiff before the passage of the act of Congress, very different considerations would have arisen as to the effect of the act upon this private right of action from that upon a simple proceeding to enjoin the building of the bridge; or, if built, to abate it as a nuisance.

We think that the ruling of the court below was right, and that the judgment should be

AFFIRMED.

Syllabus.

CORBETT *v.* NUTT.

1. Statutes authorizing redemption from sales for taxes, are to be construed favorably to the owners of the land, and particularly when such statutes provide full indemnity to the purchaser and impose a penalty on the delinquent.
2. Mrs. H., a resident at the time of Virginia, devised in April, 1863, certain lands situated in that State, and also other lands situated in the District of Columbia, to N., in trust for two married women. On bill filed by the *cestuis que trust*, the Supreme Court of the District of Columbia appointed M. trustee in place of N., and with the latter's powers and duties; *Held*—

   That although the appointment was invalid so far as the land in Virginia was concerned; and that M. was thus not legally trustee of *that* land, yet inasmuch as he was apparently clothed by the decree of the court appointing him with the legal title and acted as trustee, and was treated as such trustee by the *cestuis que trust*, the tax commissioners under the act of June 7th, 1862, to collect taxes in the insurrectionary districts, (and which provides that if the owner of land be under a legal disability the trustee or other person having charge of the person or estate of such owner may redeem the land sold for unpaid taxes), were authorized to allow him to redeem the lands in Virginia sold under the said act, in which such *cestuis que trust* were interested; that the commissioners were not obliged to inquire into the validity of the decree; and that it was sufficient for them to allow the redemption, when they found that the party offering to redeem furnished *primâ facie* evidence of possessing the character which entitled him under the statute to do so.

   That M. being thus clothed apparently with the legal title, and acting under his appointment with the consent of the *cestuis que trust*, was a person "having charge" of their estate, and was thus entitled to make redemption for them of the lands sold for taxes within the meaning of the said act.
3. The 7th section of the amendatory act of March 3d, 1865, which declares "that no owner shall be entitled to redeem unless, in addition to the oath prescribed by existing laws, he shall swear that he has not taken part with the insurgents in the present rebellion, or any way given them aid or comfort, and shall satisfy the board of commissioners that the said oath is true," applies only to owners seeking in person to redeem, and not to trustees, guardians, and agents redeeming for others whose property they have in charge.
4. The voluntary residence of a person within the Confederate lines during the late rebellion, did not incapacitate him, under 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" (which act makes null and void all *sales, transfers, and conveyances*, of any estate

and property, of persons engaged in armed rebellion against the United States, or aiding and abetting such rebellion, who after sixty days' warning and proclamation duly given and made by the President, did not cease to aid, countenance and abet such rebellion and return to their allegiance to the United States, and which act prescribes proceedings to condemn such property, and apply the proceeds to the support of the army), from making a last will and testament, further, if at all, than as against the United States.

5 Assuming (what is not decided) that a devise is within the terms "sales, transfers, and conveyances," invalidated by the act, and that a person who during the rebellion left loyal territory, and went to and resided in and died in the rebel lines, is within the category of persons for whom the warning and proclamation of the President prescribed by the act was intended, the invalidity declared is to be regarded as limited, and not absolute; and it is only as against the United States that the "sales, transfers, and conveyances," of property liable to seizure, are null and void. They are not void as between private persons, or against any other party than the United States.

6. Where land sold under the said act of June 7, 1862, has been redeemed, the owner is entitled to recover it from the purchaser at the tax sale, without showing that the certificate of redemption has been forwarded to the Secretary of the Treasury, and that the purchaser has been paid his purchase-money by draft drawn on the treasury of the United States.

ERROR to the Supreme Court of Appeals of Virginia; the case being thus:

The seventh section of the act of June 7th, 1862, for the collection of direct taxes in insurrectionary districts, after directing the advertisement and sale of lands, upon which taxes due the United States remained unpaid, after a time specified, enacts*—

By a first clause, that the *owner* of the land, or any loyal person of the United States having any interest in it, may at any time, *within sixty days after the sale*, appear before the board of tax commissioners, in proper person, and redeem it from sale upon paying the amount of the tax and penalty, with the interest and expenses prescribed, and taking an oath, if a citizen, to support the Constitution of the United States.

And by a second clause, that if the owner of the land be

* 12 Stat. at Large, 423, 424.

under a legal disability, the *trustee*, or other person *having charge* of the person or estate of such owner, may redeem *at any time within two years after the sale.*

An act of March 3d, 1865, amendatory of the act just mentioned, enacts that when a redemption is made the board of tax commissioners shall certify the fact to the Secretary of the Treasury, and that he shall repay the purchaser, by draft on the treasury, the principal and interest of the purchase-money; and that the purchaser shall deliver possession to the owner redeeming.

It also enacts,* "that no *owner* shall be entitled to redeem unless, in addition to the oath prescribed by existing laws, he shall swear that he has not taken part with the insurgents in the present rebellion, or any way given them aid or comfort, and shall satisfy the board of commissioners that the said oath is true."

An act of July 17th, 1862, originating like the other two in the exigencies of the late civil war, and entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," enacts by its fifth section,† 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" thereinafter named, "*and to apply and use the same, and the proceeds thereof, for the support of the army of the United States.*"

The section then enumerates six classes of persons whose property is thus made subject to seizure. The fourth class embraces persons "who, having held an office of honor, trust, or profit under the United States, shall thereafter hold office in the so-called Confederate States."

The sixth section enacts that if any person within any State or Territory of the United States, other than those named in the previous section, being engaged in armed rebellion against the United States, or aiding or abetting such

* 13 Stat. at Large, 502. † 12 Id. 590.

rebellion, shall not, within sixty days after public warning and proclamation 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 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.

It continues:

"And *all sales, transfers, or conveyances* of any such property, after the expiration of the said sixty days from the date of such warning and proclamation, *shall be null and void;* and 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."

[The proclamation of the President was made July 25th, 1862.]

The seventh section directs the proceedings to be instituted for the condemnation and sale of the property seized.

With these enactments of June and July, 1862, in force, Mrs. Louisa Hunter died, April, 1863, seized of a tract of land consisting of sixty acres, situated in the county of Alexandria, in the State of Virginia, leaving a last will and testament, by which she devised the premises, along with certain real estate in the city of Washington, to one W. D. Nutt, in trust for Marion Young, her adopted daughter, and Emily Featherstonaugh, her niece, both of whom were then and still are married women.

Prior to the war Mrs. Hunter resided in the county of Alexandria, in Virginia, but after the occupation of Alexandria by the forces of the United States, she went within the Confederate lines, and there remained until her death.

Immediately preceding the commencement of the war, Nutt held an office under the government of the United States. This he resigned in February, 1861, and in September following went within the Confederate lines, and took

office under the Confederate government, which he held at the time of Mrs. Hunter's death.

On the 29th of February, 1864, the land in *Virginia* was sold for taxes due the United States under the first of the above quoted acts of Congress, the act, namely, of June 7th, 1862, providing for the collection of direct taxes in insurrectionary districts within the United States; and at the sale one W. P. Corbett became the purchaser, received the commissioners' certificate of sale, and took possession of the premises under the title thus acquired.

In July, 1865, the *cestuis que trust*, under the will of Mrs. Hunter, filed a bill in the Supreme Court of *the District of Columbia* to obtain the appointment of a new trustee in place of the one named in the bill, setting forth that the testatrix had left a large and valuable estate, the greater part of which lay within the District; that the settlement of the estate was impossible, by the terms of the will, without the intervention of the trustee named therein, or another in his stead, invested with his powers and duties; and that they were informed that the trustee named declined to qualify, or to accept the trusts reposed in him.

Nutt appeared to the suit and answered the bill, admitting that he was the person named in the will, and that he had declined to accept the trust thereunder. The court thereupon, at the hearing, adjudged that the complainants, the *cestuis que trust*, were entitled to the relief prayed, and by its decree appointed J. D. McPherson, of Washington, D. C., trustee, in "the name, place, and stead," "clothed with all the powers and charged with all the duties reposed and vested in said Nutt as trustee, by the testatrix mentioned in the will," first requiring of him the execution of a bond in the penal sum of ten thousand dollars, conditioned for the faithful performance of his trust.

On the 10th of February, 1866, McPherson, as trustee, appeared before the tax commissioners and paid to them the several sums required for the purpose of effecting a redemption of the property from the tax sale, and received from them a certificate of redemption, stating the payments made

by him, and that he had taken an oath to support the Constitution of the United States; and that Marion Young and Emily Featherstonaugh, owners of the property, and married women at the time of the sale, and still under the same disability, had sworn that they had not taken part with the insurgents in the rebellion, or in any way given them aid or comfort, and had satisfied the commissioners that the oath was true.

Nutt, the trustee appointed by Mrs. Hunter's will, now brought suit in one of the State courts of Virginia to recover the property, and on the trial offered in evidence the certificate of redemption against the objection of the defendant that the redemption was illegal and did not sustain the claim of the plaintiff. The court admitted it. To this ruling of the court the defendant excepted.

The testimony being closed, the defendant requested instructions thus:

1. If the jury shall believe from the evidence that Nutt, the plaintiff, who sues as trustee, held a position under the government of the United States, and resigned said office, went voluntarily within the lines of the Confederate States, and accepted office under the Confederate government, and held said office at the time of the death of the testatrix, and that the said Louisa Hunter was a resident of the county of Alexandria at the time of the breaking out of the civil war, and after its breaking out went voluntarily into the Confederate lines and resided therein up to the time of her death, and that the premises in the summons described were at all times in the military lines and under the jurisdiction of the United States, then that said devise to the plaintiff was inoperative to pass or transfer any title to him, and he cannot therefore recover in this action.

2. That to enable the plaintiff to recover in this action, he must show that the certificate of redemption was forwarded to the Secretary of the Treasury, and the defendant repaid his purchase-money by draft drawn on the treasury of the United States.

The object of the instruction prayed, the defendant stated

in his petition to the Court of Appeals of Virginia, was to raise the question as to the effect and meaning of the sixth section of the above-quoted act of Congress of the 17th of July, 1862, "to suppress insurrection, punish treason," &c.

The court refused to give the instructions thus asked for, and the defendant excepted. Verdict and judgment having gone for the plaintiff, the case was taken to the Supreme Court of Appeals of Virginia, which sustained the judgment. The case was now brought here under the 25th section of the Judiciary Act; the only ground of error alleged in this court being that there was drawn in question the construction of,

1st. The act of Congress of June 7th, 1862, "for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes."

2d. The act passed July 17th, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

3d. The act of March 3d, 1865, amendatory of this last act.

And that the decision of the Supreme Court of Appeals of Virginia was adverse to the right and title claimed under the said acts.

Messrs. G. W. Brent and C. W. Wattles, for the plaintiff in error:

One of several points argued and passed on in the court below, was of course the point whether, after his answer in the Supreme Court of the District, that he had declined to accept the trusts under Mrs. Hunter's will, Nutt was still trustee and could maintain a suit to recover the land, even admitting that the redemption was rightly made. If that matter is open in this court, it deserves consideration. Passing it by, however, we come to the matters excepted to.

1. *As to the evidence.* The certificate ought to have been excluded, for it proved on its face that the redemption was bad. It describes McPherson as "trustee." But he was not trustee of *this* land, for the court of the District of Co-

lumbia could not appoint a trustee for lands in Virginia; and as trustee of *such* land he had no power to redeem. It is in vain to say that he redeemed as a person "having charge" of the person or estate of the owner. The case does not show that he had any charge of this land, in another State, still held in trust by a recognized trustee, if this suit is rightly brought by Nutt. On the contrary, as trustee of land in the District alone, he could have no lawful charge of the other land; and the fact of Nutt's now bringing suit, indicates rather that *he*, if any one, and not McPherson, had the care of it. There is nothing which shows any relation in McPherson to the two ladies except as he got it from the court in the District, which could not give him charge of lands out of it.

2. *As to the instructions refused.* The first one should have been given. The act of 17th July, to suppress insurrection, &c., makes by plain terms "null and void" "all sales, transfers, and conveyances" of persons "aiding and abetting" the rebellion; and by it Mrs. Hunter was prevented from selling, transferring, or conveying any estate and Nutt from accepting any. When Mrs. Hunter left loyal territory to go, and went, into the rebel lines, she became a rebel, for it has been settled that all the citizens of the rebel "government" became enemies to the United States.* Moreover, a person holding by devise, holds, in the language of the law, "by purchase." Where there has been a purchase, there has, of necessity, been a sale. And, without resort to technical rules, a devise must be admitted to be "a transfer." It has been decided to be "a conveyance."† We have thus the case of a rebel, "selling, transferring, conveying;" and of an office-holder, who transfers the scene of his office-holding, attempting to take. But the statute declares all "null and void." It cannot be said that no one but the United States can object. The statute was a measure of war. It comes, and was meant to come like "a tyrant;"

* Mrs Alexander's Cotton, 2 Wallace, 404; The Venice, Ib. 258.

† Seaburn *v.* Seaburn, 15 Grattan, 423.

its purpose was to inflict the greatest possible injury; to make war short, by making it sharp and decisive. Office found may be dispensed with by the sovereign;* and under this statute it was dispensed with, and the invalidity of the transfer is allowed to be taken advantage of by any one concerned.

The second instruction refused should also have been given. The object of the provision in the amendatory act of March 3d, 1865, is twofold. First, to protect the treasury; secondly, to benefit the purchaser. It invests the secretary with a superintendency or revisory power over the tax commissioners. Before the owner is entitled to possession the secretary must be satisfied that the lands have been duly redeemed, and on being so satisfied he repays the purchaser, and not until then is the owner entitled to the possession.

Messrs. Carlisle and McPherson, contra:

The matter of Nutt's right to sue was a matter of local law decided affirmatively below, and not open as a Federal question for discussion here. We proceed to the exceptions.

1. Selling land for taxes with no actual notice to owners, is an extreme exercise of sovereign power; and as authorities show, the right of redemption being a right in favor of property, is to be liberally construed. Courts support it, and have presumed and intended against many probabilities in support of it.† Now here it is sufficiently plain that McPherson had charge of this land. The oaths of the ladies made in furtherance of his purpose to redeem, show that at the time he redeemed he did have charge, and had it by their assent, for they were acting in furtherance of his purpose as he was of theirs. From the time of his appointment as trustee by the court of the District, his relation was necessarily confidential to them both. What so natural as that he, who had their moneys from the District property, should be in charge of property near it; the "trustee" of it de-

* Smith *v.* Maryland, 6 Cranch, 286.

† Patterson *v.* Brindle, 9 Watts, 100; Gault's Appeal, 33 Pennsylvania State, 94; Dubois *v.* Hepburn, 10 Peters, 1.

clining to take actual charge, and McPherson not being able under his appointment to act as *trustee* in his place? The statute does not speak of the time when the charge is to begin. If it be within two years, it is enough. The certificate was then rightly admitted.

2. The instructions asked for were rightly refused. There was no condemnation under the seventh section by the government. This justified the refusal of the first one.* And the request for the second proceeds on a misconception of the act on which the request was founded.

Mr. Justice FIELD delivered the opinion of the court.

Several questions were raised and elaborately examined in this case in the courts of Virginia, both in the lower courts and in the Court of Appeals of the State, which are not open for consideration here. The only questions which we can consider, under the twenty-fifth section of the Judiciary Act, arise upon the ruling of the court admitting the certificate of redemption issued to McPherson, and the refusal to give certain instructions prayed by the defendant.

The seventh section of the act of June 7th, 1862, for the collection of direct taxes in insurrectionary districts, after directing the advertisement and sale of lands, upon which taxes due the United States remained unpaid, after a designated period, contains two clauses relating to the redemption of the land from such sale.† The first clause provides that the owner of the land, or any loyal person of the United States having any valid lien upon or interest in the land, may at any time, within sixty days after the sale, appear before the board of tax commissioners, in proper person, and redeem the land from sale upon paying the amount of the tax and penalty, with the interest and expenses prescribed, and taking an oath, if a citizen, to support the Constitution of the United States. The second clause provides that if the owner of the land sold be a minor, a non-resident alien, a loyal citizen beyond the seas, a person of unsound mind, or under a legal

* Fairfax *v.* Hunter, 7 Cranch, 603. † 12 Stat. at Large, 423, 424.

disability, the guardian, trustee, or other person having charge of the person or estate of such owner, may, in the same manner and with like effect, redeem the land at any time within two years after the sale.

By these provisions persons entitled to make redemption are divided into two classes. The first class embraces persons who are residents in the country, and are not laboring under any legal disability. They may well be supposed to have had personal knowledge of the assessment of the taxes and of the sale made, and for this reason, it may be inferred, their privilege of redemption was limited by Congress within the narrow period prescribed.

The second class embraces loyal citizens beyond the seas, non-resident aliens, and persons laboring under some legal disability, to whom the reason for the limitation prescribed to the first class was not applicable. To those absent from the country, personal knowledge, either of the assessment or sale, could not be justly imputed; and those under disability, if possessed of the knowledge, might reasonably expect that the matter would receive the attention of the parties intrusted with the charge of the property. Congress, therefore, gave to the persons of this class a much more extended period within which to exercise the privilege of redemption, and allowed the redemption to be made by "the guardian, trustee, or other person having charge of the person or estate" of the owner. The position of the persons composing this class, absent from the country, or under legal disability, was such that their property would, in the ordinary course of things, be in the "charge" of others, but, lest the latter might, from any cause, neglect the interests of the owners, the period of redemption was prolonged to two years. It was for the benefit of the owners of the property, that they might not suffer from the remissness or faithlessness of their guardians, trustees, or agents, that the privilege was thus extended, and to secure that benefit the act should be liberally construed. It is the general rule of courts to give to statutes authorizing redemption from tax sales a construction favorable to owners, particularly when

they provide, as in the present case, full indemnity to the purchaser, and impose a penalty upon the delinquent.*

In this case it appears to be conceded that the Supreme Court of the District of Columbia exceeded its authority in appointing McPherson trustee, in place of Nutt, of the land in Virginia. That court could not by the mere force of its decree transfer the title to land lying without its jurisdiction from the party in whom it was vested by the will of Mrs. Hunter. A court of equity acting upon the person of a defendant may control the disposition of real property belonging to him situated in another jurisdiction, and even in a foreign country. It may decree a conveyance and enforce its execution by process against the defendant, but neither its decree nor any conveyance under it, except by the party in whom the title is vested, is of any efficacy beyond the jurisdiction of the court. This is familiar law, and was declared by this court in *Watkins* v. *Holman*,† the court observing that "no principle was better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated."

McPherson was not, therefore, legally trustee of the property in Virginia, and if his right to interpose for the redemption depended upon the possession of the legal title, his action might be treated as that of a stranger to the land. But the absolute possession of such title by him was not essential under the circumstances. He regarded himself as trustee of the property. The *cestuis que trust* so regarded him. He professedly acted in their behalf and for their interests. He was apparently, from the decree of the Supreme Court of the District, clothed with the legal title. The commissioners treated him as a person entitled to make the redemption. They were not obliged to inquire into the validity of the decree. They were not expected to enter upon investigations of title any further than was necessary to prevent the impertinent intermeddling of strangers. It was

* Dubois *v.* Hepburn, 10 Peters, 22.

† 16 Peters, 57.

sufficient for the commissioners to allow the redemption, when they found that the party offering to redeem furnished *primâ facie* evidence of possessing the character which entitled him under the statute to make the redemption.

The trustee named in the will not having accepted the trust reposed in him when the decree of the Supreme Court of the District was made, it is reasonable to suppose from the subsequent conduct of McPherson that he immediately took actual charge of the estate for the *cestuis que trust*, and was in such charge when the redemption was made. If such were the case, and we think there is little doubt of it, McPherson was by the very words of the statute authorized, without regard to the validity of the decree, as a person "having charge" of the estate of the owners, who were laboring under disability by reason of their coverture, to make the redemption; although from the ineffectual parol disclaimer of his trust by Nutt, the legal title may have remained in the latter, which required the present action for the recovery of the property to be brought in his name.

It is further objected that, assuming that McPherson was entitled to redeem, the redemption was ineffectual because he did not take the oath required by the seventh section of the amendatory act of March 3d, 1865, which declares "that no owner shall be entitled to redeem unless, in addition to the oath prescribed by existing laws, he shall swear that he has not taken part with the insurgents in the present rebellion, or any way given them aid or comfort, and shall satisfy the board of commissioners that the said oath is true."*

But the objection is untenable. McPherson did not redeem as owner, but as trustee of the owners, or as a person "having charge" of their property. The act of 1862 distinguishes between owners appearing in their proper persons and redeeming, and owners beyond the seas or laboring under some legal disability and redeeming through trustees, guardians, or persons having charge of the property.† It

* 13 Stat. at Large, 502.

† 12 Stat. at Large, 423-4.

requires both of the owners redeeming in person, and of the trustees, guardians, and agents redeeming for others, an oath to support the Constitution of the United States. It specifies the taking of the oath as one of the terms on which the redemption can be made by owners and loyal persons having a lien upon or interest in the property sold, when appearing in person before the commissioners. And it subsequently authorizes a redemption by trustees, guardians, and parties acting for others, "in the manner above provided;" that is, by making the like payments and taking a similar oath. But the additional oath imposed by the act of 1865 is, in our judgment, required only of owners seeking in person to redeem. It declares that "no owner shall be entitled to redeem" unless he take the additional oath. If the requirement extended also to owners beyond the seas or laboring under legal disability, it could not in many cases be complied with, and the beneficial object of the act, which was to secure to them the right of redemption, would be defeated.

We have not overlooked the fact that, in the present case, the certificate of redemption states that the additional oath was taken by the owners. This circumstance is not entitled to weight because the owners do not themselves make the redemption; and if they could be themselves considered as redemptioners, they failed to take the oath to support the Constitution required by the act of 1862.

We proceed to consider the prayers for instructions presented by the defendant and refused by the court. By the first of these prayers the court was requested to declare, in effect, that the voluntary residence of the testatrix within the Confederate lines incapacitated her from making a last will and testament; and the resignation by the plaintiff of an office under the United States, and acceptance of an office under the Confederate government incapacitated him from acting as trustee under her will, and taking the devise in that capacity.

The object of the instruction prayed, says the defendant

in his petition to the Court of Appeals of Virginia, was to raise the question as to the effect and meaning of the sixth section of the act of Congress, passed on the 17th of July, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

The previous section of the act provides 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" thereinafter named, "and to apply and use the same, and the proceeds thereof, for the support of the army of the United States."*

The section then enumerates six classes of persons whose property is thus made subject to seizure. The fourth class embraces persons "who, having held an office of honor, trust, or profit under the United States, shall thereafter hold office in the so-called Confederate States." The section concludes by declaring that "all sales, transfers, or conveyances of any such property shall be null and void."

The sixth section provides that if any person within any State or Territory of the United States, other than those named in the previous section, "being engaged in armed rebellion against 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, 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.

"And all sales, transfers, or conveyances of any such property, after the expiration of the said sixty days from the date of such warning and proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by

* 12 Stat. at Large, 590.

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."

The seventh section of the act directs the proceedings to be instituted for the condemnation and sale of the property seized.

If the devise of Mrs. Hunter can be brought within the language of this last section, it must be because a devise is embraced within the terms "sales, transfers, and conveyances;" and because her "aiding and abetting" the rebellion, and her refusal to return to her allegiance to the United States, are legitimate and necessary inferences from her voluntary and continued residence within the Confederate lines, for there is no direct evidence on either of these latter points, nor any evidence tending to establish either of them except such voluntary residence. Assuming, however, that a devise is within the "sales, transfers, and conveyances" invalidated by the act, and that Mrs. Hunter is within the category of persons for whom the warning and proclamation of the President were intended, we are of the opinion that the invalidity declared is limited and not absolute; that it is only as against the United States that the "sales, transfers, and conveyances" of property liable to seizure are null and void; and that they are not void as between private persons, or against any other party than the United States.

The object of the provisions cited is manifest. It is declared, in express terms, to insure the speedy termination of the existing rebellion. The confiscation of the property of persons engaged in the rebellion, and the appropriation of it, or its proceeds, to the support of the army of the United States, were supposed to have a tendency to advance that object. The seizure of the property of particularly designated classes, and of others engaged in the rebellion, or aiding and abetting it, who should not heed the public warning and proclamation of the President, was therefore directed, as also the institution of proceedings required in the courts of the United States for its condemnation and sale.

It was to prevent these provisions from being evaded by

the parties whose property was liable to seizure that "sales, transfers, and conveyances" of the property were declared invalid. They were null and void as against the belligerent or sovereign right of the United States to appropriate and use the property for the purpose designated, but in no other respect, and not as against any other party. Neither the object sought, nor the language of the act, requires any greater extension of the terms used. The United States were the only party who could institute the proceedings for condemnation; the offence for which such condemnation was decreed was against the United States, and the property condemned, or its proceeds, went to their sole use. They alone could, therefore, be affected by the sales.

Any other construction would impute to the United States a severity in their legislation entirely foreign to their history. No people can exist without exchanging commodities. There must be buying and selling and exchanging in every community, or the greater part of its inhabitants would have neither food nor raiment. And yet the argument of the defendant, if good for anything, goes to this extent, that by the act of Congress "all sales, transfers, and conveyances" of property of the vast numbers engaged in the late rebellion against the United States, constituting the great majority of many towns, and cities, and even of several states, were utterly null and void; that even the commonest transactions of exchange in the daily life of these people were tainted with invalidity. It is difficult to conceive the misery which would follow from a legislative decree of this wide-sweeping character in any community, where its execution was conceived to be possible, or confidence was reposed in its validity.

We do not notice that part of the instruction prayed which relates to the status of the plaintiff as an office-holder under the United States just previous to the commencement of the war, and subsequently taking office under the Confederate government, as it was not his property, the sale of which is assailed. If he was incapable of taking the devise, it was not from his participation in the rebellion, but because

the testatrix was incapable of passing her property by will under the act of Congress, a position which we have already shown to be untenable.

The second, and the only other prayer for instruction presented by the defendant, and refused by the court, which we can take notice of, is this: "That to enable the plaintiff to recover he must show that the certificate of redemption was forwarded to the Secretary of the Treasury, and the defendant repaid his purchase-money by a draft drawn on the Treasury of the United States." This prayer was based upon a misapprehension of the seventh section of the act of Congress of March 3d, 1865,* which provides that when a redemption is made the board of tax commissioners shall certify the fact to the Secretary of the Treasury, and the secretary shall repay the purchaser, by draft on the treasury, the principal and interest of the purchase-money; and that the purchaser shall deliver possession to the owner redeeming. These provisions only prescribe the duty both of the secretary and purchaser when the redemption is made, but they do not make the performance of the duty of the purchaser dependent upon the previous performance of the duty resting on the secretary. The act was intended for the benefit of the purchaser, to enable him to obtain the repayment of the purchase-money and interest thereon; but the validity of the redemption does not depend upon such repayment. That is a matter between the purchaser and the secretary, with which the owner or redemptioner has no concern.

We find no error in the record, and the judgment of the Supreme Court of Appeals of Virginia must be, therefore,

AFFIRMED.

* 13 Stat. at Large, 502.

HANNAUER *v.* WOODRUFF.

Where, on a certificate of division from a Circuit Court, this court is equally divided in opinion, the case will be remitted to the court below for the purpose of enabling it to take such action as it may be advised.

ON a certificate of division in opinion between the judges of the Circuit Court for the Eastern District of Arkansas.

The case was thus:

Woodruff made and delivered to Hannauer, at Memphis, Tennessee, on the 22d of December, 1861, a promissory note, dated that day, for $3099, with interest.

The only consideration of this note was certain bonds issued by an ordinance of the convention which attempted to carry the State of Arkansas out of the Federal Union, by what is called the secession ordinance.

These bonds were issued for the purpose of supporting the war levied by the insurrectionary bodies then controlling the State of Arkansas against the Federal government, and were styled "War Bonds" on their face, and the purpose of their issue was well known to both parties to the note.

The bonds had at the time of the transaction a value not much below their par value on their face, say ten per cent., at Memphis and in Arkansas.

The war bonds received by Woodruff were not used, or intended to be used, by him in support of the war aforesaid.

On these facts two questions of law arose on which the judges of the circuit were divided in opinion, to wit:

1st. Was the consideration of the note void on the ground of public policy, so that no action could be sustained on it in the Federal courts?

2d. If the bonds were a sufficient consideration to sustain the action, what was the measure of damages?

The case was submitted on a brief of Mr. Garland, for the plaintiff, Hannauer; no counsel appearing contra.

Mr. Justice NELSON announced the judgment of this

Statement of the case.

court, to the effect, that it being equally divided in opinion upon the questions, the case would be remitted to the court below for the purpose of enabling that court to take such action therein as it might be advised; this direction being in conformity, the learned justice observed, with the opinion of the court in *Silliman* v. *The Hudson River Bridge Company*.*

ORDER ACCORDINGLY.

IN RE PASCHAL.

1. The attorney or solicitor, who is also counsel in a cause, has a lien on moneys collected therein for his fees and disbursements in the cause, and in any suit or proceeding brought to recover other moneys covered by the same retainer.
2. A motion to pay into court the moneys collected will not be granted, but the parties will be left to their action, if the attorney is guilty of no bad faith or improper conduct, and has a fair set-off against his client, which the latter refuses to allow.
3. A party has a general right to change his attorney, and a rule for that purpose will be granted, leaving to the attorney the advantage of any lien he may have on papers or moneys in his hands as security for his fees and disbursements.

THESE were two motions on George W. Paschal, an attorney and counsellor of this court, and as such lately representing the State of Texas in suits which it had here. The first motion being in the case of that State against White, Chiles and others (No. 4 on the original docket), already largely reported; the second, in the case of the same complainant against Peabody & Co. (No. 6 on that same docket), not yet in any way adjudged.

In the first of the cases the motion was for an order on Paschal to pay to the clerk of this court, for the benefit of the State of Texas, the sum of $47,325 in gold, alleged to have been received by him under the decree in the first of the two cases above mentioned. In the other (the suit

* 1 Black, 582.

against Peabody & Co.), that the name of the said Paschal be stricken from the docket as counsel for the complainant, and that he be forbidden to interfere with the case. Rules to show cause having been granted, with leave to either party to file affidavits, Paschal, at the return of the rules, answered, filing a statement under oath by way of cause why the motions should not be granted.

This answer, in the first of the two cases, set forth the history of the litigation instituted for the recovery of the Texas indemnity bonds and the part taken by him therein, both in the two cases in which these motions are made and in other cases and proceedings. A portion of this history is published in the report of *Texas* v. *White, Chiles, et al.*,* and a portion in the case of *Texas* v. *Hardenberg.*†

The answer admitted that the respondent had received the sum alleged, viz., $47,325 in gold, paid under the decrees of this court, but alleged that his disbursements had been $13,355.98 (of which he gave an account by items), and that his charge for services was $20,000 in the case of *Texas* v. *White, Chiles, et al.*, alone; the reasonableness of which charge was corroborated by affidavits of highly respectable counsel. The balance, and much more, he claimed as due to him from the State of Texas for his services in relation to others of this same lot of indemnity bonds, for the recovery of which he was originally retained by the governor of Texas, as well as for other matters specified in the answer, into the merits of which the court deemed it not necessary for it to go, inasmuch as neither party had asked it to settle or liquidate the accounts between them.

It appeared by the answer that at the breaking out of the rebellion there were in the treasury of Texas seven hundred bonds of the United States of $1000 each, belonging to the school fund of the State, and known as the Texas Indemnity Bonds, being part of the $5,000,000 of bonds delivered to the State at the time of its admission into the Union. These bonds by their terms were payable to the bearer, but

* 7 Wallace, 700. † *Supra*, 68.

by statute of Texas were required to be indorsed in order to be available in the hands of the holder. The particular bonds which were the subject of the respondent's services, had not been indorsed by any governor of the State, but its military board nevertheless disposed of them for the purpose of aiding in carrying on the war. Of these bonds one hundred and thirty-six came into the hands of White, Chiles, and others, about one hundred and fifty into the hands of Peabody & Co., and various others into the hands of other persons. It was contended by these parties, that having received the bonds in good faith, they were entitled to be paid their full amount by the government of the United States, and many of them were so paid. But it was set up by the answer to the present rules, that, by the indefatigable exertions of the respondent, payment was stopped on a large number of the bonds, and suits were instituted against the parties who had received them, or had received the money secured by them.

The respondent was employed by A. J. Hamilton, the provisional governor of Texas, in 1865, to carry on these prosecutions. He first commenced a suit against White, Chiles, et al., in Texas, but not being able to serve them with process he removed his operations to Washington, and there commenced the suit, now No. 4 on the original docket, in which the money in question was recovered. He also took the proper steps and presented elaborate arguments in the treasury department to prevent a redemption of the bonds and to render the prosecution effectual; being partially successful in this object, as before mentioned. No stipulation was made with Governor Hamilton for any certain fee for these services, but it was understood between them that the respondent should charge such fees as the responsibility, expense, time, skill, and services should render proper. On the faith of this understanding, the respondent left his home in Texas, where his practice was lucrative, and came to the North to attend to this business. For a time, on a change of local administration in Texas, other counsel were employed in the cases, but never, as it appeared, to

the entire displacement of the respondent; and in December, 1867, he received the following special engagement from E. M. Pease, then governor of Texas:

"EXECUTIVE OF TEXAS,
"AUSTIN, December 3d, 1867.

"GEORGE W. PASCHAL, ESQ.

"DEAR SIR: Your two letters, of the 9th and 14th of November, came together a day or two since. I had intended to write you before this, and ask you to make a thorough examination of the suit at Washington in behalf of the State against Chiles and others, for certain United States bonds belonging to the school fund of Texas, but a great press of business has prevented me from doing it. I now wish you to make such an examination, and make a full report thereon to this office as early as possible. In the meantime you are fully authorized to take charge of and represent the interest of the State in said suit. Your compensation will be dependent upon the action of a future legislature, unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received.

"Yours, with respect,
"E. M. PEASE."

The power of the governor to make such an arrangement was not disputed. The legislature, in October previous, had passed an act expressly authorizing him to take such steps as he might deem proper to recover possession of these bonds, and to compromise with the parties holding them, or through whose hands they had passed. The respondent accepted these terms and continued to manage and conduct the subsequent litigation, both in this case of White, Chiles, et al., and other cases. In addition to the above letter, Governor Pease, on the 13th of November, 1868, executed to him a power of attorney, constituting him his agent and attorney in fact, to represent the State of Texas in any suits then pending, or thereafter to be instituted, in any courts in the District of Columbia, in relation to any of the said bonds, with power to settle and compromise with any of the parties. Under these various retainers and engagements, the re-

spondent gave his attention for several years to the recovery of the bonds, and finally succeeded in recovering the amount before mentioned from the defendants in the case of White, Chiles, and others, and made considerable progress in negotiating a settlement of those which had come to the hands of Peabody & Co. In June, 1869, Governor Pease visited Washington, and on being made acquainted with the respondent's proceedings, approved of the same, and entered into a further arrangement with him in relation to 300 of the said bonds, which had been carried to Europe by one Swisher (of which the Peabody bonds were a part), by which he agreed that the respondent should be paid for carrying the litigation through, twenty-five per cent. on the one hundred and forty-nine bonds received by Peabody & Co., and twenty per cent. on the remainder, being one hundred and fifty-one bonds, in the hands of Droege & Co. Under this arrangement the respondent continued his negotiations with these parties, and was, as he believed, near effecting a satisfactory arrangement and settlement with them, when, on or about the 27th of January, 1870, he received a telegram from E. J. Davis, who had been appointed provisional governor of Texas, in place of Governor Pease, that his appointment as agent for the State of Texas was revoked. A letter from the governor was received shortly after, containing a formal revocation of the respondent's authority as such agent, and of the power to represent the governor of Texas, given to him by Governor Pease. The respondent alleges that this interference on the part of Governor Davis put an end to the negotiations for settlement with Droege & Co., and Dabney, Morgan & Co. (parties who had received the money on the Peabody bonds), and was entirely unauthorized by the governor, and entitles him to receive the contingent fees of twenty-five and twenty per cent., as before mentioned, and to continue as attorney and counsel in the case until his demand is settled.

He also asserts that the State of Texas is indebted to him in a balance of $17,577 for publishing, binding, and delivering to the secretary of state of Texas, 400 copies each of

five volumes of reports of the decisions of the Supreme Court of Texas, which he reported under the laws of the State; also that the State owes him $1000 for bringing two suits in the District Court of Travis County, and presenting appeals therein to the Supreme Court of the State.

On the part of the State of Texas it was shown, not only that the governor had revoked the respondent's authority, but that he had appointed Mr. Durant as attorney and agent of the State in his stead, with authority to receive all moneys due to the State; and that Mr. Durant had made due demand of the respondent for the moneys in his hands, and had required him not to intermeddle further in the suit of *Texas* v. *Peabody et al.*

Mr. A. G. Riddle, for the respondent:

1. *As to the rule in the first case.* Attorneys at law and solicitors in equity have, undoubtedly, by the English rule, a general lien, not only upon all the papers and documents of their clients in their possession, not only for all the costs and charges due to them in the particular cause in which the papers and documents come to their possession, but also for the costs and charges due to them for other professional business and employment in other causes; and this lien extends to all moneys received and judgments recovered. The rule is applied in the United States, for the protection of the bar generally. The whole subject is presented in a learned and able note by Mr. T. W. Dwight, in the American Law Register.*

The fact that the fee is a contingent fee, does not affect the case. Such fees are lawful in Texas,† and have been recognized by this court in *Wylie* v. *Coxe*.‡

* Vol. 10 (or Vol. 1, New Series), 414; see also Wylie *v.* Coxe, 15 Howard, 415; Ex parte Plitt, 2 Wallace, Jr., 453; Pinder *v.* Morris, 2 Caines, 165; Martin *v.* Hawks, 15 Johnson, 405; St. John *v.* Dieffendorf, 12 Wendell, 261; Bradt *v.* Koon, 4 Cowan, 416; Hutchinson *v.* Howard, 15 Vermont, 544; Hutchinson *v.* Pettes, 18 Id. 614; Gammon *v.* Chandler, 30 Maine, 152; Frost *v.* Belmont, 6 Allen, 152; McDonald *v.* Napier, 14 Georgia, 99; Patten *v.* Wilson, 34 Pennsylvania State, 299.

† Hill *v.* Cunningham, 25 Texas, 31.

‡ 15 Howard, 415.

Argument for the client.

Finally, the respondent shows that he retains the fund in good faith. This being so, the rule must fall.*

2. *As to the rule in the second case.* It is not pretended that any cause exists for Mr. Paschal's removal, except the wish of the present governor of Texas. But a contract for a contingent fee having been made, and Mr. Paschal having entered upon his work, and spent much time, labor, and thought upon it, and incurred heavy expenses, he is not dischargeable at all, or, if so, dischargeable only on payment of his full fee. He has neglected other business to devote himself to this great claim; he has made arrangements affecting his whole course of life. He is interested pecuniarily and by contract in a recovery, as actually as the State of Texas is. He cannot sue that State for the balance remaining above the sum which he can get from the fund in his hand. His only chance, since a disturbance has arisen between him and the governor of Texas, is success in the case, and a recovery from Peabody & Co. Our argument rests on the fact that the fee was to be contingent on recovery. That class of fees has been decided to be lawful, and the court cannot apply the ancient chivalric rules which govern counsellor and client in countries or states where the relation is purely honorary, and where no action will lie for even the *quantum meruit* to the new class of cases. The matter is, in them, one of business and contract; not of mere confidence and honor. In *Wylie* v. *Coxe*, Mr. Coxe had been employed by one Baldwin, upon a contract for a contingent fee. Baldwin died, and his administrator sought to revoke the powers of Coxe. But this court said that it could not be done, except upon payment of the fees. And the reason is obvious. It is because such an attorney has a power, coupled with an interest.

Mr. Durant, contra:

As to the motion in the first case. The defence presents the remarkable case of a lawyer recovering a large sum of money

* Pittman's Case, 1 Curtis, 186.

for his client, and then not only keeping the whole of it, but claiming an enormous sum beside. The percentage claimed is excessive. In *Wylie* v. *Coxe*, the contingent fee was but 5 per cent., and the money had been all recovered by Mr. Coxe, leaving the remaining 95 clear to the client's hand. The fruitlessness of the recovery to the client in this case, owing to the percentages claimed for Mr. Paschal, and the sums paid out for other counsel, is itself a sufficient argument in favor of the rule asked for.

By the settled laws of England a barrister cannot sue for his fees. This court has never decided that he could. *Coxe* v. *Wylie* does not decide this, nor anything pertinent to our case; for the services rendered by Mr. Coxe were not rendered in any court, nor as a barrister, but were in obtaining an act of Congress and in proving the case before a board of commissioners. Probably any intelligent man, acquainted with business and politics, could have done the same service as Mr. Coxe did.

If counsel can sue for fees he has no lien for money in his hands, and must deposit it in court. The privilege of lien is one given to attorneys only. At all events he cannot set up a lien on moneys not the specific product of his effort in the case. "The lien," says Lord Cottenham, "upon the fund realized in the suit is confined to the costs of that suit."* Here Mr. Paschal seeks to retain a large balance obtained in one case for services (as he conceives) in another; services which were to be paid for only in case of his getting certain moneys; moneys which he has failed to get.

Those who contract with the State, must rely on the discretion and good faith of the legislative body. It is a presumption of law that the sovereign power will do justice.†

As to the rule in the second case. The governor had the legal right to discharge Mr. Paschal.‡ Even in cases of

* Bozon *v.* Bolland, 4 Mylne & Craig, 354.

† Gibbons *v.* United States, 8 Wallace, 274.

‡ Earl Cholmondeley *v.* Lord Clinton, 19 Vesey, 272, 274, 276; Beer *v.* Ward, Jacob's Chancery, 77; Bricheno *v.* Thorp, Ib. 300; Johnson et al *v.* Marriott, 2 Crompton & Meeson, 183.

contracts for personal service for a fixed period, the employer may discharge the servant.* The fact that the fee was contingent don't affect the case.†

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

The application made on the first of these cases (No. 4), for an order on the respondent to pay money into court is in the nature of a proceeding as for a contempt. The application is based upon the power which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. For such improper conduct the court may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty under pain of discharge or imprisonment. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney have collected money for his client, it is *primâ facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdiction to compel him to pay the money, in conformity with his professional duty. The application against him in such cases is not equivalent to an action of debt or assumpsit, but is a quasi criminal proceeding, in which the question is not merely whether the attorney has received the money, but whether he has acted improperly and dishonestly in not paying it over. If no dishonesty appears the party will be

* Orphan Asylum *v.* Mississippi Marine Insurance Company 8 Louisiana Reports (Thos. Curry), 181.

† Carpenter *v.* Sixth Avenue Railroad, 10 American Law Register (vol. 1 New Series), 411.

left to his action. The attorney may have cross demands against his client, or there may be disputes between them on the subject proper for a jury or a court of law or equity to settle. If such appear to be the case, and no professional misconduct be shown to exist, the court will not exercise its summary jurisdiction. And as the proceeding is in the nature of an attachment for a contempt, the respondent ought to be permitted to purge himself by his oath. "If he clear himself by his answers," says Justice Blackstone, "the complaint is totally dismissed."*

All, then, that we are concerned to ascertain and decide on this motion is, whether the respondent retains the money in his hands in bad faith, and is therefore guilty of any such misconduct as will justify the court in interposing its authority in a summary way.

Upon a consideration of the facts disclosed by the answer and affidavits, the result to which the court has come, in relation to the money retained by the respondent, is, that he has not been guilty of any misconduct which calls for the exercise of summary jurisdiction. We see no reason to suppose that he is not acting in good faith; and whether his claim to the entire amount be valid or not—(a point which we are not called upon to decide)—it is clear that the claim is honestly made. The case is one in which the parties should be left to the usual remedy at law, where the questions of law and fact which are mooted between them can be more satisfactorily settled than they can be in a summary proceeding.

A good deal has been said in the argument on the question whether the respondent has, or has not, a lien on the moneys in his hands. We do not think that the decision of this motion depends alone on that question. For, even if he has not a *lien* coextensive with the sum received, yet if he has a fair and honest set-off, which ought in equity to be allowed by the complainant, that fact has a material bearing on the implied charge of misconduct which underlies

* 4 Commentaries, 288.

the motion for an order to pay over the money. And when, as in this case, there exists a technical barrier to prevent the respondent from instituting an action against his client (for it is admitted that he cannot sue the State of Texas for any demand which he may have against it), it would seem to be against all equity to compel him to pay over the fund in his hands, and thus strip him of all means of bringing his claims to an issue. Whilst, on the other hand, no difficulty exists in the State instituting an action against him for money had and received, and thus bringing the legality of his demands to a final determination.

But in the judgment of the court the respondent has a lien upon the fund in his hands for at least the amount of his fees and disbursements in relation to these indemnity bonds. His original retainer by Governor Hamilton related to all the bonds indiscriminately, and much of the service rendered by him has been rendered indiscriminately in relation to them all. With regard to the White and Chiles bonds the agreement of Governor Pease was express, that in case of recovery the respondent might retain his compensation out of the amount received. In England, and in several of the States, it is held that an attorney or solicitor's lien on papers or money of his client in possession extends to the whole balance of his account for professional services. But whether that be or be not the better rule, it can hardly be contended that, in this case, it does not extend to all the fees and disbursements incurred in relation to all of these indemnity bonds. And, in this country, the distinction between attorney or solicitor and counsel is practically abolished in nearly all the States. The lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot be well distinguished. And, as a general rule, counsel fees, as well as those of attorney or solicitor, constitute a legal demand for which an action will lie. And whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client a different rule obtains. The claim of the attorney or solicitor

in the latter case, even in England, extends to all proper disbursements made in the litigation, and to the customary and usual fees for the services rendered.

The fee bill adopted by Congress in 1853 recognizes this general rule and, in fact, adopts it. By the first section of that act it is expressly declared, that nothing therein shall be construed to prohibit attorneys, solicitors, and proctors from charging to, and receiving from, their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

The change in the rule relative to fees and costs has been gradually going on for a long period. In Pennsylvania, counsel fees could not be recovered in an action so late as 1819, when the case of *Mooney* v. *Lloyd*,* was decided. But, in the subsequent case of *Foster* v. *Jack*, decided in 1835,† the contrary was held in a very able opinion delivered by Chief Justice Gibson. And in *Balsbaugh* v. *Frazer*,‡ Chief Justice Black delivered the opinion of the court in a series of propositions which strongly commend themselves for their good sense and just discrimination. The court there held that in Pennsylvania an attorney or counsellor may recover whatever his services are reasonably worth; that such claim, like any other which arises out of a contract, express or implied, may be defalked against an adverse demand; that an attorney who has money in his hands, which he has recovered for his client, may deduct his fees from the amount; that if he retain the money with a fraudulent intent the court will inflict summary punishment upon him; but if his answer to a rule against him convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial.

In New York, counsel fees have always been recoverable on a *quantum meruit*. In the case of *Stevens & Cagger* v.

* 5 Sergeant & Rawle, 411.

† 4 Watts 334.

‡ 19 Pennsylvania State, 95.

Adams,* Stevens recovered $300 for counsel fees and $50 for maps made to be used in a cause. It was held by the court that the fee bill, which declares it unlawful to demand or charge more than therein limited, has reference only to the question of costs as between party and party, and not as between counsel and client. The arguments of Chancellor Walworth and Senators Lee and Verplank, in the Court of Errors, on the general subject, were exceedingly lucid and able, going to show that in this country the counsellor is regarded as entitled to a fair remuneration for his services, and to recover the same in an action either upon an express or implied contract. The code has since abolished the fee bill, and left attorneys and solicitors to make their own bargains with their clients. But the courts have held that this change has not affected the attorney's lien, even on the judgment recovered, for the amount which it has been agreed he shall receive. In one case he was to receive one-half the amount to be recovered. Judgment was obtained for $1179, and the court held that the attorney had a lien on this judgment for his half of it, and that the defendant could not safely settle with the plaintiff without paying him.†

In Texas the law has been held substantially the same. In the case of *Casey* v. *March*,‡ it was decided that an attorney has a lien on the papers and documents received from his client, and on money collected by him in the course of his profession, for the fees and disbursements on account of such claims, and for his compensation for his services in the collection of the money. If, as the respondent contends, this case is to be governed by the law of Texas, it is decidedly in favor of his lien, at least to the extent of his services and disbursements in relation to the indemnity bonds.§ As the original retainer was made in Texas, we are inclined to the opinion that the rights of the parties are to be regu-

* 23 Wendell, 57; S. C., 26 Id. 451.

† Rooney *v.* Second Avenue Railroad Company, 18 New York, 368.

‡ 30 Texas, 180.

§ See the cases of Kinsey *v.* Stewart, 14 Texas, 457; Myers *v.* Crockett, Ib. 257; Ratcliff *v.* Baird, Ib. 43; Hill *v.* Cunningham, 25 Id. 25.

lated by the laws of that State. But if this be not the case, this court would be guided by what it deems to be the prevailing rule in this country; and, according to this rule, we are of opinion that the respondent has a lien on the fund in his hands for his disbursements and professional fees in relation to the indemnity bonds; and that in retaining the said fund for the purpose of procuring a settlement of his claim he has done nothing to call for the summary interposition of this court.

The motion for an order in case No. 4, to compel the respondent, George W. Paschal, to pay to the clerk of this court the money received by him, is therefore DENIED.

The other motion we think should be granted. The respondent, as appears from his answer, was employed by Governor Pease to proceed with and carry through the litigation relating to the 300 bonds in the hands of Peabody & Co. and Droege & Co., with a stipulation to receive 25 per cent. of the amount that might be recovered on 149 of the bonds, and 20 per cent. of the amount to be recovered on the remainder. Granting it to be true that this contract was definitely concluded (although there seems to have been some uncertainty as to one part of it), it cannot be seriously claimed that the complainant is so fixed and tied up by the arrangement that it cannot change its attorney and employ such other counsel as it may see fit, always being responsible, of course, for the consequences of breaking its contract with the respondent. Whether in discharging him the State has made itself liable for the whole contingent fee agreed upon, or only for so much as the respondent's actual disbursements and services were worth up to the time of his discharge, or for nothing whatever, it is not necessary for us to decide. That question can be more properly determined in some other proceeding instituted for the purpose. The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must necessarily suffer. Whether in any case, in virtue of an agreement

made, an attorney may successfully resist an application of his client to substitute another in his place, we need not stop to inquire. In this case one of the States of this Union is the litigant, and moves to change its attorney for reasons which are deemed sufficient by its responsible officers. It is abundantly able, and it must be presumed will be willing, to compensate the respondent for any loss he may sustain in not being continued in the management of the cause. The court cannot hesitate in permitting the State to appear and conduct its causes by such counsel as it shall choose to represent it, leaving the respondent to such remedies for the redress of any injury he may sustain as may be within his power. Under the decision which we have just made in relation to the money in his hands, he will be able to retain that fund and any papers and documents belonging to his client until his claims shall be adjudicated in such action as the State may see fit to institute therefor.

An order to discharge the respondent, George W. Paschal, as solicitor and counsel for the complainant in the second case, No. 6, will be GRANTED.

No COSTS will be allowed to either party on these motions.

ORDERS ACCORDINGLY.

YATES v. MILWAUKEE.

1. The owner of land bounded by a navigable river has certain riparian rights, whether his title extend to the middle of the stream or not.
2. Among these are, free access to the navigable part of the stream, and the right to make a landing, wharf, or pier for his own use, or for the use of the public.
3. These rights are valuable, and are property, and can be taken for the public good only when due compensation is made.
4. They are to be enjoyed subject to such general rules and laws as the legislature may prescribe for the protection of the public right in the river as a navigable stream.

Statement of the case.

5. But a statute of a State which confers on a city, the power to establish dock and wharf lines, and to restrain encroachments and prevent obstructions to such a stream, does not authorize it to declare by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when, in point of fact, it was no obstruction, or hindrance to navigation.
6. The question of nuisance or obstruction must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure, a nuisance, in such a summary mode, and enforce its decision at its own pleasure.

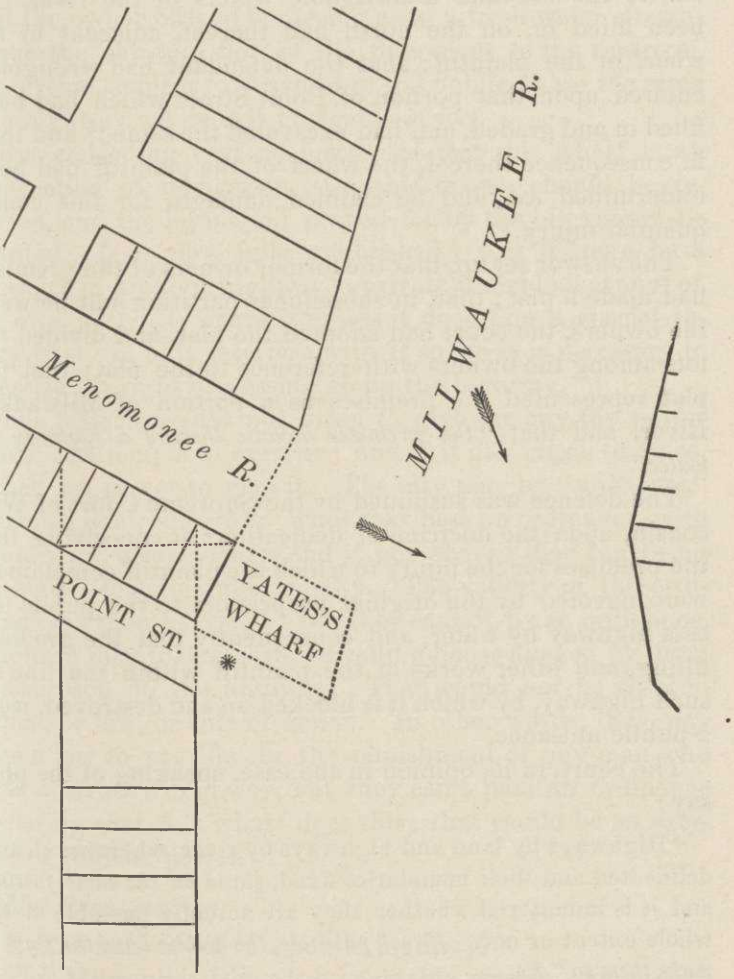
APPEAL from the Circuit Court, District of Wisconsin. The case was this:

In the year 1856, Shepardson, who was the owner of a lot in Milwaukee fronting on the Menomonee and Milwaukee Rivers in the said city, and who had begun to build a wharf at the junction of those rivers, conveyed the interest that he had in the wharf and in the front of the lot to the centre of the Milwaukee River, to one Yates, with the right and privilege of docking, dredging out, and making a water front on the Milwaukee River. Between the margin of the water, which for the purposes of this case may be assumed to be the eastern boundary of Shepardson's lot, and the navigable channel of the Milwaukee River, a space intervened which was covered with water more or less, but which was of no use for purposes of navigation. The title of this was supposed by Shepardson and Yates to be conveyed by the deed from the former to the latter, and over it Yates built a wharf of the width of the lot, and extending one hundred and ninety feet, in order to reach the navigable part of the river.

An act of the Wisconsin legislature, approved March 31st, 1854, had authorized the common council of Milwaukee, "*by ordinance*, to establish dock and wharf lines upon the banks of the Milwaukee and Menomonee Rivers, restrain and prevent encroachments upon said rivers and obstructions thereto; . . and also to cause the said Milwaukee River to be dredged," &c., and in 1864, the city by an ordinance declared *this* wharf an obstruction to navigation, and a nuisance, and ordered it to be abated. On the refusal of

Statement of the case.

Yates to abate it himself, the city entered into a contract with one Miller, to remove it, and thereupon Yates filed the bill in the court below against the city and Miller, to restrain them from doing so.



There was no evidence to show that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance.

It appeared, however, by the record of the case of *Judd*

v. *Yates*, in the Supreme Court of Wisconsin,* that some time before this bill Yates sued one Judd (a stranger to this suit), alleging that he, Yates, was the owner of the wharf in question, and that Point Street, which was originally laid out to the low and unnavigable waters of the river, had been filled in, on the north half thereof, adjacent to the wharf of the plaintiff; that the defendant had wrongfully entered upon that portion of Point Street which had been filled in and graded, and had excavated the same;† and that, in consequence thereof, the wharf of the plaintiff had been undermined, &c., and he claimed damages for this consequential injury.

The answer set up, that the former owners of the premises had made a plat; that, in subsequent partition suit between the owners, the court had adopted the plat, and divided the lots among the owners with reference to the plat; that the plat represented the premises as a portion of Milwaukee River, and that "*the premises became thereby a highway by water.*"

The defence was sustained by the Supreme Court of Wisconsin, upon the doctrine of dedication; it conceiving that the premises for the injury to which the plaintiff complained, were devoted by the original proprietors to the public use as a highway by water, and consequently that the grading, filling, and other works of the plaintiff within the line of such highway, by which it is blocked up and destroyed, were a public nuisance.

The court, in its opinion in the case, speaking of the plat, say:

"Highways by land and highways by river, wherever clearly delineated and their boundaries fixed, *stand on the same footing*, and it is immaterial whether they are actually passable in the whole extent or not. *If not passable, the public have the right to make them so*," &c.

In the present suit, the court below, relying perhaps on

* 18 Wisconsin, 118.

† The star on the diagram on p. 499, represents apparently this spot.

the decision referred to, dismissed the bill. The complainant appealed.

Mr. Carpenter, for the appellant:

The law is settled in Wisconsin, by *Walker* v. *Shepardson*,* that the owner of land bordering upon a fresh-water stream, above the ebb and flow of the tide, owns to the centre of the stream, subject to the right of the public to use the same as a highway where it is navigable *in fact*.

But conceding that as matter of fact this wharf is an obstruction of navigation, still this decree should be reversed, and the injunction prayed for by the bill should be granted. It is now fully established,† that if there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and can only interfere with it so far as is necessary to exercise his right of passing along the highway.

The legislature did not mean to give the city the power which it attempts to exercise; and if it did mean to do so, it had no power to give it. The city may by "*ordinance*," establish dock lines, &c. They may pass an ordinance, with penalty for disobedience, and if not obeyed they can bring an action to collect the penalty. The validity of the ordinance can then be tested. But they cannot, by an ordinance, employ a man to demolish a dwelling-house alleged by them to encroach on the highway. That would not be an ordinance, or law, or rule of action. In other words, they may pass a law to provide for the punishment of any man who does obstruct a highway, but they can't pass an ordinance declaring that A.'s wharf does this; that would be an exercise of judicial power.

Mr. Ryan, contra:

1. The *locus in quo* is a public highway.

The Milwaukee River is a navigable stream, and as such

* 4 Wisconsin, 486.

† Bridge *v.* Railroad, 3 Meeson & Welsby, 244; Davies *v.* Mann, 10 Id. 546; Mayor of Colchester *v.* Brooke, 7 Q. B. 339; Dimes *v.* Petley, 15 Adolphus & Ellis, N. S. 276; Harrower *v.* Ritson, 37 Barbour, 301.

is a "public highway, forever free."* Many public acts of the territory and State of Wisconsin, and of the United States recognize it as a navigable stream. It was meandered as such by the Federal government. Acts of the State and Territory authorize bridges over it, and provide for draws therein for the passage of vessels.

Being a highway, it is such in its whole width, from bank to bank, although some portions are too shallow for some uses; just as a street is none the less a highway because it is not worked and fit for use in its whole width. Riparian owners hold but to the edge, not *ad medium filum*.†

The premises in question are made a public highway by water by *dedication* of the owners of the fee and acceptance by the public. By the plat made by the proprietors, the streets, alleys, and rivers, as designated thereon, were dedicated to the public use. In *Yates* v. *Judd*, Yates asserted the same right, to the same premises, in an action in the State courts of Wisconsin. The decision of that case establishes the law of Wisconsin on the questions necessarily involved in the present suit. It disposes of all the merits of the complainant's case; and binds this court under its own rule of decision to recognize the adjudication of the highest State courts on matters concerning State laws. *Walker* v. *Shepardson*, relied upon by Mr. Carpenter, must be read by its light.

2. It is said that the city had no power to remove the obstruction. The city, by its charter, has charge of all the public highways within its corporate limits, and has a special duty to keep the river dredged to a sufficient depth. It has established a wharf and dock line under the authority of the statute of 1854. Yates's wharf comes beyond it. It is therefore difficult to see the force of the opposing argument. This point also is settled by *Yates* v. *Judd*.

Reply: The decision in *Yates* v. *Judd*, is not upon the con-

* Ordinance of 1787; Const., Art. IX, sec. 1.

† Keen *v.* Stetson, 5 Pickering, 494; Stetson *v.* Faxon, 19 Id. 147; Lansing *v.* Smith, 4 Wendell, 21; Commissioners *v.* Long, 1 Parsons, 143.

struction of any statute or constitutional provision of the State, but upon a principle of the common law. Such a decision this court is not bound to follow.

Moreover, the decision is not sound in doctrine, and ought not to be followed. It is erroneous in holding that by the platting of the land upon the bank of the river, and representing the river as it existed in nature, the proprietors intended to, or in law did, part with their rights as riparian owners. No authority is cited, no reason given, for this view; none can be. The distinction between *land* and *water* is founded in nature. When a proprietor makes a plat, and lays out a street on his own land, it is fair to say that he intended to establish a highway of the precise dimensions indicated by his plat; for the reason that it was made a highway only by his act, and that if he had not intended to make it a highway to the extent indicated, he would not have so indicated it. But Milwaukee River does not owe its existence, capacity, or limits, to any proprietor or plat. The sensible doctrine is that which everybody knows corresponds with the fact, that in platting land bordering upon a river the owner intends to mark only the line of separation, as it exists in fact between land and water, without intending to indicate where the navigable channel is at present, or to predict where it will be in the future; and that, as a riparian proprietor, he intends to retain the right to reach the navigable channel of the river, wherever it is or may be, with piers and wharves.

Mr. Justice MILLER delivered the opinion of the court.

The defendants, in support of their right to remove the wharf, seem to rely—1st, upon the want of title in the plaintiff to the *locus in quo;* and 2d, upon the absolute power of the city of Milwaukee, as the repository of the public authority on the subject of wharves, piers, and other matters affecting the navigation of the river within the city limits, to determine the character and location of such structures.

As to the first of these propositions, it does not seem to be necessary to decide whether the title of the lot extends to

the thread of the channel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of *The Railroad Company* v. *Schurmier*,* would limit the *title* to the margin of the stream.

But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the cases of *Dutton* v. *Strong*,† and *The Railroad Company* v. *Schurmier*, just cited. The Supreme Court of Wisconsin has gone further, and asserts the doctrine that the *title* of the owner of such a lot extends to the centre of the stream, subject to the easement of the public in its use for navigation, and that he "may construct docks or landing-places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage, nor prevented from the use of all parts of the stream which are navigable."‡

This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

The act of the Wisconsin legislature, approved March 31, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee Rivers, and restrain and prevent encroachments upon said rivers and obstructions thereto,

* 7 Wallace, 272. † 1 Black, 25.

‡ Walker *v.* Shepardson, 4 Wisconsin, 486.

and it is by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the city, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public.

It is true that it is said in argument that the city council has established a wharf and dock line under the authority of the statute we have cited, and that Yates's dock projects beyond that line.

No such defence is set up in the answer, and the existence of such a line, being a matter of which the court could not take judicial notice, it cannot be taken into account here, though there is some testimony on the subject as to two different dock lines, one made before and the other after Yates's wharf was built. But however this may be, we are of opinion that the city of Milwaukee cannot, by creating a mere artificial and imaginary dock line, hundreds of feet away from the navigated part of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose.

The case of *Yates* v. *Judd*,* is much relied on as conclusive of the one before us. Not as a technical estoppel, though one of the parties is grantor of the lot in question to the present plaintiff, and the suit embraced some of the points mooted here. But it is said that, as a case establishing the law of the State of Wisconsin on the questions necessarily involved in the present suit, we are bound to follow it in this court.

We do not see in that case any legal proposition decided in conflict with what we have said in the previous part of this opinion. The court held that from the plat made by the original owners, who had laid out the lots, they would infer a dedication of the space covered with water, in front of the dry land of the lots, to public use, and that Yates's wharf was an invasion of that public right. This question of dedication, on which the whole of that case turned, was one of fact, to be determined by ascertaining the intention of those who laid out the lots, from what they did, and from the application of general common law principles to their acts. This does not depend upon State statute or local State law. The law which governs the case is the common law, on which this court has never acknowledged the right of the State courts to control our decisions, except, perhaps, in a class of cases where the State courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the State.

This is not such a case. In every instance where the question of a dedication might arise it would be decided on the special facts of each case even in the Wisconsin courts, and the case of *Yates* v. *Judd* lays down no principle of law which would govern all such cases. The Supreme Court inferred from the facts as presented in that case a dedication of the land between the lot, as ascertained by its given dimensions, and the navigable channel of the river. That question does not arise here, because, as we have already seen, the case of *The Railroad Company* v. *Schurmier* decided

* 18 Wisconsin, 118.

that if the lot, as thus described, came to the margin of the stream, no title to the precise locality supposed to be dedicated ever passed from the United States.

Much, however, as we respect that court, we feel at liberty to hold, as we do, that there is no valid dedication as the case is presented to us.

On the whole we are of opinion that Shepardson, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and that Yates, the appellant, whether he be regarded as purchaser or as licensee, has the same right; and that if the authorities of the city of Milwaukee deem its removal necessary in the prosecution of any general scheme of widening the channel and improving the navigation of the Milwaukee River, they must first make him compensation for his property so taken for the public use.

The decree of the Circuit Court is therefore REVERSED, with instructions to enter a decree enjoining the defendants below from interfering with plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary in the *actual* improvement of the navigability of the river, and

UPON DUE COMPENSATION MADE.

MESSENGER *v.* MASON.

1. A certificate from the Supreme Court of Iowa (lately a Territory) that in a case brought here from its final judgment, the validity of the Partition Law of Iowa *Territory*, approved January 4th, 1839, was drawn in question, on the ground that the same was in conflict with the Ordinance of 1787, the Constitution of the United States, the treaties and laws thereof, the objections thereto overruled, and the statute held to be valid against the rights and interests of the defendant, as claimed by them, presents the constitutional objection in too general a form to give this court jurisdiction under the 25th section of the Judiciary Act.
2. That section does not apply to the case where is drawn in question the validity of a statute of a *Territory*.

Statement of the case.

3. Where an ordinance of the United States, then existing, has been incorporated as organic law into the system of laws of a new Territory, with a provision, however, that the ordinance should be subject to be altered, modified, or repealed by its governor and legislature, the decision of the Supreme Court of the State (lately the Territory) cannot be brought here under the 25th section, on the ground that in a suit before it there was drawn in question the validity of a statute of the Territory as being repugnant to a law of the United States.

MOTION to dismiss a writ of error to the Supreme Court of the State of *Iowa*. The case was thus:

Mason sued Messenger in one of the county courts of *Iowa*, to recover the possession of certain land in that State. He relied upon a judgment in partition of the tract, rendered in the District Court of the *Territory* of Iowa, in April, 1841, in pursuance of a law of that Territory.

The defendant objected to the admission of the record of judgment on the ground that the law under which the proceedings were had was unconstitutional and void.

The objection was overruled, the record admitted, and a verdict and judgment rendered for the plaintiff. On an appeal to the Supreme Court of the Territory, by the defendant, the judgment was affirmed, and the case was brought here as within the 25th section of the Judiciary Act.

The certificate from the Supreme Court of Iowa certified:

"That on the final hearing, the validity of the partition law of Iowa Territory, approved January 4th, 1839, was drawn in question, on the ground that the same was in conflict with the Ordinance of 1787, the Constitution of the United States, the treaties and laws thereof, that the objections thereto were overruled, and the statute held to be valid."

The Territory of Iowa, it should be stated, was not a part of that to which the Ordinance of 1787 originally applied, but was a part of the Louisiana purchase. Prior to June 12th, 1838, it was part of the Territory of Wisconsin.* The act, however, of the date just mentioned, which set it off and

* 5 Stat. at Large, 235.

made its organic law, incorporated into its laws, indirectly, many of the provisions of the ordinance by extending to its inhabitants the rights and privileges theretofore secured to the Territory of Wisconsin by *its* organic law, among which were those found in the ordinance.* But the section that conferred these rights and privileges upon the new Territory of Iowa, provided that they should be subject "to be altered, modified, or repealed" by its governor and legislative assembly.

Mr. Mason now moved to dismiss the case for want of jurisdiction, submitting that the certificate did not present any Federal question, and that the case was not within the 25th section.

Mr. Wills, contra, insisted that it was plain enough by the certificate that a right set up under the Ordinance of 1787 had been denied to his clients in consequence of the partition law of Iowa; and as the Ordinance of 1787, made by the Congress of the Confederation, was continued in force by an act of the Congress of the United States,† that a Federal question was thus raised.

Mr. Justice NELSON delivered the opinion of the court.

It is insisted, on the part of the defendant in error, that an examination of the record will show that there is no Federal question in the case of which this court can take cognizance.

In the case of *Maxwell* v. *Newbold et al.*‡ it was held the objection that "the charge of the court, the verdict of the jury, and the judgment below are each against, and in conflict with the Constitution and laws of the United States," was not sufficiently specific to raise a question within the provisions of this section. The Chief Justice in delivering the opinion of the court observes, that "the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the State court, in order

* Act of 7th August, 1789, 1 Stat. at Large, 50.
† § 12.
‡ 18 Howard, 511.

that this court might see what was the right claimed by them, and whether it was denied by the decision of the State court." This court had previously held, in *Lawler* v. *Walker and others*,* that the statement in a certificate of the State court that there was drawn in question the validity of statutes of Ohio, without saying what statutes, was too indefinite, and that the statutes complained of in the case should have been specified. These decisions were reaffirmed in *Hoyt* v. *Shelden*.† It is quite clear, upon these authorities, that the constitutional objection taken in the present case is too general to be noticed on a writ of error under this 25th section.

As to the effect of the certificate from the court below, see *Commercial Bank* v. *Buckingham*,‡ *Lawler* v. *Walker*,§ and *Porter* v. *Foley*.‖

One difficulty in bringing the case within this 25th section is, that it makes no provision for the re-examination of a judgment in a State court which upholds the validity of a statute of a Territory in contravention of the Constitution. It applies only to the case where is drawn in question the validity of a statute of, or authority exercised under, any State. The circumstance, therefore, that the court below held the statute of the Territory providing for partition of lands among tenants in common, valid, is of no importance in the case.¶

It has been urged on the argument, however, in view of the certificate of the court, that a right set up under the Ordinance of 1787, by the defendants at the trial, had been denied them, and that the construction of a law of Congress had thus been drawn in question.

Although the organic law of the Territory of Iowa did incorporate into its system of laws, indirectly, many of the provisions of the Ordinance of 1787, by extending to its inhabitants the rights and privileges theretofore secured to the Territory of Wisconsin by its organic law, among which were those found in the ordinance, yet the same section

* 14 Howard, 149. † 1 Black, 518. ‡ 5 Howard, 317. § 14 Ib. 149.
‖ 24 Id. 413. ¶ Scott *v.* Jones, 5 Howard, 375.

that conferred these rights and privileges upon the Territory of Iowa provided that they should be subject to be altered, modified, or repealed by the governor and legislative assembly of the said Territory. If, therefore, anything is found in this act of partition in conflict with these provisions, to that extent they must be regarded as altered or modified, which affords a complete answer to the ground relied upon under the ordinance.

MOTION GRANTED.

Mr. Justice MILLER took no part in the decision, having been counsel in the case.

RAILROAD COMPANY *v.* MCCLURE.

1. No jurisdiction exists in this court under the 25th section of the Judiciary Act, to review a decision of the highest court of the State, maintaining the validity of a law which it has been set up "impairs the obligation of a contract," when the law set up as having this effect was in existence when the alleged contract was made, and the highest State court has only decided that there was no contract in the case.
2. A constitution of a State is in this case admitted to be a "law," within the meaning of that clause of the Constitution of the United States, which ordains that "no State shall pass any law impairing the obligation of contracts."

ERROR to the Supreme Court of Iowa; the case in its principal features being thus:

The District Court of Washington County, Iowa, on a bill by the county to restrain the collection of taxes for the payment of certain county bonds issued to railroads *in June and July*, 1858, and where the fact whether, *at the time the bonds were issued*, the then constitution of the State gave authority to counties to issue such bonds, was one of the issues raised by the pleadings, enjoined the collection; so apparently, in effect, deciding that the bonds were void under the constitution of the State existing when they were issued. The

creditors appealed to the Supreme Court of the State. That court affirmed the judgment. The record brought here from it showed that the creditors made the question before that court, "that the decision of the court below violated that clause in the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts; and the decision of this court was against the right set up under such clause of the Constitution."

The creditors now brought their case here as within the 25th section of the Judiciary Act, which enacts that final judgments in the highest court of a State where is drawn in question the validity of a statute of, or authority exercised under any State on the ground of their being repugnant to the Constitution . . . of the United States, and the decision is in favor of such, their validity, may be re-examined and reversed or affirmed in this court.

The Supreme Court of Iowa, as appeared from its published opinion, considered that the decision of the inferior court, which, it stated, had adjudged the bonds to be unconstitutional, and so null and void *ab initio* (in other words, had adjudged that there was *no* contract in the case), was not a decision against the clause of the Constitution of the United States which says "that no State shall pass any law impairing the obligation of contracts;" and on this ground affirmed it.

Mr. Grant, for the plaintiff in error, referred to cases in the Supreme Court of Iowa to show that at the time when the bonds were issued, the constitution of that State, now construed by its courts in the decision below so as *not* to authorize the issue by counties of railroad bonds, had been construed so as to authorize such issues;* and argued that the later interpretation, adverse to the validity of the bonds, impaired the obligations of a contract; as this court had decided.†

* See the whole history set forth in Gelpcke *v.* City of Dubuque, 1 Wallace, 175.

† Ib

Statement of the case in the opinion.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Iowa. The case is brought into this court under the 25th section of the Judiciary Act of 1789.

Nathaniel McClure, and the other complainants who are such in their own right, filed a bill in equity in the District Court of Washington County, whereby they sought to enjoin the collection of taxes, to be applied in the payment of the interest upon certain bonds issued by that county to the Ohio and Mississippi Railroad Company, as set forth in the bill.

Samuel S. Owen, the county treasurer and collector, and S. P. Young, the county judge, were made defendants.

McClure died, and his legal representatives were made parties complainant in his stead. A preliminary injunction was granted. The Ohio and Mississippi Railroad Company prayed to be made a party; was made a party accordingly; and filed an answer, alleging, among other things, that Thomas Durant, Betsey D. Tracey, Joseph E. Sheffield, Clark Durant, Thomas Dunn, and William Newton, were *bonâ fide* holders of $132,000 of said bonds, and that, without their being parties, no decree could be made in the cause. The complainants amended their bill by making those persons defendants, and those defendants thereupon prayed to have the cause removed to the District Court of the United States for the Southern Division of Iowa. The application was overruled. They then filed an answer, wherein they maintained the validity of the bonds, and averred that they and the other holders, held them *bonâ fide*, and prayed that the county judge and the county treasurer should be decreed to collect the amount of taxes requisite to pay the interest which had accrued. They afterwards filed a supplemental answer, in which they set forth that, on the 15th of August, 1860, Clark Durant, for himself and the other defendants, owners of said bonds, commenced in the District Court of the United States for the District of Iowa an action at law against the County of Washington upon the bonds and cou-

pons referred to in the bill, to recover the instalments of interest due thereon for July, 1859, January, 1860, and July, 1860, and that the County of Washington appeared and pleaded in bar the same matters that are set up in the bill, and particularly that the issuing of the bonds was unconstitutional and void, that judgment was rendered in favor of the plaintiff, and that the said county thereupon removed the cause to the Supreme Court of the United States, where it was still pending. The board of supervisors were subsequently made defendants in this case. The District Court of Washington County decreed a perpetual injunction as prayed for. The case was taken by appeal to the Supreme Court of the State. In that court the defendants filed two supplemental answers. In the first it was alleged that since the filing of their preceding answer the case of *Durant* v. *The County of Washington*, taken to the Supreme Court of the United States, had been dismissed from that court, and that the judgment of the District Court of the United States for the District of Iowa then stood in force, and was unsatisfied. The second answer set forth that on the day of , 1867, the defendants, Clark Durant and others, by the judgment of the Circuit Court of the United States for the District of Iowa, upon due process of law, recovered a further and other judgment upon interest warrants of said bonds to the amount of $70,652.37; that in said action Clark Durant was plaintiff and the County of Washington defendant, and that the complainants are taxpayers of that county, and privies to said judgment. The board of supervisors also answered in the appellate court. A stipulation was filed by the counsel of the parties admitting the facts set forth in the supplemental answers as to the judgments alleged to have been recovered and the dismissal of the writ of error from this court. The motion to remove the cause to the proper court of the United States was renewed and overruled, as it had been in the court below. The Supreme Court of the State affirmed the decree of the District Court of Washington County. The record shows that the counsel for the plaintiff in error waived in the Supreme Court of the State

all questions except the one relating to the validity of the bonds. The opinion of the court was confined to that subject. The bonds were held to be invalid upon the ground that they were unauthorized and were forbidden by the constitution of the State. The same counsel in his brief and argument here has discussed only that subject. He has presented no other proposition for our consideration. Under these circumstances we have not deemed it proper to extend our examination of the case beyond this point.

The question of the validity of the bonds is not one of Federal jurisdiction. The Constitution of the United States declares,* that no State shall pass a law "impairing the obligation of contracts." The constitution of a State is undoubtedly a law within the meaning of this prohibition. A State can no more do what is thus forbidden by one than by the other. There is the same impediment in the way of both. But the State has passed no law upon the subject, and the constitution of the State, which, as construed by the Supreme Court of the State, has worked the result complained of, was in force when the bonds were issued. The 25th section of the Judiciary Act of 1789 specifies the questions of which we can take cognizance in this class of cases, and expressly excludes all others from our consideration. It is clear that the question before us is not within the affirmative category.

If the case had been brought up from the Circuit Court under the 22d section of the Judiciary Act, this question and all others arising on the record, would have been open for examination. The 25th section is more limited in its operation.

The case will be DISMISSED FOR WANT OF JURISDICTION, and remanded to the court whence it came.

* Article I, § 10.

CODDINGTON *v.* RICHARDSON.

Norris v. *Jackson* (9 Wallace, 125) and *Flanders* v. *Tweed* (Ib. 425), affirmed: and it is again decided that under the act of March 3d, 1865, authorizing parties to submit the issues of fact in civil cases to be tried and determined by the court, this court will not review a general finding upon a mass of evidence brought up; and that if a party desires to have the finding reviewed, he must have the court find the facts specially, so that the case may come here as on a special verdict or case stated.

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

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. The act continues:

"The finding of the court upon the facts, which finding shall be general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the progress of the trial when excepted to at the time, may be reversed 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 sufficiency of the facts found to support the judgment."

With this enactment in force Richardson sued Coddington in the court below, in trover to recover damages for the conversion of certain horses and mules. The declaration contained two counts, the first for the conversion of the whole, and the second for the conversion of the undivided half of sixty-four horses and forty-five mules. By consent the case was tried by the court without the intervention of a jury, on the plea of the general issue and joinder.

The court found on the 5th July, 1866, "that the plaintiff was the owner of an undivided interest of one-half in forty-

* 13 Stat. at Large, 501.

Argument for the plaintiff in error.

eight mules and fifty-two horses, part of the property described in the declaration, and that the defendant converted the said interest to his own use, and thereupon assessed the plaintiff's damages at $5000," and gave judgment accordingly. The defendant moved for a new trial, which being denied, he filed, with leave of the court, on the 30th of January, 1868, a bill of exceptions. The bill began:

"Be it remembered that upon the trial of this cause, by agreement of the respective parties present in court, and their attorneys, a jury was waived, and the cause was tried by the court by stipulation in writing, *and all just and legal objections and exceptions which might be made were reserved by each party;* and plaintiff, in order to maintain the issue in his behalf, introduced and read in evidence the depositions," &c.

After setting forth a great deal of evidence the bill ended thus:

"This was all the evidence offered or introduced in the cause by either of the parties, and the court thereupon found the issue for the plaintiff, and assessed his damages at the sum of $5000.

"Whereupon the defendant moved the court for a new trial upon the grounds following:

"1st. The finding and judgment of the court is erroneous.

"2d. The damages were erroneously computed.

"3d. The finding as to the damages was not warranted by the evidence.

"Which motion the court overruled, and rendered judgment upon the finding against the defendant; to which several findings and rulings of the court, in *finding the issue for the plaintiff, in assessing the damages for the plaintiff, and in overruling the motion for a new trial, and in rendering judgment for the plaintiff*, the said defendant, by his counsel, severally excepted at the time of such finding, overruling, and judgment respectively, and prays that this his bill of exceptions may be signed and sealed by the court, which is done"

Mr. W. H. Lamon, for the plaintiff in error, submitted the case, with a brief, which endeavored to show that the evi-

dence as disclosed by the bill of exceptions, did not warrant a finding of the issue for the plaintiff, and assessment of damages as made; observing at the same time that though the matter was not put in a very technical form for review, it was a form not unusual in Illinois where the parties dispensed with a jury, and intended to bring up the whole question for review.

Mr. Lyman Trumbull, contra, argued that the case was disposed of by *Norris* v. *Jackson*,* and by *Flanders* v. *Tweed*;† that there was no *special* finding such as the act of Congress required; that on such a record as was here brought up, there was nothing for the court to consider.

The declaration was in the usual form, all the proceedings appeared to be regular, and the finding of the facts by the Circuit Court, like the verdict of a jury, was conclusive here, and whether the fact was rightly decided or not according to the evidence, was not open to inquiry in this court.

Mr. Justice NELSON delivered the opinion of the court.

No exceptions were taken to the admission or rejection of evidence on the trial, nor any special statement of facts found by the court. The only statement after closing the evidence, is, "and the court thereupon found the issue for the plaintiff, and assessed his damages at the sum of $5000."

There is no question of law arising upon the pleadings or the trial. Those attempted to be raised refer to the evidence, as embodied in the record, but which, in a trial of the facts before the court, a jury being waived, we do not look into. We look into them only when found by the court.

JUDGMENT AFFIRMED.

* 9 Wallace, 125. † Ib. 425.

Statement of the case.

BROBST *v.* BROCK.

1. If for any reason appearing in the record it is clear that a plaintiff in error, who was also plaintiff below, cannot recover in the action, the court will not determine whether error was committed in instructions given to the jury respecting other parts of the case. To warrant the reversal of a judgment, there must not only be error found in the record, but the error must be such as may have worked injury to the party complaining.
2. A mortgagor of land, as between himself and his mortgagee, has only an equitable title. He cannot, therefore, recover in ejectment against the mortgagee in possession, after breach of the condition, or against persons holding possession under the mortgagee.

   Quære, whether such a suit can be maintained until redemption, even though the money secured by the mortgage has been paid or tendered.
3. Twenty-five adjoining tracts of wild and uninhabited land, surveyed in a block, and separated by no marks on the ground, were purchased from the commonwealth by one person at one time, and subsequently conveyed by him as an entirety by one deed. His grantee also conveyed them as a whole by one deed, and the second grantee mortgaged them as a whole in the same way. After the debt secured by the mortgage fell due, the mortgagee placed a tenant upon the lands, whose actual occupancy, or *pedis possessio*, did not extend beyond the limits of a single tract:

   Held, that the possession of the whole body of land, as described in the deed, must be presumed to have been taken by the mortgagee in right of the mortgage.
4. An irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such.
5. No presumption of payment of a mortgage can arise from lapse of time against a mortgagee or his assigns in possession, when the mortgagor became insolvent and died before the debt fell due, and when his vendee of the equity of redemption also became insolvent before the maturity of the debt, removed from the State, and never afterwards returned.

ERROR to the Circuit Court for the Eastern District of Pennsylvania, the suit below being an ejectment for an undivided fourth of a tract of land, and the case being this:

The tract for a fourth of which the ejectment was brought, was the easternmost of twenty-five adjoining tracts in Pennsylvania which were surveyed in 1793, on warrants issued the same year, and for which separate patents were issued

Statement of the case.

on the 9th and 10th of May, in 1816, to one George Grant, who in the same year conveyed the whole, forming a tract of 10,000 acres, to Thomas B. Smith. Smith conveyed the whole in undivided fourths, on the 27th of September, to Michael Brobst and three other persons, one-fourth to each. On the 6th March, 1817, Brobst mortgaged his undivided fourth to Samuel Wood, for $1500, payable on the 1st of April, 1821; the mortgage being properly recorded. The deeds of both Grant and Smith, and the mortgage of Brobst described the land collectively as one tract.

Michael and John Brobst were brothers, and were engaged in partnership in making iron in Berks County, in the eastern part of Pennsylvania. They failed in business, and confessed several judgments, among them one, January 17, 1817, for $1000, to Jacob Kutz and Jacob Levan.

On the 15th May, 1817, Michael Brobst conveyed to his brother, John Brobst, his undivided fourth of the twenty-five tracts and went to Illinois, where he died, in 1820, never having married; news of his death being brought to Pennsylvania about 1823.

John Brobst left the eastern parts of Pennsylvania, where he lived, about the year 1820, went to distant parts of the State for a short time, and in 1824 out of it to Maryland. His place of residence was unknown to his relatives in Pennsylvania. He was supposed to be dead, and about the year 1847, letters of administration on his estate were issued; though in point of fact he did not die till 1861.

The mortgage already mentioned as given in 1817 by Michael Brobst to Wood, having been assigned in the same year by Wood to a certain Dunn, and by him to one Boyer, Boyer on the 3d of November, 1825, proceeded by the mode usual in Pennsylvania, where mortgages are recorded, and considered, in some respects, as records, to foreclose it; that is to say, he issued upon it a writ of *scire facias*, under an act of 1705.

By this old act the mortgagee is authorized a year and a day after the mortgage is payable, to sue forth, if it remains unpaid, a writ of *scire facias* from the Court of Common

Pleas, of the county where the mortgaged premises lie, directed to the proper officer, requiring him, by honest and lawful men of the neighborhood,

"To make known to the *mortgagor, his, her, or their heirs, executors or administrators*, that he or they be and appear before the magistrates, judges, or justices of the said court or courts, to show if anything he or they have to say wherefore the said mortgaged premises ought not to be seized or taken in execution for payment of the said mortgage-money, with interest, &c. . . . And if the defendant in such *scire facias* appears, he or she may plead satisfaction or payment of part or all the mortgage-money, or any other lawful plea; but if such defendants in such *scire facias* will not appear on the day whereon the writ shall be made returnable, then, if the case be such as damages only are to be recovered, an inquest shall forthwith be charged to inquire thereof, and the definitive judgment therein as well as all other judgments to be given upon such *scire facias* shall be entered, that the plaintiff in the *scire facias* shall have execution by *levari facias*, directed to the proper officer, by virtue whereof the said mortgaged premises shall be taken in execution and sold," &c.

The writ issued as already mentioned was directed against "Michael Brobst with notice to *terre tenant*," and confessedly was not served in the way the most proper. There was no personal service upon the mortgagor, who in fact was dead, nor any upon his heirs or representatives, nor any upon the true *terre tenant*, that is to say, upon John Brobst; the holder of the title being the only person regarded in Pennsylvania as falling within that designation. Neither was this want of actual service supplied by a return of two *nihils*, which in Pennsylvania are commonly regarded as the equivalent of service. The return was thus:

"Served upon Jacob Rodeberger, *terre tenant*, 21 miles. *Sci. fa. sur mortgage*, debt $3000. March 29, 1826, judgment *lev. fac.* July Term, 1826, 46."

Upon this irregular service, judgment was entered on motion that the mortgaged lands be sold to satisfy the debt. And

upon this judgment all the mortgaged property was sold on the 22d March, 1828, to one Charles Frailey, to whom a sheriff's deed was made; Frailey purchasing at the request of Boyer, assignee of the mortgage, and with his money. He subsequently conveyed to John Smull, whose title became vested in Brock and others, defendants in the case.

The body of lands patented to Grant were uninhabited until about 1824, when one Philip Rodeberger erected a small log tavern in what was still a wilderness, upon a tract adjoining the tract whose fourth part was here sued for, and cleared an acre or two of ground.

In 1834 a partition of some sort, valid or invalid, was made of the four undivided fourths of the whole twenty-five tracts, and the parties who had been originally co-owners with the Brobsts took what they considered their own purparts in severalty.

No further improvements than Rodeberger's were made on any of the purparts until 1847, when the owners of some of the purparts (not derived through the Brobsts) laid out towns, began building railroads, opening coal mines, and making extensive and costly improvements, which had been continued to the present time, when not less than ten thousand people live in the various towns laid out on the land — with their churches, halls, manufactories, stores, school-houses, dwellings, cemeteries, &c., &c.

About the year 1848, possession was taken of the purpart allotted to the Brobst alienees, by the present defendants, and those from whom they derived title, who had paid taxes from that time to the present; and on these purparts, also, similar improvements had been made and hundreds of houses and other buildings erected, and inhabited by a large population, and more than half a million of dollars expended in mining improvements.

In this state of things the heirs and devisees of John Brobst brought the present ejectment, A.D. 1865, against Brock and others to recover, as already stated, an undivided fourth of one of the tracts; one warranted in the name of Deborah Grant.

Argument for the mortgagors.

In addition to the title made, as already stated, under the mortgage, the defendants asserted that they were possessed of a title under the partition made in 1834; also by virtue of a sheriff's sale of the property under the judgment of Kutz and Levan, already mentioned as entered against the Brobsts, also under a tax sale, as the property of John Brobst, of the particular lot sued for.

Every one of the titles set up by defendants, including all the last-mentioned titles, were disputed by the plaintiff, as irregular, null, and void.

The court below (GRIER, J.) charged that the title set up under the partition was good enough, as also that set up under the judgments of Kutz and Levan. In regard to the title set up under the mortgage, he said that it was not necessary to decide whether those proceedings were regular and sufficient to extinguish the equity of redemption and vest a title in the purchaser; but that admitting that they might have been set aside or could be, it was first necessary to show that the mortgage debt was paid or offered to be paid, which was not shown; that as to redemption now, more than thirty years had elapsed, during which time John Brobst, the owner of the equitable title, had taken no step to assert or establish his right to redeem. That in such case the presumption of law was that he had released his equitable right, and equity would give him no remedy after his sleep of thirty years. "He must now," said the court, "as plaintiff in this case, show a legal title. He has shown no valid title, either legal or equitable."

Judgment having gone for the defendant, the plaintiff brought the case here.

It was fully and ably argued on all the points decided below; *Messrs. G. W. Woodward, Brent, and Crittenden, for the plaintiff*, contending that the partition of 1834, the sale under the judgment of Kutz and Levan and the purchase at the tax sale were severally void; *Messrs. George W. Biddle and J. P. Brock*, on the other side, supporting their case under those titles. The ground, however, upon which this court rests the

case, avoiding, as it does, any decision on those points, report of this argument would be useless. On the other point, the title derived under the mortgage, the ground taken was thus:

For the plaintiffs:

I. The defendant sets up title through a purchase under a statutory foreclosure of a mortgage. The proceeding under the Pennsylvania act is one *in rem* and *strictissimi juris*. For every reason, therefore, the party setting up the foreclosure must show a compliance with the statute. Now, here the writ was issued against the mortgagor. But *he*, confessedly, was dead at the time, and of course was not served. His "heirs, executors, and administrators," the parties mentioned in the act, are nowhere referred to in writ, service, judgment, or other part of the record. These are not irregularities but fatal defects.

Is the matter helped by the service upon Rodeberger, "*terre tenant?*" The act does not speak of *terre tenants*, nor does it authorize any such service; though by the Pennsylvania practice, besides service upon the mortgagor, notice is sometimes given to the *terre tenant*. But service upon Rodeberger amounted to nothing; because—

1. He was not tenant of anything, but of one tract, and *that* tract was not the one sued for, but a tract at best adjoining it. It is impossible to consider the possession of a person thus putting himself down on one tract, surveyed specifically, and patented by a patent defining its dimensions, as working a possession of twenty-four other tracts. He occupied but a spot even on the tract where he was. It is difficult to regard such possession as extending even to *its* boundaries. The case of *Ellicott* v. *Pearl*, in this court,* sustains our views.

2. He was not *terre* tenant of even the spot where he was. A *terre* tenant is the holder of the title to the ground; and the reason why notice is given (when it is given) to *him*, is in order that if he has any title, other than that derived

* 10 Peters, 412.

through the mortgagor, he may come in and set it up *in defence to the scire facias*, when the mortgagee is about to take possession as owner under his mortgage.

Everything was void, therefore, in form, without the least alleviation in substance.

II. After such a lapse of time as exists here, the debt of Brobst must be presumed to be paid. And, if all were regular in form, instead of being fatally defective, the defendants stand in the position of parties claiming under a mortgage actually satisfied.

Contra, for the defendants:

The judgment on the mortgage was but erroneous, not void. The proceeding was not upon an original cause of action, but upon that which was the equivalent of a record of the court, namely, a mortgage acknowledged and recorded and already a lien on the defendant's property. The judgment was not that the plaintiff should recover a sum of money, &c., from the defendant, as in ordinaay cases, but in the language of the act of 1705, that the defendant, the mortgagor, &c., should show, if he could, wherefore the said mortgaged premises ought not be seized and taken in execution for the said mortgage debt. The writ of *scire facias* was therefore substantially mesne process, and required no personal service; for, by the well-known practice, the sheriff was only bound to make reasonable efforts to find out the mortgagor (he not being entitled of right to personal notice), and these reasonable efforts being made, he was considered to have had notice of the intended taking in execution of the mortgaged premises. It is only under this theory that two returns of *nihil habet* are regarded as the equivalent of the return of service. In such a proceeding, therefore, the personal knowledge of the defendant of the writ was not necessary, and its absence did not vitiate the proceeding. It has been decided in *Allison* v. *Rankin** that one return of *nihil* was enough to prevent the judgment being void or im-

* 7th Sergeant & Rawle, 269, and see Feger *v.* Keefer, 6 Watts, 297.

peachable collaterally; but there is no difference in reality between a return, that the defendant cannot be found, and an omission to state this fact in the return by the sheriff. In *Warder* v. *Tainter*,* the court say:

"But is it necessary that the court should have jurisdiction of the person in a proceeding by *scire facias* upon a mortgage? If it be, then, I apprehend that many judgments and sales of mortgaged land, made under them, that have hitherto been considered valid, are void."

We have in this case, as in *Allison* v. *Rankin*, a judgment in a court of record having jurisdiction of the subject-matter, in full existence when the *levari* issued. We have also the additional fact apparent, that before this judgment was entered, the sheriff had gone upon the land to look for the mortgagor, for the purpose of serving the writ upon him. This is plain, from the return of service upon the only person then in possession of this undivided portion of twenty-five tracts. No partition had then been made, and, of course, Michael or John Brobst's interest was, as to his undivided fourth, commensurate with the extent of all the tracts. The judgment was, therefore, valid to sustain a sale made under it. But suppose, for the sake of argument, that the judgment in question did not authorize the issuing of a writ of *levari* upon it, what then is the case? We have a mortgagee solemnly asserting, by the process of the law, that the mortgage debt was unpaid, and that he was entitled to take the mortgaged lands in execution. We have a writ of execution issued upon a judgment containing this assertion; also a sheriff's sale, and a deed under it, carrying into consummation this assertion, so far as the mortgagee is concerned. In the face of this assertion, published to the whole world in the form of a judicial proceeding, we find no counter assertion by the mortgagor for nearly forty years. No attempt is made by him, or his heirs, or by his alienee, in all this period, either to review the proceeding or to impeach it in

* 4 Watts, 277.

any way, or to enter upon the mortgaged land, or to pay the taxes upon it, or to exercise any act of dominion or ownership over it. The sheriff's vendee was the mortgagee claiming to be in possession under a foreclosure of a mortgage. He stood ready, in all this time, to contest the right of the mortgagor, or those claiming under him to redeem. At the end of twenty years, the right of a mortgagor, to redeem, or against a mortgagee claiming to be in possession, is barred. Their right, therefore, to redeem, now is gone.

In *Slicer* v. *Bank of Pittsburg*,* on a question of the right of mortgagors to redeem land, which, by improvements and the general increase of the value of real estate, had become of great value, the court dwell with emphasis upon this state of things. They say:

"Thirty years have elapsed since it was sold, under the appearance, at least, of judicial authority."

And cases are cited to show that twenty years' undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage, during that period, is a bar to a bill to redeem.

Reply: The case and argument of the other side assume that John Brobst, finding himself insolvent, left the State years ago, and after these lands had been applied to the payment of his debts and taxes, bought by honest purchasers, and coal veins opened, towns and railroads built, and expensive improvements erected, that he is aroused from his sleep of years, and comes to reclaim his abandoned property. But that is not the true case. The true case is that of an unfortunate man who, believing that his fourth part of inaccessible, untaxed, mountain land, was worthless, left his native State to seek a home among strangers, and was overtaken by death; then a rush of speculators to these immense fields; hunters of void executions and worthless papers, and the seizure of the lands of the absentee upon less than twenty

* 16 Howard, 571.

years' possession, to bar the true owner. If the defendants are even now ejected, they will retire enriched by nearly twenty years of lucrative trespass.

Mr. Justice STRONG delivered the opinion of the court.

Much of the very elaborate argument addressed to us on behalf of the plaintiff in error was directed to the consideration of questions not necessary to the decision of this case. Whether the judgment in the *scire facias* upon the mortgage was absolutely void, or only irregular, we are not called upon now to determine, for on the trial of the case in the court below no effect was allowed to it. The learned judge who presided at the trial did not rule that the judgment was valid, or that the sale made under it divested the equity of redemption of the mortgagor, or of John Brobst, to whom the equity had been conveyed. It is true the defendant set up that he had acquired title under that sale, and, had that been his only defence, it would be necessary to consider whether it was sufficient to extinguish the equity of redemption. But there were several other defences, two of which the court below ruled sufficient to protect the defendant in his possession. If the ruling was correct, or if either of these defences was perfect, it matters not what may have been the instruction given to the jury respecting other parts of the case. It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action. In *Greenleaf's Lessee* v. *Birth*,* it was stated to be "a general rule that where there are various bills of exceptions filed according to the local practice, if, in the progress of the cause, the matters of any of those exceptions become wholly immaterial to the merits as they are finally made out at the trial, they are no longer assignable as error, however they may have been ruled in the court below. There must be some injury to the party to make the matter generally assignable as error." So in *Campbell's Executors* v. *Pratt et al.*,† the court refused

* 5 Peters, 135. † 2 Id. 354.

to reverse a decree of the Circuit Court, although an error had been committed, as no benefit could result to the appellant from the reversal.

Without noticing, therefore, for the present at least, the particular exceptions taken in the court below, we proceed to inquire whether the record exhibits any insuperable obstacle to the plaintiff's recovery in this action. Both parties claim under Michael Brobst, who, on the 27th day of September, 1816, became the owner of one undivided fourth part of twenty-five adjoining tracts of land, of which the tract now in controversy was a part. The whole body was then, and during many years thereafter, wild, uncultivated, and uninhabited. While thus, the owner, Michael Brobst, on the 6th day of March, 1817, mortgaged his interest in the entire body of lands to Samuel Wood to secure the payment of fifteen hundred dollars, with interest, on the 1st day of April, 1821. This mortgage, by subsequent assignments made in the same year, became the property of Boyer. On the 15th of May, 1817, after the execution of the mortgage, Michael Brobst conveyed his remaining interest in the lands to John Brobst in fee, who does not appear ever to have made any entry upon them, or to have claimed possession prior to his death, which occurred in 1861. It is as an heir and devisee of John Brobst that the lessor of the plaintiff claims. The defendants claim under Wood, the mortgagee, through Boyer, the assignee of the mortgage. They also set up several other titles, which it is not necessary now to notice. It thus appears that what John Brobst acquired by the deed of Michael Brobst to him was only an equity of redemption. As between his grantor and Wood, or Wood's assignees, the legal title was then in the latter, and so it continued notwithstanding the conveyance of the equity of redemption to John Brobst.

It is true that a mortgage is in substance but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant

which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Formerly, if the condition was not strictly performed, the estate of the mortgagee, at first conditional, became absolute, and the mortgagor's right to redeem was lost. The estate or interest, though defeasible at its inception, became unconditional on the failure of the mortgagor to pay the money secured, or fulfil the condition at the time appointed for performance.*

Courts of equity have in modern times relieved against such forfeitures, and, in favor of a mortgagor, have extended the time for redemption. But such courts, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land. And having entered he cannot be dispossessed by the mortgagor so long as the mortgage continues in force. Applying these principles to this case it is plain that John Brobst, having acquired only an equity by the deed from Michael Brobst, neither he nor his heirs can recover in ejectment against those in possession under the mortgagee while the mortgage remains in existence, or until there has been a redemption.

It is true that in the State courts of Pennsylvania ejectment may be maintained upon an equitable title, but such has never been the rule in the Federal courts. It becomes, therefore, a material inquiry whether the legal title which was in Wood has ever been acquired by John Brobst or his heirs, and also whether the defendants are in possession under Wood, and in virtue of the mortgage. It has already been noticed that Boyer became the assignee of the mortgage in 1817. It was assigned by Wood to Dunn, and by

* Powell on Mortgages, 9–10; 2 Blackstone's Commentaries, 158; Littleton, 332.

Dunn to Boyer. The assignments were undoubtedly sufficient to transmit the rights and estate of the mortgagee. When the debt secured by the mortgage fell due in 1821, no effort was made to redeem, and none has been made to the present day. There is no evidence that any one was in actual possession of the lands before 1821, or at any time before the condition of the mortgage was broken. But after that time Boyer had possession by his tenant, Roderberger, who occupied a house upon the body of lands mortgaged, certainly as early as 1825. In regard to this there is no dispute and no contradictory evidence. It is true Roderberger was resident upon one of the twenty-five tracts which adjoins the tract now in dispute. But, though for the purpose of acquiring title from the commonwealth several patents were taken, they described collectively but one tract. Several patents were required under the law of the State when there were, as in this case, several warrants. The warrants were each issued for four hundred acres, and an allowance of six per cent., and the law required the patents to follow the surveys made on each warrant. The whole twenty-five tracts belonged to one person. They were all patented to George Grant on the 9th and 10th days of May, 1816, and they adjoined each other, so as to constitute one tract or body. Grant sold them together, as a whole, to Smith, who in turn sold an undivided fourth part of the whole body to Michael Brobst by one deed. So Michael Brobst mortgaged his entire estate in the whole to Wood, and conveyed his equity of redemption by one deed to John Brobst. From the beginning the entire body of land was treated as one subject of grant or mortgage, though held under several conveyances. After Grant became the owner nothing in the title ever separated the tracts before Boyer took possession. Having been paid for originally by one person, and one warrant calling for another as an adjoiner, it is not probable the interior lines of the block were ever run. We have not the surveys before us, but when surveys in Pennsylvania are laid in a block (that is so as together to constitute one tract), under warrants issued at the same time

and calling for each other, it is not required, nor is it usual, that the surveyors run more than the exterior lines.

It is then to be presumed there was nothing upon the ground to distinguish one part of the entire body from any other part, and the mortgage treated it all as one hypothecation. The entry of Boyer, therefore, by his tenant, Rodeberger, upon any part of this large tract must be held to have been an entry upon the whole, a taking possession of the whole. There is nothing in *Ellicott* v. *Pearl*,* in conflict with this. On the contrary it was there held, as had been frequently held before, that one, entering under color of title by deed, is deemed to have taken possession coextensive with the bounds of the deed, that is, of all the land conveyed by the deed, if it is not in any adverse possession. Here Boyer entered under a deed. Having a right to enter only in virtue of the mortgage of which he was assignee, it is a legal presumption that his entry was in right of it, under color of his title, and that he intended to assert his claim to the entire subject of the grant. It follows that the entry transferred the possession of the whole body of the land from John Brobst to Boyer, and that no matter where his "*pedis possessio*" was taken, he acquired possession to the extent of the mortgage deed. There is no distinct evidence how long he continued an actual occupation by his tenants. It is enough that Brobst never afterwards sought to regain possession, and the presumption of law therefore is that the possession remained in Boyer so long as his rights under the mortgage continued. On the 3d of November, 1825, he caused a *scire facias* to be issued under the statute law of the State against the mortgagor, with notice to *terre tenants*, requiring them to show cause why the lands should not be sold, and the proceeds of sale applied to the payment of the debt. This writ was not served upon the mortgagor, or upon John Brobst, the owner of the equity of redemption, The sheriff's return was, "Served upon Jacob Rodeberger; *terre tenant*." Nevertheless a judgment was entered on mo-

* 10 Peters, 412.

tion. That judgment was, that the lands mortgaged be sold to satisfy the debt. Had the judgment been authorized, even though erroneously entered, a sale under it would have passed to the purchaser both the interest of the mortgagee in the lands and the equity of redemption then in John Brobst.

But it is contended the judgment was void in law because no service of the *scire facias* was made upon the mortgagor, or the actual *terre tenant*, John Brobst (no one but the holder of the title being recognized as a terre tenant), and because there was no return of "*Nihil*" in default of such service. We shall not discuss that. Assuming that the objection is well taken, and so it was assumed in the court below, it is still true that the record exhibited a formal judgment. Upon this a writ of *levari facias* was issued, and all the lands described in the mortgage were sold under it to Charles Frailey, on the 22d of March, 1828, to whom a sheriff's deed was duly made. Frailey purchased at Boyer's instance, with Boyer's money, and, of course, for Boyer. Subsequently, at Boyer's request, he conveyed the property to John Smull, whose title the defendant, Brock, has. In regard to all this there is no controversy. The evidence submitted by the plaintiff shows how Frailey purchased and conveyed. Now, the worst that can be said of the sheriff's sale under the judgment so obtained is, that it did not pass the title to the equity of redemption; that it did not operate as a foreclosure of the mortgage. But did it not, in connection with Frailey's deed to Smull, made at Boyer's instance, and the subsequent conveyances by which Brock became invested with the title, operate to transmit to Brock the rights of the mortgagee? We think it did. It would be "passing strange" if Boyer, after having requested Frailey to buy at the sheriff's sale, and after having furnished him with the money to purchase, and directed him to convey to Smull, could have asserted his mortgage against Smull or Smull's grantee. Beyond question the conveyance by Frailey under the circumstances was a conveyance in effect by Boyer, and it passed all the right to the land which

Boyer had. It is not necessary to this conclusion that we should hold the sale under the judgment cut off the equity of redemption. We express no opinion upon that subject. It is enough that an irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee, as such, had. For this authority is hardly needed. We may, however, refer to *Gilbert* v. *Cooley*,* where it was held that though a statutory foreclosure of a mortgage be irregular, and no bar to the equity of redemption, yet the purchaser at the sale succeeds to all the interest of the mortgagee. In that case there was no evidence that the purchaser bought at the instance of the holder of the mortgage. *A fortiori*, must one who has bought from the mortgagee, or from a purchaser at such a sale for the mortgagee, as in this instance, obtain all the rights which the mortgagee held. To the same effect as *Gilbert* v. *Cooley* is the case of *Jackson* v. *Bowen and Neff*.† If, therefore, it could be held that Boyer's possession, through his tenant, Roderberger, did not, of course, extend over the Deborah Grant tract (which is the tract in contest in this suit), it would still be established that the defendants are assignees of the mortgage in possession. The principal defendant, Brock, consequently, is clothed with the rights of the mortgagee. He is protected by the legal title, even though it be conceded that the equity of redemption is still in existence. From 1821 to 1861, the date of John Brobst's death, and, indeed, until 1865, when this suit was brought, no claim for redemption was ever asserted. As a general rule, a mortgagor, after his mortgagee has been in possession twenty years, cannot be heard in advancing a claim to redeem. As was said in the court below, it is presumed he has released his equity. A chancellor will not entertain stale claims. It is true that in most cases where this doctrine has been avowed the mortgagee had been in continued actual occupancy, having not merely a right, but a *pedis possessionem*. But the cases are not rested upon that ground, nor is it easy

* Walker's Chancery, 494. † 7 Cowen, 13.

to see how that can make any difference in the rule when the mortgagor is out of possession, and knows, or is bound to know, that a right is asserted against him. The refusal of a court of equity to interfere is because of the laches of the holder of the equitable right, and a sleep of forty years such as there was in this case, may well raise every presumption against a claim merely equitable. All such rights are imperfect, and hence they must be asserted with vigilance.

It was said in the argument, on behalf of the plaintiff in error, that the lapse of more than twenty years raised a presumption that the mortgage had been paid, and that the mortgagee's rights had been extinguished before this suit was brought. No such point appears to have been presented in the court below, and hence it ought not to be mooted here. But how any such presumption can arise against a mortgagee, or his alienee, when he has been in possession under the mortgage, we have not been shown. Even if it could, it was completely rebutted in this case by the evidence submitted by the plaintiff in error. It was proved, without contradiction, that Michael Brobst, the mortgagor, became insolvent, and died in 1820, before the mortgage debt became due, never having been married, and leaving no personal representatives, and none but collateral heirs. John Brobst, his alienee, also became insolvent, removed to the western part of the State, and thence to Maryland in 1827, where he resided until his death in 1861, never having returned to Pennsylvania, so far as it appears, and having been supposed to be dead. These facts, shown by the plaintiff, were quite enough to repel any presumption of payment arising from the lapse of time. Had they been submitted to the jury, it would have been their duty to find that the legal presumption, if any could arise under the circumstances, was rebutted. To this the authorities are numerous.*

* Filadong *v.* Winter, 19 Vesey, 196; Blacket *v.* Wall, 3 Meeson & Roscoe, 119, note; Daggett *v.* Tallman, 8 Connecticut, 176; Newman *v.* Newman, 1 Starkie, 81; Shields *v.* Pringle, 2 Bibb, 387; Boardman *v.* De Forrest, 5 Connecticut, 1; Bailey *v.* Jackson, 16 Johnson, 210; Godhawk *v.* Duane, 2 Washington Circuit Court, 323.

The defendant, Brock, then, if all his other titles are shut out of view, is, as has been said before, in the position of a mortgagee in possession, and the lessor of the plaintiff has at most only an equity of redemption—an equity more than commonly stale. From 1825, when Rodeberger was certainly in possession under Boyer, until 1865, when this suit was brought, no attempt was made to assert the equity or to redeem the land. Meanwhile extensive improvements have been made upon the property, and it has been converted from a wilderness to a populous settlement. It is hardly probable that at this late day a bill to redeem would be entertained by any chancellor. But this we need not now decide. It is sufficient that there has been no redemption. It has been held that ejectment will not lie at the suit of a mortgagor against his mortgagee in possession, after breach of the condition, even if the money secured by the mortgage be paid or tendered. This was said by the Supreme Court of Massachusetts in *Hill* v. *Payson et al.*,* and solemnly decided by the same court in *Parsons* v. *Wells et al.*,† where may be found a thorough discussion of the subject. The doctrine of that case is, that the only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee, having entered for condition broken, refuses to relinquish possession of the mortgaged premises, is by bill in equity. This was shown to be in accordance with the rules of the common law, as well as implied in the statutes of the State, and this seems to rest upon correct principles. If it were not so, a mortgagor might remain quiet until his mortgagee in possession (the property being unimproved, as in this case) had made improvements necessary for obtaining any income therefrom. He might then tender the debt and interest, and recover the possession without making any compensation for the improvements. The mortgagee in such a case would have no remedy for his disbursements. But if the mortgagor must file a bill to redeem, asking for equity, he may be compelled to do equity.

* 3 Massachusetts, 559. † 17 Id. 419.

Syllabus.

Hence, there is justice and fitness in holding that the legal title remains in the mortgagee until redemption, though the debt has been paid. It is observable that the statute of 7 Geo. II, ch. 20, enacted that a mortgagee shall not maintain ejectment, after payment or tender by the mortgagor of principal, interest, and costs. There could have been no necessity for such an enactment if the legal title had not remained in the mortgagee. The point has never been decided by this court, but in *Gray* v. *Jenks*,* Judge Story intimated at least that such was his opinion, though the case did not call for such a decision. It is true a different rule is said to prevail in New York from that held in Massachusetts, but it is not the rule of the common law, nor can it be so promotive of justice.

This is all that need be said of the case. Were it conceded that the Circuit Court was in error in instructing the jury that the sale under the Kutz and Levan judgment passed whatever title John Brobst had (which we do not assert), or that the rulings respecting the partition and the tax title were erroneous, it would not avail the plaintiff in error, because, for the reasons mentioned, there can be no recovery in this action.

JUDGMENT AFFIRMED.

BETHELL *v.* DEMARET.

1. The authority conferred by a State on its Supreme Court to hear and determine cases, is not the kind of authority referred to in the 25th section of the Judiciary Act, which gives this court a right to review the decisions of the highest State court, where is drawn in question the validity of a statute of, or *an authority exercised under any State*, on the ground of their being repugnant to the Constitution, &c., . . and the decision is in favor of such validity.
2. The decision of a State court which simply held that promissory notes, given for the loan of "Confederate currency," together with a mortgage to secure the notes, were nullities, on the ground that the considera-

* 3 Mason, 520.

tion was illegal, according to the law of the State, at the time the contract was entered into, is not a decision repugnant to the Constitution.

ON motion to dismiss a writ of error to the Supreme Court of Louisiana. The case was this:

Bethel brought suit against Demaret and others in a district court of the State, to enforce a mortgage given to secure the payment of two notes of $7500 each, given by them for the loan of Confederate currency, on the 2d April, 1862, payable in two and three years after date, with interest. The plaintiff recovered judgment, and the mortgaged premises were directed to be sold to pay it. Whereupon an appeal was taken to the Supreme Court of the State, where the judgment was reversed and the suit dismissed. The decision was placed on the ground that the Confederate money was illegal, and constituted no valid consideration for the two notes and mortgage at the time they were executed, according to the code of the State.* The court say, in its opinion, "The plaintiff is endeavoring to enforce a contract, the consideration of which was Confederate currency. The nullity of contracts founded upon that unlawful currency has been frequently determined." The plaintiff then brought the case here, assuming it to come within that clause of the 25th section of the Judiciary Act, which gives a right of review to this court of the judgment in the highest State court, "where is drawn in question the validity of a statute of, *or an authority exercised under any State*, on the ground of their being repugnant to the Constitution, &c., . . and the decision is in favor of such validity."

Mr. J. A. Campbell now moved to dismiss the writ for want of jurisdiction.

Mr. Miles Taylor, in support of the writ:

When the mortgage in this case was given, "Confederate notes" were the only money of the South. They were habitually in use there for procuring the necessaries of life,

* Art. 1887, 1889, 2026; Schmidt *v.* Barker, 17 Annual, 261.

and for paying for services of every kind. And by all principles of equity a mortgage to secure the payment of a loan of them was a "contract." In this case we sue on them, and the defence is set up that the contract was unlawful. We plead the obligation of the contract, and the provision of the Constitution which forbids a State to violate its obligation. The Supreme Court of Louisiana decides against us. It decided, in effect, that the contracts contained in the obligations sued on, were null and void, because they were given for Confederate money; and, in consequence thereof, the court exercised its power, under the authority of the State of Louisiana, to prevent the plaintiff from enforcing the payment of these obligations, so as not only to impair the obligation of the contracts in question, but to destroy them altogether.

Mr. Campbell, contra, in support of *his motion:*

The Supreme Court of the State decided that a loan of Confederate money could not be a lawful cause of a contract. The judges did not consider the court in which they were sitting as having been at any time independent of the laws and statutes of the United States. Those laws and the acts of the departments of the government have never regarded the Confederate States as anything more than a name, or the notes otherwise than as without authority, and for a purpose illegal, and hostile to the government of the United States; issued to sustain and to promote what was declared to be an existing insurrection, and carried the evidence of that fact on their face.

The question now submitted is, whether this judgment presents any matter for the review of the Supreme Court of the United States? Does the Constitution of the United States, or any treaty or law, authorize or protect the circulation of these Confederate notes, or prescribe that they shall be a basis for a contract of loan? The answer must be in the negative.

Does the adjudication that they do not form a legal cause for a contract of loan by the Supreme Court of the State

violate any part of the Constitution, laws or treaties of the United States? The answer must be the same.

The decision of the State court is, that the circulation of those notes by any party for any cause, affected the public order and disturbed the public peace of the United States. Unquestionably this is true, and beyond this the court did not go.

Mr. Justice NELSON delivered the opinion of the court.

There was no Federal question presented to the court below by the plaintiff in error, so far as appears from the record. There is no statute of a State in question here.

But it is insisted that there was an authority under the State of Louisiana exercised in the case drawn in question, and which was repugnant to the Constitution, and the decision in favor of its validity, and that is, the Supreme Court of the State were acting under the authority of the State at the time its decision was rendered.

There are two answers to this ground: 1st. That the authority conferred on a court to hear and determine cases in a State, is not the kind of authority referred to in the 25th section, otherwise every judgment of the Supreme Court of a State would be re-examinable under the section; and 2d. The decision of the court was not repugnant to the Constitution. It simply held that the promissory notes, together with the mortgage in question, were nullities, on the ground that the "Confederate currency," which constituted the consideration, was illegal according to the law of the State at the time the contract was entered into.

As no Federal question appears in the record the motion to dismiss must be

GRANTED.

Statement of the case in the opinion.

EX PARTE GRAHAM.

Proceedings to confiscate real estate under the act of July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," &c., are not "proceedings in admiralty," although the act declares that they "shall be *in rem*, and conform as near as may be to proceedings in admiralty or in revenue cases."

Accordingly, no writ of prohibition from this court to a District Court lies in the case of such proceedings; the writ being confined by the Judiciary Act to cases where the District Courts are proceeding as courts of admiralty.

ON petition for a writ of prohibition to the District Court of the United States for the District of Louisiana.

Mr. Durant, for the petitioner; Mr. Cushing, contra.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

A rule was granted by this court that the district judge show cause why a writ of prohibition should not issue agreeably to the prayer of the petitioners.

The petition upon which the rule was founded discloses, so far as it is necessary to state them, the following facts:

The United States instituted in the District Court of the United States for the Eastern District of Louisiana, under the act of Congress approved July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," proceedings in confiscation against sixteen lots of ground, the property of Duncan Kenner. The lots were condemned as forfeited to the United States and ordered to be sold by the marshal. This was accordingly done. Graham and Day became the purchasers of certain portions of the property. They complied with the conditions of the sale and received deeds from the marshal. The court ordered the proceeds of the sale, less the costs, to be paid over to the United States. Subsequently, on the 9th of February,

1869, Kenner, as is alleged for the purpose of clouding the title of the purchasers, and of annoying and harassing them, filed in said court what purports to be a libel of review, wherein he prayed that the decree in confiscation condemning the property and ordering it to be sold, should be reviewed and reversed for errors of law apparent on the face of the record.

On the 29th of November, 1869, for the same purposes as is alleged, he filed, by leave of the court, an amendment to his original libel of review, whereby and by process duly served upon them, Graham and Day were made parties to the proceeding.

In addition to the prayer of the original libel the amendment prays that they should render an account of the rents and profits of the property while in their possession, and that they should be required respectively to pay to Kenner such sums as should be found due to him.

The district judge, it is alleged, holds that the proceeding in confiscation was a proceeding in admiralty, and that it was therefore competent for him to entertain the libel of review and to exercise the jurisdiction which it invoked.

The jurisdiction is denied by the petitioners and a remedy is prayed for by a writ of prohibition.

The district judge has filed an answer to the rule, but the view which we take of the case renders its consideration unnecessary.

Our jurisdiction is specific and limited. It is defined by the Constitution and laws of the United States. We can exercise none but what is conferred by one or the other.

The thirteenth section of the Judiciary Act of 1789* authorizes this court "to issue writs of prohibition to the District Courts when proceeding as courts of admiralty."

The question whether the District Court, in entertaining the libel of review, is proceeding as a court of admiralty, meets us, therefore, at the threshold of the case before us. It is only in such cases that it is competent for this court to

* 1 Stat. at Large, 81.

issue the writ.* The seventh section of the act of 1862,† under which the decree sought to be reviewed was made, provides that proceedings against the property seized shall be *in rem*, and "shall conform as nearly as may be to proceedings in admiralty or in revenue cases." It is too clear to admit of doubt that the original case was not one in admiralty, and it is equally clear that the proceeding sought to be prohibited is not within that category.‡

The supplemental case is an elongation of the original case, and necessarily of the same nature and jurisdictional character.

These conclusions are fatal to the case of the petitioners. If the District Court shall err in the proceedings upon the libel of review, the remedy of the petitioners will be by a writ of error from the Circuit to the District Court, and, if need be, finally by a like writ from this court to the Circuit Court.

The rule is discharged and the

MOTION DENIED.

BALTIMORE *v.* BALTIMORE RAILROAD.

1. A railroad company wanting to borrow $4,500,000 to complete its unfinished railroad, a city, its chief stockholder, and interested in the completion, agreed to lend to it the sum. The arrangement resolved on and carried out was this:

The city was to issue and sell, from time to time, as the railroad needed the money, its own bonds (having about 35 years to run), for $4,500,000, at a price, however, not *below* par; and was to issue to the commissioners of its sinking fund similar bonds for $500,000, which, with the constant accumulations of interest (to be invested in the purchase of the city debt), were to constitute a sinking fund for payment of the whole debt at maturity. Any premiums which the city might get by the sale of

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* United States *v.* Peters, 3 Dallas, 121; Ex parte Christy, 3 Howard, 292.

† 12 Stat. at Large, 589.

‡ The Union Insurance Co. *v.* United States, 6 Wallace, 759; United States *v.* Armstrong's Foundry, Ib. 766; United States *v.* Hart, Ib. 770, The Sarah, 8 Wheaton, 391.

the loan *above* par, and any excess which, at the maturity of the loan, it might be found that the city had made by its sinking fund operations, (above what would be necessary to pay the principal), were to enure to the benefit of the city treasury.

The railroad company, on its part, was to mortgage its road for $5,000,000; and to place in the city treasury, at a specified number of days before each instalment of interest fell due, the sum which the city had to pay on its $5,000,000 of bonds, and at a certain date before the maturity of the loan, the amount which should then be due by the city for the principal not yet bought in. By the terms of its contract the railroad company was to pay "*all* and *any* expense *incidental* to the issue of any of the bonds."

All this took place in 1854. In 1862, Congress passed an excise law, levying an income tax of 3 per cent. on all sums due for interest by railroad companies, which sum it required the companies to withhold from their creditors and pay to the government, making, by a subsequent act—one of June, 1864—such payment a discharge, in terms, from their creditors for the amount, "except where the companies might have contracted otherwise." But no such tax was laid on the bonds of cities, nor did the act require *them* to withhold anything from their creditors. The railroad company, to save itself from being distrained upon, and giving notice to the city of all that was done, paid the tax under such protest as by the acts of Congress would authorize a recovery of it by the city if it was illegally exacted:

Held, that the city did not, under the arrangement between it and the railroad company, stand in the position of a surety in such way as that the company was bound to prevent its being prejudiced by events not anticipated when the arrangement between the parties was entered into.

2. That the contract of the railroad company to pay "all and any expense incidental to the issue of any of the bonds," did not oblige it to pay this tax out of its own money, and so to pay the full interest to the city discharged of the tax.

3. That whether this was a tax laid on the securities of a municipality, and whether, if so, it was lawfully laid, was a question which the city was not in a condition to raise, as the tax having been paid under protest, and she having received notice of all that was done, could, under the statutes of the United States, have stepped in and tested the legality of the assessment and collection, by instituting proper proceedings to recover the money.

ERROR to the Circuit Court for the District of Maryland; the case being this:

In 1854, the Baltimore and Ohio Railroad Company being then unfinished, and needing money to complete its road, the city of Baltimore, which was a very large stockholder

in the road, and greatly interested to have it completed, agreed, in pursuance of an act of the legislature of Maryland, which gave it this power, to lend the company $4,500,000; and, in order to raise the money, to issue the bonds of the city for $5,000,000, payable in 1890, with interest payable quarterly, on the first days of certain months named. An ordinance was accordingly passed by the city authorizing the loan. It directed that the commissioners of finance of the city should issue certificates of city debt, or bonds, which they themselves were to sell, *not however below par;* and pay the proceeds of $4,500,000 to the register of the city. With the money thus put "from time to time" into his hands, the register was to pay the railroad company the amount that might be required by it. The remaining $500,000, and its quarterly interest, as accumulated, were to be reserved as a sinking fund to redeem the principal of the whole loan at maturity. The city at the time owed several other debts incurred in aid of internal improvement; and the ordinance proceeded:

"If, at the maturity of said bonds, the sinking fund shall have accumulated to an amount *exceeding* the principal sum of the loan authorized of $5,000,000, *the said excess shall be paid into the city treasury, for the use of the city*, and be applied to the extinguishing the internal improvement debt."

"The *premium*, if any, that may be received on account of the sale of the said certificates or bonds, shall be converted into a sinking fund and *invested in the public debt of the city of Baltimore*, and so from time to time, with the interest quarterly accruing, to be *applied to the payment of the original internal improvement debt of the city*."

The railroad company in fulfilment of its part of the contract mortgaged its property to the city; the mortgage containing a proviso thus:

"*Provided*, That if the said railroad company do, and shall pay to the register of the said city, the principal sum of $5,000,000, less the amount of the sinking fund provided for therein, and its accumulations, *at least one month before the day on which the bonds,*

directed by said ordinance to be issued, shall become redeemable, and shall also pay to the said register interest at the rate of six per cent. per annum on the whole amount of said certificates or bonds issued quarterly, and *in advance at least ten days previous to the first days of the several months mentioned in said ordinance,* which said payment shall commence to be made in advance of the first payments of interest which shall be required to be made by the city, on said certificates or bonds, and shall continue to be made as aforesaid until the repayment by the said company to the city, of the principal sums of money which shall or may be issued as aforesaid; and shall well and truly pay *all and any expense incidental to the issue of any of the bonds* as aforesaid, and shall pay the expense of recording this indenture of mortgage in the proper offices, then these presents shall be null and void; else to remain in full force and effect."

The railroad company having received the money from the city, paid the interest on its mortgage, as agreed on, and in full, until October, 1862.

On the 1st of July in that year,* Congress passed an excise law, levying an income tax of 3 per cent. on all sums of money due for interest by a *railroad* company on its bonds or other "evidences of indebtedness," and "authorized and *required*" such companies to deduct and *withhold* from all payments made to any party after the said 1st July, 1862, the said duty; thus, in effect, constituting the company the collector of the tax for the United States. A statute of June 30th, 1864,† enacted that payment over by the railroad companies should discharge them from that amount of interest, "except where said companies may have contracted otherwise."

Neither statute, however, taxed the bonds of municipal corporations. The Commissioner of Internal Revenue now made a demand on the railroad company, for 3 per cent. on its mortgage to the city, insisting that the mortgage was an "evidence of indebtedness" within the meaning of the act of 1862. The company gave notice to the city of this demand, and that if it was enforced by the government, the

* 12 Stat. at Large, 469. † 13 Id. 284.

company would have to deduct the 3 per cent. from the interest which it had hitherto paid the city. The city objected to this being done in any event, and the railroad company and city made a joint attempt to persuade the Commissioner of Internal Revenue that the case did not come within the act of 1862. The commissioner did not accept this view, and to prevent a distress upon it the company paid the tax, making a protest, however, setting forth fully and specifically the grounds of objection to the demand, "in view," as the protest declared, "of attempting to recover it under the provisions of the act of Congress in this connection;" provisions, which, when protest is properly made, authorized recovery from the government, if the tax have been illegally exacted. Having thus paid the tax the company deducted the amount of it from the payments of interest to the city, and in October, 1864, the city brought this suit to recover the amount thus withheld. Judgment having been given in favor of the railroad company, the city brought the case here.

Messrs. W. H. Norris and G. H. Chandler, for the city, plaintiff in error:

1. The case shows that the position of the city in relation to the railroad was that of a surety. The transaction was in fact but a loan of credit for the benefit of the railroad. The bonds of the city were of a higher *market* value than bonds of the railroad, though of no higher real value; and so the city issues *its* bonds; the company stipulating that it will always pay to the register of the city, at least ten days before it becomes due, the interest on its mortgage (being the same sum exactly which the city has to pay on *its* bonds), so that without raising a cent by taxation the city might pay this large sum of interest; and the railroad agreeing also that when the principal is about to fall due it will put into the city treasury a month before it is actually due all principal not redeemed by the operations of the sinking fund. This is a pure loan of credit.

Independently, therefore, of the express stipulations, to

be referred to hereafter, the road company was bound by the nature of the transactions to indemnify the city, as if the form of principal and surety had been carried out. By that relation the situation of a surety can never be more onerous than that of the principal.

The possibility of taxation should have been foreseen by the principal, and it is a part of his obligation to indemnify the surety.* If there is any hardship in the taxation, it is one which the borrower contracted to bear and is a part of the obligation of his contract.†

2. The contract expressly provided "that all and any expense incidental to the issue of any of the bonds" shall be chargeable to and paid by the railroad company.‡ Congress never intended to give the power to deduct the tax by the debtor when the debtor had contracted to pay all expenses incidental to the loan. It did not propose to alter contracts, but merely to use the debtor as an agency to collect the tax from the creditor whom it intended to tax, and it made that purpose very obvious by its act of June 30th, 1864. In this case the railroad company has "contracted otherwise."

3. The tax was not to be deducted in this case, because Congress did not intend double taxation of the same fund. It had no right to use *municipalities* as agencies for collection, they being political bodies not liable to their service. Accordingly no power was given to the municipality to deduct the tax from the holders of its bonds, for Congress has not attempted to employ *it* as a collecting agency. It paid full interest to its bondholders without abatement, and they are taxed on that income in their returns. Is not the fund double taxed?

4. The city, in the exercise of a function of government delegated by the State, had issued its bonds and borrowed money of the purchasers, which was brought into the mu-

* Maltby *v.* Reading and Columbia Railroad Co., 52 Pennsylvania State, 148–9.

† Dermott *v.* Jones, 2 Wallace, 8; United States *v.* Keehler, 9 Wallace 88.

‡ Catawissa Railroad Co. *v.* Titus, 49 Pennsylvania State, 277–281.

nicipal treasury. Repayment was secured by the delegated power of taxation. For the promotion of a public purpose, "a State object" constitutionally adequate to justify taxation, the money thus raised was lent, under a specific scheme for its reimbursement, to a private corporation as an agency to effect this public purpose. The debt, by being thus due to the territorial political agency of the State, is due to the State, so as not to be taxable by the National government, and it is to be assumed was not intended to be taxed by the Internal Revenue Act.

Mr. J. H. B. Latrobe, contra:

The mortgage was given in 1854, at which time there was no income tax nor the expectation of one by any man. It comes to us as an incident of our civil war. The "expense incidental to the issue of any of the bonds" was such expense and such alone, as related to the preparation of them, and such books and clerk hire as might be required in connection with them.

While the doctrine that a surety shall not be prejudiced by contingencies not anticipated at the time of creating the relation, is true as a general one, it is not true to the extent of vacating a contract such as exists here, where the parties declare what shall be their respective rights and liabilities.

But the doctrine has no application to this case. The city was not a surety. Had she guaranteed bonds issued by the railroad company, had she even placed her own bonds lent to the company, in the hands of the latter, there might be ground, perhaps, for saying that the city was a surety only. But, when besides issuing her own bonds, she retained the possession of them, and sold them only when required to pay from time to time the moneys wanted by the company, the transaction is that of a principal borrowing money to lend it again; in this instance to aid in the promotion of an object in which such principal was deeply interested.

Or, had the ordinance provided that the mortgage should be released or become void so soon as the accumulations

of the sinking fund amounted to the entire debt of $5,000,000, it might have been argued, that the city was a surety only, having no interest but to secure itself from loss. But the ordinance shows, that so far as the city is concerned, the transaction in one aspect is for her own benefit apart from the Baltimore and Ohio Railroad Company altogether. It directs all excess of the sinking fund, and all the premiums, if any, to go into the city treasury.

The transaction was intended as an operation by which the city, if the commissioners of finance performed their duty by making judicious investments, would be a gainer, and be furnished with the means of discharging a debt with which the Baltimore and Ohio Railroad Company was unconnected, the general internal improvement debt of the city.

By the ordinance the commissioners of finance were required to invest the interest and premium, if any, received by them, in the public debt of the city. Now, if the calculation which fixed the amount of the sinking fund and the length of the loan was based upon sales and purchases at par, the ability of the finance commissioners to invest at rates 8 and 10 per cent. below par (which it may be stated that as a matter of fact they have been able to do), would leave a large surplus in the hands of the city in 1890, to be applied to its general debt.

We agree that the tax is illegally laid, and we have paid it only to save a distress on us and under protest. If we recover it, we will pay it to the city, or the city using our protest can proceed, itself, to recover it.

Mr. Justice DAVIS delivered the opinion of the court.

It is contended, on the part of the city, that if the tax in question be a lawful exaction by the United States, the burden of it must be borne by the company, and that the obligation of the company to the city is not changed by reason of the imposition and collection of the tax. Whether this be so or not, depends on the nature of the contract between the parties, for the company was authorized to withhold the tax, unless it had contracted with the city to pay

it.* The position taken by the city is, that the company was bound to pay the full amount of the interest without deduction, because of the following words in the defeasance clause of the mortgage: "And shall pay all and any expense incidental to the issue of any of the bonds." It is, therefore, necessary to construe these words, and there is no difficulty about it, when we consider the subject-matter about which they were employed. The word expense may mean one thing in one case and quite a different thing in another. Its meaning in this case cannot be mistaken.

To carry out the arrangement between the parties required a considerable expenditure of money for printing, clerk hire, stationery, advertising, and similar matters. These expenses were incidental to the issue of the bonds, and it was right and proper that the railroad company—the party to be benefited by the transaction—should pay them. And it agreed to do so; but this agreement cannot be extended to cover the tax in question, for in no sense is it an expense incidental to the issue of the bonds. At the date of the mortgage (1854) there was no tax of the kind, nor any reasonable expectation of one. If there had been, it is easy to see that appropriate words applicable to the subject would have been used. But the words which were used did not relate to the subject of taxation at all, and it is very certain that the possibility of taxation was not in the contemplation of either of the parties to the mortgage.

It is unnecessary to discuss the general rules of law affecting the relations of principal and surety, and to show in what state of case a surety is required to save his principal from loss, because these rules are not applicable to this case. It is always competent for parties capable of entering into a business arrangement to fix the terms of it, and to declare what shall be their respective rights and liabilities under it. If the court can in any case see that this has been done, it is required to give effect to the contract which the parties chose to make for themselves, although, in the

* 13 Stat. at Large, 284.

absence of a special agreement on the subject, the rule to determine the rights of the parties might be different.

The parties to this suit have made a contract in relation to a matter of interest to both, and have settled what each shall do. To hold one of them responsible for contingencies not provided for, and not even anticipated when the contract was executed, would be to disregard instead of giving effect to the will of the parties.

It is contended, however, by the city, that the securities of a municipality like Baltimore are not taxable by the National government, and therefore the tax in question was an unlawful exaction. This presents an important question; but the city is not in a condition to raise it, and, under the circumstances, can have no cause of action against the company for paying the tax. It is difficult to see in what respect the company failed to discharge its duty in regard to this subject. It occupied the position of a stakeholder, owing the money either to the city or the United States, and wholly indifferent to which of the parties it should be paid. It notified the city that the United States were enforcing the collection of the tax, and did not pay it until it was obliged to do so to avoid the consequences provided for in the act in case of refusal, and not then, without a written protest stating distinctly all the grounds of objection claimed by the city to the assessment and collection of the tax. In this condition of things, if the city felt itself aggrieved by the action of the officers administering the internal revenue laws in a matter of interest to it and not the company, it should have stepped in, and taken upon itself the burden of testing the legality of the assessment and collection of this tax, by instituting proper proceedings to recover back the money. This it was authorized to do by these laws, which not only provide for the manner of collecting the revenue, but also furnish a mode of redress to the party who has suffered injury by their administration.*

* City of Philadelphia *v.* The Collector, 5 Wallace, 731; Nichols *v.* United States, 7 Id. 130–1; The Assessors *v.* Osborne, 9 Id. 571.

If there were injury at all, the city sustained it, and, as it did not avail itself of the privilege to sue, it cannot turn round and litigate the legality of the tax with the railroad company. This tax was exacted under color of law, and the company, having notified the city of the demand of the United States and the proceedings taken to enforce it, and having protested against its collection, were justified in paying it.

And it cannot be required in this state of case, on its own behalf, to test the correctness of the ruling of the revenue officers.

JUDGMENT AFFIRMED.

PENNSYLVANIA *v.* QUICKSILVER COMPANY.

1. In a suit against a corporation by one State, an averment that the defendant is a body politic by the law of another State, named and "doing business" in it, is not sufficient to give jurisdiction to this court.
2. This court has no original jurisdiction of a suit brought by a State against its own citizens.

ON motion to dismiss an original writ:

The first clause of the second section of the third article of the Constitution ordains that the judicial power shall extend to certain cases named, and among them "to controversies between a State and the citizens of another State."

The second clause of this same section provides:

"That in all cases affecting ambassadors, &c., and *those in which a State shall be a party*, the Supreme Court shall have original jurisdiction," and that "in all the other cases before mentioned it shall have appellate jurisdiction."

The 13th section of the Judiciary Act provides:

"That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, and except also between

a State and citizens of another State, or aliens, in which latter case it shall have original, but not exclusive jurisdiction."

In this state of the law, constitutional and statutory, the commonwealth of Pennsylvania brought an original suit against the Quicksilver Mining Company. The declaration was thus:

"The commonwealth of Pennsylvania, by her attorney-general, complains of the Quicksilver Mining Company, a body politic *in the law of, and doing business in*, the State of California, of a plea that the said company render unto the said commonwealth the sum of $100,000, &c."

Mr. M. H. Carpenter, on behalf of the Quicksilver Company, defendant in the case, now moved to dismiss the writ, resting his motion on the ground that as the record did not aver or in any way show that the said company was incorporated by the laws of any other State or nation than those of Pennsylvania, or was resident elsewhere than in that State, no cause of action within the jurisdiction of this court was disclosed.

Mr. F. Carroll Brewster, in support of the jurisdiction:

We admit that the Quicksilver Company was incorporated by Pennsylvania, and we have no knowledge that it is incorporated by California. But it does business in California. Its mines are there; its office, officers, agents and concerns. Citizenship when spoken of in the Constitution in reference to the jurisdiction of the Federal courts, means, as is well settled, nothing more than residence. What then constitutes the residence of a corporation? This seems to have been ruled by McLean, J.,* in the seventh circuit. The declaration there characterized the plaintiff as "doing business and resident in the State of New York." Mr. Stanbery demurred for want of jurisdiction. The opinion of the court is thus:

McLean, J.: "Where a corporation of another State sues in this court, an allegation of citizenship is not now necessary, as

* New York and Erie Railroad *v.* Shepard, 5 McLean, 455.

was formerly required. The State where the corporation is located, and in which its corporate functions are exercised, if alleged, is sufficient to give jurisdiction. The demurrer is overruled."

Now, here we allege that the company is "a body politic in the law of, and does business in California;" which brings us sufficiently within the language of the opinion cited.

But, independently of this, under the second clause of the second section of the third article of the Constitution, this court has original jurisdiction in all cases where a State is a party; jurisdiction even where the party is one of its own citizens. The language is express, and this view is expressed by Marshall, C. J., and by Thompson, J., in the *Cherokee Nation* v. *The State of Georgia.** The former says:

"The second section of the third article of the Constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended with 'controversies' between a State or the citizens thereof, and foreign States, citizens or subjects. A subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a State shall be a party. The party defendant may unquestionably be sued in this court."

The latter says:

"The Supreme Court shall have original jurisdiction in all cases where a State shall be a party."

Mr. Justice NELSON delivered the opinion of the court.

By the second section of the third article of the Constitution it is ordained that the judicial power shall extend "to all controversies between a State and the citizens of another State." The second clause of this section provides "that in all cases affecting ambassadors, &c., and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. . . In all other cases before mentioned it shall have appellate jurisdiction."

* 5 Peters, 15, 52.

This second clause distributes the jurisdiction conferred upon the Supreme Court in the previous one into original and appellate jurisdiction; but does not profess to confer any.

The thirteenth section of the Judiciary Act,* which provides for the jurisdiction of this court, accords with this construction.

A State, therefore, may bring a suit, by virtue of its original jurisdiction, against a citizen of another State, but not against one of her own. And the question in this case is whether it is sufficiently disclosed in the declaration that this suit is brought against a citizen of California. And this turns upon another question, and that is, whether the averment there imports that the defendant is a corporation created by the laws of that State; for, unless it is, it does not partake of the character of a citizen within the meaning of the cases on this subject.†

The court is of opinion that this averment is insufficient to establish that the defendant is a California corporation. It may mean that the defendant is a corporation doing business in that State by its agent; but not that it had been incorporated by the laws of the State. It would have been very easy to have made the fact clear by averment, and, being a jurisdictional fact, it should not have been left in doubt. Indeed, it was admitted in the argument that the defendant was a Pennsylvania corporation, and the jurisdiction sought to be sustained by a suit against this agency. We have already shown that this is unavailable to support the jurisdiction.

Motion granted, and the WRIT DISMISSED.

* Quoted *supra*.

† Marshall *v.* The Baltimore and Ohio R. R. Co., 16 Howard, 314, and cases there cited.

Syllabus.

THE DANIEL BALL.

1. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters.
2. The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact.
3. Rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.
4. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.
5. Grand River, in Michigan, held to be a navigable water of the United States, from its mouth in Lake Michigan to Grand Rapids, a distance of forty miles, being a stream capable of bearing for that distance a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, and forming by its junction with the lake a continued highway for commerce, both with other States and with foreign countries.
6. The limitation of the power of Congress over commerce to commerce among the several States, with foreign nations, and with the Indian tribes, necessarily excludes from Federal control all that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States.
7. The steamer in this case being employed in transporting goods on Grand River, within the State of Michigan, destined for other States, and goods brought from without the limits of Michigan and destined to places within that State, was engaged in commerce between the States, and however limited that commerce, was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does not affect the character of the transaction. To the extent to which each agency acts in that transportation, it is subject to the regulation of Congress.

Statement of the case.

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

The act of July 7th, 1838,* provides, in its second section, that it shall not be lawful for the owner, master, or captain of any vessel, propelled in whole or in part by steam, to transport any merchandise or passengers upon "the bays, lakes, rivers, or other navigable waters of the United States," after the 1st of October of that year, without having first obtained from the proper officer a license under existing laws; that for every violation of this enactment the owner or owners of the vessel shall forfeit and pay to the United States the sum of five hundred dollars; and that for this sum the vessel engaged shall be liable, and may be seized and proceeded against summarily by libel in the District Court of the United States.

The act of August 30th, 1852,† which is amendatory of the act of July 7th, 1838, provides for the inspection of vessels propelled in whole or in part by steam and carrying passengers, and the delivery to the collector of the district of a certificate of such inspection, before a license, register, or enrolment, under either of the acts, can be granted, and declares that if any vessel of this kind is navigated with passengers on board, without complying with the terms of the act, the owners and the vessel shall be subject to the penalties prescribed by the second section of the act of 1838.

In March, 1868, the Daniel Ball, a vessel propelled by steam, of one hundred and twenty-three tons burden, was engaged in navigating Grand River, in the State of Michigan, between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places, without having been inspected or licensed under the laws of the United States; and to recover the penalty, provided for want of such inspection and license, the United States filed a libel in the District Court for the Western District of Michigan.

* 5 Stat. at Large, 304. † 10 Id. 61.

Statement of the case.

The libel, as amended, described Grand River as a navigable water of the United States; and, in addition to the employment stated above, alleged that in such employment the steamer transported merchandise, shipped on board of her, destined for ports and places in States other than the State of Michigan, and was thus engaged in commerce between the States.

The answer of the owners, who appeared in the case, admitted substantially the employment of the steamer as alleged, but set up as a defence that Grand River was not a navigable water of the United States, and that the steamer was engaged solely in domestic trade and commerce, and was not engaged in trade or commerce between two or more States, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed.

It was admitted, by stipulation of the parties, that the steamer was employed in the navigation of Grand River between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places; that she was not enrolled and licensed for the coasting trade; that some of the goods that she shipped at Grand Rapids and carried to Grand Haven were destined and marked for places in other States than Michigan, and that some of the goods which she shipped at Grand Haven came from other States and were destined for places within that State.

It was also admitted that the steamer was so constructed as to draw only two feet of water, and was incapable of navigating the waters of Lake Michigan; that she was a common carrier between the cities named, but did not run in connection with or in continuation of any line of steamers or vessels on the lake, or any line of railway in the State, although there were various lines of steamers and other vessels running from places in other States to Grand Haven carrying merchandise, and a line of railway was running from Detroit which touched at both of the cities named.

The District Court dismissed the libel. The Circuit Court

reversed this decision, and gave a decree for the penalty demanded.

From this decree the case was brought by appeal to this court.

Mr. A. T. McReynolds, for the appellant:

1. The steamer Daniel Ball is not liable under the navigation laws, unless she was employed upon the *navigable waters of the United States*, in carrying on commerce among the States.

What, then, is meant by the term "navigable waters of the United States," and the kindred phrases employed in the navigation laws? And does Grand River fall within the class?

It is clear that the term is not employed in a territorial sense; merely or primarily to include all waters within the territorial limits of the United States, to which the term "navigable" is applied in American law. We have extended that term to include not simply the tide-waters, as is understood by it in England, but also the great fresh-water rivers and lakes of our country; and, in a still broader sense, we apply it to every stream or body of water, susceptible of being made, in its natural condition, a highway for commerce, even though that trade be nothing more than the floating of lumber in rafts or logs.*

But if merely because a stream is a highway it becomes a navigable water of the United States, in a sense that attaches to it and to the vessels trading upon it the regulating control of Congress, then every highway must be regarded as a highway of the United States, and the vehicles upon *it* must be subject to the same control. But this will not be asserted on the part of the government.

The navigable rivers of the United States pass through States, they form their boundary lines, they are not in any one State, nor the exclusive property of any one, but are common to all. To make waters navigable waters of the

* Brown *v.* Chadbourne, 31 Maine, 9; Morgan *v.* King, 35 New York, 454; Moore *v.* Sanborne, 2 Michigan, 519.

United States, some other incident must attach to them besides the territorial and the capability for public use.

This term contrasts with *domestic* waters of the United States, and implies, not simply that the waters are public and within the Union, but that they have attached to them some circumstance that brings them within the scope of the sovereignty of the United States as defined by the Constitution.

Grand River, we maintain, is a domestic stream, and not a navigable water of the United States. It is not brought within the sphere of the sovereignty of the United States as defined in the Constitution, unless it be by becoming a highway for the commerce which Congress can regulate. By the Constitution, Congress regulates commerce with foreign nations, among the several States, &c. No such commerce is carried on upon Grand River. Commerce means an exchange of commodities. This river is entirely within the State of Michigan, and therefore an exchange of commodities between two States cannot be made upon it. It is navigated by vessels, the commencement and termination of whose voyage is within the State. It is not adapted to navigation by lake-going vessels, which alone could carry on commerce between the port at its mouth and any other State. It cannot, therefore, be said to be a public water of the United States, because forming part of a continuous route for vessels engaged in interstate trade.

The framers of the Constitution supposed that the State would be best able to establish all necessary regulations for commerce carried on between citizens of the same State; and all proper police regulations for domestic highways. They have not authorized Congress to interfere, and Congress has never done so by attempting to subject this stream to regulations specially applicable to it. The case falls within that of *Veazie* v. *Moor*.* There, as here, the stream was navigable; but there, as here, its natural condition precluded its being used for continuous voyages from one State to another.

* 14 Howard, 569.

2. If Grand River is a navigable water or river of the United States, the steamer was not engaged in carrying on commerce among the States. So far as her passenger trade was concerned, she was engaged in internal commerce; as she transported passengers solely between Grand Haven and Grand Rapids, and the landings on the river between those places, in the State of Michigan. It makes no difference that packages were put on board the steamer plying on Grand River, destined and marked for ports and places in States other than the State of Michigan. It is admitted that she did not take these packages out of the State, nor did she run in connection with any vessels that did; she simply took packages at one place in the State of Michigan, to be delivered at another place in the same State, to some party who appears by a direction on the packages to be expected to find some other conveyance for them to a distant point. We do not know from this record that such conveyance was ever found. But found or not, the owners of this vessel had nothing to do with it. Their operations were confined entirely to the State, and did not, even by contract, extend beyond its limits.

It seems clear, therefore, that this steamer was engaged exclusively in domestic trade. If it was not, there is no such thing as the domestic trade of a State, and Congress may take jurisdiction of the whole commerce of the country. Railroads entirely within a State, which transport grain or fruit destined eventually to a distant market, may be subjected to police regulations from Congress.

Mr. Bristow, Solicitor-General, contra, for the United States.

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

Two questions are presented in this case for our determination.

First: Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of Congress; and,

Second: Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length.* A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

* The Genesee Chief, 12 Howard, 457; Hine *v.* Trevor, 4 Wallace, 555

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in *Gilman* v. *Philadelphia*,* "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States,"

* 3 Wallace, 724.

with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States.* In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

* Gibbons *v.* Ogden, 9 Wheaton, 194, 195.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.

We perceive no error in the record, and the decree of the Circuit Court must be

AFFIRMED.

LIVERPOOL INSURANCE COMPANY *v.* MASSACHUSETTS.

1. A corporation created by one State can only exercise its corporate franchises in another State by the comity of the latter.
2. A joint stock association, which by its deed of settlement in England and certain acts of Parliament is endowed with the faculties and powers mentioned below, is a corporation, and will be so held in this country, notwithstanding the acts of Parliament in accordance with a local policy declare that it shall not be so held. These faculties and powers are:
   1. A distinctive artificial name by which it can make contracts.
   2. A statutory authority to sue and be sued in the name of its officers as representing the association.
   3. A statutory recognition of the association as an entity distinct from its members, by allowing them to sue it and be sued by it.
   4. A provision for its perpetuity by transfers of its shares, so as to secure succession of membership.
3. In this country the individual responsibility of the shareholder for the debts of the association, is not incompatible with the corporate idea.

4. Such corporations, whether organized under the laws of a State of the Union or a foreign government, may be taxed by another State, for the privilege of conducting their corporate business within the latter.

ERROR to the Supreme Judicial Court of Massachusetts; the case being this:

A statute of the State just named imposes upon "each fire, marine, and fire and marine insurance company, *incorporated* or *associated* under the laws of any government or State other than one of the United States, a tax of 4 per cent. upon all premiums charged or received on contracts made in this commonwealth for insurance of property." The same statute imposes a tax of but 2 per cent. upon such premiums when the company is incorporated under the laws of any one of the United States other than Massachusetts; upon which premiums, where the company is incorporated by itself, it imposes but 1 per cent.; while no tax is imposed by the laws of the State upon the business of insurances transacted by any natural persons citizens of the same.

With the enactment just mentioned on its statute-book, the State of Massachusetts, in 1868, filed a bill in its Supreme Judicial Court against the Liverpool and London Life and Fire Insurance Company (a company doing a large business in that State), to collect a tax of 4 per cent. on its premiums upon contracts made in Massachusetts for insurance of property, and to restrain the company from doing further business till the tax was paid. The company set up that it was not "incorporated" at all, but was an association, under the laws of Great Britain, of natural persons, some of whom were citizens and residents of the country just named; and some citizens and residents of the State of New York; formed for the purpose of conducting the business of insurance under certain deeds of settlement, and having the legal character of a partnership; that accordingly it could not be taxed as a "company *incorporated* under the laws of any government or State other than one of the United States;" while, in so far as the discriminating tax of 4 per cent. was sought to be laid against it as a company *associated* simply and not incorporated, it violated, in regard to the members

of the company who were subjects of Great Britain, a provision in the treaty of 1815, between that country and the United States, by which it is agreed that the merchants and traders of each nation respectively shall enjoy the *most complete protection and security for their commerce;* and—in regard to the citizens of New York, that provision in section 2, article 4, of the Federal Constitution which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

Of course, if the company was a corporation, the defence failed: and it not being denied that the persons composing the company were British subjects, with certain citizens of New York with rights like theirs, the first question—and the only one if it was resolved affirmatively—was whether the company was a corporation or not.

The company had been originally formed, in May, 1836, in Liverpool, by a "deed of settlement."

This instrument, as far as it could be done without the aid of Parliament, established a company under the name of "The Liverpool Life and Fire Insurance Company," with a capital of £2,000,000 sterling, which was divided into 100,000 shares of £20 each, and declared its purpose to be making insurance on life and against fire. These shares could be sold and transferred, and executors and administrators represented them in the company on the death of the owner. If, by the laws of the association, a share became forfeited, the owner was released from all further liability to the company. The business of the company was to be conducted by a board of directors *exclusively*, and they could make by-laws and change and modify them. There was a covenant that suits might be brought by or against the company in the names of one or more directors, which should bind the stockholders, and that no stockholder would plead in abatement the nonjoinder of the others; and it was further covenanted that a judgment so obtained against a director might be made out of the property of any of the stockholders. Numerous other provisions were found in the original articles, which consisted of over a hundred sec-

tions, but only those are referred to here which bear on the question which the court had before it. There were also three subsequent deeds of settlement, and three acts of Parliament were passed to give efficiency to the purposes of the association.

The first of these acts provided that the association might sue and be sued in the name of the chairman or deputy chairman of the board of directors; that the stockholders might sue the company as plaintiffs, or be sued by it as defendants. It regulated the manner in which *the shareholders might be made individually liable for the debts of the association;* and it declared that the act should *not be construed to incorporate the company or relieve its members from their individual liability*, except as provided in the act.

The second act of Parliament changed the name of the company to that which it now bears, and authorized it to make contracts by the new name, and it also contained a provision that the act should *not make the company a corporation;* and there was a third act which authorized amalgamation with another company, and which again provides *against its being construed into an act of incorporation or a limited liability partnership.*

The Supreme Judicial Court of Massachusetts gave a decree against the company, and enjoined it from the further prosecution of its business till the taxes found to be due were paid.

The case was now brought to this court on the ground that in its application to the company the statute of Massachusetts was in conflict with the provision of the Constitution, which confers on Congress the right to regulate commerce with foreign nations and among the States, and with that which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

Messrs. B. R. Curtis and J. G. Abbott, for the company, plaintiff in error:

Whatever may be the character of the defendants, their association together and their relations to others, they must

depend upon the laws of Great Britain. If the defendants are not a corporation by the English law, then they are not by our law, because here they have done no act in any way to alter or change their legal status or their relations to others. Indeed, our law does not in any way apply to them, act upon or affect their character, or profess to do it; it leaves that to be defined by the laws of the country under which they formed their association.

Now, under the laws of Great Britain, it cannot be maintained that the defendants are a corporation, or in fact anything more than a partnership of a large number of natural persons, having procured certain privileges from the government, under which they associated together for the convenience of those who deal with them.

In Great Britain, the King and Parliament alone can create corporations. In this case, neither has exercised the power, but when Parliament granted to the company certain privileges, especial care was taken to declare that the grant made should *not* create a corporation. This seems conclusive.

With us the defendants would not possess and enjoy the privilege, or be subject to the liability of being sued, and suing in the name of an officer of their association, but would be obliged to sue or be sued in the name of all partners, for the acts of Parliament giving that right and imposing that liability, apply to the manner of enforcing a remedy, and cannot avail beyond its own limits and courts.

So that when the defendants transact their business in this country, the acts of Parliament, giving some of the privileges of corporations, are of no avail to them; in fact they are like any partnership of natural persons, and must be treated in the same way, entitled to the same rights and privileges, and subject to the same liabilities.

Numerous cases in the English Reports where the rights, privileges, and liabilities of such bodies as this one are passed upon, show that the association here is not a corporation.*

* Harrison *v.* Timmins, 4 Meeson & Welsby, 510; Bartlett *v.* Pentland, Barnewall & Adolphus, 704; Van Sandau *v.* Moore, 1 Russell, 441; Cape's

But if the defendants were an association of our own citizens, formed here under like deeds of settlement, and like acts of the legislature, they would not be held to be corporations. The association does not make out of its members a new artificial political person; it still remains a body of natural persons, with certain privileges conferred upon them. No new body is created by the legislature with the property of individuality, and the capacity of holding property and transacting business. Indeed, the association falls entirely short of being a corporation, as usually defined and understood.*

Nor does this case fall within a principle often acted upon by courts, that when a collective body of natural persons are granted powers, rights, and privileges by a collective name, and there is no mode in which they can be enjoyed and exercised, without acting in a corporate capacity, such a body is held to be a corporation by necessary implication. Here, such implication is precluded by the legislative declaration that a corporation shall not exist, and by the fact that the deeds and legislative acts very minutely and carefully provide in what manner the rights and powers granted shall be enjoyed and exercised. Indeed, it is always holden, that where a corporation is so established by implication, the legislative intention to confer a corporate existence must be certain and plain.

Assuming that the plaintiff in error was not a corporation, but was, as they above argued, a partnership or association of individuals, some of which were subjects of Great Britain and others citizens of the State of New York, the learned counsel argued further that the rights of the former were protected by the treaty between the United States and Great Britain, and the rights of the latter by section 2, article 4, of the Federal Constitution referred to in the statement of the case.

Executors, 2 De Gex, Mylne & G. 562; Mahew's Case, 5 Id. 562; Blakeley's Exec., 13 Beavan, 138; Burnes *v.* Pennell, 2 House of Lord's Cases, 522.

* Dartmouth College *v.* Woodward, 4 Wheaton, 636; Providence Bank *v.* Billings, 4 Peters, 562.

Argument for the State.

Mr. Charles Allen, Attorney-General of Massachusetts, contra:

It is true, that the various acts of Parliament conferring corporate privileges upon the plaintiffs in error declare that it is not the intention thereby to constitute them a corporation; and if merely saying that they are not to be a corporation, at the same time when all the essential qualities and privileges of a corporation are bestowed upon them, would make it that they are not in fact a corporation, then it would have to be admitted that they are not a corporation. But in ascertaining the legal character of the company, we are not to look at what they are called, but at what they are.

By what rule is the question to be tested? The essential characteristics of a corporation are not the same at different times and in different countries. The definitions of a corporation vary. Certain things were formerly deemed essential qualities of a corporation, which are so no longer. Thus, a common seal formerly had essential significance, in those days when it was considered that corporations could only act by deed; but now, in this country, the common seal is of no significance. It is a mere ornament, and without use.

The deeds of settlement of the company show that they strained all laws applicable to partnerships to the very utmost, in the endeavor to provide for the transaction of their business before applying to Parliament for corporate privileges. This company by their deeds of settlement, in fact, made provisions and took upon themselves powers which are inconsistent with the common law applicable to partnerships.

For instance, carrying on business by means of directors *exclusively*, and depriving the members of *all* voice in determining matters. This is one. But it was in vain, with the aid of all the provisions that were contained in the deed of settlement, or that could be included in a private agreement among individuals, to attempt to stretch the law of partnerships far enough to cover the business of this company.

Accordingly acts of Parliament were obtained, which gave them in direct terms the various powers; among these, that

they might sue and be sued in the name of one individual; that the company might sue and be sued by members of the company; that an amalgamation with another company should be binding on all of their members, whether consenting or not.

After these acts this company lacked no quality or characteristic of a corporation.

The exemption from individual liability is not now (however it may have been heretofore) a characteristic test of a corporation.

[Mr. Allen then replied (though he considered that the court would not get so far as to these points) to the arguments as to rights of the British stockholders under the treaty with Great Britain and of those of New York under the Federal Constitution.]

Mr. Justice MILLER delivered the opinion of the court.

The case of *Paul* v. *Virginia*,* decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that a corporation created by a State could exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense busi-

* 8 Wallace, 168.

ness in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, &c., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch

of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

Mr. Justice BRADLEY:

Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative

aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

JUDGMENT AFFIRMED.

THE COTTON PLANT.

A capture made within the State of North Carolina on the Roanoke River, 130 miles from its mouth, by a naval force detached from two steamers that had proceeded up the river, one about 80 miles and the other about 100, where they stopped in consequence of the crookedness of the stream and apprehensions of low water, held to be a capture upon "inland waters" of the United States, as that phrase is used in the act of Congress of July 2, 1864 (13 Stat. at Large, 377), and therefore not to be regarded as maritime prize.

APPEAL from the District Court for the Eastern District of Pennsylvania, condemning as prize the steamer Cotton Plant, and her cargo; the case was thus:

An act of Congress of July 2, 1864, passed during the late rebellion, enacts that "no property seized or taken upon *any* of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize;" and directs that all property so seized or taken shall be promptly delivered to the officers of the courts, to be dealt with in a way which the act prescribes.

The capture, which was the subject of this libel, took place on the 10*th day of May*, 1865, in North Carolina, at the mouth of Quankey Creek, on the Roanoke River, about half a mile

below Halifax, and about 130 miles above Plymouth, which lies at the mouth of the river, where the river falls into Albemarle Sound; the river at that point being narrow and shallow. An expedition, consisting of the United States steamers Ioscoe and Valley City, with a picket launch, went up the Roanoke River. The Ioscoe proceeded to Hamilton, which was 50 miles from the place of capture; the Valley City went up the river to a point 32 miles from the place of capture; both vessels stopping at the places where they did on account of the winding course of the stream and from fear of getting aground. An officer and six men were placed on the picket launch, attended by an armed crew from the Ioscoe. The launch, with these crews, proceeded up the river to the place of capture, and there seized the steamer with her cargo then on board, cotton chiefly, and putting on her some other cotton that they brought from a barn on land, recently landed from this same steamer and put in the barn for temporary safe keeping until reladed, sent her to Philadelphia, where she was libelled in the District Court and condemned, as already mentioned.

Her owners appealed to this court. There was no allegation of any breach of blockade.

Messrs. W. L. Hirst and T. R. Elcock, for the appellants:

It is matter of public history that Lee surrendered on the 9th day of April, 1865; Johnston, on the 26th day of the same month; and that thus ceased all hostilities and opposition to the United States, in Virginia and North Carolina. How, in the face of such facts, can the Cotton Plant, *on the 10th of May following all this*, have been the subject of lawful capture as prize under *any* circumstances?

But situated where she was, the steamer was not a subject for prize even if war had still been flagrant. The entire expedition by the picket launch was a *raid* rather than a lawful act of war. The act of July 2d, 1864, is conclusive; declaring as it does, that no property taken, upon any of the "*inland waters*" of the United States by the naval forces shall be regarded as maritime prize, and provides, as it also

does, another system for all such seizures. "*Inland*" means "*remote from the sea.*" In the case of *Mrs. Alexander's Cotton*,* the cotton was captured much as some of this was, on the Red River, a few miles above the point where it enters the Mississippi. This court declared that it could not be the subject of a libel as maritime prize, but should have been turned over to be treated as captured and abandoned property under the statutes of 1863 and 1864. It follows that the court below had no jurisdiction. The steamer and her cargo should have been "*promptly*" handed over to the agent of the Secretary of the Treasury. Want of jurisdiction in the court below, however, does not prevent this court from assuming jurisdiction on appeal for the purposes of reversing the decree rendered by the court below, and of vacating its unwarranted proceedings.†

Mr. C. H. Hill, Assistant Attorney-General, for the United States; Mr. Ashton, for the captors, contra:

Although Generals Lee and Johnston had surrendered in April, 1865, General Richard Taylor did not surrender Mobile till May 4th, six days before this capture, and General Kirby Smith did not surrender until after it, May 23d. These are public historical facts, known to all and of which the court takes notice. War, therefore, still existed, and this capture, to use the words of Lord Tenterden, was "a hostile seizure, made, if not *flagrante*, yet *nondum cessante bello.*"‡

The Roanoke River, where the capture was made, was not "inland waters" within the act of July 2d, 1864. It is a short navigable river, flowing directly into tidal waters. The term "inland waters" has been generally considered as applying to the lakes or to the immense rivers like the Missouri, Mississippi, Ohio, &c., which have their courses a thousand miles from the sea. To come within the act all the waters should be "inland." But water which runs directly into the sea is not "inland," though the term may

* 2 Wallace, 204. † Morris's Cotton, 8 Id. 507.

‡ Elphinstone *v.* Bedreechund, 1 Knapp, 316.

apply to such waters as flow into other waters that do discharge themselves into the sea.

This case is different from that of *Mrs. Alexander's Cotton.* That was cotton seized wholly on land and which grew on the plantation where it was deposited. No maritime capture was made with it, and there was nothing to distinguish it from any other property on land which is ordinarily exempt from condemnation as prize. The Red River, on whose banks that seizure was, enters the Mississippi at a distance of 334 miles from the sea.

Mr. Justice STRONG delivered the opinion of the court.

Whether the steamer Cotton Plant and her cargo of cotton were subject to lawful capture when seized, is a question that need not now be considered; for if it be conceded that they were, we are still of opinion that they were not liable to condemnation as maritime prize. The capture was made within the State of North Carolina, on the Roanoke River, and about one hundred and thirty miles above its mouth. It was made by a naval force detached from two steamers that had proceeded up the river from Albemarle Sound, one about eighty, and the other about one hundred miles, where they stopped, in consequence of the crookedness of the stream and apprehensions of low water. A picket launch, with a crew of six men, and two other boats' crews, were then sent forward, and they effected the capture. It was, therefore, an inland capture, though made upon a river which empties into an arm of the sea, and it was at a point where ordinary vessels of war could not safely go. There was nothing in the situation of the property that required peculiarly a naval force or maritime service to effect its capture. The seizure might as well have been made by a detachment from the army, as by one from the navy. It appears to us, therefore, that in view of the legislation of Congress, the property cannot be regarded as a maritime prize. By the seventh section of the act of July 2d, 1864,*

* 13 Stat. at Large, 377.

it was enacted "that no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts (or) as provided in this act, and in the said act approved March twelve, eighteen hundred and sixty-three." The language of this section is very comprehensive. It embraces *all property* seized or taken by the naval forces upon *any* of the inland waters of the United States. It would be difficult to give any reason for holding that the part of the Roanoke River upon which the Cotton Plant was seized is not described by the phrase "any of the inland waters of the United States," as understood by Congress. The river is wholly inland. It is true that it discharges its waters into Albemarle Sound, and that it is accessible directly from the ocean. But, in speaking of inland waters, Congress must have intended waters, within land indeed, yet waters where a naval force can go, and where naval captures could be made. And it is obvious that other waters than those of the great lakes were contemplated and designed to be included. The act was passed during the war of the rebellion, and it was part of a system devised for securing captured and abandoned property in States and districts declared to be in insurrection by the President's proclamation of July 1st, 1862. There was no war upon the lakes, and they were not within insurrectionary districts. If, therefore, the act does not apply to rivers, and to rivers accessible from the sea, upon which naval captures could be made, it could never have had any practical effect. But if it applies to captures upon rivers, what reason can there be for confining its operation to seizures by the naval forces upon rivers that run directly into the sea? The act speaks of captures upon *any* of the inland waters of the United States. It makes no distinction between rivers that run directly into the sea, and those that flow into others that discharge into the sea. If any distinction exists it is purely arbitrary and judicial, rather than legislative. Both classes of rivers are inland waters; equally such. Maritime service

can be no more meritorious or efficient upon one than upon the other. In the absence of express legislative enactment to that effect, no satisfactory reason can be given why a vessel captured on the Red River five miles above its junction with the Mississippi should be turned over to the courts to be treated as captured and abandoned property under the statutes of 1863 and 1864, which does not apply to a capture made on the Mississippi itself, five hundred miles farther from the Gulf of Mexico. Congress probably anticipated, especially in view of the state of the war when the act was passed, that most of the captures on the rivers would be made by the army, and thought it unwise to continue two modes for the disposition of the property taken.

Such being our opinion of the meaning of the seventh section of the act of July 2d, 1864, we must hold that the property captured and condemned in this case ought not to have been regarded as maritime prize, and subject to condemnation as such.

The decree of the District Court is therefore REVERSED, and the case is remanded, in accordance with the rule stated in *United States* v. *Weed*,* for further proceedings, if the government shall see fit to institute them.

MILLER *v.* MCKENZIE.

A writ of error dismissed as defective in respect to parties, where the suit was against four persons by name, and the writ recited that it was against two which it named, "and others."

ERROR to the District Court for the Northern District of Mississippi.

Pitzer Miller brought suit in the court just named against Larkin McKenzie, James Hamer, Joseph Hamer, and Ezekiel Wall, to recover the value of several bales of cotton.

* 5 Wallace, 62.

Syllabus.

Such proceedings were had that a judgment was rendered for the defendants, whereupon the plaintiff brought this writ of error; the writ reciting that the proceedings were between "Peter Miller, Larkin McKenzie, *and others.*"

Mr. P. Phillips, on the part of the defendants, now moved to dismiss the case for want of jurisdiction.

Mr. T. Wilson, contra.

Mr. Justice NELSON delivered the opinion of the court.

It appears, from an inspection of the record, that the writ of error is defective in respect to the parties. It is therein recited that the proceedings are between Pitzer Miller and Larkin McKenzie, *and others.* This defect has been held so many times in this court as fatal to its jurisdiction that it need be but mentioned to require a dismissal of the case.

MOTION GRANTED.

STOVALL *v.* BANKS.

1. A decree which adjudges a certain sum of money to be due from an administrator to each of the distributees of his intestate's estate, and awards execution to collect it, is a final decree. An added direction that the defendant be allowed, as payment to each of the distributees, the amount of any note held by him against them, and also that the several shares of the parties to whom the estate is awarded, shall be subject to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator, does not make the decree less final; especially when it does not appear that the administrator held any notes against any of the distributees, or that there were any unpaid fees.
2. Sureties in an administration bond are bound by a decree against their administrator finding assets in his hands, and nonpayment of them over, to the same extent to which the administrator himself is bound. They cannot attack collaterally a decree made against him on such a subject.
3. A decree of a court of competent jurisdiction awarding a sum in the hands of an administrator to distributees, cannot be attacked collaterally.

Statement of the case.

ERROR to the District Court for the Northern District of Georgia.

This was an action of covenant upon an administration bond, brought by the ordinary of Morgan County, Georgia, for the use of persons claiming to be distributees of the estate of Alfred Eubanks, deceased, against the administrator, who was the principal obligor, and against his sureties in the bond. At the trial the plaintiff offered in evidence the record of a suit in chancery in the Morgan County Superior Court, in which the persons for whose use this suit was brought were complainants, and the administrator, with others who also claimed to be heirs and distributees of the estate of the decedent, were defendants. By that record it appeared that the Superior Court adjudged the sum of $31,743.50, assets of the decedent's estate, to be in the hands of the administrator, and made an order distributing the whole. In the distribution $3820 were decreed to be paid to each of the complainants in the bill, and it was ordered that they should have executions for the respective sums adjudged to them on application to the clerk of the court after four days from its adjournment. The record further exhibited that executions were issued upon the decree, that no objection was made to the issue, and that to all of the executions the sheriff returned, "No property of the defendant or of the estate of Alfred Eubanks to be found upon which to levy."

In addition to this, however, the record showed that the court, after having fixed the sum due to each complainant, and ordered its payment, and after having awarded execution, went on to direct that the administrator should be allowed as payment to the respective parties, to be deducted from the amounts therein adjudged to them, the principal and interest of any note held by him against either of them; and also *that the several shares of the parties to whom the estate was awarded should be subjected to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator.*

When this record was offered in evidence the District Court rejected it, holding that the decree was not final, and consequently that it could not be read in evidence for any

purpose in the case. This action of the court was now here for review.

Mr. J. D. Pope, for the plaintiff in error:

The last sentence in the decree was the ground doubtless for the rejection. But it was insufficient. It does not appear that any portion of the litigation was held back for *future* adjudication. A decree in which nothing is so held back must be final. The right reserved in the present case is no more than a right reserved to pay in any specific piece of property or in a designated kind of currency. A decree is not less final in its nature because some future *orders* of the court may possibly become necessary to carry it into effect.*

Mr. D. T. Walker, contra:

1. The record of the suit in the Morgan County court, offered in evidence and rejected by the court below, was so incomplete that it would not support an action. Matters were left open by it, and until these were adjusted the decree had nothing specific and final in it. The case of *Sadler* v. *Robins*, 1 Campbell's Nisi Prius,† seems exactly in point. The attention of this court is directed to it.

2. If admitted, the decree would have such effect only as it had in the State court, and in that court it was only *primâ facie* evidence as to the surety. Judgments bind none but parties and privies, and there is no such privity between principal and surety.‡ If it had been admitted, and that effect had been given to it, the result in this case would have been the same.

3. Finally, the court of Morgan County and the Supreme Court of the State, we may add, on appeal, fell into the fatal error of holding the marriage, in virtue of which the distributees in this case claimed, to have been voidable instead of void.

[The counsel then went into an argument upon evidence

* Thompson *v.* Dean, 7 Wallace, 342; Railroad Company *v.* Bradley, Ib 575.

† Page 253.

‡ Bryant *v.* Owen, 1 Kelley, 369-371.

taken on commissions from the court of Morgan County and found in the transcript, to show that the distributees, for whose use the suit below was brought, claimed in virtue of a marriage which had no legal existence.]

Mr. Pope, in reply, went largely into this same evidence, to show that the conclusions of the opposing counsel could not on the evidence be sustained.

Mr. Justice STRONG delivered the opinion of the court.

The court below rejected the record of the suit in chancery in Morgan County Superior Court, holding that the decree was not final, and consequently could not be given in evidence for any purpose in the case. In this we think there was error. It cannot be maintained that a decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is not a final decree conclusive upon the parties. We do not overlook the fact that in this instance the court, after having determined the sum due to each of the complainants and directed its payment, and after having awarded execution, went on to direct that the administrator be allowed as payment to the respective parties, to be deducted from the amounts therein adjudged to them, the principal and interest of any note held by him against either of them. It also directed that the several shares of the parties to whom the estate was awarded should be subjected to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator. But we think the decree was not, for this reason, the less final.

Even if the sum decreed was left indeterminate, it was certainly adjudicated that the complainants were entitled to participate in the distribution, and the extent of their interest was defined. But it does not appear that there were any unpaid fees, or that the administrator held any notes against either of the distributees. All that these parts of the decree meant, therefore, was either direction to the sheriff respecting the execution of the *fi. fas.*, or liberty to the defendant

to move for a modification of the decree,—a motion never made. Plainly they were not intended to prevent the enforcement of the decree by executions against the administrator, for such executions were expressly allowed. It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of the liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final. They are all that is necessary to give to the successful party the full benefit of the judgment. In Daniell's Chancery Practice,* the effect of allowing the privilege of making such applications to the chancellor, is stated to be no alteration of the final nature of the decree. Says the author, "A decree with such a liberty reserved is still a final decree, and, when signed and enrolled, may be pleaded in bar to another suit for the same matter." So in *Mills* v. *Hoag*,† it was said that "a decree is not the less final in its nature, because some future orders of the court may possibly become necessary to carry such final decree into effect." In the case before us no future orders were necessary. The decree was ripe for execution, and execution was ordered.

We are referred, however, to the nisi prius case of *Sadler* v. *Robins*, 1 Campbell's Nisi Prius Reports.‡ Without dwelling upon the fact that those Reports have not always been considered safe authority, an examination of the case, as reported, will reveal that it does not sustain the ruling of the District Court. It was an action of assumpsit on a decree of the High Court of Chancery in Jamaica. The decree was for a certain sum, current money of the island, "first deducting thereout the full costs of the defendants expended in the said suit, the same to be taxed by George Howell, Esquire, one of the masters of the said court, and also deducting all and every further payment or payments which the said James Sadler and R. Haywood, or either of them, might, on or before the first day of January, 1806, show to the sat-

* Vol. 2, pp. 641, 642. † 7 Paige, 19. ‡ Page 253.

isfaction of the said George Howell that they or either of them had paid on account of their said testator's estate." This decree Lord Ellenborough held to be incomplete, and ruled that assumpsit would not lie upon it. But it must be observed that there were certainly unascertained deductions to be made. Costs had been expended by the defendants, and the plaintiff might have had them taxed, even if the defendants had not appeared to tax them. It was for this reason the decree was adjudged not complete. There was not, as in the present case, an award of execution to enforce the decree, and there could not have been, for there was a reference to a master to ascertain definitely its amount.

It has been argued on behalf of the defendants in error that the decree of the Superior Court, if admitted, would have been only *primâ facie* evidence against the sureties in the bond. Were that conceded it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. A principal in a bond may be liable beyond the stipulations of the instrument, independently of them, but so far as his liability is in consequence of the bond, and by force of its terms, his surety is bound with him. There may be special defences for a surety arising out of circumstances not existing in this case, but in their absence, whatever concludes his principal as an obligor concludes him. He cannot attack collaterally a decree made against an administrator for whose fidelity to his trust he has bound himself.

Much of the argument upon both sides of this case has been devoted to the consideration of the inquiry whether the Su-

Statement of the case.

perior Court of Morgan County and the Supreme Court of Georgia rightly adjudged that the equitable plaintiffs are entitled to a share of the estate of the decedent in the administrator's intestate. That is no longer an open question. It was concluded by the decree offered in evidence. It cannot be tried again in this case.

JUDGMENT REVERSED, AND A NEW TRIAL ORDERED.

STAGG *v.* INSURANCE COMPANY.

1. Where there is an express contract for the compensation of an insurance agent, no proof of a general custom as to such compensation is admissible which is in conflict with the contract.
2. Where such agent had received a general circular from his company, which contained in clear language the terms of his compensation, and had acted on that circular without complaint for several years, he is estopped to deny that he was employed on those terms.
3. The production of a circular of prior date, with other terms as to compensation, does not alter the case.

ERROR to the Circuit Court for the District of Missouri; the case being this:

Stagg became the agent of the Connecticut Mutual Life Insurance Company, in October, 1849, by his acceptance of a circular which contained this language:

"The usual compensation of agents, so far as we know, is 10 per cent. commission on the premiums, with one dollar for each policy, and 5 per cent. on the premiums on the renewal of policies."

This circular gave him certain instructions about his agency, and some suggestions as to the modes of inducing persons to insure with the company. In about a year afterwards he received another circular like the former one in its main purpose, but much more full and specific; a sort of short essay on the subject of life insurance, setting forth its

advantages, and pointing out the various reasons which the agent might advantageously suggest to persons whom he should address, why they should insure their lives, and do this with the Connecticut company rather than with any other company. This second circular, intended obviously for his careful perusal and study throughout, contained, in lieu of the language above cited, from the first one, the following:

"For your services, as above, you will be allowed a commission of 10 per cent. on the first premiums (cash and notes), and 5 per cent. on all subsequent renewal premiums, *so long as you continue the agent of the company.*"

The plaintiff received and acted on this latter paper for about fifteen years, when he was *discharged.* He now brought this suit, claiming some $3000, as the 5 per cent. commission on the renewal premiums of policies originally made by him as agent, which had been received by the company since he was discharged.

To support this claim he undertook to prove by other insurance agents that such was the custom as between insurance companies and their agents. But the court ruled as matter of law that there was an express contract in the case, and that the custom could not be admitted.

It also ruled that the later circular was substituted as a new contract instead of the first one, and that its fair construction was to limit the agency to the pleasure of the company, and to terminate the right of the agent to commissions on renewal premiums with the revocation of his agency.

These rulings, or more particularly the second one, made the error complained of.

Mr. J. C. Moody, for the plaintiff in error:

When Stagg received the second circular, he had already a contract with the company fixing the terms of his agency. He knew they could not be changed without his consent. If the company wanted to change them he might well have presumed that they would address him directly upon the

subject. He might have overlooked the little clause in question of the second circular entirely, covered up, as it was, in a mass of other matters; or, if it had caught his attention, he might have thought that it was meant for subsequently employed agents.

Now, if he did not notice the clause, that is to say, if he did not really apprehend it as a proposition directly made to him, how shall he be bound by it? It becomes, then, a main question in the case, "Is it so plain that the circular was meant to bring about a change in the terms of Stagg's agency, that the law will impute to him a recognition of such intent?" Let it be kept in mind that it takes two to make a bargain, and as many to *unmake* one. The use proposed to be made of this circular is to unmake a bargain of a year's standing; to convert the circular into a direct personal address to Stagg, saying: "Either give up your contract entitling you to an interest in renewals, or by which you claim such interest, or resign." But the Connecticut Life Insurance Company was possessed of no authority to deal with its agents in this military style. It had contracted with Stagg, and if it was dissatisfied with its contract, it should have addressed him directly on the subject, in the usual way of conducting a business correspondence. The clause in the circular looks like a trap to catch the unwary.

But assuming that the circular is the equivalent of a direct appeal in the usual mode of a commercial correspondence, proposing that Stagg accept of the new terms or resign, is his silence acceptance of the new terms? We deny that it is. If A. has bought a horse of B., and obtained possession at the agreed price of $200, would he be bound to take any notice whatever of a note from B. informing him that if he retained the horse he would expect $500 for him? If an auctioneer had sold a hundred horses, and delivered them, or a hundred houses, and delivered them, could he impose new terms upon the purchasers through the instrumentality of a circular like this? Of course not, in either case. Stagg, before and at the issuing and reception of the circular, had his contract with the company, and possession under it. He was

no more bound to answer a proposition from the company for new terms than was the company to answer a similar proposition from him. The limit of his right in that direction was to write to the company, saying: "Send me better terms, or I resign." The limits of the company's right with him was a direct note, saying: "Accept harder terms, or we turn you out." It could not even say, "Accept the harder terms, or *resign.*" If it had, he would not have been bound to resign. Nor would his failing to resign afford an argument that he had accepted the harder terms. He had, in that view, the right of continuing on under his old contract until *removed.*

So we may say that, admitting the clause referred to in the circular was meant for Stagg; that he so understood it; that he was bound to treat it as a direct proposition to accept the new terms or resign (all which matters we deny), it put no obligation upon him either of accepting the new terms or of resigning.

The company not being possessed of power to compel his resignation, but only to remove him, he might well wait to see, if after all, they would go so far as to turn him off. Possibly they might not do so.

We do not deny that the agency held under the letter of 1848 was held at the pleasure of the principal. Our proposition is that, being so held, the company never revoked it until they removed Stagg in 1864; that the agency was not revoked by the circular of 1849.

Mr. J. M. Krum, contra.

Mr. Justice MILLER delivered the opinion of the court.

The right of the insurance company to terminate the agency of the plaintiff, at its discretion, is not denied by his counsel, nor is there any serious effort to support the offer to prove the custom. Indeed, if the court was right in holding that the contract between the parties was expressed by the language of the second circular, it is quite clear there was no room for usage, for it is there expressly stated that

the commission on the renewal premiums, like those on the original premiums, was to be paid only so long as the plaintiff continued to be the agent of the company.

Nor can we doubt for a moment that the later circular must be held to represent the agreement of the parties as to compensation. After having received that circular and acted on it for fifteen years, received and adjusted his compensation by it, he is estopped to deny that it was the contract under which he acted. If there was any other contract it was for him to show it. He does not do this by producing the circular of the year previous. If there was anything fraudulent, unfair, or illegal in the new terms offered, or in the mode in which he was induced to accept them, he should have shown it, but he has not even attempted it.

We are, therefore, clearly of opinion that when it is shown that, as agent of the company, he received and acted upon that circular, he is bound by its terms as the measure of his compensation.

JUDGMENT AFFIRMED.

WARD v. UNITED STATES.

An ancient claim against the United States, founded on loan certificates issued by the Continental Congress in 1777, and sent to the loan office in Georgia, to be given in exchange for money when countersigned by the loan officer of that State, rejected; there being no sufficient evidence that the certificates were countersigned and issued as required by the legislation which authorized them; the same claim having been rejected in 1792 by Alexander Hamilton, then Secretary of the Treasury, and there being no sufficient evidence now that the facts then assumed by him as the basis of his conclusions were unfounded. The claim being moreover considered by this court as without equity.

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

The Continental Congress, on the 3d day of October, 1776, being in want of five millions of dollars to prosecute the war, resolved to borrow it on what were called loan-

office certificates, and to establish a loan office in each State for the convenience of the lenders of money. The resolution directed the appointment by the authority of the State of a commissioner of loans, whose duty it was to receive the certificates from the Treasurer of the United States, and to deliver them for such sums of money as he should be able to borrow. The faith of the government was pledged to redeem these certificates when countersigned by this officer.

In continuation of its policy on this subject, Congress, on the 15th of January and the 22d of February, 1777, provided for a further issue of this class of securities on the basis of the resolutions of the preceding October. Accordingly, certificates in proper form, duly signed by the designated Federal officer, were transmitted to the different loan offices of the country to be given in exchange for money, when countersigned by the loan officer of the State. Some of these certificates were sent to the loan office of Georgia, and among them forty-three, now in the possession of one Ward, as treasurer of a company called the Ohio Company, an old land company composed originally largely of Revolutionary soldiers, and which forty-three certificates made the foundation of the claim in the court below. His petition alleged that they were duly issued and in possession of a *bonâ fide* holder on December 23d, 1781, and about 1787 came into the possession of the Ohio Company, and he now claimed payment from the United States; representing apparently the Ohio Company, the real owner in the matter.

The Court of Claims decided at first in favor of the claim, but the matter was referred back by Congress for a further consideration.

On this second hearing the court found as matter of fact thus:

"2. That it was unknown and could not be ascertained who was the commissioner for the State of Georgia, or whether any such commissioner had been appointed and authorized to countersign such loan certificates; that at the time of the transaction there was no formal loan office in Georgia, and that a large part of the State was in the possession of the public enemy.

Statement of the case.

"3. That the said loan certificates were not signed by any duly authorized commissioner for the State of Georgia, but that they bore a certificate in the words following, to wit:

"'Countersigned: By order of J. A. Treutlin, Esq., Governor of Georgia. E. DAVIS, JR.'

"4. That there was no evidence to show that E. Davis, Jr., was a commissioner for Georgia, or that he was ever reputed to be such, or that he was authorized to countersign such loan certificates by the State or by the governor of Georgia, or that these are the veritable signatures of E. Davis, Jr.

"5. That interest on certain loan certificates, similar to those in action, was paid by the Treasury Department up to the 23d December, 1781, and that on twenty-nine of the certificates in action interest for four years has also been paid by the defendants, and duly noted and indorsed thereupon, and that no objection to these or similar loan certificates, or to the authority of E. Davis, Jr., to act as commissioner, was taken by the defendants until the year 1792.

"6. That no direct consideration or value ever passed to the defendants from the claimant or from any other person for the said loan."

In regard to the question about which the Court of Claims certified that no evidence showed it, to wit, whether E. Davis, Jr., was commissioner of loans for the State, &c., it appeared that the questions had been considered in 1792 by Mr. Hamilton, then Secretary of the Treasury, and that in a report dated the 28th of March, 1792, and published at the time, he stated as the result of "diligent inquiry" on the subject, that he had been unable to obtain evidence either of the appointment of E. Davis to the office of commissioner of loans for Georgia, or that he was ever known or reputed to have acted in that capacity; and that there was no evidence that the paper which he put in circulation had been issued for any purpose of the United States. With this report papers were transmitted to Congress tending to justify his conclusion, and to show that the certificates were placed in the hands of Davis by the executive council of Georgia, to purchase goods for the State. These papers con-

sisted of an affidavit of John Wereat, auditor of Georgia, and a long time resident there, denying that Davis, whom he well knew, was at any time commissioner of loans; of letters from Richard Wyllzhyr, commissioner of loans of the State in 1791, giving his opinion to the same effect, and a communication from Samuel Steick, of Governor Houston's staff, that the certificates were issued on State account.*

The payment of interest Secretary Hamilton conceived to have been unauthorized, and made by mistake of one of the treasurers, a certain Hillegas. He notes that such mistakes had occurred, and that there were examples of payment on both forged and counterfeit certificates; a payment which he observes "could not confer validity upon a claim originally destitute of it, though it might occasion hardship to individuals, who, on the faith of that payment, might have been induced to become possessors of these certificates for a valuable consideration." There was, however, no intimation that such was the case with regard to these certificates.

In 1795 the same certificates apparently were presented by one Tracy "for Benjamin Talmadge,"† who sought to have them funded, but, in consequence of the objections previously made to them by Mr. Hamilton, they were rejected.

According to a statement of Ward, found among the public documents,‡ the certificates were presented to the treasury in 1792 by Mr. Talmadge (who was treasurer of the Ohio Company from 1791 until 1825), and remained there until 1812. In that year having, according to this statement of Ward, been sold by Mr. Talmadge, treasurer of the company, at public auction, and bought by one John Delafield (though still according to Ward's statement considered the property of the Ohio Company), the certificates were withdrawn from the treasury, and Congress was asked to pay them, on the petition of Delafield, who states in his petition that he owned them, and wished them funded for his benefit.

* See American State Papers, class ix, vol. Claims, pp. 464–5.

† Ib. 179.

‡ See Report, No. 101, House of Representatives, 19th Congress, 1st session, by Mr. Little, from the Committee on Revolutionary Claims.

Statement of the case.

Before the committee of Congress which had charge of the subject, and of which Mr. Talmadge was chairman, many letters and documents were produced; letters from Major Hugh McCall, a revolutionary officer of Georgia, and others, to show that the claim was well founded; among them a letter giving a history of the two persons already named (Wereat and Steick), who had certified in the papers accompanying Mr. Hamilton's report, in a way which made against the claims; Major McCall's letters tending to prove that Wereat and Steick were uninformed of the passing events during Governor Treutlin's administration; also a certificate of Sheftall, Esq., stating that E. Davis did in the latter part of 1777 receive an appointment from Governor Treutlin "similar to that of commissioner of loans," and countersign certificates. Divers well-known persons testified that Mr. Sheftall's integrity was great, and his knowledge of events in the revolutionary war was supposed to be superior to that of any person living; that he had "an unusually strong memory," and that they would consider him in 1816 quite competent to speak about the matter in question.

The committee, of which Mr. Talmadge was chairman, reported in successive sessions of the Fourteenth Congress in favor of the payment.* But Congress did not pay the claim.

On the case as found by them the Court of Claims decided as matter of law:

"1. That no cause of action would arise upon the said loan certificates unless the same were duly countersigned by a commissioner for the State of Georgia.

"2. That in the absence of other evidence the indorsements of E. Davis, Jr., did not raise a legal presumption that E. Davis, Jr., was a commissioner for the State of Georgia, or that he was authorized to countersign such certificates, or that the signatures are the veritable signatures of the said E. Davis, Jr.

* See American State Papers, vol. Claims, p. 463, report 296, 1st session, 14th Congress; Ib. p. 496, report 325, 2d session of the same Congress.

"3. That the payment and cancellation of certain similar loan certificates and the payment of interest for four years upon certain of the loan certificates in action did not raise a legal presumption that E. Davis, Jr., was a commissioner for the State of Georgia, or authorized to countersign such loan certificates, and do not estop or conclude the defendants from controverting such authority and signature."

The claimant now brought the case here.

Mr. Stanbery and Mr. T. Ewing, Jr., for the appellant:

This claim is old, but not by the fault of the claimant; for until 1855 there was no forum provided by the United States to hear and decide it. Meanwhile, as is matter of historical knowledge, all the executive records in Georgia were destroyed by fire, in 1780.* And "the papers of the State of Georgia, on which a settlement was made by the United States with that State," were burned in August, 1814, with other records of the United States Treasury.†

Evidence of contemporaries abundant to prove the claim‡ perished before the United States provided a court to hear or perpetuate it. The time of the issue was not favorable to strict method in governmental transactions, and they were very loosely conducted. These certificates were executed and sent to Georgia while the Continental government was on the wing from Philadelphia to Lancaster, and thence to Yorktown.§ The date was left blank, and apparently also the name of the payee, to be filled up by the State agent, and they were charged in the first instance to nobody. The State was at that time invaded and this fund was sent to enable the local government and forces to make head against the enemy, which soon after overran the rest of Georgia, took its capital, and drove its executive officers from the State.‖

In a report to the House of Representatives, in 1797,¶ the

* Statement of Peter Deveaux, member of Executive Council, American State Papers, vol. Claims, p. 599.

† Report of Register of the Treasury, 1816, Ib. p. 466.

‡ Ib. 599. § 3 Journals, 400. ‖ Lee's Memoirs, vol. i, p. 68–70.

¶ American State Papers, vol. Claims, p. 202.

Honorable Dwight Foote, chairman of the committee on claims, said:

"It will be recollected that at the commencement of the war the United States were destitute of money, and during a long period of years afterwards were obliged to rely principally on credit in all of their important operations. Having at that time no settled National government, a regular system for conducting public business, especially money transactions depending on credit, was not to be expected. Great numbers of individuals were necessarily invested with the power of binding the public by their contracts. Almost every officer of the army, whether in the commissary department or otherwise, in different stages of the war, had it in his power to contract debts legally or equitably binding on the United States."

In view of these circumstances, this case should be judged without unfriendly presumptions from the absence of evidence which perished by time or fire before a court was allowed to hear or perpetuate it, or from that apparent want of method in the transaction which came of the exigencies of the Revolution, to promote which these certificates were expended.

But the positive recognition of the claim is great. The payment of interest for four years, which was of course indorsed on the certificate, gave them a currency which was above all reproach. They were payable to bearer. The report of 1792, doubtless prepared by a clerk, bears the signature of Alexander Hamilton, and the shadow of his great name seems to have thenceforth obscured the case. But that report was largely founded on the testimony of Wereat and Steick, whose knowledge, the far better information of Mr. Sheftall shows to have been bad, in regard to the relation which E. Davis, Jr., bore to these certificates; and in this tribunal no name, however high, and no error, however ancient or often repeated, if finally refuted, should stop the course of justice.

Mr. Talbot, for the United States, relied largely upon the report of Mr. Hamilton, whose knowledge was contempo-

rary knowledge, and who above all statesmen of the day would have paid any claim against the United States which was not plainly unfounded. There was no evidence whatever that he suffered his clerks to make reports for him on subjects involving the credit and good faith of the United States.

Mr. Justice DAVIS delivered the opinion of the court.

The United States deny their obligation to pay the certificates in controversy, because they were not countersigned in conformity with the prescribed regulation of Congress, nor used for their benefit. It will be conceded, if they were not executed as required by the legislation on the subject, that they were irregularly issued, and the United States under no obligation to pay them unless they are estopped in some way from interposing this defence.

It becomes, therefore, of importance, in the first instance, to ascertain whether E. Davis, Jr., who countersigned them, as he says, by order of J. A. Treutlin, governor of Georgia, was commissioner of loans for the State, and whether he negotiated them on account of the United States.

Fortunately, these questions were considered in 1792 by Alexander Hamilton, then Secretary of the Treasury, who was charged by Congress with their investigation. In his report of the 28th of March of that year, he states as the result of diligent inquiry on the subject, that he had been unable to obtain evidence either of the appointment of E. Davis to the office of commissioner of loans for Georgia, or that he was ever known or reputed to have acted in that capacity, and that there was no evidence that the paper which he put in circulation had been issued for any purpose of the United States. With this report papers were transmitted not only justifying the conclusion reached by the Secretary, but tending strongly to show that the certificates were placed in the hands of Davis by the executive council of Georgia to purchase goods for the State. These papers consist of an affidavit of John Wereat, auditor of Georgia, and a long time resident there, denying that Davis, whom

he well knew, was at any time commissioner of loans; of letters from Richard Wyllzhyr, commissioner of loans of the State in 1791, giving his opinion to the same effect, and a communication from Samuel Steick, of Governor Houston s staff, that the certificates were issued on State account.* This report, with the accompanying papers, was published, and, of course, read by the holders of the disputed paper. If in their power to deny it, interested as they were to do so, it would at least have been attempted. As no contradictory proof was furnished to the Treasury Department, always ready and willing to receive it, it is fair to infer that none existed. But this consideration did not prevent the holders of this paper from seeking to get it funded in 1795. They were met by the accounting officers of the treasury with the same objections taken by Mr. Hamilton, and, as these were not removed, the same result followed. In this condition of things, if the controversy had been between individuals, and there had been another forum to hear and decide it, it would have been resorted to at once, unless the decision of the first tribunal was accepted as final. But the holders of these certificates acted differently. Instead of taking an immediate appeal to Congress from the decision of the treasury, they waited until two decades had passed away. Nahum Ward says that these identical certificates were presented to the treasury in 1792, by Mr. Talmadge, and remained there until 1812, when they were withdrawn and Congress asked to pay them, on the petition of John Delafield, who professed to possess them in his own right.† Why this delay of twenty years? No reason is even suggested for it, and none can be given which is consistent with the conduct of men in the ordinary affairs of life. It is absurd to suppose that any one, informed of the grounds of objection to a controverted claim, if there were evidence to remove them, would delay action on the subject until

* See American State Papers, class ix, vol. Claims, pp. 464, 465.

† See Report No. 101, House of Representatives, 19th Congress, 1st session, by Mr. Little, from the Committee on Revolutionary Claims.

thirty-four years had passed since the transaction, out of which the claim had arisen, occurred.

It is said the forum was changed because of newly discovered evidence, and for proof of this we are referred to the reports of Mr. Talmadge, chairman of the committee, on the petition of John Delafield, made to Congress in 1816 with the accompanying papers. It is hard to reconcile these reports with the ownership of the property as claimed by Nahum Ward. He says the Ohio Company has owned the forty-three certificates since 1791, and yet Delafield stated in his petition that he owned them, and wished them funded for his benefit, and we must suppose the Congress of that day, and especially Mr. Tallmadge, believed the fact to be as stated by Delafield. At any rate the Ohio Company is estopped from denying the change of ownership, as Ward says that Mr. Talmadge, who was treasurer of the company from 1791 until 1825, was ordered to sell the certificates by the company, and did sell them at public auction to Delafield. It is true he couples this statement with another, that, notwithstanding Delafield's purchase, they were considered as the company's property; but this would place Mr. Talmadge in the predicament of aiding, while a member of the National legislature, to procure the payment of a disputed debt for a company of which he was an important officer.*

And why the necessity of selling at all unless there were an honest purpose of parting with the title to the property? It surely was as easy to prosecute a just claim before Congress in the name of a corporation as in the name of a natural person. If, then, Delafield purchased the claim free from any trust, as we are bound to suppose in order to relieve the Ohio Company and their treasurer from censure, he did it at his own risk and for a venture, and took it subject to all equities. He cannot plead want of notice of the defences interposed by the United States, because the company of whom he bought, and of which he was a member,

* See Report, No. 101, House of Representatives, 19th Congress, 1st session.

were well informed on the subject. It does not appear how or when the title got back in the Ohio Company, nor is it of any consequence, as the company occupies the same position in this litigation that Delafield would had he retained the ownership of the certificates.

But, apart from this view of the subject, these reports do not change the status of the parties to this controversy. The evidence they furnish comes too late, is chiefly hearsay in its character, and should have no weight in the determination of the questions in dispute. It consists mainly of lengthy letters from Major Hugh McCall, of Georgia, addressed to Mr. Talmadge, which seem to be in the nature of arguments against the position taken by the government. One of them is devoted to a futile effort to prove that Wereat and Steick were uninformed of the passing events during Governor Treutlin's administration. It is true the certificate of Mr. Sheftall tends to show that Davis did act in the capacity of commissioner of loans, but although it is certified that he had an unusually strong memory, we place but little reliance on his recollection in 1816, of what transpired in the commissary department of Georgia in 1777–78. Especially do we distrust his memory of these events when it is in opposition to the recollection of others, equally trustworthy, who testified in 1792, twenty-four years nearer the time when the certificates were put in circulation.

It is urged that the United States is not in a position to contest the validity of these certificates, because of the payment of interest for a period of four years. The report of Mr. Hamilton takes the ground that the interest was paid by the mistake of the treasurer, and without authority, and therefore not binding on the United States. It is very clear that there was no *purpose* on the part of the government to ratify the acts of Davis, for the paper bearing his name was rejected, as soon as the attention of the proper department was called to it. But it is not necessary to discuss the general rules of law on the subject of ratification, and to show in what state of case they are applicable, for, in our judgment, under the circumstances of the claim, as they appear

in this case, there is no equity raised in favor of the Ohio Company against the United States.

Without pursuing the subject further, or noticing the various reports in Congress adverse to this claim, we are satisfied it is not a just charge on the treasury of the United States.

JUDGMENT AFFIRMED.

Mr. Justice FIELD, dissenting:

I dissent from the judgment of the court in this case. I am of opinion that the demand of the plaintiff is a just obligation of the United States, as binding as any part of the public debt of the country.

MERCHANTS' BANK *v.* STATE BANK.

1. Evidence of powers habitually exercised by a cashier of a bank with its knowledge and acquiescence, defines and establishes, as to the public, those powers, provided that they be such as the directors of the bank may, without violation of its charter, confer on such cashier.
2. Where the authority of the agent is left to be inferred by the public from powers usually exercised by the agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject-matter.

   Thus, if in the case of a bank having power by its charter to buy and sell exchange, coin and bullion, its cashier have habitually, with the knowledge of the bank, dealt with the public as authorized to buy and sell exchange, then the power to buy and sell coin also (the right to do both being conferred by the same clause of the charter), may be inferred by a jury.

   So, if a cashier is shown to have frequently pledged in writing the credit of his bank for large amounts in the usual course of business, with the knowledge of the bank—borrowing and lending its money, and buying and selling exchange—doing all this usually by cashier's checks, though sometimes by certificates of deposit and sometimes by memoranda, the transactions being uniformly made in faith of the implied powers of the cashier, without inquiry as to special authorization, and such is shown to be the usage of other banks as above stated, it is evidence from which a jury may infer that such cashier is authorized to pledge the bank's credit by certifying a check to be "good;" this last method being one not distinct in its nature from the others named, but similar

to them, and involving in form and substance the same obligation and consequence to the bank.

3. These principles hold even though it is not shown that any cashier of any bank in the particular place where the transaction which was the subject of the suit arose, ever used his powers to purchase coin, or ever certified a check to be good.
4. The National Currency Act of 1864, authorizing the banks created under it to buy and sell coin, a bank having coin in pledge may sell and assign its special property; in which case the assignee will become vested with the legal rights of the assignor.
5. If a cashier, without authority to buy coin in behalf of his bank, do so buy it, and it goes into the funds of the bank, the bank is liable upon the principle of *quantum valebat.*
6. The clause of the National Currency Act of 1864, which directs that "the usual business" of the banks created under it shall be transacted "*at* an office or banking-house in the place specified in its organization certificate," does not prevent the purchase of coin by one bank at the banking-house of another.
7. The certifying as "good" of checks given in the course of business for convenience, is not within the prohibition of the 23d section of the National Currency Act of 1864, which forbids the issue of post notes or "*other notes*" to circulate as money, other than the ordinary bank bills authorized by the act.
8. A stamp, such as the Internal Revenue Act requires, for the acceptance of a draft, is not required on the marking of a check "good;" "certified checks" being taxed specifically in another way.

ERROR to the Circuit Court for the District of Massachusetts, in a suit by the Merchants' National Bank against the State National Bank, upon three checks of Mellen, Ward & Co., on the latter bank, marked "good" by its cashier, and given to the former bank; amounting, the three, to $600,000.

The case, as developed by admitted facts and by the plaintiff's evidence alone, was thus:

Both banks were associations organized under the National Currency Act of 1864; the State Bank with a capital, as its articles of association seemed to show, of $1,800,000, capable of being increased.

Under this National Currency Act the affairs of "every such association shall be managed by not less than five directors, one of whom shall be president." The directors during their whole term of office must be citizens of the

United States. Three-fourths of them must have resided in the State one year preceding their election, and reside there during their continuance in office. Each must own at least ten shares of stock, and as such owner he is personally liable to twice their value. All are to be sworn to the diligent and honest administration of the affairs of the association.

The total liabilities of any person, or firm or association, to the bank, shall never, by section twenty-nine of the act, exceed one-tenth of its capital. Bonds are to be deposited as security for the bills of the bank, which by section twenty-one may never exceed 90 per cent. of the bonds deposited. Section twenty-three enacts that no bank shall issue post notes, or *other* notes, to circulate as money than such as are authorized by the foregoing provisions of the act, and by various sections* care is taken to restrain the circulation, and to secure its redemption.

The act by its eighth section enacts that each association organized under it may, "by its board of directors appoint a president, vice-president, cashier, and other officers, *define their duties*," &c., &c. And it authorizes the association to exercise all such *incidental powers* as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; *by buying and selling* exchange, *coin*, and bullion, &c. The directors are empowered to regulate by by-laws the manner in which its general business shall be conducted. "And its usual business," says the same section, "shall be transacted *at* an office or banking-house located in the place specified in its organization certificate."

The directors of the State Bank defined the duties of their cashier, no otherwise than that by the 1st article of the by-laws he was to notify corporate meetings, and act as clerk at them; by article 7th was to be responsible for moneys, funds, and all other valuables of the bank; by article 11th

* §§ 22–27, 47, 50.

"was—(either he or the president)—to sign all conveyances of real estate voted by the directors; and by article 17th was —(either he or the president again)—to *sign* all contracts, *checks*, drafts, receipts," &c.; and also all indorsements necessary to be made by the bank.

Evidence, however, showed that, as matter of fact, the cashier of the Merchants' Bank was intrusted by its directors with large and comprehensive powers in dealing with the funds; so much so that instead of his transactions going regularly, as they occurred, through the books of the bank, and being credited or debited to the accounts to which they severally belonged, there was opened on the books of the bank one general account with the cashier, in which all the debits and the credits arising out of them, were entered to *his* debit or credit, that these transactions, thus entered on the books, embraced the giving of checks in lieu of bills where discounts were made; giving checks for the purchase of exchange; giving checks for money borrowed of other banks; that the amount of checks thus given for exchange, and in lieu of bank bills on discounts, during the five months prior to the transaction which was the subject of this suit, was $2,500,000, and in addition, that the amount of such checks given for money borrowed of other banks during the same period, was $1,547,000. And that regular printed blank checks were kept by the bank to facilitate these operations of their cashier.

So also evidence derived from the officers of twenty-two banks of Boston, in relation to the dealings of such banks with each other, showed a usage by which, without by-law or vote, powers were intrusted to cashiers of such banks to borrow and lend the money of their banks of and to each; to buy and sell exchange of and to each other, and in all such transactions to pledge the credit of their respective banks—usually by cashiers' check, sometimes by certificates of deposit or memoranda; that these transactions were frequent, involving large sums of money, and that they were uniformly conducted in faith of the implied powers of cashiers, without inquiry; but the usage shown with regard to

the powers exercised by the twenty-two cashiers failed wholly to show that any one cashier had ever used his powers to the purchase of gold coin, or had ever certified checks to be "good." Nor was it shown that the cashier of the State Bank had, either before or since the transactions on which this suit arose, ever certified as good the check of either depositor or stranger.

In fact, the Supreme Court of Massachusetts had decided in *Mussey* v. *Eagle Bank** that a *teller* could not so certify checks; placing the decision on grounds that seemed general. Such a power, said the court in that case, "is in fact a power to pledge the credit of the bank to its customers; a power which, by the constitution of a bank, can alone be exercised by its president and directors, unless specially delegated by them, and consequently it cannot be implied as a resulting duty or authority in any individual officer." Touching the matter of usage, the court said:

"But if a usage had been proved of the certifying by the teller that the check is good, to enable the holder to use it afterwards at his pleasure, such a usage would be bad and could not be upheld. It would give to bank checks, which are intended for immediate use and are the substitute for specie, in the ordinary transactions of business, the character of bills of exchange, payable to the bearer, the bank being the acceptor, and payable at an indefinite time. It would lead to loans to favored individuals, without the usual security. It would substitute checks for cash in the hands of tellers who receive them, and would confer the power upon a single officer to pledge the credit of the bank by the mere writing of his name; a power never contemplated by the legislature, nor intended to be conferred by the stockholders."

On the other hand, Congress, by its Internal Revenue Act of June 30, 1864,† under the head of "Banks and Banking," had laid "a duty of one-twelfth of one per cent. each month upon the average amount of circulation issued *by any bank*, &c., including as circulation all *certified* checks, and all

* 9 Metcalf, 313.

† 13 Stat. at Large, 278.

notes and other obligations, *calculated* or intended to circulate or to be used as money."

In this state of pre-existent laws and usage, or absence of it, the plaintiffs' evidence showed that the Merchants' National Bank of Boston were applied to on the 22d of February, 1867, by Ward, Mellen & Co., brokers, with the statement that they were about to purchase in New York, "for responsible parties," three or four hundred thousand dollars of gold, and with the request that the Merchants' Bank would take and pay for the gold as it came from New York at $1.25 in currency (about 15 per cent. below the value at that time in currency); that these responsible parties would be prepared to take it in a few days, and that when thus taken away, it would go through probably some other bank, mentioning, perhaps, the State Bank.

There had been previous transactions in gold between the bank and Mellen, Ward & Co.; and the proposition now made was accepted upon the terms previously fixed in them, viz., that the gold should be a purchase by the bank, with a right of repurchase by Mellen, Ward & Co., on repayment of the cost and a premium "equivalent to interest on the amount invested by the bank on the gold."

Under this arrangement, the Merchants' Bank, on notice from Mellen, Ward & Co., on the 26th and 27th of February, took from the Second National Bank, and paid that bank for the same, $400,000 gold certificates, which, so far as appeared, had never been in the hands of or owned by Mellen, Ward & Co., and added the same to the gold of the bank. No obligation, note or memorandum accompanied the transaction as made; it being, as the direct testimony of the cashier and teller of the Merchants' Bank stated, and so far as the transaction appeared on its face, a sale of gold with a right to repurchase; although both the officers named, in written instruments, spoke of it as a loan.

On the 28th of February, Smith, the cashier of the State Bank, came to the Merchants' Bank, *in company with Carter*.

one of the firm of Mellen, Ward & Co., and said to the cashier there, "We have come in to get an amount of gold," and that he "would pay for the gold by certifying the checks when he saw that the gold was all right." The coin certificates to the amount of $400,000 were by the cashier of the Merchants' Bank, "passed out *to Mr. Smith, cashier of the State Bank.*" He counted them, and then handed to the cashier of the Merchants' Bank the two checks of Mellen, Ward & Co., on the State Bank, certified "Good, C. H. Smith, cashier." These checks were certified, not at the State Bank, but in the Merchants' Bank, "on the spot;" and after it was ascertained that the gold certificates received corresponded with the amount for which the checks had been drawn. They had no stamp on them but the usual two cent bank check stamp, that is to say no such stamp as the law requires for an acceptance. On the same day, Smith, the cashier of the State Bank (*Carter accompanying him*) applied to and received from the teller of the Merchants' Bank $60,000 more of gold, which the bank had previously purchased at the request of Mellen, Ward & Co., upon the same terms as above stated. The cashier was absent, and the teller took from Smith in payment a check for $75,000, similar to ones already mentioned, for the reason, as he says, that "I delivered the gold *to the cashier of the State Bank.*" Although it appeared that Mellen, Ward & Co. had been somewhat speculating in a copper stock, and had once obtained a loan on it from the Merchants' Bank, and that the cashier of the bank had a small interest with them in the stock, there seemed to be no proof in the case as it stood before this court, that is to say as it was presented by the plaintiff's evidence alone, that the cashier of the Merchants' Bank, in the delivery of the gold, or the cashier of the State Bank in certifying the checks in payment for it, acted otherwise than with good faith.

On or before the 1st of February following, Ward, Mellen & Co. failed. The subsequent history of the checks was thus given by Mr. Haven, the president of the plaintiff or Merchants' Bank.

Statement of the case.

"The first time I saw these checks was a little after twelve o'clock, on Friday, the 1st day of March, 1867. I took the checks in my hand a little after one o'clock, on that day, and presented them to the cashier of the State Bank. I said to him, 'I thought you were coming in to pay the money for these checks early this morning.' The cashier replied, 'Yes, I am going out now to attend to it, and get the money.' 'Get the money?' said I; 'didn't you have the money—the gold? were not the gold certificates delivered to you?' 'Yes,' said he; 'I *had* them here, but they are not here now. I am going out to get it, and will come in and attend to it.' I spoke rather abruptly, and said that he should do it immediately. He looked up and said, '*You hold the State Bank.*' I came back and laid the checks on the desk of the teller. About a quarter before two o'clock I took the checks into the directors' room of the State Bank. There were three or four gentlemen present. Either Mr. McGregor (who was a former president of the bank) or Mr. Dana, introduced me to the president of the bank, Mr. Stetson. I presented the checks to Mr. Stetson, the president. Mr. Stetson took the checks and deliberately read them, one by one, aloud to his directors, and those gentlemen who were present. He then said to me that they had not authorized their cashier to certify checks. He turned to Mr. McGregor and said, 'Have we, Mr. McGregor?' Mr. McGregor made no reply. I then said, 'He *has* certified checks, and those checks were given to the cashier of the Merchants' Bank for gold delivered to him, the property of the Merchants' Bank, and I want payment for that gold.' The gentlemen were considerably excited, and I wanted action. I said to them, 'I have just heard that there is trouble at the sub-treasury. I think you had better go down there; perhaps you will find your gold there, and if you wish it, I will go with you.' The gentlemen went, two of them, Mr. Stetson, the president of the bank, and Mr. McGregor, the ex-president, and we entered the room of the assistant treasurer. I think I introduced them, saying to the assistant treasurer, 'These gentlemen have come in to see if there has not been a large amount of gold placed to the credit of the State Bank.'"

Farther than as it was to be inferred from this testimony, it did not appear whether the State Bank had or had not

got the use of the gold. No proof was given that it did not go to that bank. However, that particular fact might have been, the State Bank refused to pay the checks of Mellen, Ward & Co., certified "good" by Smith, its cashier, and the Merchants' Bank sued in assumpsit for the amount; some of the counts being special on the transaction, others on a *quantum valebat*, *money had and received*, &c.

The case was tried before CLIFFORD, Presiding Justice, and the plaintiff having closed his case, the defendants moved the court to instruct the jury that the evidence was not sufficient to warrant them to find a verdict in favor of the plaintiff, under any of the counts in the declaration, and that as matter of law, the verdict of the jury upon each of them should be for the defendant; and this instruction the court gave.

The case being brought here on error, was elaborately argued at the last term.

Messrs. S. Bartlett, J. G. Abbott, and W. M. Evarts, for the plaintiff in error:

The contest turns, it is submitted, upon the following propositions, which, if successfully maintained by the plaintiff, are decisive on the question whether the case was properly withdrawn from the jury:

1. If in the absence of regulation by charter, by-law, or vote, and with no evidence as to the powers actually exercised by the cashier, and acquiesced in by the bank, nor of the powers usually intrusted to cashiers of banks established in the same community, the court can judicially know what the powers and duties of such cashiers are; yet it is a principle perfectly well settled, that under the foregoing circumstances (and even when by-laws and votes on this subject exist), evidence of the powers habitually or usually exercised by the cashier, with the knowledge and acquiescence of the bank, defines and establishes as to the public these powers, provided that the powers thus exercised may, without violation of the charter, be by the directors or corporation conferred on such cashier.

2. The evidence offered by the plaintiffs at the trial of the cause was competent and sufficient to have been submitted to the jury, on which they might lawfully find that the powers habitually or usually exercised by the defendants' cashier, with their knowledge, embraced the power to make for the defendants, the contracts declared on or some one or more of them, and that such powers might, without violation of the charter or law, be confided to such cashier.

1. The soundness of the first of the above propositions is obvious. To hold that the public may not safely confide in the existence of powers which by charter can be lawfully delegated, and which are openly exercised, but must investigate and find if those powers have been the subject of by-law or vote, and act accordingly, would not only suspend the business of commerce, but tend to make transactions with corporations a snare and a cheat.* So far as the public are concerned it is immaterial whether the powers thus exercised are in disregard of the by-laws of the corporation or not, provided they are within the corporate powers conferred by the charter.†

2. Then was the evidence offered by the plaintiffs competent and sufficient to be submitted to a jury in support of the claims made by the declaration?

The main original contract (laying aside for the present the question of certified checks), and of which evidence (sufficient at least to be submitted to the jury) was offered by the plaintiffs, was a contract for the purchase and delivery of gold by the plaintiffs to the defendants. The charters of both banks in terms authorized them to carry on the business of banking, by "*buying and selling exchange, coin and bullion*," so that the contract set up by plaintiffs was within the

* Bank of the United States *v.* Dandridge, 12 Wheaton, 64–70; Minor *v.* Bank of Alexandria, 1 Peters, 46–70; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; Nicoll *v.* American Insurance Company, 3 Woodbury & Minot, 530; (Maule, J.) in Smith *v.* Hull Glass Company, 8 C. B., 668, S. C. 11 Id. 397.

† Agar *v.* Athenæum Insurance Company, 3 C. B (N. S.) 725; Royal Bank, &c. *v.* Turquand, 6 Ellis & Blackburn, 327; Prince of Wales Insurance Company *v.* Athenæum Insurance Company, 3 C. B. (N. S.) 757 note.

corporate powers of both parties. The transaction then being legitimate, and in its character forming part of the business of both banks, the principal question is, have the plaintiffs lost this large sum of money by improperly trusting in the assumed powers of the defendants' cashier. The buying and selling of gold must of course be intrusted, under general powers, to some officer of the bank. A vote of directors authorizing each daily or hourly transaction would be impracticable. In this attitude of the case, we ask attention to the evidence offered by us as to the powers habitually exercised with the knowledge of the defendants by their cashier, to the end that the correctness of the ruling withdrawing the case from the jury may be determined; and attention also to the evidence of the officers of numerous other National banks established at Boston, as to the powers and duties usually exercised by their cashiers in dealing with the public and with other banks. The competency of this evidence has been thus declared by this court.*

"Considering that all insurance companies in Boston have similar charters, and the same kind of officers to conduct their business, we think that there is competent evidence that presidents of insurance companies in that city are generally held out to the public as having authority to act in this matter, viz., to make oral insurance."

The legal principles that are to govern the application of the testimony in the case we submit, are these:

Where the authority of an agent is left to be inferred by the public from powers usually exercised by the agent, *it is sufficient if the transaction in question involves precisely the same general powers* though applied to a new subject-matter. Were this otherwise, the general authority to make purchases in the usual course of the business of the principal, could never be relied on, unless upon proof of previous purchase of the identical article, the authority to purchase which is in con-

* Commercial Insurance Company *v.* Union Insurance Company, 19 Howard, 318.

troversy. Thus if it be shown that the defendants' cashier had habitually, with the knowledge of the bank, dealt with the public as authorized to buy and sell exchange, and still more if that power is shown to have been habitually exercised by the cashiers of all other banks established in the same community and "having similar charters," then the power to buy and sell gold (the right to do both which is conferred by the same clause of the charter) may be inferred by the jury.

Again, if a cashier is shown to have usually or frequently *pledged in writing the credit of the bank* in the usual course of business, with the knowledge of the bank, and such is shown to be the usage of other banks, as before stated, it is evidence from which the jury may infer that he is authorized to pledge that credit in all transactions authorized by the charter, and which could lawfully be intrusted to a cashier.

It is not contended by the plaintiffs that a power to buy may be inferred from an exercise of a power to sell, however frequent that exercise may have been, nor that a power to indorse may be shown from numerous instances of signature as promissor. The contracts in such cases are wholly dissimilar; acts distinct in their nature. But when the powers exercised are shown to be of the same character, *involving both in form and substance the same identical obligation, and the same consequence to the principal*, and in the course of his business, it cannot be necessary to show that in their previous exercise they have been applied to contracts for the same article.*

The American Leading Cases† thus speak:

"With regard to the limits of the general agency, which is created by a series of acts or course of dealing, the language of Lord Eldon's, in *Davison* v. *Robertson*,‡ has generally been considered as defining the principle with accuracy. In that case the position had been stated that an indorsement *per* procuration required a special mandate, but Lord Eldon's opinion was,

* Tripp *v.* Swanzey Manufacturing Company, 13 Pickering, 291.

† Edition 1857, p. 573. ‡ 3 Dow, 219, 229.

that no such thing was absolutely necessary: 'for if *from the general nature* of the acts permitted to be done, the law would infer an authority; the law would say that such an authority might exist without a special mandate.'"

The author goes on to say:

"This is illustrated in *Commercial Bank of Erie* v. *Norton*."*

In the case thus cited, Cowen, J., states the exact principles thus:

"It is not necessary, in order to constitute a general agent, that he should have done before *an act the same in specie with that in question*. If he has usually done *things of the same general character and effect* with the assent of his principals, that will be enough."

The doctrine thus stated was in that case applied where the agent of a firm, who with their knowledge and assent, was in the habit of drawing bills and making notes and indorsements for them, had made an acceptance, *but no proof was offered* that he *had ever previously made an acceptance*. The principal was charged. The case is cited as sound, in Parson's Mercantile Law,† and Paley's Agency.‡ In *Watkins* v. *Vince*,§ Lord Ellenborough carried the doctrine so far as to hold that a son who had signed for his father in three or four instances and had accepted bills, could bind the father *by a guarantee*. In *Prescott* v. *Flinn*,‖ C. J. Tindall says:

"It may be admitted that an authority to draw does not *impart in itself* an authority to indorse bills, but still the evidence of such authority to draw is *not to be withheld from the jury, who are to determine on the whole evidence*, whether such authority to indorse exists or not."

The evidence to which these principles are to be applied, appears in the statement of the case.¶ It shows that the cashier of the defendants was intrusted by them with powers

* 1 Hill, 502. † Page 135, note. ‡ Edition of 1856, p. 169, note.
§ 2 Starkie, 324. ‖ 9 Bingham, 22. ¶ See it *supra*, p. 607.

the largest and most comprehensive in dealing with the funds of the bank, giving its checks, pledging its credit, and making its contracts and purchases. Similar powers were openly and habitually exercised by the cashiers of banks in Boston, in the dealings of such banks with each other.

In view of such proofs, we ask if it ought to be determined that there was *no* legal competent evidence proper to be submitted to a jury, from which they might infer that, as among the wide powers openly exercised by Smith, the defendants' cashier, in numerous instances and for large amounts, was the authority to purchase exchange, he had or not also intrusted to him the power to purchase gold, and thus to find their verdict for the plaintiffs upon the counts framed upon such purchase?

We next submit, that upon the evidence the question, whether the defendants' cashier, clothed as he was with the powers stated in the proofs, had or not the *incidental power* to certify the checks declared on, was fit to be submitted to the jury.

In discussing this point we assume that there was evidence competent to be submitted to the jury to show the large powers intrusted to the cashier to pledge the credit of the bank—that the jury might well find that he had power to make the purchase of gold from the plaintiffs, and that he might have given a cashier's check on his own bank, a certificate of deposit, or a credit for the purchase-money.

Now, the form of pledging the credit of the bank at the moment the gold was received, viz., by certifying the checks of the parties for whom the arrangement was made, is of the same character and nature as a cashier's certificate of deposit, checks, or memorandums of credit, referred to in the history as to usage. Like these, it is an absolute and not a contingent promise to pay, and in view of the wide powers exercised by the defendants' cashier, the jury had a legal right to infer that this mode of pledging the credit of the bank, suited as it was to the circumstances (the cashier having full authority to make the purchase), was within his delegated powers.

The view of the court below rests on the doctrine, that if a charter prescribes the mode in which the officers of the bank must act or contract, that mode must be strictly pursued, and the power cannot be delegated. But this doctrine has no application in this cause, since the National Currency Act prescribes neither the mode nor the officers by whom the acts or contracts necessary to the course of business shall be made, but merely confines the general oversight and management to a board of directors.

This precise question as to power of the directors to authorize other officers of a bank, by a general vote, to exercise in the name of the bank, *at all times*, the power to borrow money and give notes, has been raised and carefully discussed in a case where the charter, in terms, provided "the affairs of the company shall be conducted by the directors," and the careful judgment of Chief Justice Tilghman, displaying, as it does, the practical difficulties which would arise from a denial of the power, seems conclusive.*

If the power to borrow money, at all times, for the purposes of the bank, and give notes therefor, can be delegated by the directors to the cashier, the power to purchase exchange and gold, in pursuance of the charter, can be so delegated. Whether the power to delegate to a cashier authority to certify checks exist, has nowhere been settled. As to conferring such authority *on tellers by usage*, the power is negatived in Massachusetts,† while in New York it is settled that such power may be conferred,‡ and a statute of the United States recognizes certified checks, and makes them in common with the circulation subject of taxation.

Whether the control of the great leading business for which a bank is created, viz., loans and discounts, can be

* Ridgway *v.* Farmers' Bank, 12 Sergeant & Rawle, 256–261. As to the incidental powers of banks to borrow money, see Beers *v.* Phœnix Glass Company, 14 Barbour, 358.

† Mussey *v.* Eagle Bank, 9 Met. 306.

‡ Farmers' and Mechanics' Bank of Kent County, Maryland *v.* The Butchers' and Drovers' Bank, 4 Duer, 219; affirmed on appeal, 16 New York, 125; Willets *v.* Phœnix Bank, 2 Duer, 121.

delegated, may be doubted. The prevailing practice known and acted upon by the public, is to apply to a board of directors for discounts. But it does not follow that the whole of the other functions of a bank can only be performed by a vote of directors, upon each hourly transaction. The authorities cited above are repugnant to any such doctrine.

But if the power to certify was not under the evidence fit to have been submitted to the jury, still the right to recover the purchase-money for the gold, stands unaffected by the giving of the checks. They were received in the faith that, in dealings of bank with bank, the defendants' cashier had authority to certify them. If they were void, no payment has been made. It is equivalent to a payment in forged bills. The debt remains.

No proof was offered by defendants that the gold purchased of the plaintiffs was not carried to the defendants' bank and placed with their funds; although if it was not so, the onus is on the defendants.

Proof that the gold was so carried and placed is found in the occurrences on the occasion of the demand made at defendants' bank of its cashier and of its directors. The cashier of the defendants admitted that he had had the gold certificates in their bank; and that the State Bank was held. So at the interview of Mr. Haven with the defendants' directors, when he stated to them that their cashier had certified checks, and those checks were given to the cashier of the Merchants' Bank for gold delivered to him, the property of the Merchants' Bank, and that he wanted payment for that gold, there was no denial that the gold had been received by the State Bank, but merely a statement that the directors had not authorized their cashier to certify checks.

Messrs. B. R. Curtis, C. B. Goodrich, and B. F. Thomas, contra, and in support of the ruling below:

The main question is, whether the cashier had authority to bind the defendants in the contracts declared on.

I. Had he authority to certify the checks?

It is clear that no *express* authority had been given to him

to do so. Certainly no such power was conferred upon him by the act of Congress, from which the corporation derives all its powers and functions; for by *it* the entire control and management of the bank are vested in the directors, and with this view, both as to qualifications and responsibility, their office and trust is most carefully guarded.

If, then, the cashier was authorized in any way to certify the checks, he must have been so through the action of the directors. But no such power was conferred upon him by any by-law; nor by any vote of the directors; no ratification or sanction by the directors as a board, or separately, of the use of such power by him; no evidence that he ever in a single instance, before or since the acts in question, made any certificate upon any check of depositor or stranger.

How then, if at all, have the directors clothed him with the power to make the contracts declared on? They had the power to appoint a cashier and to "define his duties." But they had no power to transfer or make over to him the duties and powers of the directors. They had power only to point out, and *define* what he was to do, not trenching upon but in just subordination to their own powers and duties.

Though the power to define the duties of the cashier is vested by the act of Congress with the directors, we concede that the appointment of a cashier devolves upon him various powers and duties. The inquiry then is as to their nature and extent.

Speaking in general terms, they are executive and ministerial, not discretionary or *quasi* judicial. His function is to carry into effect the contracts made by the directors, and to execute their orders. If in carrying into execution the contracts and orders of the directors, his acts sometimes assume the form of contracts, they are ancillary and accessory, and not substantive and independent agreements.

It is plain that the appointment of cashier does not confer upon the appointee any power, duty, or function which the courts of law, and especially this court, have said do not appertain to the office.

What, then, has been determined by this court on this subject?

In *Fleckner* v. *Bank of the United States*,* the earliest case, the obligation of a bank for the acts of its cashier is limited to those done in the ordinary course of business intrusted to him.

In *Minor* v. *The Mechanics' Bank of Alexandria*,† it was held that no usage, even under the sanction of the board of directors, would justify a cashier in allowing customers to overdraw. The case at bar is not merely a case of overdrawing by a depositor, but a case of drawing to the amount of $500,000 by a firm who were not, so far as appears, depositors, and who had not and never had had funds in the bank.

In *Bank of the United States* v. *Dunn*,‡ this court held, that the president and cashier of a bank, acting together, had no power to bind the bank by a representation to an indorser where there was collateral security, that he would not be bound by his indorsement.

The United States v. *The Bank of Columbus*,§ recognizes and affirms as settled law, that the making of a contract involving the payment of money, or the purchase or sale of property, is not within the ordinary business of a cashier, and that if a party relies upon such contract by a cashier, he must show (at the least) a special delegation of power from the directors. The court say:

"The term, ordinary business, with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our State courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and

* 8 Wheaton, 338. † 1 Peters, 46.

‡ 6 Id. 51, and see United States *v.* The Bank of Columbus, 21 Howard, 356.

§ 21 Howard, 356.

customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary."

It is vain to say that the contract in that case was *ultra vires*. The case was neither argued nor decided on that ground, but was argued and decided on the power of a cashier to make the contract. The principles involved in the decision are therefore authority in the case at bar.

The leading case in Massachusetts, where the contracts sued on purport to have been made, is *Mussey* v. *The Eagle Bank*.* The case, though arising as to a check certified by a teller, in its reasonings and the principles affirmed, applies as well to those by a cashier. The argument made here,—that this certificate of "good," on the check, is but another form of the exercise of a usage, so common in banks, of granting a certificate of deposit of money to the credit of a third person, was made there. What say the court?

"We are of opinion, that usage of the one will not support the practice of the other. The two practices, while having the appearance of resemblance, and although one may be used for the same purpose as the other, in the form of a remittance, are, in their character, essentially distinct."

And the court show wherein they are so.

The cases decided in New York do not really touch the question of authority. They have no tendency to show that the power to certify checks was inherent *in the cashiers of banks in Massachusetts*, existing under the laws of the State, or of the United States.

It is true that the 17th article of the by-laws of the State Bank provides that "all contracts, checks, drafts, receipts, &c., shall be signed either by the cashier or by the president." But the duty of signing contracts is ministerial and executive, not discretionary. The power to sign, without

* *Supra*, 608.

more, excludes the idea of a power to make. The contracts and the checks to be signed are the checks of the bank and not of third persons.* The drawer of the check is the debtor to the payee. It is his contract, he standing to the payee as the maker of a promissory note or acceptor of a bill of exchange. The check does not contemplate or require acceptance, and, in the usual course, is not accepted. Smith here put his name upon contracts, which had their existence as contracts when signed by Mellen, Ward & Co. They were in no sense contracts made by the directors, or which had been prepared by them for signature by the cashier.

Nor does the production of a contract signed by the cashier furnish *primâ facie* evidence that the contract was made by the proper authority. Though such presumption may attach to payments made or received by the cashier over the counter of the bank, or other acts within the scope of his ordinary business and duties, it is limited to them. No rule of law is better settled than that a party contracting with a corporation of limited and defined powers, or the servant or agent of such corporation of limited agency, is always put upon his inquiry as to the extent of the power of both principal and agent.†

The distinction between natural and political persons in this regard is obvious. A natural person may appoint an agent to do what he may do himself. Not so with corporations. They can exercise no powers not delegated, and must use them in the mode prescribed by their charter. He who relies upon a contract as binding upon a corporation, when such contract can be made only by its directors, must show affirmatively not only that the directors made it, but that it is within the scope of their powers and duties.‡

But a like rule of agency applies even to natural persons. Under certain circumstances an authority arises to an agent

* Fearn *v.* Filica, 7 Manning & Granger, 513.

† See, among other cases, Lowell Savings Bank *v.* Winchester, 8 Allen, 109; Zabriskie *v.* Cleveland, 23 Howard, 398; Pearce *v.* Madison, 21 Id. 443; Salem Bank, *v.* Gloucester Bank, 17 Massachusetts, 1.

‡ Burnes *v.* Pennell, 2 House of Lords' Cases, 520, 521, 522.

to do a certain act, but you must show the occurrence of the circumstances before you can count upon his act. Familiar illustrations occur. *Ex. gr.*, the master of a ship may give a bottomry bond under certain circumstances; the lender must show the circumstances. The master may sell in case of necessity; the purchaser must show the necessity. The master may give a bill of lading for goods put on board; the holder must show that the goods were on board. So a power to draw and indorse bills for and in the name of the principal will not authorize a drawing or indorsing in his name for the accommodation of third persons.*

The plaintiffs argue that the defendants, by putting a cashier into the bank, and not defining or restricting his powers, held him out to the world as the organ of the bank for doing the business of banking, and that, therefore, any acts done by him in carrying on the business of banking, as receiving deposits or buying and selling gold, are at least *primâ facie* valid. But the directors have done no such thing; they put the cashier into their bank as *cashier*, they held him out as *cashier*, and nothing more. The appointment to the office of cashier was a limitation of his powers. Whosoever dealt with the bank was bound to know the law, and especially a bank organized under the same laws, and doing business at its side. The defendants neither did nor could hold themselves out except as a banking association organized under the act of Congress, with the powers given by and to be exercised in the manner prescribed by that act.

That the putting a cashier behind the counter of a bank gives him no power to bind the bank, by representing that he has power to do what he cannot lawfully do, is plain. There could be no effectual definition or restriction of the powers of an agent if his representation of what he is authorized to do is to bind the principal. Though as to statements of facts on matters falling clearly within the agent's

* See the distinctions set forth in 1 American Leading Cases, 4th ed., 549, Batty *v.* Carswell, Peck *v.* Harriott, and note.

sphere of power and duty, he may bind the principal; that is the outside limit. Something more then was necessary to be shown than putting Smith into the bank as cashier, and a failure to define all his duties.

If the power to make these contracts was not inherent in the office of cashier, and the directors have not defined or pointed it out as one of his functions, it could not spring out of their silence. It was not necessary for the directors to negative its existence, because there was neither law nor usage to require them.

Then, have the directors so conducted themselves as to their cashier and third persons, as to warrant them in believing that the cashier had been so authorized? They have not acquiesced in the use of the specific power, for there is no evidence that the cashier ever certified a check before or since he certified those in suit.

The plaintiffs' evidence is offered to show that defendants' cashier had been permitted to make contracts pledging the credit of the bank, and that it was the usage or course of business for cashiers in Boston to make such contracts. From the existence of a power to make the class of contracts testified of, they would infer a power to make the contracts sued upon. So far as the evidence concerns the conduct of the State Bank and its relations with its cashier, it tends to show that the cashier had, before these transactions, been accustomed to borrow money of other banks to make up deficiencies at the clearing-house and give his check therefor; to lend money for the same purpose, and receive a cashier's check therefor; to sell exchange on New York, and to draw on the bank's correspondent for the same; to buy exchange on New York, and give a cashier's check for the same, and (when discounts had been made) to give checks in lieu of bills to customers of the bank. But none of these acts, if proved to have been done by the cashier of his own motion, would have any tendency to show or warrant the jury in finding, that Smith had authority to go to the Merchants' Bank and certify checks of Mellen, Ward & Co., given to it in payment of a previous loan to them, or in payment for

gold which the Merchants' Bank was under contract to sell to them. The calling of the cashiers of twenty-two banks to prove the borrowing of other banks and giving checks therefor, and the purchase and sale of New York exchange, and the absence of evidence of the certifying of a single check by a cashier, is the most forcible of negatives pregnant. It shows not merely that there is no evidence in the case, but that none was to be had.

So far as the evidence tends to show a usage or course of business, it clearly marks and defines it, and the line of demarcation falls outside of the class of acts counted upon by the plaintiff.

But it is asserted that the classes of acts shown to have been done by the defendants' cashier, and the acts sued upon, though not alike in form, are alike in principle in this regard, that they both pledge the credit of the principal.

Seemingly there are few agencies, general or limited, which do not more or less concern and involve the credit of the principal; but a power to pledge the credit of the principal for one purpose has no tendency to show the power to pledge it for another and distinct purpose. If A. authorizes B. to buy cotton on time, and he buys wool, or even real estate, all these acts assume to pledge the credit of A., but only the first does pledge it. The law does not extend or expand the powers of agents by analogy. On no subject are its rules of limitation more rigid.

Moreover we object to what constitutes the principal part of the evidence of the plaintiffs, the testimony of the cashiers of banks in Boston, as to the powers exercised by those cashiers, as incompetent and immaterial. The plaintiff cannot show that the defendant bank had conferred a substantive power upon their cashier, by showing that cashiers of other banks used such power; *a fortiori* not by showing that cashiers of other banks used powers entirely distinct from the one relied upon.

In appointing a cashier, the directors charged him with the powers and duties which the law had declared to be inherent in the office of cashier. As to modes and forms of

business, they authorized him to follow the usage and custom of the city of the bank's location, so far as they did not conflict with positive law. But these were the outside limits. To say because cashiers of debtor banks borrow money of creditor banks at the clearing-house to make up their balances, or buy or sell exchange on New York, that therefore the cashier of the defendant bank could by certifying checks pledge the credit of the bank without limit, for persons who were not depositors at the bank, who had no funds there, lending in effect not merely more than a tenth, but nearly one-third of the bank's capital, contrary to the 29th section of the National Currency Act, by acts done outside of the banking-house or office where its business was by law to be transacted, without the knowledge of the directors or any one of them, or of any other officer of the bank, without any consideration to the bank for the responsibility assumed, paid or promised—is not merely to make the cashier the bank, but to take the bottom out of the bank itself.

Mellen, Ward & Co. not being depositors, having no account with the State Bank, had no right to draw a check upon that bank, and its cashier had no power to receive or recognize it. Paying the check of a depositor to the extent of his deposit is but paying as the bank has agreed to pay. Paying the check of a non-depositor, or guaranteeing its payment, is doing just what the bank had never agreed to do. Nor does it follow because the cashier might pay or guaranty the payment of a check where there were funds, he could do it where there were not.* There is no evidence of any agreement of Mellen, Ward & Co. and the defendants' cashier to place the gold coin or gold certificates in the defendant bank. Mr. Haven, indeed, the president of the Merchants' Bank, testifies that at noon on the 1st of March, in the State Bank, he asked Smith, its cashier, "if he did

* Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 New York, 125; Schooner Freeman *v.* Buckingham, 18 Howard, 182; Lowell Savings Bank *v.* Winchester, 8 Allen, 109; Grant *v.* Norway, 10 Common Bench, 665.

not have the money? if the gold certificates were not delivered to him?" and that Smith said: "Yes, I had them here, but they are not here now." Giving full force to this testimony, it is, that Smith had the certificates with him in the bank edifice, not that they were ever mingled with the funds of the bank. As the cashier had no authority to buy the gold for the State Bank, or contract for its deposit there, that bank could not be responsible for it, until with the knowledge and assent of the directors it had been mingled with the bank's own funds.* And as the cashier had no authority to deal with the gold, either by purchase or receiving it on deposit for Mellen, Ward & Co. to draw upon it, he clearly has not the power to bind the bank by any declarations concerning the transaction. In addition to which, when Smith made this declaration he was not acting as agent of the bank.

If it be said that the certificate of the cashier is *primâ facie* evidence that the drawers were depositors, and had funds to meet the checks, it comes to the same thing, as asserting that a cashier has power to certify where the drawers were not depositors, or had no credit at the bank.

The relation created by depositing money in a bank is that of debtor and creditor,—the depositor, the creditor; the bank, the debtor. The money deposited becomes the money of the bank. The depositor has for it the promise of the bank to pay him so much money on his orders or checks. The relation is the result, then, of contract. When a cashier or teller pays the check of a depositor having credit at the bank, he pays as the bank has promised; every dollar that is thus paid out discharges so much of the debt due the depositor from the bank. The cashier is but executing the contract of the bank. When the cashier accepts the draft or check of a non-depositor, a new and different contract is entered into. The bank agrees to advance or lend so much money to the drawer. The bank becomes the creditor, and

* Atlantic Bank *v.* Merchants' Bank, 10 Gray, 532; Skinner *v.* Merchants' Bank, 4 Allen, 290.

the drawer of the check the debtor. It is not enough to say the two things differ; there is no resemblance between them. The bank may be very willing to have A. its creditor, and very unwilling to have him its debtor.

A specific objection to the giving to the cashier the power to accept these drafts, or the exercise of it by the directors themselves, is, that it clearly contravenes the provisions of the 29th section of the Banking Act. It would create a liability of Mellen, Ward & Co. to the defendant bank, exceeding one-tenth part of the capital of the bank; to the extent, indeed, of nearly a third of the capital.

II. Then, as to the sale of gold certificates and coin to the State Bank through its agent and cashier, Smith. The considerations, as to the power of the cashier to enter into contracts by certifying the checks, already suggested, apply with equal force here. The cashier had no authority to make the purchase; none under the act of Congress, none under the by-laws, none under any vote of the directors, none under the oral consent of the directors, or any one of them, none under any practice or any one precedent of his own. There is no evidence that the State Bank ever engaged in the business of buying and selling gold, or so held themselves out to the public. Though the statute *permits* it does not *require* the bank to deal in gold. It is for the directors to decide whether they will enter upon this business or not; without their consent, express or implied, the cashier could not do it.

If the cashier had made the most formal purchase of the plaintiffs' gold, the defendants could not be holden. If the directors had received the gold coin or certificates, and had not within a reasonable time, or on reasonable request, returned them, the bank might be charged with their value. But the putting them into the hands of Smith (if proved) is nothing; for if Smith had no authority to make the contract for the gold, he certainly was not the defendants' agent to receive the gold. Nor would the delivery to, and receipt of the gold or gold certificates by the defendants' cashier, when absent from the bank, create a deposit for Mellen, Ward & Co., or render the bank liable on any im-

plied assumpsit to the owner. If one delivers money to the cashier of a bank when absent from the bank, to deposit, or to pay a note in the bank, he makes the cashier his agent to deposit or pay; and if the money be lost or stolen before it reaches the bank, the bank is not liable.*

This rule, applicable to banks generally, has peculiar force to one organized under the United States Banking Act, which requires that "its usual business shall be transacted *at* an office or banking-house located in the place specified in its organization certificate."

If the cashier of the State Bank had the power to purchase, the Merchants' Bank had no right to sell. Mellen, Ward & Co. had a right to the gold at any time by paying the advance. The Merchants' Bank had the right at any time to demand the payment of the money. Interest was to be paid on the sum advanced. No matter what name the parties give to the transaction, these essential features remain and show conclusively a loan. But whether a loan or conditional sale is not important. Mellen, Ward & Co., it is certain, had a right to receive the gold upon payment of the amount advanced, with interest. Neither the bank nor Smith had such right. If Smith was not an agent to contract, he was not to receive. At the time of the delivery, Carter and Smith were present. Carter said he had come in for his gold; it was delivered. The delivery in contemplation of law was to Carter, the only person present competent to receive. Whether the manual caption was by Carter or Smith is immaterial.†

The payment, if any was made, was made by Mellen, Ward & Co. The checks were their checks, none the less after the certificates than before. If the word "good" can be treated as a guaranty by the bank, Mellen, Ward & Co. were the principals. If the checks, when certified, were acceptances of the bank, yet in contemplation of law they were drafts on and to be paid from their funds in the hands

* Manhattan Company *v.* Lydig, 4 Johnson, 377; Bullard *v.* Randall, 1 Gray, 605; Thatcher *v.* Bank of State of New York, 5 Sandford, 121.

† Frost *v.* Çloutman et ux., 7 New Hampshire, 15.

of the bank, charged to account of Mellen, Ward & Co., and of course their property.

Other objections, somewhat more technical, may be suggested.

(*a*) The certificates having been made by the cashier when absent from the banking-house, were in violation of the 8th section of the act of Congress requiring its business to be done at its office or banking-house. None of the presumptions which would attach to payments made, or other acts done over the bank's counter, apply to these.

(*b*) Certified checks are against the policy of the Banking Act, which prohibits the issue of bills exceeding 90 per cent. of the bonds deposited. It is familiar history that certified checks have been used chiefly, if not wholly, to eke out a currency larger than the act allows.

They are equally illegal and void, as within the prohibition of the 23d section of the Banking Act, which forbids any banking association to issue post notes, or any *other notes*, to circulate as money than such as are authorized by the act. It is sufficient to bring the certified checks within the provision that they are capable of being so used, and that the general purpose for which they had been used was a substitute for bills.

(*c*) The written contracts relied upon could not be offered in evidence, because not duly stamped. If the certificates were valid, and to bind the bank, they engrafted upon the checks new and distinct contracts, to wit, acceptances of bills, and must be stamped as such.

Reply: The defendant's view is, that in the absence of definition by charter, by-law, or vote, the law prescribes the extent and limit of the powers of a cashier. But this view is not supported either by principle or authority.

Doubtless there exist classes of commercial agencies, whose powers and duties are so fixed and defined by the common law, after ages of judicial proof and investigation, that they are not only no longer the subject of inquiry but cannot be varied and controlled as against the public by

proof of special contract limiting those powers. Such are partners, shipmasters, brokers, factors, &c. The powers and duties of such agents are fixed by the law, not in the absence of powers prescribed by writing or contract (as is claimed for cashiers), but in utter disregard of such prescription. But a cashier, the offspring of modern commerce, is, as stated by Baron Parke of bill brokers, "not a character known to the law with certain prescribed duties, but his employment is one that depends entirely on the course of dealing. It may differ in different parts of the country. The nature of these powers and duties in any instance, is a question of fact, and is to be determined by the usage and course of dealing in the particular place."*

That this is the precise doctrine applicable to cashiers is obvious, since even the defendants must admit that, in the absence of regulations by charter, by-law, or vote, the powers and duties of a cashier may be shown by the course of dealing lawfully committed to his charge by the bank. Now if this be so, defendants' proposition must be, that in the absence of all regulation by charter or vote, and of all evidence of the powers actually exercised by a cashier with the knowledge and ratification of the bank, the law prescribes the powers of a cashier. The value of which doctrine, if true, will appear, whensoever such a state of facts shall (if ever) occur.

But in no one of the cases decided by this court and relied on by the defendants, has the court attempted to *rest its decision* upon an assumed judicial knowledge of the common law powers and duties of a cashier, where the acts in question were within the pale of the charter. There are in several of the cases *recitals* of what the court suppose are the ordinary powers of cashiers, but no judicial decision has turned upon those recitals.

In *Fleckner* v. *Bank of United States*,† an early case, the question was, whether a cashier had a right to indorse the note

* Foster *v.* Pearson, 1 Crompton, Meeson & Roscoe, 858.

† 8 Wheaton, 360-1-2.

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in suit. In the course of the judgment it is said: "We are *very much inclined to think*" that the indorsement falls within the ordinary duties and rights of a cashier, *at least if his office be like that of similar institutions.* "The cashier is usually," &c. "*It does not seem too much to infer.*" "But waiving this consideration." *The case is decided on another ground.*

Minor v. *Bank of Alexandria*,* was debt on a cashier's bond; the defence set up a usage sanctioned by directors, to allow parties to overdraw, and the case was decided on the ground that it was "a usage to misapply the funds of the bank and connive at their withdrawal, *and could not be supported by any vote of the directors, however formal.*" The case states with great fulness the rights of the public in dealing with the officers of banks. "The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from regulations prescribed by the board of directors, &c. It *would be not only inconvenient, but perilous, for the customers or any other persons dealing with the bank, to transact their business with the officers upon any other presumption.* The officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of their business, and their acts within the scope of such usage, would bind the bank in favor of third persons having no other knowledge."

Then follows next the case of *Bank of the United States* v. *Dunn*,† in which the defence was set up by an indorser that prior to the discount of the note, both the president and cashier represented to him that the note was secured and his liability nominal. The evidence was held as inadmissible, both as contradicting the note and upon the ground that "*all discounts are made under the authority of directors, and it is for them to fix any conditions.*" "The agreement was not made by persons who have power to bind the bank *in such cases*, nor have they power to bind the bank except in discharge of the ordinary duties." There is no other or further remark in the case as to powers of cashiers.

* 1 Peters, 72.

† 6 Peters, 51.

Reply.

The last case is the *United States* v. *Bank of Columbus.** The question at issue was the authority of the cashier to contract with the United States in the name of the bank for the gratuitous transfer of $100,000 from New York to New Orleans. The important feature of the case as showing that it really decided a question *of corporate powers* is, that there was no offer of evidence to show the extent and character of the functions actually intrusted in the course of its business by this bank to its cashier, from which the inference might be drawn whether the bank had or had not intrusted him with powers involving the same principle.

It has been determined by the same judge who delivered the opinion of this court in *United States Bank* v. *Dunn*, relied on by defendants, that "the cashier of a bank authorized by its charter to deal in bills of exchange, may accept such bills as the agent of the bank. *This is in the scope of his agency*, and is sanctioned by universal usage."†

It is argued:

(*a*) That in view of the testimony as to the transaction by which the gold was delivered to the defendants' cashier, it was not and could not be intended or legally held to be a sale or delivery of the gold by the plaintiffs to the defendants.

(*b*) That as a matter of law the transaction by which the plaintiffs originally received the gold, under the arrangement with Mellen, Ward & Co., must be held to be a loan by the plaintiffs on a pledge of the gold, and that, considered as a loan, it violated the provisions of section twenty-nine of the National Currency Act, and by reason thereof the plaintiffs cannot by law maintain a suit for the price of the gold under the sale to defendants.

1st. The ground on which the defendants assert that the question whether there was a sale of gold to defendants, is not to be submitted to the jury, is that there was in legal

* 21 Howard, 356.

† Lafayette Bank *v.* State Bank of Illinois, 4 McLean, 208. See also Sturges *v.* Bank of Circleville, 11 Ohio State, 153.

contemplation no evidence of such sale, but that the court must rule, as matter of law, that it was a sale and delivery to Mellen, Ward & Co.

This view assumes, for the purposes of the argument, that the contract of plaintiffs with Mellen, Ward & Co. was a contract to purchase the gold, with an agreement as to the right of Mellen, Ward & Co. to repurchase it. Now this right to repurchase was capable of being transferred to the defendants. Indeed the testimony shows that at the outset, it was agreed or contemplated that it would be so transferred "in the course of a few days, and that the gold, when taken away, would go through, probably, some other bank, mentioning, perhaps, the State Bank." The transfer of this right to the State Bank (within two days) was, in fact accomplished. There was a transfer to the State Bank of Mellen, Ward & Co.'s right to repurchase the gold, and an exercise of that right by their cashier. Nor does the fact that the attempted payment was by checks of Mellen, Ward & Co. certified by the defendants' cashier negative the view that the State Bank were purchasers. The inference, without further evidence, would be strong that they made the same arrangement with Mellen, Ward & Co. as had been previously made with them by the plaintiffs (perhaps upon easier terms), as they agreed to pay the plaintiffs precisely what the plaintiffs had paid, viz., 125 per cent. The moment that the defendants got the gold, they had funds in their hands, and the certified checks could be drawn against those funds, and were drawn for the identical amount which the plaintiffs had agreed originally with Mellen, Ward & Co. to pay.

But however all this might have appeared to a jury, it was a question to be submitted to them.

2d. As to the defendants' other proposition, that the arrangement between the plaintiffs and Mellen, Ward & Co. must in law be held to be a loan, with a pledge of the gold as security, it is submitted, that if there be any evidence of the amount of their capital stock upon which to rest the averments that if it were a loan, it exceeded

the quantum permitted by the 29th section of the National Currency Act, such evidence was for a jury and not for a court.

Certain features of the transaction are relied on by the defendants which, if there were no direct evidence of what the exact contract was, and that it was intended by both parties to be a purchase and not a loan, might support, with more or less strength, the position that in law such features would constitute a loan. But the direct evidence of the terms of the contract negatives any inference which the jury might otherwise draw from these detached features. In such a conflict the question is for the jury, with instructions as to what facts, if found by them, would in law constitute a loan, and what a purchase.

But assume that the court or a jury should arrive at the conclusion that the transaction was a loan accompanied by a pledge, can the State Bank avoid their contract to pay the agreed price of their purchase of the pledge from us (an agreement made with the assent of the pledgor) on the ground that we received the pledge under a contract with the pledgor, which is illegal? Or can a party, who has accepted the draft of a pledgor given in settlement of a transaction which is an infraction of a statute, set up the illegality of that transaction to avoid his acceptance?

The minor objections are of small weight.

(*a*) The requirement that the "*usual* business" of the bank is to be transacted at its banking-house, means that the bank shall not carry on banking in distant places. Under the construction of the other side, how could two banks ever conclude any business between *themselves?* It would have to be done *at* the banking-house of one, and so *out* of the banking-house of the other. This business was done at the banking-house of the Merchants' Bank.

(*b*) "Certified checks" are indirectly authorized by Congress, by being taxed. If they contravene the National Banking Act they do so by leave of the legislature.

(*c*) Being specifically taxed they do not require a stamp as acceptances.

Recapitulation of the case in the opinion of the court.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts. The plaintiff in error was the plaintiff in the court below. It appears, by the bill of exceptions, that upon the evidence in behalf of the plaintiff being closed, the defendant's counsel moved the court to instruct the jury that it was not sufficient to warrant them to find a verdict for the plaintiff upon either of the counts in the declaration. This instruction was given. The jury found for the defendant. The plaintiff excepted, and has brought that instruction here for review. This renders it necessary to examine the entire case as presented in the record. According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court. The facts disclosed in the bill of exceptions are neither numerous nor complicated. The defendant called no witnesses. There is no conflict in the testimony. The questions which it is our duty to examine are questions of law. None are made upon the pleadings, and it is unnecessary to consider them. It is sufficient to remark, that the declaration is so framed as to meet the case in every legal aspect which it can assume.

On the 26th of February, 1867, Fuller, the plaintiff's cashier, received from the Second National Bank of Boston $200,000 of gold certificates, and paid the bank, upon their delivery, the amount of their face and a premium of 25 per cent. Payment was made in currency and legal tender notes. The next day he received from the same bank $200,000 more of like certificates, and paid for them at the same rate in currency and a ticket of credit by the Merchants' Bank in favor of the National Bank for $175,000. Both transactions were

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pursuant to an arrangement with Mellen, Ward & Co., brokers, in Boston. The market premium upon gold at that time was 40 per cent. It was understood between Fuller, the cashier, and Mellen, Ward & Co., that the latter might receive the same amount of gold from the Merchants' Bank, at any time thereafter, by paying the amount advanced, compensation for the trouble the bank had incurred, and interest at the rate of six per cent. There had been like transactions upon those terms between the parties prior to that time. The president of the bank was consulted in advance as to both the purchases from the Second National Bank, and approved them. The following testimony is taken from the record:

"George H. Davis testified as follows: I am the paying teller of the Merchants' Bank. From about the 1st of January, 1867, and previous to the 23d of February, the bank several times received gold, or gold certificates from Mellen, Ward & Co., for which it paid currency at the rate of $125 for $100 in gold. At that time they had deposited in the bank about $90,000 in gold. No note, memorandum, or check was taken connected with it in any way. The gold was added to the gold of the bank; on my cash book it was added to the item of gold, and the gold was mixed with the gold of the bank in the vault. If it consisted of certificates, they were put in a pocket-book kept in my trunk with other certificates and bills. (The paying teller's book was put in, and from the entries in it on the 26th, 27th, and 28th of February, 1867, it appeared that the gold received from Mellen, Ward & Co. was added to the gold of the bank.)"

On the 28th day of February, Carter, of the firm of Mellen, Ward & Co., and Smith, the cashier of the State Bank, called together at the Merchants' Bank. Carter said to Fuller, "We have come in for gold." Smith, the cashier, said, "We have come to get an amount of gold," and that he would "pay for it by certifying these checks," referring to two papers which Carter held in his hand. The teller handed Fuller 84 gold certificates of $5000 each, making the sum of $420,000. Fuller announced the amount. Smith said

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that was the amount wanted, and the amount covered by the checks. He received the certificates, certified the checks, and handed them over to the plaintiff's cashier. They were drawn by Mellen, Ward & Co. upon the State National Bank in favor of Fuller, the plaintiff's cashier, or order, and were certified "Good; C. H. Smith, cashier." One was for $250,000, and the other for $275,000. Smith thereupon left the bank with the certificates in his possession. Nothing was said by Fuller to Carter, or by Carter to Fuller, in relation to the checks, and Fuller did not know what checks Smith referred to until they were delivered to him. Smith did not certify or deliver the checks until he had got possession and control of the funds upon which his certificates were apparently founded, and this was known to the plaintiff's agent when he received the checks. Later, on the same day, Smith and Carter called again at the Merchants' Bank. Fuller was absent. Smith received $60,000 more of gold and gold certificates from the teller, and gave in return a check for $75,000, drawn by Mellen, Ward & Co. on the State Bank, payable to "gold or bearer." Like the two previous checks, it was certified "Good; C. H. Smith, cashier." This arrangement was in pursuance of the same agreement as that under which the gold certificates were delivered in the earlier part of the day. Both transactions were alike within its scope.

On the 1st of March, Havens, the president of the Merchants' Bank, called at the State Bank and complained that Smith had not paid the checks. Smith said he was going out to get the money. Havens inquired, "Didn't you have the money—the gold? Were not gold certificates delivered to you?" He answered, "Yes; I had them here, but they are not here now. I am going out to get it, and will come in and attend to it." Subsequently, in the same conversation, he said, "You hold the State Bank." Later in the day Havens called upon Stetson, the president of the State Bank. Stetson denied that Smith was authorized to certify the checks, and appealed to a director who was present. The director was silent. In an account which Fuller ren-

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dered to Mellen, Ward & Co. after their failure, showing the disposition of various collaterals which Mellen, Ward & Co. had deposited from time to time with the Merchants' Bank, the amount paid for gold was put down as a loan, and interest was charged, but in his testimony before the jury he denied that the money was loaned, and insisted that the gold was bought by the Merchants' Bank. The agreement between Mellen, Ward & Co. and the Merchants' Bank rested wholly in parol. No written voucher was given or received on either side touching any of the transactions between the parties. The record discloses nothing else in this connection which it is material to consider.

The State Bank was organized under the act of Congress "to provide a national currency," &c., of the 3d of June, 1864.* The eighth section of that act authorizes such associations, by their directors, to appoint a cashier and other officers, and to exercise, "under this act, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes, according to the provisions of this act," &c. It is further provided that the directors may, by by-laws, regulate the manner in which its business shall be conducted and its franchises enjoyed; and that its general business shall be transacted at an office "located in the place specified in its organization certificate."

The 5th of the articles of association authorizes the board of directors to appoint a cashier and such other officers as may be necessary, and to define their duties. The 7th by-law declares that the cashier "shall be responsible for the moneys, funds, and other valuables of the bank, and shall give bond," &c. The 17th by-law requires that all "contracts, checks, drafts, receipts, &c., shall be signed by

* 13 Stat. at Large, 99.

the cashier or by the president, and that all indorsements necessary to be made by the bank shall be under the hand of the cashier or president," unless absent.

The by-laws contain nothing further upon this subject. The directors failed to define more specifically the powers and duties of the cashier.

Smith, the defendant's cashier, exercised habitually very large powers without any special delegation of authority. An account was kept on the books of the bank with him as cashier, which represented these transactions, and printed blank checks were kept in the bank to facilitate them. The checks given by him for the proceeds of bills discounted and for the purchase of exchange during the five months preceding the 23d of February, 1867, amounted in the aggregate to two and a half millions of dollars. This was exclusive of his clearing-house checks. His checks for money borrowed of other banks, during the six months preceding the same 23d of February, amounted to one million five hundred and forty-seven thousand dollars. A large number of the cashiers of other banks in Boston were examined, and testified that they exercised the same powers under like circumstances. There is no proof that either they or Smith ever certified checks. It is not shown what became of the gold. Perhaps some light is thrown on the subject by the remark of the president of the Merchants' Bank to the president of the State Bank, "that the latter had better go to the sub-treasury, and that he would perhaps find his gold there." We find no reason to doubt that both banks, as represented by their cashiers, acted in entire good faith throughout the transactions, until they were closed by the delivery of the last of the certified checks. Neither could then have anticipated the difficulties and the conflict which subsequently arose.

The first question presented for our consideration is, what was the title of the plaintiff, and what were the rights of Mellen, Ward & Co., in respect to the gold certificates delivered by the Second National Bank to the Merchants'

Bank? No very searching analysis of the facts disclosed is necessary to enable us to find a satisfactory answer to this inquiry. It does not appear that Mellen, Ward & Co. had any connection with the certificates received from the Second National Bank until after the plaintiff took the action which they invoked, and came into possession of the property.

The Merchants' Bank applied for them, bought them, paid for them, received them, and deposited them with its other assets of like character. It does not appear that any special mark was put upon them, or that anything was done to distinguish them from the other effects of the bank with which they were mingled. Upon the face of the transaction it was a simple sale by the Second National Bank, whereby the entire title and property became vested in the plaintiff. But gold was then at a premium of 40 per cent. in currency. The Merchants' Bank paid but 25, according to the contract between the bank and Mellen, Ward & Co. The latter were to pay, and it is to be presumed did pay, the additional 15 per cent. This was a part of the consideration upon which the Merchants' Bank entered into the contract. It is evident that the bank did not agree to deliver to Mellen, Ward & Co. the identical gold certificates which were purchased, but gold, or its equivalent in certificates to the same amount, and any gold, or any certificates would have satisfied the contract. The bank cannot, therefore, be regarded as holding the certificates in pledge. The want of the element, that the identical certificates were to be delivered, is conclusive against that view of the subject. If Mellen, Ward & Co. had tendered performance and called for gold, and the bank had failed to respond, Mellen, Ward & Co. could have sustained an action for the breach of the contract. But they could not have maintained detinue, trover, or replevin against the bank. The real character of the transaction was, that the bank took the title and entire property, but Mellen, Ward & Co. had the right to purchase from the bank the like amount of gold, or its equivalent in certificates, according to the terms of the contract, which were,

that they should pay what the bank paid, compensation for its trouble, and interest from the time the purchase by the bank was made.

In respect to the $60,000 of gold and gold certificates delivered by the teller in the absence of the cashier, and the excess of gold certificates over $400,000 delivered by the cashier, the facts are substantially the same as those in regard to the $400,000, except that the excess of certificates, and what was delivered by the teller, had reference to gold and gold certificates deposited in the bank by Mellen, Ward & Co. This difference is not material. With this qualification the same remarks apply which have been made touching the $400,000 of certificates, and we are led to the same legal conclusions.

The transactions between the State Bank and the Merchants' Bank were apparently of the same character as that between the Merchants' Bank and the Second National Bank. What the understanding between Mellen, Ward & Co. and the defendant was is not disclosed in the evidence. But it is fairly to be inferred that it was the same as that between them and the Merchants' Bank. When the arrangement was proposed by Carter to Fuller, on the 22d of February, Carter said that "when the gold was taken from the Merchants' Bank he thought it would go through some other bank or banks." The assent of Mellen, Ward & Co. to the sale to the State Bank by the Merchants' Bank extinguished their claim upon the latter. The Merchants' Bank certainly had a title of some kind, and whatever it was it passed to the State Bank, unless the contract was void, because the State Bank had no corporate power, or its cashier had no authority to make the purchase. The act of Congress expressly authorizes the banks created under it to buy and sell coin. No question of *ultra vires* is therefore involved.

If the Merchants' Bank held the certificates as a pledge it had a special property which might be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor Such is the

rule of the common law, and it has subsisted from an early period.*

But we are entirely satisfied with the other view we have expressed upon the subject. *Modus et conventio vincunt legem.*

It is insisted by the defendant's counsel that the transaction was a loan to Mellen, Ward & Co. As the bank parted with its title, if there were a loan in the eye of the law, it would not in any wise affect the conclusions at which we have arrived.

Recurring to the subject of the authority of the cashier of the State Bank to make the purchase, and excluding from consideration for the present the certified checks, three views, we think, may be properly taken of the case in this aspect.

1. If the certificates and the gold actually went into the State Bank, as was admitted by Smith to Havens, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase, and this question should have been submitted to the jury.

2. It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that Smith had authority to bind the defendant by the contract which he made with the Merchants' Bank.

3. Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

If the contract can be valid under any circumstances, an

* Mores *v.* Conham, Owen, 123; Anon., 2d Salkeld, 522; Coggs *v.* Bernard, 3d Id. 268; Whitaker *v.* Sumner, 20 Pickering, 399, 405; Thompson *v.* Patrick, 4 Watts, 415; Story on Bailments, § 324.

innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

The jury should have been instructed to apply this rule to the evidence before them.

The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court.*

Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application.†

Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances.‡

Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another.§ Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon

* Supervisors *v.* Schenck, 5 Wallace, 784; Knox Co. *v.* Aspinwall, 21 Howard, 539; Bissell *v.* Jeffersonville, 24 Id. 288; Moran *v.* Commissioners, 2 Black, 722; Gelpcke *v.* Dubuque, 1 Wallace, 203; Mercer Co. *v.* Hacket, Id. 93; Mayor *v.* Lord, 9 Id. 414; Royal British Bank *v.* Turquand, 6 Ellis & Blackburn, Q. B. & Ex. 327; The Farmers' Loan and Trust Co. *v.* Curtis, 3 Selden, 466; Stoney *v.* American Life Ins. Co., 11 Paige, 635; Society for Savings *v.* New London, 29 Connecticut, 174; Commonwealth *v.* The City of Pittsburg, 34 Pennsylvania State, 497; Commonwealth *v.* Allegheny County, 37 Id. 287.

† Philadelphia and Raltimore Railroad Co. *v.* Quigley, 21 Howard, 209; Green *v.* London Omnibus Co., 7 C. B. N. S. 290; Life and Fire Ins. Co. *v.* Mechanic Fire Ins. Co., 7 Wendell, 31.

‡ Ranger *v.* The Great Western Railway Co., 5 House of Lords Cases, 86; Thayer *v.* Boston, 19 Pickering, 511; Frankfort Bank *v.* Johnson, 24 Maine, 490; Angel and Ames on Corporations, §§ 382, 388.

§ Swan *v.* The British North Australasian Company, 7 Hurlstone & Norman, 603; Hern *v.* Nichols, 1 Salkeld, 289.

the plainest principles of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result.*

Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party.†

In the *Bank of the United States* v. *Davis*,‡ Nelson, Chief Justice, said: "The plaintiffs appointed the director and held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud."

The director had fraudulently appropriated the proceeds of a bill discounted for the drawer. It was held the drawer was not liable.

The reasoning of Justice Selden in the *Farmers' and Mechanics' Bank of Kent Co.* v. *The Butchers' and Drovers' Bank*§ is also strikingly apposite in the case before us. He said: "The bank selects its teller and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, *so far as is known or can be seen by the party dealing with him*, he is guilty of misrepresentation, ought not the bank to be responsible?"

The same principle was applied in the *New York and New Haven Railroad Co.* v. *Schuyler*.‖

It was explicitly laid down by Lord Holt, in *Hern* v. *Nichols*.¶ He there said: "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger," "and upon this the plaintiff had a verdict."

* Dezell *v.* Odell, 3 Hill, 216.

† Farmers' and Mechanics' Bank of Kent Co. *v.* Butchers' and Drovers Bank, 16 New York, 133; Welland Canal Co. *v.* Hathaway, 8 Wendell, 480

‡ 2 Hill, 465. § *Supra.*

‖ 38 Barbour Supreme Court, 536; S. C., affirmed, 34 New York, 30.

¶ 1 Salkeld, 289.

Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants' Bank, and the bank, under the circumstances, had a right to believe him.

We have thus far examined the controversy as if the certified checks were void or had not been given. It remains to consider that branch of the case. Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud.*

All the authorities, both English and American, hold that a check *may be* accepted, though acceptance is not usual.†

By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its

* Grant on Banking, 89, 90; Keene *v.* Beard, 8 C. B. N. S. 373; Serle *v.* Norton, 2 Moody & Robinson, 404, n.; Boehm *v.* Sterling, 7 Term, 430; Alexander *v.* Burchfield, 7 Manning & Granger, 1067.

† Robson *v.* Bennett, 2 Taunton, 395; Grant on Banking, 89; Ch. on Bills, 10 ed. 261; Boyd *v.* Emmerson, 2 Adolphus & Ellis, 184; Kilsby *v.* Williams, 5 Barnewall & Alderson, 816; Story on Promissory Notes, §§ 489, 490.

satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment.

It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion.

A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in "a certified check account," and when the check is paid to debit that account with the amount. Nothing can be simpler or safer than this process.

The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money.

It is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred millions of dollars.

We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity.

Our conclusions as to their legal effect are supported by authorities of great weight.*

Congress has made them the subject of taxation by name.†

But it is strenuously denied that the cashier had authority to certify the checks in question. To this there are two answers:

1. In considering the question of his authority to buy the gold, the evidence that he had given his checks for loans to his bank, and for the proceeds of discounts, was fully considered. Our reasoning and the authorities cited upon that subject apply here with equal force. We need not go over the same ground again. The questions whether the requisite authority was not inferable, and whether the principle of estoppel *in pais* did not apply, should in this connection also have been left to the jury.

2. As before remarked, the organic law expressly allowed the bank to buy coin and bullion. We have also adverted to the provisions of the by-laws, that the cashier shall be responsible "for the moneys, funds, and all other valuables of the bank;" and that "all contracts, checks, drafts, receipts, &c., shall be signed either by the cashier or president." The power of the bank to certify checks has also been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the

* Bickford *v.* First National Bank, 42 Illinois, 238; Willets *v.* Phœnix Bank, 2 Duer, 121; Barnet *v.* Smith, 10 Foster, New Hamsphire, 256; Meads *v.* Merchants' Bank, 25 New York, 146; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 4 Duer, 219; affirmed, 14 New York, 324; Brown *v.* Leckie et al., 43 Illinois, 497; Girard Bank *v.* Bank of Penn Township, 39 Pennsylvania State, 92.

† 13 Stat. at Large, 278.

books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office.*

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown.†

The foundation upon which this liability rests was considered in an earlier part of this opinion. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly.

In *Barnes* v. *The Ontario Bank*,‡ the cashier had issued a false certificate of deposit. In the *Farmers' and Mechanics' Bank* v. *The Butchers' and Drovers' Bank*,§ and in *Mead* v. *The Merchants' Bank of Albany*,‖ the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

It is objected that the checks were not certified by the

* Wild *v.* The Bank of Passamaquoddy, 3 Mason, 506; Burnham *v.* Webster, 19 Maine, 234; Elliot *v.* Abbot, 12 New Hampshire, 556; Bank of Vergennes *v.* Warren, 7 Hill, 91; Lloyd *v.* The West Branch Bank, 15 Pennsylvania State, 172; Badger *v.* The Bank of Cumberland, 26 Maine, 428; Bank of Kentucky *v.* The Schuylkill Bank, 1 Parsons' Select Cases, 182; Fleckner *v.* Bank of the United States, 8 Wheaton, 360.

† Commercial Bank of Lake Erie *v.* Norton et al., 1 Hill, 501; Bank of Vergennes *v.* Warren, 7 Id. 94; Beers *v.* The Phœnix Glass Company, 14 Barbour, 358; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 14 New York, 624; North River Bank *v.* Aymar, 3 Hill, 262, 268; Barnes *v.* Ontario Bank, 19 New York, 156, 166.

‡ 19 New York, 156.

§ 14 New York, 624; S. C., 16 New York, 133.

‖ 25 New York, 146.

cashier at his banking-house. The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection.*

It is also objected that each of the checks, after being certified, required an additional stamp. The act of Congress relating to the subject directs certified checks to be included in the circulation of the bank for the purpose of taxation.† This is a conclusive answer to the objection.

In *Brown* v. *London*,‡ judgment in a suit upon two accepted bills of exchange was arrested after verdict because "entire damages" were given, and the count, upon one of the bills, failed to aver that by the custom of merchants and others trading in England the acceptor was obliged to pay. This was in 1671. Other decisions in this class of cases, not less remarkable, are familiar to those versed in the learning of the elder reports. The *law merchant* was not made. It grew. Time and experience, if slower, are wiser law makers than legislative bodies. Customs have sprung from the necessities and the convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions.

We have disposed of this case as it is before us.

How far it may be changed in its essential character, if at all, by a full development of the evidence on both sides in the further trial, which will doubtless take place, it is not for us to anticipate.

* Bank of Augusta *v.* Earle, 13 Peters, 519; Pendleton *v.* Bank of Kentucky, 1 T. B. Munroe, 182.

† 13 Stat. at Large, 278, ch. 173, § 110.

‡ 1 Levinz, 298.

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The judgment below is REVERSED, AND A VENIRE DE NOVO AWARDED.

Mr. Justice MILLER was not present at the argument of this case, and did not participate in its decision.

Mr. Justice CLIFFORD (with whom concurred Mr. Justice DAVIS), dissenting.

Persons uniting to form an association for carrying on the business of banking are required, as a condition precedent to their right to do so, to make an organization certificate, specifying, among other things, the name assumed by the association, the place where its operations of discount and deposit are to be conducted, designating the State, Territory, or district, and also the particular county and city, town or village, and shall transmit the same, duly acknowledged, to the comptroller of the currency, to be recorded and carefully preserved in his office; and the provision is that the usual business of the association shall be transacted at an office or banking-house located in the place specified in their organization certificate.*

Such an association, when duly organized, have a succession by the name designated in the organization certificate for the period of twenty years, and they may adopt a common seal, may make contracts, sue and be sued, complain and defend in any court of law or equity as fully as natural persons, and may elect or appoint directors, and may exercise all such incidental powers as may be necessary to carry on the business of banking. They may also, by their board of directors, appoint a president, vice-president, cashier, and other officers, and define their duties, . . . and they may, by their directors, dismiss said officers, or any of them, at pleasure, and appoint others to fill their places. By the terms of the act the directors shall consist of "not less than five," and the express enactment is that the affairs of the association shall be managed by the directors.

Evidence that that requirement is regarded as one of im-

* 13 Stat. at Large, 101.

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portance, and that it is intended to be peremptory, is also found in the provision prescribing the qualifications of directors as well as in the one defining their duties. None but citizens of the United States are eligible under any circumstances, and the further regulation is that three-fourths of the number must have resided in the State, Territory, or district, one year next preceding their election, and that they must be residents of the same during their continuance in office.

Besides these guarantees of fidelity, the additional requirement is that each director shall own in his own right at least ten shares of the capital stock, and when appointed or elected shall make oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of the act under which the association was formed.*

Organized under that act, as both of these banks were when they assumed the name and character of national associations, they are both subject to its provisions and bound by its regulations.

Three checks were held by the plaintiffs, each dated Boston, February 28th, 1867, and signed Mellen, Ward & Co., with the words, Good—C. H. Smith, cashier, written across the face of the checks. Separately described they read as follows: (1) State National Bank pay to J. K. Fuller, cashier, or order, two hundred and fifty thousand dollars. (2) State National Bank pay to J. K. Fuller, or order, two hundred and seventy-five thousand dollars. (3) State National Bank pay to Gold, or bearer, seventy-five thousand dollars.

Smith was the cashier of the defendant bank, and the plaintiffs claimed that the defendants, inasmuch as Mellen, Ward & Co. had failed, were liable to pay the whole amount, as the words written across the face of the respective checks were in the handwriting of their cashier; and the defendants refusing to pay the same as requested, the plaintiffs commenced an action of assumpsit against them in the Circuit Court, the declaration containing eleven counts.

* 13 Stat. at Large, 102.

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Eight of the counts are founded upon the checks, of which it will be sufficient to refer to the first, which alleges in substance that the signers of the checks made the same to enable the defendant bank to obtain from the plaintiff bank certain gold certificates held by the latter, of great value, and that the plaintiff bank received the checks and delivered to the defendant bank the gold certificates, and that the defendants, in consideration thereof, declared that the checks were good, and promised to pay the same on presentment, as more fully set forth in the record.

Two of the counts, to wit, the ninth and tenth, allege a sale and purchase of the gold certificates for the sum of six hundred thousand dollars, and that the defendants have refused to pay as they promised. Superadded to these is a count for money had and received for the same amount, which is in the usual form. Process was issued and served, and the defendants appeared and pleaded the general issue, and upon that issue the parties went to trial.

Pursuant to the usual course the plaintiffs introduced the checks described in the declaration, and examined the officers of their bank in support of the cause of action therein set forth. They also read from the books of the defendant bank, produced for their use by the order of the court passed on their motion, the fifth of the articles of association of that bank, and article seventeen of their by-laws. Besides the officers of their own bank, they also examined the bookkeeper of the defendant bank in respect to the account of their cashier as exhibited in the general ledger of the bank.

Twenty-two of the cashiers of the national banks doing business in that city were also examined by the plaintiffs in respect to the powers of a cashier as exemplified in the usage there of such institutions, no one of whom testified that he, as cashier of a national bank, ever certified as good the check of a third person under any circumstances.

Certain other exhibits were also introduced in the course of the examination or cross-examination of the witnesses, as for example the letter of the president to the comptroller of the currency, and the exchange slip, so called, showing that

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the checks in suit were not sent to the clearing-house with the other transactions of that day, and that they remained in the hands of the paying teller until the president took the same the next day to present them to the State Bank.

No testimony was introduced by the defendants; but the court, when the plaintiffs rested, on the prayer of the defendants, instructed the jury that the plaintiffs, on the whole evidence, were not entitled to recover, and the jury, under that instruction, returned a verdict for the defendants. Exceptions were taken by the plaintiffs to that ruling, and they sued out a writ of error and removed the cause into this court.

Power to grant a peremptory non-suit is not vested in a Circuit Court; but the defendant may if he sees fit, at the close of the plaintiff's case, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and that their verdict should be for the defendant, as was done in this case. Such a motion is not one addressed to the discretion of the court, but it presents a question of law which it is the duty of the court to decide in view of the whole evidence, and the decision of the court in granting or refusing the motion, is as much the subject of exceptions as any other ruling of the court in the course of the trial.

In considering the motion the court proceeds upon the ground that the facts stated by the witnesses examined by the plaintiff are true, but that those facts as proved, with every inference which the law allows to be drawn from them, would not warrant the jury in finding a verdict in his favor. When viewed in that light the plaintiff's case, as shown in the evidence, presents a question of law, and it is well settled by the decisions of this court, that it is the duty of the Circuit Court to give the instruction whenever it appears that the evidence is not legally sufficient to serve as the foundation of a verdict.*

Founded as the ruling was upon the assumption that the cashier of the State Bank had no authority under the cir-

* Schuchardt *v.* Allens, 1 Wallace, 370; Parks *v.* Ross, 11 Howard, 362; Bliven *v.* N. E. Screw Company, 23 Howard, 433.

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cumstances to certify the checks in suit, it becomes neces sary to examine that question. Whether he had such authority or not presents a mixed question of law and fact dependent upon the evidence and the legal principles applicable to the case.

Testimony was introduced by the plaintiffs showing that the president of the plaintiff bank exercised very comprehensive powers, including the loan of money, discounts, and the general superintendence of all the affairs of the bank, he reporting and holding himself responsible to the directors for the performance of his duties.

On Saturday, the twenty-third of February, 1867, the cashier of the plaintiff bank informed the president, as the latter testified, that Mellen, Ward & Co. were going to purchase in New York a large amount of gold, and that they desired to know whether the bank would take it as it arrived, and pay for it at the rate of $125 in currency for every $100 of gold. Inquiries were made upon the subject by the president, and explanations were given to him by the cashier, but the result was that the president told the cashier that he might take the gold and pay for it on the same terms that he had taken gold on several previous occasions from the same parties.

Reference is there made to the conceded fact that those parties had, at several times within two or three months previous, brought gold into that bank and received currency for it on the same terms as those proposed to the cashier, and the president testified that he told the cashier that he might take the gold as it arrived on the same terms, and that he, the cashier, might give the parties the right to come into the bank at any time afterwards "and take the gold from the bank, paying the bank for the gold $125 in currency for every $100 in gold, and such premium or compensation as would be equivalent to interest," taking no obligation or note of any kind, but to rely entirely on the purchase of the gold.

Two hundred thousand dollars of the gold arrived on the twenty-sixth of the same month, and the president states

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that he was informed by the cashier on that day that it was in the Second National Bank, in gold certificates. Not being familiar with such certificates he advised the cashier that he had better go to the office of the assistant treasurer and ascertain whether the certificates were correct before taking them, as previously arranged. On the following day two hundred thousand dollars more in similar certificates arrived, and similar directions were given by the president to the cashier. Due inquiry was made at that office in both cases, and all of the certificates, amounting to four hundred thousand dollars, were received and transferred to the plaintiff bank.

Correspondence ensued between the comptroller of the currency and the president of the bank, and the president, in reply to the letter of the comptroller, stated that on the twenty-sixth of the same month the cashier of the bank made an advance to Mellen, Ward & Co. of two hundred and fifty thousand dollars in legal tender notes and currency upon two hundred thousand dollars in gold certificates, that no note or security was taken for the amount of the advance except a check signed by the parties for fifty thousand dollars, to be kept in the teller's cash in order to balance his cash account; that on the following day a similar advance upon gold (certificates) was made by the cashier for the same amount to the same parties and in the same manner in all particulars, no note or obligation being taken for the amount so advanced.

Prior to the first of these transactions the same parties, as the president states in the communication, had deposited in the bank the sum of ninety thousand dollars in gold, and received therefor currency at the rate of $125 for $100 in gold, the bank taking no note or obligation on account of the transaction.

Fuller, the cashier, was also examined, and he testified that the inquiry whether the bank would take the gold on its arrival and pay for it was made of him by Carter, the junior member of that firm, and that he, the witness, stated to him to the effect that he could not answer the question,

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that he should have to consult the president in regard to it, that he did consult the president of the bank, and that the president told him that if it would not interfere with their ability to make their regular discounts he might take the gold on the same terms as the bank had taken gold of those parties on previous occasions. Notice was accordingly given to Mellen, Ward & Co. by the cashier, as he states, either on that day or on the Monday following, that the bank would afford them the accommodation.

Gold had been taken by the bank of that firm before, and the cashier testified that "they asked if the bank would take gold and pay for it at such time as either party might wish—either the firm of Mellen, Ward & Co., or the Merchants' Bank—at $125 currency for $100 gold, *they paying the bank for the trouble, &c., a sum equal to the interest on the amount of the currency loaned*, and the witness in response to that question, after having consulted the president, *said we would do it.*"

Evidently both parties understood that the deposit of the gold with the bank was only for a brief period, and in confirmation of that theory the cashier also testified that Carter said to him, in their preliminary interview, that they, the firm, wanted the bank "to take the gold and pay for it, and that it would be taken away again in a few days, mentioning perhaps the last day of the month or the first day of the following month." He also admits that when the first instalment was received he took a check from the parties for fifty thousand dollars, but he says it was without the knowledge of the president.

On the twenty-eighth of February, which was the last day of the month, at half-past one o'clock, Carter and the cashier of the defendant bank called at the plaintiff bank and went together to the desk of the cashier, they being outside of the counter. Carter said, "We have come for the gold." Smith, the cashier of the defendant bank, said, "We have come in to get an amount of gold," and that he would pay for it by certifying the two checks which he held in his hand when he saw that the gold was all right.

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Responsive to that remark the cashier of the plaintiff bank said, step to the paying teller, and he did so, passing on the outside of the counter to that desk, the cashier of the plaintiff bank passing to the same desk on the inside of the counter, and that the latter said to the paying teller, the cashier of the State Bank has come to take some gold, and the paying teller immediately handed to the cashier of the plaintiff bank the package containing eighty-four gold certificates of five thousand dollars each, saying, there are eighty-four in the package, to which Smith, the cashier of the State Bank, standing outside the counter, replied, that is the amount wanted, that is the amount of these checks. They were passed out to Smith and he certified the two checks and handed them to the cashier of the plaintiff bank. Both were certified in the bank by the cashier of the State Bank subsequent to the delivery to him of the gold certificates and not until he had examined the certificates; and the president, in his letter to the comptroller of the currency, states that the two checks, amounting to $525,000, were certified as good "on the spot" by the cashier of the State National Bank.

Davis, the paying teller of the plaintiff bank, was also examined by the plaintiffs, and he testified that the cashier on that day came down to his desk, on the inside of the counter, the cashier of the defendant bank, *accompanied by Carter*, being on the outside; that he, the paying teller, handed to the cashier of his bank eighty-four gold certificates of five thousand dollars each; that the cashier counted the same and passed them over the counter to the cashier of the State Bank; that the cashier of the latter bank handed back two checks drawn by Mellen, Ward & Co. on the State National Bank, one for $250,000, the other for $275,000, certified "Good—C. H. Smith, cashier." They were handed to the cashier and by him to the paying teller, and by the latter to the receiving teller to be added to his account for that day.

Later on the same day, and after the cashier had left the bank, Ward, of the firm of Mellen, Ward & Co., called at the bank and said to the paying teller, "We shall want

some more gold," and immediately left the bank, and in a few minutes the cashier of the State Bank and Carter of the same firm came in, and the former handed to the paying teller a check for seventy-five thousand dollars, signed by Mellen, Ward & Co., with the words, "Good—C. H. Smith, cashier," written across the face of the check, which is the third check described in the declaration. Carter wrote the check in the bank at the desk for customers, situated outside the counter, and it was certified at the same time by the cashier of the State Bank before it was handed to the paying teller.

The check, as the teller testified, called for $60,000 in gold, and he states that he handed thirty thousand, to wit, $10,000 in gold certificates and four bags of gold of five thousand each, to Smith, passing it over the counter, and that Carter took the gold and carried it away, but whether or not he also took the gold certificates he cannot state. Thirty thousand remained to be paid, and after Carter left, he, the teller, took from the vault of the bank six bags of gold, of five thousand each, and placed the same outside the counter in charge of Smith, he being the only person present. Some third person, however, came in while the gold was there, and the impression of the witness is that it was Mellen, of the firm of Mellen, Ward & Co., and that he assisted in carrying it away from the bank.

Evidently the first question upon the merits is whether the State Bank received the gold or the gold certificates, withdrawn from the Merchants' Bank, when the checks in suit were given; for if they did, or if they authorized their cashier to certify the same, they are clearly liable for the whole amount claimed by the plaintiffs. Evidence to show that they authorized their cashier to certify the checks is entirely wanting, and it is quite obvious from the whole case that neither the State Bank nor any of its officers, except the cashier, had the slightest knowledge of the transaction or of any of its incidents until the president of the plaintiff bank, at a quarter past two in the afternoon of the following

day, presented the checks to the president of the State Bank for payment.

When presented, the president of the State Bank took them and read them, and immediately replied that they had not authorized their cashier to certify checks, to which the president of the plaintiff bank rejoined in substance and effect as follows: "He has certified checks, and those checks were given to the Merchants' Bank for gold, the property of that bank, delivered to him, and that he," the president of that bank, "wanted payment for that gold." He did not pretend that they had conferred any actual authority upon the cashier to certify the checks, but evidently based his claim upon the ground of an implied legal liability, and there is not a scintilla of evidence in the case tending to show any express authority on the part of the cashier to certify the checks.

Suppose that is so, still it is suggested that there is some evidence tending to show that the gold and gold certificates, when they were withdrawn from the Merchants' Bank, were transferred to, and actually deposited in, the defendant bank, and the argument is that the Circuit Court erred in not submitting that question to the jury.

Before the president of the plaintiff bank visited the president of the State Bank he called on the cashier of that bank, and whatever evidence there is in the case applicable to the issue, which it is supposed should have been submitted to the jury, consists of the conversation which took place between those officers during that interview before the other officers of the defendant bank knew anything of the transaction.

Just after one o'clock of that day the president of the plaintiff bank called on the cashier of the State Bank with the checks in his hands, and he states the conversation as follows: "I said to him, I thought you were coming in to pay the gold for those checks early in the morning. Question.—To pay the gold? Answer.—To pay the money. I didn't say gold; to pay the money on those checks early in the morning. The cashier replied, Yes, I am going out

now to attend to it and get the money. Get the money? said I; didn't you have the money—the gold? Were not the gold certificates delivered to you? Yes, said he, I had them here, but they are not here now; I am going out to get it, and will come in and attend to it. I spoke rather abruptly and said he should do it immediately. He looked up and said, You hold the State Bank. I came back and laid the checks on the desk of the teller."

Grave doubts were entertained by the circuit judges whether the evidence, if it had been objected to, would have been admissible, as it can hardly be maintained that the cashier, under the circumstances, was the agent of the bank to make any such admission in respect to a past transaction; and still graver doubts were entertained whether the supposed admission was understandingly made, as it was obvious that the cashier was abruptly and unexpectedly arraigned for his unauthorized and illegal acts in terms of complaint and in tones of accusation and command, but the judges were quite satisfied, even if the language as reported was deliberately employed, that the statement was untrue; that the admission, even if it was made, was contrary to the fact; that every dollar of the gold and of the gold certificates went directly from the Merchants' Bank to the office of the assistant treasurer for the benefit of the drawers of the checks, as the circumstances abundantly prove.

Regarded in that light, it is settled law that the remark of the cashier was entitled to no weight, as it was an admission contrary to the fact. Direct proof to that effect was not introduced in this case, as the defendants did not introduce any testimony, but the circumstances shown in evidence were equally persuasive and convincing, leaving no doubt in the mind of the Circuit Court that the whole fund withdrawn from the Merchants' Bank was transferred directly to the office of the assistant treasurer to supply a corresponding deficiency in the deposits in that institution which had been embezzled and loaned to the persons whose firm name was signed to the checks.

Some of the circumstances referred to have already been

mentioned, and there are many others reported in the transcript which tend very strongly in the same direction. Enough is exhibited in the record to show beyond all doubt that Mellen, Ward & Co. were extensively engaged in speculations; that they were largely interested in copper stocks; that in their first interview with the cashier of plaintiff bank they disclosed to him the fact that they only wanted the bank to take the gold for a few days, naming the day when they would desire to withdraw the same, and the arrangement as completed with the cashier, and as sanctioned by the president of the bank, gave them the right to call for that amount of gold whenever they might see fit by paying for the same at the same rate, and an additional sum equal to interest from the time the gold was deposited in the bank to the time it should be withdrawn. Authority was given to the cashier to take the gold as it arrived, on the terms proposed, and he was told at the same time that the parties depositing it would be allowed to call for the same amount on the same terms, paying also for the trouble a sum equal to interest while it remained in the bank.

Weighed in the light of these explanations it must require the exercise of much incredulity not to see in the acts, conduct, and declarations of the parties plenary proof that the gold and gold certificates, for which the checks were given, were withdrawn from the bank in pursuance of that arrangement. First Carter appears, then Ward, then Carter again, and finally Mellen, the three being all the members of the firm.

They had informed the cashier through their junior partner that the gold "would be taken away" on the last day of the month or the first day of the following month, and on the last day of the month Carter called and said "we have come for the gold," and when Ward came at a later hour on the same day, to give notice that their necessities were not fully supplied, he made no inquiry, nor did he submit any proposition, but said, "we shall want some more gold," and immediately left, showing conclusively that the contract had been previously made; and finally Mellen, the

senior partner, called to assist in carrying away the last thirty thousand dollars, which, with the thirty thousand previously taken, was delivered by the teller in the absence both of the cashier and of the president.

Loaned and withdrawn as the gold and gold certificates were but for one day, the president the next forenoon, when he found that the same were not returned, nor the amount of the checks paid, immediately took the matter into his own hands. He at once, or just before one o'clock, having previously "*heard that there was trouble at the sub-treasury*," called upon the cashier of the State Bank, and failing to obtain satisfaction there, he proceded, at a quarter before two on the same afternoon, to the room occupied by the president and directors of that bank, and he states that he found the president of the bank and two or three other persons present. Much of what was said on the occasion has already been narrated and need not be repeated.

Two of the persons present were the president of the State Bank and his predecessor in that office, and the president of the plaintiff bank testified that they were considerably excited; that he informed them that *he had just heard that there was trouble at the sub-treasury*, that he thought *they had better go to that office*, adding that if they did *perhaps they would find their gold there*, offering at the same time to go with them if they desired him to do so, and it appears *that he and those two persons* went to the room of the assistant treasurer, and that he introduced them to that officer, saying that they had come to see *if a large amount of gold had not been placed there* to the credit of the State Bank.

What further was said or done on the occasion does not appear, as the plaintiffs' testimony stopped there in respect to that interview, and none was introduced by the defendants. Sufficient, however, was given to satisfy the court beyond doubt that every dollar of the gold and gold certificates was transferred to that institution for the benefit of the drawers of the checks, and that no part of the same was ever received by the defendant bank.

Courts of justice have sometimes said that it is necessary

in all cases to leave the question to the jury if there is any evidence, even a scintilla, in support of the issue, but it is well settled law that the question for the judge is not whether there is literally no evidence, but whether there is none that ought *reasonably* to satisfy the jury that the fact sought to be proved is established.*

Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant a jury in finding a verdict in favor of that party.†

Formerly it used to be held, say the court in that case, that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but that a course of recent decisions has established a more reasonable rule, to wit, that in every case, before the evidence is left to the jury, there is or may be a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.‡

Apply that rule to the present case and it is clear to a demonstration that the ruling was correct, as there is no evidence reported which would warrant a jury in finding that the gold or gold certificates or any part of the same ever went into the defendant bank.§

Express authority in the cashier, either from the directors or under any act of Congress, to certify the checks of third persons is not pretended, and it appearing that no part of the funds withdrawn from the plaintiff bank was ever received by the defendant bank, or that they had any knowledge of the transaction prior to the interview between the presidents of the respective banks, the plaintiffs are forced

* Ryder *v.* Wombwell, Law Rep. 4, Exchequer, 39.

† Law Rep., 2 Privy Council Appeals, 335.

‡ Jewell *v.* Parr, 13 C. B., p. 916; Toomey *v.* L. & B. Railway Company, 3 Id. N. S. p. 150; Wheelton *v.* Hardisty, 8 Ellis & Blackburne, 262, 266.

§ Schuchardt *v.* Allens, 1 Wallace, 369.

to invoke usage as the source of the cashier's authority to certify the checks, or to put their case, as in the opinion of the court, upon the legal proposition that the power of the cashier to perform those acts is inherent in the office; that the certificates of the cashier import on their face that he was authorized to exercise that power in behalf of the bank, and that it makes no difference whether the acts were performed in the banking-house of the institution or elsewhere, provided it appears that he added to his signature the word cashier, at the time he certified the instruments.

Whether a usage exists or not, to confer power to do an act which otherwise would not be authorized, is a question of fact dependent upon the evidence, and he who alleges that such a usage exists must prove it, unless it is general and of such long standing that it has become incorporated into, and may be regarded as, a part of the commercial law, which cannot be pretended in this case, as it clearly appears that no such usage exists in the State where the transaction took place. No such evidence was introduced, and the settled rule of law in the highest judicial tribunal of the State is that the cashier of a bank possesses no such authority, unless it is specially delegated to him by the directors, which is in exact accordance with the rule prescribed in the act of Congress giving to the directors the power to appoint or elect a cashier and to manage the affairs of the institution.*

Such a power, say the court in that case, that is, the power of certifying checks, is in fact a power to pledge the credit of the bank to its customers, and is a power which, by the constitution of a bank, can alone be exercised by its president and directors, unless specially delegated by them, and consequently it cannot be implied as a resulting duty or authority *in any individual officer*. Evidence of usage, therefore, cannot confer any original, inherent, and implied power to certify such instruments. Checks had been certified in that case by the teller, but the rule as laid down is equally appli-

* 13 Stat. at Large, 102; Mussey *v.* Eagle Bank, 9 Metcalf, 313.

cable to cashiers, as the court say that the authority is vested in the president and directors, and that it cannot be implied as a resulting duty *in any individual officer*, which includes the cashier as well as the teller.*

Established as that rule was in that State more than twenty-five years ago, by the unanimous decision of the highest court of the State, it is not strange that no cashier in the State could be found who would testify that there was any such usage as is supposed by the plaintiffs. They called twenty-two cashiers, including the cashier of their own bank, but they did not venture to ask the question at all whether there was any such usage, though one or more of the number volunteered to say that none such existed, which was equally well proved by the silence of all the others. Proof of usage authorizing a cashier to certify checks, even if such proof would confer such an authority, which is denied, is certainly wanting, as there is not a scintilla of evidence to that effect to be found in the record.

Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense, and different from the sense which they ordinarily import, and it is also admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admissible to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous and doubtful, but it is never admissible to vary or contradict what is plain. Where the language employed is technical or ambiguous, such evidence is admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general principle or rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law.†

* 9 Ib. 313.

† Oelricks et al. *v.* Ford, 23 Howard, 63; Barnard *v.* Kellogg et al., *supra*, 383; Insurance Company *v.* Wright, 1 Id. 457; Simmons *v.* Law, 3

Whether such evidence is admissible or inadmissible to prove such an authority, it is quite clear that there was none in this case of any kind, and certainly none which would have warranted the jury in finding that the cashier of the defendant bank had any authority whatever to bind his bank by his certificates that the checks were good.

Interrogatories, however, were put to the cashiers examined as witnesses touching their powers in respect to other transactions, and they testified that the business at the clearing-house was usually conducted by the cashier of the bank, and that in adjusting balances occurring there the cashiers whose banks belonged to that association were accustomed to draw checks for that purpose, and that they were in the habit of receiving each other's checks in such adjustments as the checks of their respective banks; and they also testified that they bought and sold New York funds, as their banks redeemed very largely in that city, which created a necessity for the daily use of such funds in conducting the usual and regular operations of the banks; but the Circuit Court was of the opinion that the evidence was entirely unimportant in this case, as there was no evidence of any usage showing that the cashiers were authorized to certify the checks of third persons, and the judges were confirmed in that conclusion by the fact that it had long been the settled law of the State that no individual officer of a bank possessed any such authority.

Giving full effect to the usage proved, it only shows that a cashier may borrow money of the other banks, in the settlement of balances through the clearing-house, and that he may sign the checks given for the same, and that he may buy and sell New York funds, that is, he may buy for use in redeeming their bills, and he may sell the same when they have an excess beyond what is necessary for that purpose; but the evidence, in the opinion of that court, had no

Keyes, 219; Beirne *v.* Dord, 1 Selden, 97; Bliven *v.* Screw Company, 23 Howard, 431; Dickinson *v.* Gay et al., 7 Allen, 37; Dodd *v.* Farlow, 11 Id. 428; Spartali *v.* Benecke, 10 C. B. 222; Trueman *v.* Loder, 11 Adolphus & Ellis, 598; The Reeside, 2 Sumner, 567.

tendency to prove that the cashier of a National bank might certify the checks of a third person, as in this case, as the settled law everywhere is, that a power evidenced by usage must be considered as defined and limited by the usage.*

Nothing remains but to examine the question, whether there is any such inherent power in the office of a cashier as is supposed by the plaintiffs, as it is clear that the act of Congress confers no such power, and that there is no proof of any such usage in the case even if it be admitted that evidence of usage would be sufficient to establish that theory. Special reference to the by-laws of the bank is unnecessary, as it is not pretended that they confer any such power upon the cashier, and there is not a particle of evidence that the directors, directly or indirectly, ever gave him any such power.

Before attempting to answer the inquiry, what are the usual and ordinary duties of a cashier, it becomes necessary to look somewhat more closely at the circumstances which attended the transaction at the time the checks were certified. None of the checks were signed by the drawers or certified by the cashier in the banking-house of the defendants. On the contrary, the cashier left his own bank and went to the banking-house of the plaintiffs, and there, in the presence of the cashier of the plaintiffs, who knew full well what the arrangement was between his bank and the signers of the checks, and that by virtue of that arrangement they had a right to withdraw from the bank on that day that amount of gold and gold certificates, and that he as cashier was fully authorized by the president of his bank to deliver it to them, on the terms and conditions specified in the arrangement.

He knew, also, that he himself, as cashier, had no authority to certify checks; that the law of the State did not authorize such an act; that he had never done such an act; that it had never been done by the cashier of a National bank in that city; that the act of certifying these checks had not been

* The Floyd Acceptances, 7 Wallace, p. 678.

done *in the usual course of business*, nor in the presence of the directors of the defendant bank, as he testifies that the first two checks, amounting to five hundred and twenty-five thousand dollars, were certified "in the bank after the delivery and examination of the certificates;" and the president of the bank, in his letter to the comptroller of the currency, states that they were "certified as good on the spot by the cashier of the State National Bank."

Known to the cashier of the plaintiff bank as all the antecedent circumstances were, the judges of the Circuit Court did not entertain a doubt that he knew full well that the gold and gold certificates were withdrawn for the benefit of the drawers of the checks, and that the cashier of the defendant bank certified the checks as a mere surety or guarantor. Unmistakably he knew that the funds were withdrawn only for a day, for he testified that he was informed when the arrangement was made that the same would be taken away on the last day of the month or the first day of the following month, and the president, in his interview with the cashier of the defendant bank the next day, just before one o'clock, opened the conversation by saying, "I thought you were coming in to pay the gold or the money on those checks early in the morning." Both the president and cashier of the plaintiff bank knew what that arrangement was, and the cashier also knew all the circumstances which attended the execution of the checks and the delivery of the funds. Actual knowledge of all the circumstances on the part of the cashier of the plaintiffs is fully proved, and if he wanted more information he knew that the means of knowledge were at hand, as the cashier of the State Bank was there in his presence, and that if he was not satisfied with his answers he could ascertain the whole truth from the directors.

Suppose it be conceded, for the sake of the argument, that the checks were negotiable instruments, standing upon the same footing as bills of exchange and promissory notes, still the plaintiffs cannot recover if the cashier had no power to execute the certificates, as all the facts and circumstances

were known to the cashier of their bank. Indorsees of such negotiable instruments for value in *the usual course* of business are not obliged to make inquiries, as was held in *Goodman* v. *Simonds*;* but it was also held in that case, and is believed to be settled law everywhere, that an indorsee in such a case must not wilfully shut his eyes to the means of knowledge which he knows are at hand, for the reason that such conduct is equivalent to notice, and is plenary evidence of bad faith.†

Precisely the same rule was laid down by Baron Parke in the case of *May* v. *Chapman*,‡ and the same rule has been applied by this court in the case of *The Lulu*,§ decided at the last term.

He knew that he himself had no authority to do such an act as cashier; that the law of the State forbade it; that no cashier of a National bank in that city had ever exercised any such authority, and that the means of ascertaining whether the cashier of the defendant bank had such authority were at hand, and the rule, under such circumstances, is well settled that the party must inquire before assuming to act or take the risk that the necessary authority exists.

Examined in the light of the undisputed circumstances, the case is as strong for the defendants as it would be if the defect of authority had been apparent on the face of the instruments, as it in fact was to one having such knowledge. Where the defect or infirmity appears on the face of the instrument, the question whether the party who took it had notice or not is a question of law, and must be determined by the court as matter of construction.‖

Unable to maintain the suit upon these grounds, the plaintiffs are forced back to the grounds assumed by their president in his first interview with the president of the defendant bank, when he said, in effect, that your cashier has certified those checks and I want payment for the gold,

* 20 Howard, 367.
† Stagg *v.* Elliott, 12 C. B., N. S. 380.
‡ 16 Meeson & Welsby, 355.
§ *Supra*, 192.
‖ Goodman *v.* Simonds, 20 Howard, 365; Andrews *v.* Pond et al., 13 Peters, 65; Fowler *v.* Brantly, 14 Id. 318; Brown *v.* Davis, 3 Term, 80.

and to that it comes at last. Undoubtedly the cashier of the defendant bank certified the checks, but the circumstances show that the cashier of the plaintiff bank must have known that he did so without the knowledge of the directors, and if the cashier of the defendant bank had no authority, and the cashier of the plaintiff bank knew it, it is clear to a demonstration that the defendant bank is not liable. Circumstances, altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute the most convincing and conclusive proof.*

Repeated decisions of this court have determined the question that the power to certify the checks of third persons in behalf of the corporation is not inherent in the office of the cashier of a bank, and also that the exercise of such a power is not within the scope of his usual and ordinary duties.

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by the bank, and their acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge.†

So where a contract was made by the president and cashier of a bank with the indorser of a promissory note due to the bank, that he should be discharged in a certain event, this court held that it was not a part of their duty to make such a contract, and that they had no power to bind the bank except in the performance of their ordinary duties, which was a much stronger case than the one before the court, as the president of the bank joined with the cashier in making the contract.‡

His ordinary duties are quite extensive, but it is settled law in this court that they do not comprehend the making of a contract which involves the payment of money, without

* Castle et al. *v.* Bullard, 23 Howard, 187.

† Minor *v.* Mechanics' Bank, 1 Peters, 70.

‡ United States Bank *v.* Dunn, 6 Peters, 59.

an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank.*

Authority to certify the checks in this case, except what is supposed to be implied, is not pretended, and if it were the theory could not be supported for a moment, as there is no such evidence reported and none such was introduced.

Recurring to the two principal checks it will be seen that the plaintiff bank or their cashier, which is the same thing, is the payee, and inasmuch as the same were certified in the presence of the cashier of the plaintiffs, who knew all the circumstances, the suggestion that they are innocent holders as against the defendants cannot be supported. If a bank may be held liable in any case upon a certificate of their cashier that a check is good when they have no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized.†

Substantially the same concession is also made in the case of *North River Bank* v. *Aymar*,‡ and in *F. & M. Bank* v. *B. & D. Bank*.§ Like concession is also made in the case of *Railroad Co.* v. *Schuyler*.‖ Evidently the case of the *Mechanics' Bank* v. *Railroad*,¶ makes the same concession, even if it does not fully sustain the English doctrine as exemplified in the leading case of *Grant* v. *Norway*,** which, in the judgment of the Circuit Court, contains the true rule.††

Much vacillation is exhibited in the decisions of the New York courts upon this subject, but they agree at present that the certificate of the cashier or teller, as the case may be, if regular, in form, and unattended with any special circumstances, amounts to a representation that the drawer of the check has funds in the bank to meet the same, and that the

* United States *v.* Bank of Columbus, 21 Howard, 364.

† F. & M. Bank *v.* B. & D. Bank, 16 New York, 131.

‡ 3 Hill, 266. § 14 New York, 631. ‖ 34 New York, 72.

¶ 3 Kernan, 615. ** 10 C. B. 686.

†† Kirk *v.* Bell, 12 English Law & Equity, 389; Coleman *v.* Riches, 29 Id. 329.

certificate unexplained binds the bank whether accurate or erroneous, but that no such consequences will follow if there is anything on the face of the instrument to show the contrary, or if the payee or holder knew that the authority of the cashier to make the certificate depended upon the existence of funds in the bank to meet the liability, and that the bank had none such at the time, and that the payee or party presenting the check knew that fact.*

Carefully examined it will be found that in every one of the cases decided by the courts of that State where the more stringent rule is applied the check was presented at the bank in the *usual course of business*, and that the act of the cashier in making the certificate did in fact amount to an actual representation that the bank held the funds of the drawer to meet the demand.

Some of those decisions are doubtless inconsistent with the decisions of this court and with the English decisions and those of the Supreme Court of Massachusetts upon the same subject; but there is not one of them, if the facts of the case before the court are properly examined and understood, which will sustain the claim of the plaintiffs.

Beyond all question the cashier of the plaintiff bank represented his bank, he was an agent with full authority, and what he knew in respect to the transaction in question must be regarded as known to his bank. Viewed in the light of the circumstances it is clear that he did not receive the certificates as a representation that funds to that amount were in the State National Bank to meet the checks. He knew that the fact was not so, as the drawers were the customers of his own bank, and the case does not show a single instance in which they ever had any dealings with the defendant bank. Instead of that he regarded the acts of the certifying cashier as constituting the defendant bank a surety of the drawers of the checks to his bank, and the conduct of the president the next day in first arraigning the signer of the certificates before he presented the checks to the president

* Clarke National Bank *v.* Bank of Albion, 52 Barbour, 596; Irving Bank *v.* Wetherald, 36 New York, 337; Mead *v.* Merchants' Bank, 25 Id. 145.

of the defendant bank strongly confirms that view of the evidence.

Agents, held out as such by their principals for certain defined purposes, well known to the public, cannot bind their principals by any acts done outside of the scope of their authority, as defined by the well-known purposes of their agency. Masters of vessels are authorized to sign bills of lading, and the instruments when duly executed in *the usual course of business* bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well settled law that the owners are not liable if the party to whom the bill of lading was given had no goods or the goods described in the bill of lading were never put on board nor delivered into the custody of the master.* Like principles are applied in all cases where the authority of the agent is limited and the limitations as defined by the purposes of the agency are well known to the public.†

Persons dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at their peril, see in each case that the paper on which they rely "comes within the power under which the agent acts."‡

Where the plaintiff in the suit is the payee of the instrument, the correctness of that rule cannot be questioned, and this court decided in that case that the same rule applies to every *subsequent taker* of the paper, adding, what is certainly correct, where the suit, as in this case, is in the name of the payee, "that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

Cashiers are forbidden by the express decision of this court from making contracts on behalf of their banks not within the scope of their usual and ordinary powers, involv-

* The Schooner Freeman, 18 Howard, 187.

† Mussey *v.* Beecher, 3 Cushing, 511; Lowell Bank *v.* Winchester, 8 Allen, 109; Benoit *v.* Conway, 10 Id. 528; Grant *v.* Norway, 10 C. B. 665; Stagg *v.* Elliott, 12 Id. (N. S.), 373; Hubersty *v.* Ward, 8 Exchequer, 330; Alexander *v.* Mackenzie, 6 C. B. 766.

‡ The Floyd Acceptances, 7 Wallace, 676.

ing the payment of money, without an express delegation of authority from the directors.*

Checks signed at the clearing-house and contracts for the purchase and sale of New York funds are authorized by the directors, and are sanctioned by usage, but cashiers have no such authority to certify checks for third persons, which was well known to the cashier of the plaintiff bank.

Associations organized under the act of Congress to carry on the business of banking are required by the express words of the act to transact *their usual business* at an office or banking-house, located in the place specified in their organization certificate, and no individual officer ought to be allowed to leave his bank and go elsewhere to make large contracts without the instruction of the directors. Unless his power in that behalf is limited to the established place of business he may go wherever he pleases for that purpose, and if he certifies checks anywhere within the four seas of our continent, the bank is bound by his contracts. Stockholders and depositors should take warning if such is the law, as the National banks are liable at any moment to be overwhelmed with pecuniary obligations, and involved in utter ruin.

MARSH *v.* FULTON COUNTY.

1. In February, 1853, the Mississippi and Wabash Railroad Company was incorporated by the legislature of Illinois, and authorized to construct a railroad from Warsaw, on the Mississippi River, to the east line of the State. In February, 1857, an act was passed by that legislature amending the charter of the company, by which the line of the railroad was divided into three divisions, designated as the Western, the Central, and the Eastern, and each division was created a new company; so that there were three distinct corporations in place of the original corporation;—*Held*, that a subscription of stock and issue of county bonds, authorized upon a vote of the people of the county to the original corporation, could not be legally made to one of the three new corporations.
2. Where county bonds to a railroad company are issued without any authority, they are invalid in the hands of an innocent purchaser.

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* United States *v.* Bank of Columbus, 21 Howard, 364.

Statement of the case.

The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder.

3. A ratification being in its effect, upon the act of an agent, equivalent to the possession by him of a previous authority, and operating upon the act ratified in the same manner as though the authority of the agent to do the act existed originally, can only be made when the party ratifying possesses the power to perform the act ratified. Accordingly, where supervisors of a county possessed no authority to make a subscription or issue bonds to a railroad company, in the first instance, without the previous sanction of the qualified voters of the county, they could not ratify a subscription to the company already made without such authorization.

ERROR to the Circuit Court for the Southern District of Illinois. The case was thus:

In 1849 the legislature of the State of Illinois passed an act, which provided that whenever the citizens of any city or county in that State were desirous that such city or county should subscribe for stock in any railroad company already organized or incorporated, or thereafter to be organized or incorporated under any law of the State, such city or county might and were authorized to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000 for each of such cities or counties; but that no subscription should be made, or purchase or bond issued, under the provisions of the act, whereby any debt should be created, unless a majority of the qualified voters of such county or city should vote for the same. The act also required that the notices calling for the election should *specify the company in which stock was proposed to be subscribed.*

A law of the State of 1861 provided that the powers of a county in Illinois could only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted.*

In February, 1853, the Mississippi and Wabash Railroad Company was incorporated by the legislature of Illinois, and authorized to construct a railroad from Warsaw on the Mississippi River to the east line of the State.

* Gross's Statutes of Illinois, 751.

Statement of the case.

In September, 1853, the board of supervisors of Fulton County, through which county the projected line of the road was to run, ordered that the question be submitted to the voters of the county at the ensuing November election whether the county should subscribe $75,000 to the capital stock of this company, and a like sum to the capital stock of the Petersburgh and Springfield Railroad Company, payable in the bonds of the county; such bonds not to be issued to the former company until its secretary should certify to the board that $700,000 had been subscribed to its stock and 5 per cent. thereon had been paid. At the election mentioned the vote was taken, and a majority of the votes of the county was cast in favor of the subscription.

In April, 1854, the board ordered its clerk to subscribe the $75,000 voted to the Mississippi and Wabash Company, and to issue the bonds when it should be certified to him by the secretary of the company that $700,000 of the stock had been subscribed and 5 per cent. thereon had been paid.

In September, 1855, a similar order was made by the board, requiring its clerk to enter the subscription on the books of the company in the name of the County of Fulton.

In February, 1857, an act was passed by the legislature of Illinois amending the charter of the Mississippi and Wabash Company, by which the line of the railroad was divided into three divisions, designated the Western, the Central, and the Eastern divisions, and each division was placed under the management and control of a board of three commissioners, to be elected by the stockholders of the division, and to be invested with all the powers of the original board of directors of the company over the road in their division.

In April, 1857, the stockholders within the Central Division elected commissioners of the division, who thenceforth, until December, 1868, exercised all the powers conferred by this amendatory act.

On the books of the Central Division thus organized, the clerk of the County Court of Fulton County, acting as clerk of the board of supervisors of that county, made the subscription of $75,000 in the name of the county, and in Sep-

tember following issued to this division the fifteen bonds which are in suit in this cause. These bonds purport to be obligations of the County of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, and pledge the faith of the county, and its property, revenue, and resources for their payment.

The following is a copy of a bond and coupon:

"No. 11. $500.

"UNITED STATES OF AMERICA,
STATE OF ILLINOIS, COUNTY OF FULTON.

"Bond due in ten years after date.—Central Division, Mississippi and Wabash Railroad Company.

"Know all men by these presents that there is due from the County of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, OR BEARER, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first day of July in each year, at the treasury of said County of Fulton, on the presentation and surrender of the annexed coupons. The principal to be due and payable ten years from the date hereof. For the performance of all which the faith of the said County of Fulton is irrevocably pledged, as also the property, revenue, and resources of said County of Fulton.

"In testimony whereof John H. Peirsol, clerk of the County Court, has hereunto subscribed his name and affixed the common seal of said County Court this 1st day of September, 1857.

[L. S.] "JOHN H. PEIRSOL,
"Clerk of the County Court."

"Bond No. 11. STATE OF ILLINOIS. $35.

"The County of Fulton will pay thirty-five dollars on this coupon on the first day of July, 1859, at the treasury of said county.

"JOHN H. PEIRSOL
"Clerk of the County Court."

There were various acts of the board of supervisors of Fulton County done after the issue of these bonds, which tended to show that the board recognized them and considered the county bound for them.

Interest was on one occasion paid on some of the bonds by the county treasurer, and the amount paid was allowed to him by the board in settlement.

The records of the board, held on the 15th of September, 1857, showed the adoption of a report of the finance committee, estimating the amount required to pay the interest on county bonds, "issued and to be issued" that year, including county expenses and interest on railroad bonds, and levying a tax to pay the same, with no reservation or exception as to these bonds.

At the same session the board appointed county agents as to this railroad, and required *them to attend the meetings of stockholders, election of officers, and to represent the county "as a stockholder."* The clerk issued certificates of appointment to the county agents and they were paid by the county for their services. At the session of March, 1858, the board appointed a fiscal agent to manage the sinking fund on "railroad bonds;" and in the following September appointed a committee to estimate the amount of money for the current year, required to pay interest on county bonds "issued for railroad purposes." The committee reported that $350 was needed to pay interest on $4500 of these bonds.

At the session of March, 1858, it was ordered that the claim of Graham, one of the agents of the county as to the Mississippi and Wabash Railroad Company, for services as such agent, be paid, and at the September session, 1859, that the county treasurer pay "the interest on the Fulton bonds," and without any reservation of the bonds in suit, and at the September session, 1860, that the county treasurer pay all coupons presented prior to March, 1861, and from June, 1861, purchase as many bonds, at not exceeding sixty cents of the dollar, as the sinking fund would pay.

In September, 1865, the board paid two of the bonds at a discount, protesting, however, against liability upon them.

Opinion of the court.

On the 13th of September, 1866, the board ordered payment of two more of the bonds *in full*, upon the recommendation of the finance committee, and their statement that "*they entertained no doubt that they ought to be paid*," and the bonds were surrendered.

On the next day, however, the board, by order, reconsidered the vote ordering payment, and finally refused to pay the bonds.

The present action was brought on fifteen bonds issued by the clerk of the County Court of Fulton County, acting as clerk of the board of supervisors of that county to the Central Division of the Mississippi and Wabash Railroad Company, and on the coupons annexed to said bonds.

The declaration contained special counts on the instruments, and also the common counts. The defendants pleaded the general issue, and judgment passed in their favor. The plaintiff below brought the case here on writ of error.

Messrs. O. H. Browning and O. C. Skinner, for plaintiff in error, relied largely on the fact which they asserted, and which they relied on as not disproved, that the bonds were in the hands of innocent holders for value; and that whether regularly issued originally or not, they had been ratified by the county in so many different ways, so advisedly and so unequivocally, that irregularity could not now be set up.

Mr. S. Corning Judd, contra.

Mr. Justice FIELD delivered the opinion of the court.

The questions presented for our consideration are, *first*, whether the bonds issued by the clerk of the County Court of Fulton County to the Central Division of the Mississippi and Wabash Railroad Company were, at the time of their issue, valid obligations of the County of Fulton; and, *second*, if not thus valid, whether they have become obligatory upon the county by any subsequent ratification.

Were they valid when issued? The answer depends upon the law of Illinois then in force. The clerk of the County Court possessed no general authority to bind the county.

He was a mere ministerial officer of the board of supervisors; and that body was equally destitute of authority in this particular, except as the law of Illinois gave it. That law authorized any county of the State, and, of course, its supervisors, who exercised the powers of the county, to subscribe stock to any railroad company in a sum not exceeding one hundred thousand dollars, and to pay for such subscription in its bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the county at an election called for the expression of their wishes on the subject, and it prohibited any subscription or the issue of any bonds for such subscription without such previous sanction. "No subscription shall be made or purchase bond issued by any county," says the law, "unless a majority of the qualified voters of such county . . . shall vote for the same." And the law further requires that the notices calling for the election "shall specify the company in which stock is proposed to be subscribed."

These provisions furnish the answer to the first question presented. The only subscription authorized by the voters of Fulton County was that to the Mississippi and Wabash Railroad Company, and one to the Petersburgh and Springfield Company. The Central Division of the Mississippi and Wabash Railroad Company was a different corporation from the original company. It has been so held by the Supreme Court of Illinois in a case involving the consideration of a portion of the bonds in suit and the remaining sixty thousand dollars of bonds of the original subscription.

The amendatory act of 1857 dividing the road into three divisions, and subjecting each division to the control and management of a different board, clothed with all the powers of the original board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire State, was voted by the electors of Fulton County; not a subscription to a company whose

line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact we do not perceive how it could affect the liability of the County of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances.** In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the

* 7 Wallace, 676.

supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition.*

We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way.

We perceive no error in the record, and the judgment of the Circuit Court must, therefore, be

AFFIRMED.

* McCracken *v.* City of San Francisco, 16 California, 624.

INDEX.

ABATEMENT OF ACTION. See *Constitutional Law*, 3.

A bill filed previously to the passage of an act of Congress, making lawful the building of a particular bridge, the bill praying injunction against building of it as a nuisance, is abated by such act; though pleas and replication had been filed, proofs taken, and the case ready for hearing. *The Clinton Bridge*, 454.

ACCOUNT RENDERED. See *Evidence*, 3–7.

ACCOUNT STATED. See *Stated Account.*

ACKNOWLEDGMENT OF DEED. See *Illinois*, 2.

ACTION. See *Abatement of Action; Negotiable Paper*, 2.

1. Cannot be sustained on a gratuitous promise. *Railroad Company* v. *Reeves*, 176.
2. A party standing in a position of secondary liability but not in that of pure surety, *held* to be without right of against a principal for recovery of a tax exacted by the government from the principal, of which such secondary party had notice and could yet recover (protest having been made by the principal) if the tax was illegally exacted. *Baltimore* v. *Baltimore Railroad*, 543.

ACT OF GOD. See *Common Carrier.*

ADMIRALTY. See *Lookouts; Maritime Lien; Practice*, 14, 22–24; *Prize.*

A steamer crossing another, so as to involve risk of collision, condemned 1st, for not keeping clear, having the other on her starboard; 2d, being the following vessel. *The Columbia*, 246.

AGENT. See *Factor; Principal and Agent.*

ALGIERS. See *Consul of the United States.*

APPEAL. See *Writ of Error.*

APPEARANCE.

Appearing by counsel and moving to dismiss a bill for want of jurisdiction and also for want of equity, is a waiver of the privilege as to not being sued in the Circuit Court, given by the Judiciary Act of 1789, to non-residents of the district, and amounts to a voluntary appearance within the Judiciary Act of February 28th, 1839, which by implication authorizes any court of the United States "to take jurisdiction against a person not an inhabitant of, or found within the district where the suit is brought, if he voluntarily appears thereto." *Jones* v. *Andrews*, 327.

ASSUMPSIT. See *Quantum Valebat.*

ATTACHMENT, SUITS IN.

1. Their character,—how far *in rem*, how far *in personam*—and the distinction between the two sorts, stated. Conclusiveness of judgments in the latter, in collateral proceedings, where there has been a valid writ, a levy, judgment, order of sale, and deed. *Cooper* v. *Reynolds*, 308.
2. Where in such suit there is a valid writ and levy on property, a judgment of the court, an order of sale, a sale and sheriff's deed, the proceeding cannot be held void when introduced collaterally in another suit; even though there have been irregular or defective affidavits and publication of notice, such as might reverse the judgment for error in departing from the directions of the statute. *Ib.*

ATTORNEY. See *Counsel and Client.*

BAILEE.

Not bound by *gratuitous* promise. Hence the promise of a common carrier made without compensation additional to what he has contracted for, to forward goods already on his route, by an earlier train than they would usually go by, makes no contract. *Railroad Company* v. *Reeves*, 176.

BANK CHECK. See *National Banks; Negotiable Paper*, 2, 3.

BARBARY COAST. See *Consul of the United States.*

BREACHES. See *Statutory Bond; Voluntary Bond.*

Suits sustainable for, on a statutory bond, if the conditions of it be essentially within those contemplated by the statute, though not within them literally. *United States* v. *Hodson*, 395.

BURDEN OF PROOF. See *Entry for Condition Broken.*

CALIFORNIA LAND CLAIMS.

Grants of the public domain of Mexico, their three classes; the regulations prescribed by Mexico for the alienation of its public domain; the Act of the Departmental Assembly of California on such alienation; the interest passed by an imperfect grant in California constituting property protected by the treaty of cession. These matters considered. *Hornsby et al.* v. *United States*, 224.

CASES AFFIRMED.

Camanche, The (8 Wallace, 476), in The Blackwall, 1.
Flanders *v.* Tweed (9 Id. 425), in Coddington *v.* Richardson, 516.
Grapeshot, The (Ib. 129), in The Lulu, 192, and The Kalorama, 204.
Guy, The (Ib. 758), in The Kalorama, 204.
Norris *v.* Jackson (Ib. 125), in Coddington *v.* Richardson, 516.
Paul *v.* Virginia (8 Id. 168), in Ducat *v.* Chicago, 410, and Liverpool Insurance Company *v.* Massachusetts, 567.

CASHIER OF BANK. See *Principal and Agent.*

A cashier has power, when acting *bonâ fide* and in the ordinary course of business, to bind his bank by marking checks on it as "good." This rule applies to the National banks. *Merchants' Bank* v. *State Bank*, 604.

CAUSA PROXIMA, NON REMOTA, &c. See *Common Carrier*, 4.

"CHOUTEAU'S MAP."

Is not evidence conclusive upon questions of the extent of lots in St. Louis, but may go to a jury with other evidence. *The Schools* v. *Risley*, 91.

CLAIM AGAINST THE UNITED STATES.

An ancient one on loan certificates, issued by the Continental Congress of 1777, rejected; the same, after investigation into it, having been rejected in 1792 by Secretary Hamilton, and being as the court considered without equity. *Ward* v. *United States*, 593.

CLIENT. See *Counsel and Client.*

COLLISION. See *Admiralty; Lookouts.*

COMMON CARRIER. See *Contract*, 4.

1. Who shows that a loss was by some *vis major*, as by flood, is excused without proving affirmatively that he was guilty of no negligence. *Railroad Company* v. *Reeves*, 176.
2. The proof of such negligence, if the negligence is asserted to exist, rests on the other party. *Ib.*
3. In case of a loss of which the proximate cause is the act of God or the public enemy, the common carrier is excused, though his own negligence or laches may have contributed as a remote cause. *Ib.*
4. The maxim *causa proxima, non remota spectatur* applies to such cases as to other contracts and transactions; and ordinary diligence is all that is required of the carrier to avoid or remedy the effects of the overpowering cause. *Ib.*

CONCLUSIVENESS OF JUDGMENT.

Judgments of courts of competent jurisdiction cannot be attacked collaterally. *Stoval* v. *Banks*, 583; *Cooper* v. *Reynolds*, 308.

CONDITION. See *Contract*, 1, 2; *Entry for Condition Broken.*

CONSIDERATION. See *Contract*, 1, 2.

The mere promise of a carrier, without additional consideration, to forward freight already on the route by an earlier train than usual, is not evidence from which a jury can infer a special contract to do so. *Railroad Company* v. *Reeves*, 176.

CONSIGNOR AND CONSIGNEE. See *Factor.*

CONSTITUTIONAL LAW. See *Jurisdiction*, 1; *Navigable Waters of the United States.*

1. An ordinance of a city imposing a license tax upon dealers in beer or ale not manufactured in that city, but brought there for sale, is not necessarily in conflict with the clause of the Constitution which declares that "Congress shall have power to regulate commerce with

CONSTITUTIONAL LAW (*continued*).

foreign nations, and among the several States;" nor with that one which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." *Downham* v. *Alexandria Council*, 173.

2. Corporations whether organized under the laws of a State of the Union or a foreign government, may be taxed by another State, for the privilege of conducting their corporate business within the latter. *Liverpool Insurance Company* v. *Massachusetts*, 567; *Ducat* v. *Chicago*, 410; both affirming *Paul* v. *Virginia* (8 Wallace, 168).

3. An act of Congress enacting that a certain bridge, already built over a river which divides two States, "shall be a lawful structure, and shall be recognized and known as a post-route," is constitutional. *The Clinton Bridge*, 454.

4. A constitution of a State is a "law," within the meaning of that clause of the Constitution which ordains that "no State shall pass any law impairing the obligation of contracts." *Railroad Company* v. *McClure*, 511.

5. The decision of a State court which simply held that promissory notes, given for the loan of "Confederate currency," together with a mortgage to secure the notes, were nullities, on the ground that the consideration was illegal, according to the law of the State, at the time the contract was entered into, is not a decision repugnant to the Federal Constitution. *Bethel* v. *Demaret*, 537.

6. The riparian rights possessed by the owner of land bounded by a navigable river are property, and can be taken for the public good only when due compensation is made. *Yates* v. *Milwaukee*, 497.

7. A statute of a State which confers on a city the power to establish dock and wharf lines, and to restrain encroachments and prevent obstructions to such a stream, does not authorize it to declare by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when, in point of fact, it was no obstruction, or hindrance to navigation. *Ib.*

CONSTRUCTION, RULES OF. See *Evidence*, 8.

I. As Applied to Contracts.

1. Where the proper meaning of an instrument is clear, the erroneous construction which the parties to it have themselves put upon it will not control its effect. *Railroad Company* v. *Trimble*, 367.

2. When plain in terms not to be controlled by evidence of usage. *Barnard* v. *Kellogg*, 383; *Stagg* v. *Connecticut Insurance Company*, 589.

II. As Applied to Statutes.

3. A statute granting pieces of lands to Indians, and prescribing a specific mode in which they may sell, forbids by implication a sale independently of the mode. *Smith* v. *Stevens*, 321.

4. Statutes to raise revenue, are to be construed liberally to carry out the purposes of their enactment. The rule that what is implied in them is as much a part of the enactment as what is expressed, holds in regard to them. *United States* v. *Hodson*, 395.

CONSTRUCTION, RULES OF (*continued*).

5. Those authorizing redemption from sales for taxes, are to be construed favorably to the owners of the land, and particularly when such statutes provide full indemnity to the purchaser and impose a penalty on the delinquent. *Corbett* v. *Nutt*, 464.

CONSULS OF THE UNITED STATES.

The provision of the act of Congress of May 1st, 1810, fixing a salary to the consul at Algiers, and assigning to him certain duties, treating that place as belonging to a Mohammedan power, ceased to be operative when the country, of which it was the principal city, became a province of France. *Mahoney* v. *United States*, 62.

CONTINENTAL CONGRESS. See *Claims against the United States.*

CONTRACT. See *Construction, Rules of*, 1, 2; *Rescission of Contract.*

1. A sale—in the South and just as the rebellion was breaking out, by a party going North, to one remaining in the South, the sale being made under apprehension that if held by the vendor it would be confiscated by the rebel powers, as was threatened—of stock in a company at its par value, the consideration to be paid out of the net receipts of earnings of the stock, received quarterly by the company, and a note given therefor, with the condition that the principal should become due if the instalments were not regularly paid, after the receipt by the company of the net quarterly earnings, *held* a valid sale under the circumstances. *Dean* v. *Nelson*, 158.
2. Such a condition in the note was not a penalty, but was of the substance of the contract. *Ib.*
3. A contract of a special sort between a city and unincorporated contractors, who became afterwards incorporated, for making street railways, construed. *People's Railroad* v. *Memphis Railroad*, 38.
4. Consideration is essential to a contract, and a gratuitous promise of a bailee (a common carrier), that is to say a promise without compensation additional to what he has contracted for, to forward goods already on his route, by an earlier train than they would usually go by, is not obligatory. *Railroad Company* v. *Reeves*, 176.
5. When plain in terms not to be changed by evidence of usage. *Barnard* v. *Kellogg*, 383; *Stagg* v. *Insurance Company*, 589.

CORPORATIONS. See *Salvage*, 1.

The essential characters of them defined, and an association of individuals under acts of the British Parliament, somewhat in the nature of a joint stock association but with larger powers, held to constitute a corporation in the modern state of the law, though the acts declared that it should not become a corporation. *Liverpool Insurance Company* v. *Massachusetts*, 566.

CORPOREAL INTEREST.

A deed from one owner conveying quarry lands to his co-owners, in fee, they agreeing to quarry and deliver to the grantor certain sorts of marble from it, up to a limited amount, and he reserving a right, if the grantees did not furnish the marble from the land, to enter and

CORPOREAL INTEREST (*continued*).

keep possession and take the marble himself, till the grantees should be ready and willing to fulfil the conditions of the contract on their part, does not leave in the grantor a corporeal interest in the marble "*in situ*," and hence his interest is not exclusive of the right of the grantees to take marble on their own account "*ad libitum*." *Marble Company* v. *Ripley*, 341.

CORRESPONDENT. See *Factor*, 2, 4; *Letters*.

COUNSEL AND CLIENT.

1. The attorney or solicitor, who is also counsel in a cause, has a lien on moneys collected therein for his fees and disbursements in the cause, and in any suit or proceeding brought to recover other moneys covered by the same retainer. *In re Paschall*, 483.
2. A motion to pay into court the moneys collected will not be granted, but the parties will be left to their action, if the attorney is guilty of no bad faith or improper conduct, and has a fair set-off against his client, which the latter refuses to allow. *Ib.*
3. A party has a general right to change his attorney, and a rule for that purpose will be granted, leaving to the attorney the advantage of any lien he may have on papers or moneys in his hands as security for his fees and disbursements. *Ib.*

CUSTOM. See *Evidence*, 8.

CUSTOMS OF THE UNITED STATES.

The proviso to the Act of March 3, 1857, which act allows an importer to make additions to the value of goods as given in the entry or invoice, &c., and the act of the same day, which enacts that unmanufactured sheep's wool, above the value of 20 cents, shall pay an *ad valorem* duty of 24 per cent., but if, &c., construed. *Kimball* v. *The Collector*, 436.

DEED. See *Corporeal Interest; Evidence*, 1, 10-14; *Implication; Patent*, 3-5.

A deed granting quarry lands in fee, subject to incorporeal rights expressly stated, is not to be construed so as to restrict further and by implication, absolute ownership. *Marble Company* v. *Ripley*, 340.

"DEVISE."

The term held not to be embraced by a penal act making void all "*sales, transfers, and conveyances* of any estate or property of persons engaged in armed rebellion against the United States," further, if at all, than as against the United States. *Corbett* v. *Nutt*, 464.

DURESS. See *Voluntary Bond*.

EJECTMENT.

Mortgagor cannot recover in against mortgagee in possession after breach of the condition, or against persons holding under him. *Brobst* v. *Brock*, 519.

ENTRY FOR CONDITION BROKEN.

Where a person makes such an entry on land as *primâ facie* is a deforcement of the owners and an invasion of their rights as such, the burden is on the party entering to show that his entry was justifiable. *Marble Company* v. *Ripley*, 339.

EQUITY. See *Evidence*, 9; *Negotiable Paper*, 1; *Practice*, 7, 21.

1. Will enjoin one partner from violating the rights of his copartner in partnership matters, although no dissolution of the partnership be contemplated. *Marble Company* v. *Ripley*, 339.
2. Will not decree specific performance of a contract:

(*a*) Against one party in favor of another who has disregarded his own reciprocal obligations in the matter. *Ib.*

(*b*) Nor where the duties to be fulfilled by the grantee are continuous and involve the exercise of skill, personal labor, and cultivated judgment. *Ib.*

(*c*) Nor where there is a want of mutuality in the contract. *Ib.*

(*d*) Nor where the party (a grantor) has a complete remedy at law. *Ib.*

3. Will not relieve a corporation against particular parts in its contracts, voluntarily and deliberately entered into, such parts being of the consideration on which the contract was made, because with lapse of time and change of circumstances they have become oppressive to it and more favorable to the other side than was anticipated, or because other unforeseen inconvenient results to the corporation follow. *Marble Company* v. *Ripley*, 339.
4. Injunction should not be more broad than required by the offence against which it is directed; that is to say, should not, in enjoining a defendant against doing what he has no right to do, enjoin him in such a way as may possibly prevent his doing that which he may properly do. *Ib.*
5. On bill by a State praying that a defendant be enjoined from asking payment of certain United States bonds belonging to it, unlawfully taken some time before from its treasury, and now redeemable, *and for such other and further relief as the court may deem proper*, it will follow a substituted security (new bonds bearing interest) given by the United States; the substitution having been made after the issue of process under the bill, though before service, by agreement between the holder of the bonds and the United States, in order that the party properly entitled, whoever he might be finally under the bill decided to be, should not lose interest; and the new bonds being held by a trustee for this purpose. *Texas* v. *Hardenberg*, 68.

EQUITY OF REDEMPTION. See *Mortgage.*

The equity of redemption of a mortgage is not extinguished by proceedings to foreclose the same during the war, when such proceedings were taken within the Union lines, whilst the defendants were absent in the Confederate lines and were prohibited from entering the Union lines. *Dean* v. *Nelson*, 158; *Railroad Company* v. *Trimble*, 367.

ERASURE. See *Evidence*, 1.

ESTOPPEL. See *Attachment, Suits in; Conclusiveness of Judgment.*

Where an agent (in this case the agent of an insurance company) has received a general circular from his company employing him, which contains in clear language the terms of his compensation, and has acted on that circular without complaint for several years, he is estopped to deny that he was employed on those terms. The production of a circular of prior date, with other terms as to compensation, does not alter the case. *Stagg* v. *Insurance Company*, 589.

EVIDENCE. See *Attachment, Suits in; Common Carrier; Conclusiveness of Judgments; Entry for Condition Broken; Mortgage*, 3; *Practice*, 14.

In Cases Generally.

1. On an objection to the admission of a deed because of an alleged erasure and interlineation apparent on its face, the court may properly admit the deed, leaving it to the jury to determine whether there was any alteration. *Little* v. *Herndon*, 26.
2. A concession which would have effect to bind a person when claiming under it and when it relates to one piece of property, has no effect when the person does not claim under it and when it relates to another. *The Schools* v. *Risley*, 91.
3. An account rendered and not objected to within a reasonable time, is to be regarded as admitted by the party charged, to be *primâ facie* correct. *Wiggins et al.* v. *Burkham*, 129.
4. If certain items in such an account are objected to within a reasonable time, and others not, the latter are to be regarded as covered by such an admission. *Ib.*
5. What is to be regarded as a reasonable time is, when the facts are clear, a matter of law. Where the proofs are conflicting, it is a mixed one of law and fact, and in such cases the court should instruct the jury upon the several hypotheses of fact insisted on by the parties. *Ib.*
6. Between merchants at home, an account which has been presented, and no objection made thereto, after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account. *Ib.*
7. But the court will not take notice judicially of the time which rail-cars require to run between different places, and of the frequency of the mails on such roads. They are matters which must be proved by proper testimony. *Ib.*
8. The office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it. *Barnard* v. *Kellogg*, 383; *Stagg* v. *Insurance Co.*, 589.
9. An allegation in an answer entirely impertinent to the bill cannot be used as evidence for the defendant, even though the plaintiff neglect to file a replication. *Gunnell* v. *Bird*, 304.

EVIDENCE (*continued*).

10. A deed which referred to a plat of the land for one of the lines of the boundary, may be read in evidence to the jury without the production of the plat, subject to an identification of such line by competent evidence during the progress of the trial. *Deery* v. *Cray*, 263.
11. A deed which refers to such a plat for one line, or which authorizes the line to be run by a certain person according to such a plat, is not void for uncertainty on its face. *Ib.*
12. In case of such a deed made a great many years ago, though the plat is not produced, it is competent to show by other proof, written or parol, or both, that such a line existed and where it was located. *Ib.*
13. This may be shown by long possession on each side of the line evidenced by a fence, by the parol declarations of the parties holding under the deed on each side of the line, or by any facts which clearly establish the existence of such a line and its location. *Ib.*
14. Where a party having a good title in fee to lands gives a power of attorney to sell them, and the person having the power executes in proper form in behalf of his principal a conveyance, the facts that he was compelled to make the conveyance by a decree of court on a litigation consequent on a difference between himself and persons to whom he had contracted to sell, as to the terms of the contemplated sale, and on the trial gives no proof of the decree in connection with the deed, is no ground for rejecting the deed on a question between subsequent parties. *Hanrick* v. *Neely*, 364.
15. Although to establish the fact that a certain suit was brought, or the time of its commencement, the record of it may be used against one who was no party to it; yet only so much as is necessary for that purpose is admissible. Hence not depositions incorporated into such record, where the witnesses are competent, and can be procured in the second suit. Nor the answer of the defendant, the party against whom it is proposed to read it having been neither party to the former suit nor privy to a party. *Tappan* v. *Beardsley*, 427.

FACTOR. See *Principal and Agent.*

1. Where factors have made large advances, or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their right to sell at such a time, as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves and to promote the interests of the consignor; they acting, of course, in good faith and with reasonable skill. *Feild* v. *Farrington*, 141.
2. The refusal by the consignor to reply within a reasonable time after he received it, to a letter from his factors, stating that in order to meet the consignor's views they had not sold; giving him information about the state of the markets; expressing their judgment and their wish to sell, and *asking a reply*, *held* under particular circumstances to raise a presumption that the consignor approved of what his factors had done, so far as their letter informed him; and in the absence of anything to rebut that presumption, that the consignor was

FACTOR (*continued*).
to be regarded as having consented to whatever delay had occurred in effecting a sale, even though the delay was contrary to his directions. *Ib.*
3. But such receipt and non-acknowledgment *held not* to relieve the factors from a continuing obligation to sell within a reasonable time, all the circumstances of the case being considered; and at the best prices that could be obtained. *Ib.*
4. The rights and duties of a factor who has made large advances in favor of a consignor who alleges that he has given oral instructions to sell, but who does not reply to letters, such as above mentioned, on the subject of the agency, asking a reply, considered. *Ib.*
5. The questions proper to be submitted to a jury and the instructions proper to be given in such case stated. *Ib.*

FEE SIMPLE. See *Implication.*

FINAL DECREE.
What constitutes such decree, stated. *Stoval* v. *Banks*, 583.

GRAND RIVER.
In Michigan. How far "a navigable water of the United States." *The Daniel Ball*, 557.

GRANT BY IMPLICATION. See *Corporeal Interest; Implication.*

ILLINOIS.
1. A defendant claiming under a tax sale deed, under the Illinois statute of 21st February, 1861, must show not only a tax deed in proper form, but also a judgment under which the tax sale was made. *Little* v. *Herndon*, 26.
2. A deed for lands in, executed in Virginia and acknowledged in conformity with its laws at the time of execution, may be lawfully recorded in Illinois, and read in evidence without further proof of execution. *Ib.*

IMPLICATION.
A restriction upon absolute ownership in a grant of land having on it a quarry, where the grantees agree to deliver to the grantor, his heirs, &c., so long as they might want, a certain number of feet, per annum, of stone of certain kinds, for a partnership purpose (the grantor reserving a right of re-entry and of taking the stone himself, if the grantees do not fulfil their agreement), is not to be raised by implication. *Marble Company* v. *Ripley*, 340.

INCIDENTAL."
An agreement by a railroad company with a city (which was about to issue its own bonds as a loan of credit for the road, the road giving to the city an equal amount of bonds of the road), to pay "all and any expense incidental to the *issue* of any of the bonds" thereof, held not to include a payment of a tax laid on the bonds after they were issued; the city by its arrangements with the road being itself a gainer, and not standing in the exact position of a surety. *Baltimore* v. *Baltimore Railroad*, 544.

INCORPORATION.

The effect of incorporating certain persons, who as an unincorporated company had made a contract, considered in a special case, in respect of how far the identity of the unincorporated company was affected by the act of incorporating them. *People's Railroad* v. *Memphis Railroad*, 38.

INDIANS. See *Kansas Indians; Construction, Rules of*, 3.

INJUNCTION. See *Equity*, 1, 4.

INSTRUCTIONS. See *Practice*, 3, 4, 15, 16.

INSURANCE. See *Estoppel.*

A policy of insurance contained the usual covenant, that if the property was sold the insurance ceased, unless the consent of the insurer was given in writing to the sale. *Held*, that an indorsement on the policy by the assured, "Payable, in case of loss, to E. C. Bates" (the plaintiff), and under this, the indorsement by the insurer, that "Consent is hereby given to the above indorsement," did not imply either a knowledge or consent to the *sale* of the goods insured. *Bates* v. *Equitable Insurance Company*, 33.

INTERNAL REVENUE. See *Stamp.*

The 96th section of the Excise Act of June 30th, 1864, exempting from a tax laid on sundry articles of dress by section 95, construed. *Boylan* v. *United States*, 58.

INTERSTATE COMMERCE. See *Constitutional Law*, 1, 2, 3.

JUDGMENTS. See *Attachment, Suits in; Conclusiveness of Judgment.*

Validity of cannot be questioned collaterally in another suit for errors which do not affect the jurisdiction of the court that rendered it. *Cooper* v. *Reynolds*, 308; *Stoval* v. *Banks*, 583.

JUDICIAL KNOWLEDGE

Does not comprehend a knowledge of the time which rail-cars require to run between different places, and of the frequency of the mails on such roads. *Wiggins* v. *Burkham*, 129.

JUDICIAL SALE.

Made at the suit of a mortgagee, though irregular and no bar to the equity of redemption, passes the rights of the mortgagee as such. *Brobst* v. *Brock*, 519.

JURISDICTION.

1. A decree made within the Union lines, during the late rebellion, against a person absent in the Confederate lines (or confined as a rebel by the United States), and who was prohibited by the United States from being or coming where process could be served on him, is void. *Dean* v. *Nelson*, 158; *Railroad Company* v. *Trimble*, 367.

I Of the Supreme Court of the United States. See *infra*, 12, 13; *Final Decree.*

(*a*) It has jurisdiction.

JURISDICTION (*continued*).

2. Of a case, as on a final judgment, where a dismissal of a petition and exhibits, amounts, under the facts, to such a judgment; and where entries of "judgment rendered," and "judgment signed," made on such dismissal, were exhibited by the record. *New Orleans Railroad* v. *Morgan*, 256.

(*b*) It has NOT jurisdiction.

3. By virtue of its original jurisdiction, to entertain suit brought by a State against one of its own citizens. *Pennsylvania* v. *Quicksilver Company*, 553.

4. Nor, under the 25th section of the Judiciary Act, to review a decision of the highest court of the State, maintaining the validity of a law which it has been set up "impairs the obligation of a contract," when the law set up as having this effect was in existence when the alleged contract was made, and the highest State court has only decided that there was no contract in the case. *Railroad Company* v. *McClure*, 511.

5. Nor, under that section to review a decision of such a court, where was drawn in question the validity of a statute of a *Territory*. *Messenger* v. *Mason*, 507.

6. Nor, to do so where the authority of the United States, to which the State law is alleged to be opposed, has been left by the United States subject to modification by the State, and has been modified by the State law set up. *Ib.*

7. Nor, to review, as "an authority exercised under any State," the authority conferred by a State on its Supreme Court, to hear and determine cases. *Bethell* v. *Demaret*, 537.

8. Nor where the writ is defective in respect to parties. *Miller* v. *McKenzie*, 582.

II. OF THE CIRCUIT COURTS OF THE UNITED STATES.

9. A marshal of the United States sued in a State court after the 2d August, 1866, and convicted of a trespass in levying upon property not the defendant's in his writ, cannot remove the suit into the National courts either under the act of April 9th, 1866, or the act of March 3d, 1863, as a suit brought against him in a State court for a trespass made or committed during the rebellion by authority derived from an act of Congress. *McKee* v. *Rains*, 22.

10. They have jurisdiction between citizens of the same State—

(*a*) When the so-called suit is but a rule to show cause in a case where the jurisdiction confessedly existed, especially where the defendant in the rule has appeared, answered, and undergone judgment. *Reilly* v. *Golding*, 56.

(*b*) Or where it is a bill for injunction to restrain proceedings of garnishment against the complainant's property, instituted in a suit in the Circuit Court, on which jurisdiction thus existed; and also praying the benefit of a set-off against the garnishing creditors' demand. *Jones* v. *Andrews*, 327.

11. Under the act of February 28, 1839 (applicable to "any court of the United States") between citizens of different States, where the defendant is a non-resident of the district where the suit is brought, and

JURISDICTION (*continued*).
voluntarily appears, or even if not a necessary party, does not appear. *Ib.*
12. Allegation of citizenship *is* sufficiently made when it appears fairly, and in such a way as to leave no room for reasonable doubt, from any part of the bill or declaration, such as in the case of a bill, its title and prayer, of what States the respective parties are citizens. *Ib.*
13. But in a suit against a corporation it is NOT sufficiently made by an averment that the defendant is a body politic by the law of another State, named, and "doing business" in it. *Pennsylvania* v. *Quicksilver Company*, 553.

KANSAS INDIANS. See *Construction, Rules of*, 3.
Half breeds, reservees of land, under the treaty of June 3, 1825, have no authority, under the Act of Congress of May 26, 1860, to sell their reservations independently of the assent of the Secretary of the Interior. *Smith* v. *Stevens*, 321.

LACHES. See *Practice*, 5

LETTERS.
Obligation of a consignor who alleges that he has given oral instructions to sell, to reply to those of his factor who has made advances, and asks a reply as to selling; the matter considered. *Feild* v. *Farrington*, 141.

LIEN. See *Counsel and Client; Maritime Lien.*

LOOKOUTS.
The rule of navigation, which requires a special lookout, does not apply to a case where the absence of a lookout had nothing to do in causing the collision or loss. *The Farragut*, 334.

LOUISIANA.
The mode of proceeding in an attachment suit there against a surety on a forthcoming bond, given to obtain a release of property attached, being by rule to show cause, a jurisdiction existing in the Circuit Court will not be defeated because both parties to the rule are citizens of that State. *Reilly* v. *Golding*, 56.

MARITIME LIEN.
1. The doctrine of *The Grapeshot* (9 Wallace, 129), on this subject, that is to say, on the second point adjudged therein (pp. 133, 141) affirmed. *The Lulu*, 192; *The Kalorama; The Custer*, 204.
2. A maritime lien against a vessel for necessary repairs and supplies in a foreign port, may exist though the owner was there and gave directions in person for them; the same having been made expressly on the credit of the vessel. *The Guy* (9 Wallace, 758), affirmed. *The Kalorama; The Custer*, 204.
3. It is not displaced by a common law action for the value of the repairs and supplies; the action not being yet determined. *Ib.*

MARITIME PRIZE. See *Prize.*

MARSHAL OF THE UNITED STATES. See *Jurisdiction*, 9.

MERCHANTS' ACCOUNTS. See *Evidence*, 3–7.

MOHAMMEDAN POWERS. See *Consul of the United States.*

MORTGAGE. See *Equity of Redemption; Possession.*

1. A mortgagor of land, as between himself and his mortgagee, has only an equitable title. He cannot, therefore, recover in ejectment against the mortgagee in possession, after breach of the condition, or against persons holding possession under the mortgagee. *Brobst* v. *Brock*, 519.
2. An irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such. *Ib.*
3. No presumption of payment of a mortgage can arise from lapse of time against a mortgagee or his assigns in possession, when the mortgagor became insolvent and died before the debt fell due, and when his vendee of the equity of redemption also became insolvent before the maturity of the debt, removed from the State, and never afterwards returned. *Ib.*

MUNICIPAL BONDS.

Issued by a county having no power to issue them, are void, though negotiable in form. *Marsh* v. *Fulton County*, 676.

NATIONAL BANKS. See *Cashier of Bank; Principal and Agent.*

Their obligations for acts of their cashiers, considered under the Currency Act of 1864, and various provisions of that act passed upon. *Merchants' Bank* v. *State Bank*, 604.

"NAVIGABLE WATERS OF THE UNITED STATES."

Meaning of the terms within the intent of the acts of July 7, 1838, and August 30, 1852, defined. *The Daniel Ball*, 557.

NEGOTIABLE PAPER.

1. A party buying negotiable bonds of the United States with overdue coupons, is to be taken as affected with knowledge of prior equities when he purchases them after the date when they are redeemable, and for which the coupons run, knowing that the government, paying promptly all its bonds generally, objects at that time to redeeming these, and does not in fact redeem them or the overdue coupons, and where notice has been given in public papers of great circulation that payment of the bonds was forbidden, and that there was difficulty about them. *Texas* v. *Hardenberg*, 68.
2. The holder of a bank check cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer, nor does the fact that the check was properly drawn on a National bank (a public depositary) by an officer of the government in favor of a public creditor, alter this rule. *Bank of the Republic* v. *Millard*, 152.
3. Cashiers of banks have power when acting *bonâ fide* and in the ordinary course of business, to certify as "good," checks drawn upon their respective banks and to bind them thereby. *Merchants' Bank* v. *State Bank*, 604.

NOTICE. See *Negotiable Paper*, 1.

PARTNERSHIP. See *Equity*, 1.

1. In stating partnership accounts, where one partner has had entire charge of the business, he is to be debited with the whole capital placed his hands, as well as with the proceeds of sales realized by him. *Gunnell* v. *Bird*, 304.
2. If part of the capital consisted of stock, which has been used in the business, or disposed of and the proceeds charged against him, he should be credited with such stock as a disbursement, to the amount at which it was originally charged against him. *Ib.*

PATENT. See *Rescission of Contract.*

1. Where a roller in a particular combination had been used before without designs on it, and a roller with designs on it had also been used in another combination, it was not a patentable invention to place designs on the roller in the first-named combination. Such a change, with the existing knowledge in the art, involved simply mechanical skill, which is not patentable. *Stimpson* v. *Woodman*, 117.
2. A claim for arranging an elastic bed for printing designs, is not a claim for a design under the eleventh section of the act of March 2d, 1861, entitled "An act in addition to an act to promote the progress of the useful arts,"—but is a claim for a device. *Clark* v. *Bousfield*, 133.
3. A deed conveying "all one's property and estate, whatsoever and wheresoever, of every kind and description," carries patent rights and extensions, if the grantor own any. *Railroad Company* v. *Trimble*, 367.
4. A deed by which a patentee of an invention conveys all the right, title, and interest which he has in the "said invention," as secured to him by letters patent, and also all "right, title, and interest, which *may* be secured to him from *time to time*," the same to be held by the assignee for his own use and for that of his legal representatives, "to the full end of the term for which said letters patent *are* OR *may* be granted," carries the entire invention and all alterations and improvements, and all patents whensoever issued and extensions alike, to the extent of the territory specified. *Ib.*
5. A grant by a patentee of an extension of a patent, before any extension has issued, will carry, if the terms of the grant be proper ones, the legal as well as the equitable interest in the patent. *Ib.*

PEDIS POSSESSIO. See *Possession.*

PENALTY. See *Contract*, 1, 2.

PLEADING. See *Jurisdiction*, 12, 13.

I. IN CASES GENERALLY.

1. The effect of an averment that an appeal required to be made within a particular term of time, was "duly" made, considered. *Braun* v. *Saurwein*, 219.
2. Under a statute which requires promissory notes to be stamped, making them void only when the stamp is omitted with intent to defraud

PLEADING (*continued*).
the government of the stamp duty, a fraudulent omission cannot be taken advantage of on demurrer. *Campbell* v. *Wilcox*, 421.
3. An averment in a declaration that the defendants had made and delivered to the plaintiffs their promissory notes, implies that the instruments were at the time in the form and condition required by law. *Ib.*
4. The filing of a plea to the merits after a demurrer is overruled, operates as a waiver of the demurrer. *Ib.*

POSSESSION.
A mortgagee having a right to take possession of twenty-five different tracts of land, presumed to take possession of the whole, though in fact his actual occupancy did not extend beyond the limits of one; the tracts having been wild land, separated by no marks on the land, and when mortgaged mortgaged as an entirety. *Brobst* v. *Brock*, 519

PRACTICE. See *Appearance; Counsel and Client.*

I. IN THE SUPREME COURT. See *Writ of Error.*
(*a*) *In cases generally.*
1. Damages at the rate of 10 per cent. under Rule of Court No. 23, on affirmance,
i. Will NOT be given, where the law as recognized by the affirmance was not perfectly settled when the writ of error was sued out; though so settled when the affirmance was made. *McKee* v. *Rains*, 22; but
ii. WILL be given when it was so settled and the writ of error has been apparently taken for delay. *Campbell* v. *Wilcox*, 421.
2. A judgment will be affirmed, where there is no bill of exceptions, demurrer, or finding of facts. *Reilly* v. *Golding*, 56.
3. Where the bill of exceptions does not purport to set out all the evidence given in a case below, and it does not appear what other evidence, if any, was there given, this court will not reverse for an instruction whose correctness or want of it depends upon the state of the evidence; the terms of the instruction not necessarily implying that there were not facts in proof bearing upon the subject besides those of which the instruction was expressly predicated; and error not being matter to be presumed, but contrariwise. *Wiggins* v. *Burkham*, 129.
4. To warrant reversal there must not only be error found in the record, but the error must be such as may have worked injury to the party complaining. *Brobst* v. *Brock*, 519; *Deery* v. *Cray*, 263.
5. A reinstatement of a case once dismissed by consent refused chiefly on the ground of laches, notwithstanding assent by the other side. *Deming's Appeal*, 251.
6. The court will not review a general finding on a mass of evidence brought up. *Norris* v. *Jackson* (9 Wallace, 125) and *Flanders* v. *Tweed* (Ib. 425), affirmed. *Coddington* v. *Richardson*, 516.
7. All the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dismissed, ex-

PRACTICE (*continued*).

cept sufficient cause for the nonjoinder be shown. *Masterson* v. *Hern don*, 416.

8. Modern mode of proceeding on error or appeal in such judgments, where one of the parties refuses to join in the writ or appeal, stated. *Ib.*

9. Refusal under special circumstances to dismiss an appeal by the United States from a distant Territory, though, contrary to the usually obligatory rule of practice, a transcript of the record had not been filed in this court until about two years after the end of the next term after the allowance of the appeal. *United States* v. *Vigil*, 423.

10. Where, on a certificate of division from a Circuit Court, this court is equally divided in opinion, the case will be remitted to the court below for the purpose of enabling it to take such action as it may be advised. *Hannauer* v. *Woodruff*, 482.

11. Prohibition from this court to a District Court does not lie except where the latter court is proceeding strictly as a court of admiralty. *Ex parte Graham*, 541.

12. A writ of error dismissed as defective in respect to parties, where the suit was against four persons by name, and the writ recited that it was against two which it named, "and others." *Miller* v. *McKenzie*, 582.

13. A decree which adjudges a certain sum of money to be due from an administrator to each of the distributees of his intestate's estate is a final decree; and its character as such not destroyed by some added directions. *Stoval* v. *Banks*, 583.

(*b*) *In Equity.* See *Equity*, 4; *infra*, 17–21.

(*c*) *In Admiralty.* See *supra*, 11.

14. When a motion is made by an appellant to examine witnesses in this court in an appeal in admiralty, the appellant should show some excuse satisfactory to this court, why he failed to examine them in the courts below. *The Mabey*, 419.

II. In Circuit and District Courts. See *Abatement of Action; Jurisdiction*, 1; 9–11.

15. Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and they are framed in clear and unambiguous terms, it is no cause for the reversal of a judgment to show that one or more of the prayers for instruction presented by the losing party and not given by the court were correct in the abstract. *The Schools* v. *Risley*, 91.

16. When, from conflicting proofs, a question,—such as *ex. gr.* what is "reasonable time"—is a mixed one of law and fact, the court should instruct the jury upon the several hypotheses of fact insisted on by the parties. *Wiggins* v. *Burkham*, 129.

(*b*) *In Equity.* See *Equity*, 4; *supra*, 13.

17. It is a gross irregularity to hear a case without some terms imposed, on an amended bill filed after replication, without leave of the court. *Washington Railroad* v. *Bradleys*, 299.

PRACTICE (*continued*).

18. So it is an irregularity to go to hearing without replications to answers. *Ib.*
19. A petition by "way of cross-bill," which makes nobody defendant, which prays for no process, and under which no process is issued, is a nullity. *Ib.*
20. A decree on such a bill, praying the reverse of what the original bill prayed, is fatally erroneous. Nor will the fact that objection was not made below cure a combination of errors so large and so grave as above indicated. *Ib.*
21. Motion made on the foot of a decree against a defendant to compel an account, when the decree, by its terms, limited the accounting to the date of service of process in the suit, denied, where the property for which the account was asked was received (if received at all) after such service, and where, in addition, the original decree, which charged all those defendants against whom proofs existed, did not charge the one now sought to be charged, and where the proofs on the motion were no other than the proofs at the original hearing. *Texas* v. *Chiles*, 127.

(*c*) *In Admiralty.* See *Salvage*, 1–3; *supra*, 14.

22. A libel for salvage may be filed in the name of the *master* and owners of the salving vessel, although the master may himself make no claim. *The Blackwall*, 1.
23. Parties entitled to salvage because their property—a vessel—has been used in effecting the salvage, do not lose their right because other parties, who used it and were thus, perhaps, also entitled, have made no claim, and, being bound by official duty to work in effecting the salvage had, perhaps, no right to make a claim. *Ib.*
24. Lien for salvage against the United States may be enforced by proceeding *in rem.* When the property is not in the possession of the government, and the effect of the proceedings is only to compel the government to come in and assert its claim. *The Davis*, 15.

PRESUMPTION. See *Mortgage*, 3; *Possession.*

PRESUMPTION OF PAYMENT. See *Mortgage*, 3.

PRINCIPAL AND AGENT. See *Factor.*

1. Evidence of powers habitually exercised by a cashier of a bank with its knowledge and acquiescence, defines and establishes, as to the public, those powers, provided that they be such as the directors of the bank may, without violation of its charter, confer on such cashier. *Merchants' Bank* v. *State Bank*, 604.
2. Where the authority of the agent is left to be inferred by the public from powers usually exercised by the agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject-matter. *Ib.*

PRINCIPAL AND SURETY. See *Action*, 2.

1. Sureties in an administration bond are bound by a decree against their administrator finding assets in his hands, and nonpayment of them

PRINCIPAL AND SURETY (*continued*).
over, to the same extent to which the administrator himself is bound. *Stovall* v. *Banks*, 583.
2. The fact that the liability of a party who appears as a principal debtor is really and as respects the true debtor but a secondary liability, and that evidences of debt issued were issued chiefly for the accommodation of such real debtor, does not give to the other party the complete equitable rights of a surety, if he himself may also be a gainer by the operations entered into. *Baltimore* v. *Baltimore Railroad*, 543.

PRIZE.
Maritime does not exist where the capture is on "inland waters" of the United States. *The Cotton Plant*, 577.

PUBLIC LAW. See *Consul of the United States.*

PUBLIC SCHOOLS. See *St. Louis.*

QUANTUM VALEBAT.
A bank is liable under, when its cashier without authority purchases coin which goes into its funds. *Merchants' Bank* v. *State Bank*, 604.

RATIFICATION.
None of void instruments. *Marsh* v. *Fulton County*, 676.

REASONABLE TIME.
What is to be regarded as a reasonable time is, when the facts are clear, a matter of law. Where the proofs are conflicting, it is a mixed one of law and fact; and in such cases the court should instruct the jury upon the several hypotheses of fact insisted on by the parties. *Wiggins* v. *Burkham*, 129.

REBELLION, THE. See *Contract*, 1, 2; *Constitutional Law*, 5; *Jurisdiction*, 1, 9.
1. The equity of redemption of a mortgage is not extinguished by proceedings to foreclose the same during the war, when such proceedings were taken within the Union lines, whilst the defendants were absent in the Confederate lines and were prohibited from entering the Union lines. *Dean* v. *Nelson*, 158, and see *Railroad Co.* v. *Trimble*, 367.
2. The voluntary residence of a person within the Confederate lines during the late rebellion, did not incapacitate him, under the act of July 17th, 1862, from making a last will and testament, further, if at all, than as against the United States. *Corbett* v. *Nutt*, 464.

REDEMPTION FROM TAX SALES. See *Construction, Rules of*, 5; *Tax Sales.*

REMOVAL OF CASES. See *Jurisdiction*, 9.

RESCISSION OF CONTRACT.
Held after the death of a party to have been effected where nothing was ever done during life to give effect to it. *Railroad Co.* v. *Trimble*, 367.

RES JUDICATA. See *Attachment, Suits in; Conclusiveness of Judgment.*

RESTRICTION.

Upon absolute ownership in a grant in fee not to be raised by implication *Marble Company* v. *Ripley*, 340.

RIPARIAN RIGHTS.

1. May be interfered with by ancient passageway along the bank. *Risley* v. *Schools*, 91.
2. Can't be established by mere calls in deeds from private parties. *Ib.*
3. Give right of access to navigable parts of the river, and to make wharves. *Yates* v. *Milwaukee*, 497.
4. Are property. *Ib.*

ST. LOUIS.

1. Eastern boundaries of declared. *The Schools* v. *Risley*, 91.
2. Certain lands not included in her school reservations by the act of June 13, 1812. *Ib.*

"SALES, TRANSFERS, AND CONVEYANCES."

These terms, in a penal statute, held not to include a devise. *Corbett* v. *Nutt*, 464.

SALVAGE. See *Practice*, 22–24.

1. Corporations may be entitled to. *The Blackwall*, 1.
2. As also the owners of a tug carrying ordinary fire-engines under direction of the fire department of a city, and saving a vessel on fire. *Ib.*
3. One-twentieth of the value saved allowed to the owners of such tug. *Ib.*
4. Non-prosecution of their claim by one set of salvors enures to the benefit of the owners of the vessel. *Ib.*
5. Personal property of the United States on a vessel is liable for. And a lien for, may be enforced by proceeding in, when process of the court can be executed without disturbing the possession of the government, though it cannot be either by suit against the United States, or by proceeding *in rem*, when the possession of the property can be had only by taking it out of the actual possession of the officers of the government. *The Davis*, 15.

SOVEREIGNTY. See *Salvage*, 5.

SPECIFIC PERFORMANCE. See *Equity*, 2.

STAMP.

As for acceptance, not required in bank checks marked "Good." *Merchants' Bank* v. *State Bank*, 605.

STATED ACCOUNT.

When an account between merchants at home is treated as such. *Wiggins* v. *Burkham*, 129.

STATUTE OF LIMITATIONS.

When the running of, to the right to sue, has been suspended by an enforced cause not mentioned in the statute itself, the operation is suspended only during the existence of such cause. *Braun* v. *Saurwein*, 218.

STATUTES OF THE UNITED STATES.
The following, among others, referred to, commented on, or construed.
September 24, 1789. See *Jurisdiction*, 2-8, 10, 12, 13.
May 1, 1810. See *Consul of the United States.*
June 13, 1812. See *St. Louis.*
July 4, 1836. See *Patent.*
June 12, 1838. See *Jurisdiction*, 5, 6.
July 7, 1838. See *Navigable Waters of the United States.*
February 28, 1839. See *Jurisdiction*, 11; *Appearance.*
August 30, 1852. See *Navigable Waters of the United States.*
March 1, 1855. See *Consul of the United States.*
March 3, 1857. See *Customs of the United States.*
May 26, 1860. See *Kansas Indians.*
March 2, 1861. See *Patent.*
June 7, 1862. See *Tax Sales.*
July 17, 1862. See *Devise; Practice*, 11; *Rebellion.*
March 3, 1863. See *Jurisdiction*, 9.
June 3, 1864. See *National Banks*
June 30, 1864. See *Breaches; Construction, Rules of*, 4; *Internal Revenue.*
July 2, 1864. See *Prize.*
February 27, 1865. See *Abatement of Action; Constitutional Law*, 8.
March 3, 1865. See *Practice*, 6; *Tax Sales*, 3.
April 9, 1866. See *Jurisdiction*, 9.
July 13, 1866. See *Pleading*, 3; *Statutes of Limitations.*
August 18, 1866. See *Consul of the United States.*

STATUTES, RULES OF CONSTRUCTION OF. See *Construction, Rules of.*

STATUTORY BOND. See *Breaches; Voluntary Bond.*
How far deviations from the form prescribed by statute may be made, and, if the bond be voluntarily given, its obligation remains. *United States* v. *Hodson*, 395.

SUITS.
Original, and supplementary or defensive, distinguished. *Reilly* v. *Golding*, 56; *Jones* v. *Andrews*, 327.

SURETY. See *Principal and Surety.*

TARIFF. See *Customs of the United States.*

TAXATION. See *Constitutional Law*, 2; *Construction, Rules of*, 4, 5; *Tax Sales.*

TAX SALES. See *Construction, Rules of*, 5; *Illinois*, 1.
1. The act of June 7th, 1862, "to collect taxes in insurrectionary districts," authorizes redemption by a party furnishing *primâ facie* evidence of possessing the character which entitles him under the act to redeem. *Corbett* v. *Nutt*, 464.
2. Does not require, as a condition of recovery, where land has been

TAX SALES (*continued*).
redeemed, the forwarding to the Secretary of the Treasury of a certificate of redemption, &c. *Ib.*
3. The 7th section of the act of March 3d, 1865 (amendatory of the above-cited one), applies only to owners seeking in person to redeem. *Ib.*

TERMS.
Meaning of particular. See "*Devise;*" "*Incidental;*" "*Navigable Waters of the United States;*" "*Sales, Transfers, and Conveyances.*"

UNITED STATES.
A case stated where she cannot set up her immunity from suit *in rem* by an individual. See *supra, Salvage,* 5.

USAGE. See *Evidence,* 8.

"VOLUNTARY BOND."
A bond which a statute says that a party whom it requires to be licensed "shall" give before his license is issued, and which makes it a penal offence for him to exercise a business without taking out such license, is a voluntary bond, if given without duress. *United States* v. *Hodson,* 395.

WORDS.
Meaning of particular. See "*Devise;*" "*Incidental;*" "*Navigable Waters of the United States;*" "*Sales, Transfers, and Conveyances.*"

WRIT OF ERROR. See *Practice,* 7, 8, 12.
Its effect (and that of an appeal) upon the jurisdiction of the subordinate court. In virtue of what, operating as supersedeas and stay of execution. Time and mode of giving effect to, when the subordinate court afterwards proceeds to issue final process. How far operating in cases under the 25th section of the Judiciary Act. These matters considered. *Slaughter-house Cases,* 273.