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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1870.

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VOL. XI.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. SALMON PORTLAND CHASE.

ASSOCIATES.

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

ATTORNEY-GENERAL.

HON. AMOS T. AKERMAN.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 4, 1870, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

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

MEMORANDA.

THE CHIEF JUSTICE, though on the bench and presiding at the argument of some of the cases heard during the time embraced by this volume, was not sufficiently well to participate in the judgment of any here reported.

Mr. Justice NELSON having been appointed by the President one of the Joint High Commissioners who assembled at Washington in the spring of 1871, with a view to a settlement by treaty of questions between the United States and Great Britain, was constantly engaged in its discussions during the sittings of the Commission. He accordingly was able to participate in but few of the decisions here reported, beyond those in which he is represented as delivering the judgment of the court.

GENERAL RULES,

PROMULGATED MAY 1st, 1871.

RULE NO. 21.

TWO COUNSEL.

1. Only two counsel shall be permitted to argue for each party, plaintiff and defendant, in a cause.

TWO HOURS.

2. Two hours on each side shall be allowed in the argument of a cause, and no more, without special leave of the court, granted before the argument begins. But the time thus allowed may be apportioned among counsel on the same side, as they choose: *Provided always*, a fair opening of the case shall be made by the party having the opening and closing argument.

BRIEFS.

3. Counsel will not be heard unless a printed brief or abstract of the case be first filed, together with the points made, and the authorities cited in support of them, arranged under the respective points.

4. The brief filed on behalf of a plaintiff in error or an appellant shall also contain a statement of the errors relied upon, and in case of an appeal an abstract of the pleadings and proofs, exhibiting clearly and succinctly the issues presented.

5. Each error shall be separately alleged and particularly specified; otherwise it will be disregarded.

6. When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidem verbis* in the specification.

7. When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of excep-

tions. Any alleged error not in accordance with these rules will be disregarded.

8. Counsel will be confined to a discussion of the errors stated, but the court may, at its discretion, notice any other errors appearing in the record.

9. The same shall be signed by an attorney or counsellor of this court.

10. If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

11. Twenty printed copies of the abstract, points, and authorities required by this rule shall be filed with the clerk by the plaintiff in error or appellant six days, and by the defendant in error or appellee three days, before the case is called for argument.

12. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

Ordered, That the second paragraph of the twenty-third rule be amended so as to read as follows, viz.:

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1870.

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INSURANCE COMPANY *v.* DUNHAM.

1. The admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England.

   First. The *locus*, or territory, of maritime jurisdiction where *torts* must be committed, and where business must be transacted in order to be maritime in their character, extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide.

   Secondly. As to *contracts*, the true criterion whether they are within the admiralty and maritime jurisdiction, is their nature and subject-matter, as, whether they are maritime contracts, having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made.

   In view of these principles it was held that the contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States courts.
2. The case of *De Lovio* v. *Boit* (2 Gallison, 398), affirmed.
3. This court has jurisdiction, under the act of 1802, of a certificate of division of opinion between the associate justice of the Supreme Court and the Circuit judge, together holding the Circuit Court, under the act of 1869, as well as between either of the said judges, and the District judge.

ON certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts.

Statement of the case.

The act of Congress of April 29th, 1802,* provides that

"Whenever any question shall occur before *a Circuit Court*, upon which *the opinions of the judges shall be opposed*, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided."

At the time when this statute was passed the Circuit Court, when consisting of more than a single judge, was composed of a judge of the Supreme Court of the United States and the District judge of the district sitting together, and this organization remained until April 10th, 1869.

By act of that day,† "to amend the judicial system of the United States," it was enacted:

"That for each of the nine existing judicial circuits there shall be appointed a *Circuit* judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit. The *Circuit Courts* in each circuit shall be held by the justice of the Supreme Court allotted to the circuit; *or* by the Circuit judge of the circuit; *or* by the District judge, *or by the justice of the Supreme Court and Circuit judge sitting together*, . . . or, in the absence of either of them, by the other . . . and the District judge."

In this state of enactment a libel *in personam* had been filed in the District Court for the District of Massachusetts, by one Dunham against the New England Mutual Marine Insurance Company, on a policy of insurance, dated at Boston on the 2d day of March, 1863, whereby the insurance company, a corporation of Massachusetts, agreed to insure Dunham, the libellant, a citizen of New York, in the sum of $10,000, for whom it might concern, on a vessel called

* 2 Stat. at Large, 159. † 16 Id. 44.

Statement of the case.

the Albina, for one year, against the perils of the seas and other perils in the policy mentioned; and the libellant alleged that within the year the said vessel was run into by another vessel on the high seas, through the negligence of those navigating the said other vessel, and sustained much damage, and that the libellant had expended large sums of money in repairing the same, of which he claimed payment of the insurance company.

The question was whether the District Court, sitting in admiralty, had jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

The Constitution ordains, it will be remembered, that

"The judicial power shall extend . . to all cases of admiralty and maritime jurisdiction."

And the Judiciary Act of 1789, which established the District Courts, declares that they shall have

"exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

The District Court decreed in favor of the libellant, and the insurance company appealed to the Circuit Court. The judges of that court were opposed in opinion on the point raised, and it was accordingly certified to this court. Two questions were thus before this court:

1. Whether since the reorganization of the Circuit Courts under the act of 1869, a difference of opinion between a judge of the Supreme Court and "the Circuit judge," created by that act, sitting as the Circuit Court, could be certified to this court under the act of 1802.

2. If it could, what was the proper answer to be returned to the question certified? Had the District Court, sitting in admiralty, jurisdiction to entertain the libel in this case, the same being a libel *in personam* on a policy of marine insurance to recover for a loss?

The latter question was the one to which the briefs of counsel were directed.

Argument in support of the jurisdiction.

Mr. F. C. Loring, for the libellants and in support of the jurisdiction:

By the universal and unanimous foreign practice and authorities, with one exception only, the contract of marine insurance is considered to be maritime, and a proper subject for the cognizance of a court vested with jurisdiction over maritime cases. It might, therefore, have been anticipated, that when the question came before the admiralty courts of the United States, vested with jurisdiction over all maritime cases, the decision would be in favor of the jurisdiction. This does not seem to have happened for more than twenty years after the adoption of the Constitution. As the courts of common law exercise concurrent jurisdiction over contracts of insurance, and as the plaintiffs in suits thereon would naturally prefer not to waive the benefit of a trial by jury, and of a trial in their own courts; and as the lawyers of that day were brought up according to and by the common law, this is not surprising. No case is found, in the reports of any of the courts of the United States, of an action in the admiralty on a policy of insurance until the year 1815, nor on a charter-party, nor for freight, till 1829.*

At the October Term of the Circuit Court for Massachusetts, in 1815, the question was first presented by a libel on a policy of insurance. A plea to the jurisdiction was interposed, and the result was the opinion of Story, J., in *De Lovio v. Boit*,† deciding in favor of the jurisdiction.

How this decision was received at the time is not now known. As this court was then constituted, it is probable that the jurisdiction would have been maintained on appeal. Marshall, C. J., affirmed, in *The Little Charles*,‡ in 1819, that

* No report of a suit in the admiralty on a charter-party or bill of lading has been found before the case of *The Spartan* (Ware, 149), which was decided in 1829. In 1834, the jurisdiction was denied, and was sustained by Story, J., in *The Volunteer* (1 Sumner, 551). The question cannot be considered as having been finally settled till the decision of this court in this case of *The New Jersey Steamboat Company* v. *The Merchants' Bank*, in 1848 (6 Howard, 344).

† 2 Gallison, 398.

‡ 1 Brockenbrough, 380.

"The courts of the United States have never doubted their right to proceed under their general powers as courts of admiralty, where they are not restrained from the use of these powers by statute."

That Washington, J., would have sustained the jurisdiction, cannot be doubted. In *The Seneca*,* he says:

"I not only admit, but insist, first, that the judicial power of the United States under the Constitution, and the jurisdiction of the District Courts under the ninth section of the Judiciary Act of 1789, embrace all cases of maritime nature, whether they be particularly of admiralty cognizance, or not.

"Second. That this jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime law of nations, and are not confined to that of England, or of any other particular maritime nation."

He afterwards speaks of the ordinances of Louis XIV, as generally adopted, as evidence of the maritime law of nations.

Difference of opinion as to the extent of the admiralty jurisdiction has occurred only of late date. It first appears eminently in *Ramsay* v. *Allegre*, in 1827, in the dissenting opinion of Johnson, J., with whom have concurred, at different times, Baldwin, and Daniel, and Campbell, JJ., and others to a less extent; but the majority of the court have uniformly held that the practical jurisdiction of the English admiralty affords no rule for the jurisdiction vested in the courts of the United States by the Constitution and by Congress, and that that embraces all maritime contracts.

In the reports of this court, and of other courts of the United States, no other reference has been found to the contract of insurance as a matter of admiralty jurisdiction, except in *Taylor* v. *Carryl*,† where Taney, C. J., expressed a doubt upon the subject, which had not been presented, or referred to in the argument, and which evidently he had not examined.

Considering the authorities apart from the repeated decla-

* 18 American Jurist, 486.

† 20 Howard, 585.

rations of this court, that the admiralty jurisdiction of the District Court extends generally over maritime contracts, and the universal admission that marine insurance is a maritime contract, we have in favor of the jurisdiction three decisions of Story, J., in point.* The opinion of Woodbury, J.,† that insurance is clearly a contract within the admiralty jurisdiction. The fact that Curtis, J., sustained the jurisdiction as a settled practice in the first circuit,‡ and, as counsel, took no exception to it.§ The decisions of Sprague, J.,‖ and Ware, J.,¶ of the District Court, and the opinions of Mr. Dunlap,** Mr. Benedict,†† Conkling, J.,‡‡ and Chancellor Kent.§§

The weight of authority is in favor of the jurisdiction. Indeed, there is an absence of authority against it, even in England. There is no case on record known, in which the Court of Admiralty has refused to entertain jurisdiction over the subject, or in which the courts of common law have prohibited it. In admiralty commissions, insurance is usually mentioned as a matter over which jurisdiction is to be exercised; and in Scotland, the Court of Admiralty, under similar commissions, constantly entertains such jurisdiction. All that can be said about the exercise of the jurisdiction by the English court is, that, practically, it has not been resorted to. This is no argument against the jurisdiction of the courts of another nation, having jurisdiction over all maritime contracts, which they have exercised for more than fifty years over contracts of insurance. The only

* De Lovio *v.* Boit, 2 Gallison, 398; Peele *v.* Merchants' Insurance Co., 3 Mason, 27; Hale *v.* Washington Insurance Co., 2 Story, 176.

† Dean *v.* Bates, 2 Woodbury & Minot, 88.

‡ Gloucester Insurance Co. *v.* Younger, 2 Curtis, 322.

§ Hale *v.* Washington Insurance Co., *supra*, *.

‖ Younger *v.* Gloucester Insurance Co., 1 Sprague, 243.

¶ The Spartan, Ware, 152.

** Admiralty Practice, 43.

†† Admiralty Practice, 8, 50, 147, 166.

‡‡ Admiralty Practice, 13.

§§ See note, 1 Kent, 370, in which "Insurance" is mentioned as a matter of settled admiralty jurisdiction.

question then, is, whether or not marine insurance is a contract concerning matters of navigation, trade, commerce, &c.; or in other words, a maritime contract. There can be only one answer; and the jurisdiction follows of course.

An argument in favor of a general jurisdiction of the United States courts in admiralty, over maritime cases, may be drawn from the power vested in Congress to regulate commerce. By virtue of this, Congress may legislate on all commercial matters; it may enact a code of commerce, regulating all affairs of navigation, affreightments, averages, marine insurances, and other maritime matters, and has exercised this power to some extent in those acts which limit the liability of ship-owners, provide for the registration of ships, regulate the carriage of passengers, establish rules for the carrying of lights, the navigation of vessels, &c., &c. It would seem that the jurisdiction of the maritime courts of the United States should be coextensive, and should embrace all commercial and maritime matters which Congress has the power to regulate. The remedies afforded by the United States courts of common law and equity are not adapted to all maritime cases, especially where a lien exists; and as their jurisdiction generally depends on the residence of the parties, it is doubtful whether they could exercise it in all cases; and there might be the anomaly of a government with power to make laws and no tribunals to administer them; and this without remedy; for Congress has vested in the courts it created all the admiralty jurisdiction which the Constitution authorized it to confer. The power is exhausted, and if the United States courts have not jurisdiction over all maritime cases, they cannot acquire it, except by an amendment of the Constitution. If this were attempted, it would be difficult to find words sufficient to create a more ample jurisdiction than those used in the Constitution and consequent act of Congress. If these courts have not jurisdiction over all maritime contracts and cases, it is not for want of certainty and distinctness in the law, but by reason of judicial construction and legislation, limiting the general terms used in the Constitution and statute.

Argument in support of the jurisdiction.

The question of admiralty jurisdiction is in a measure historical, and to be determined by the jurisdiction actually exercised by the Vice-Admiralty colonial courts before the Revolution; inasmuch as such practical jurisdiction must have been known and contemplated by the framers of the Constitution. Now it is a matter of history that the commissions issued by the crown to the judges of the colonial courts of admiralty, conferred, in terms, unlimited jurisdiction over all maritime cases, and usually specified "*policies of assurance*,"* and that these courts, or some of them, exercised this jurisdiction over all maritime cases, without limit or qualification. Until lately not much was known about the jurisdiction actually exercised by these courts. There is little in the books to show what it was.

The Province of Massachusetts Bay, which comprised Massachusetts, Maine, and Nova Scotia, was, before the Revolution, probably more largely engaged in commerce than any other, and the records of the Court of Admiralty held in it would be likely to contain more maritime decisions than would be found elsewhere. Under the first charter of the Colony of Massachusetts Bay, admiralty jurisdiction was not reserved to the crown. It was exercised by the Court of Assistants. In Ancient Charters,† will be found a code regulating the rights and duties of mariners, owners, masters, freighters, contributors, &c.; and the last article of the chapter provides that:

"All cases of admiralty shall be heard and determined by the Court of Assistants . . . without jury, unless the court shall see cause to the contrary. Provided, always, this act shall not be interpreted to obstruct the just plea of any mariner or merchant impleading any person in any other court, upon any matter or cause that depends upon contract, covenant, or other matter of common equity, in maritime affairs."

In other words, the Court of Assistants was vested with

* See the commissions quoted in De Lovio *v.* Boit, and in Benedict's Admiralty Practice, pp. 82, 90. He states that he has seen nine commissions.

† Appendix, 716.

admiralty jurisdiction over all *maritime* cases of contract, covenant, or other matter of equity, reserving to the courts of common law concurrent jurisdiction, as is done by the Judiciary Act. This act was passed in the year 1673, and shows what was considered to be the proper jurisdiction of the admiralty at that time. No allusion is made to the English practice, though that must have been well known; but the Court of Assistants was vested with the fullest jurisdiction over all maritime contracts, and other matters of (maritime) equity. The act seems to be a code or compilation of rules for the regulation of commerce, navigation, freight, and wages, &c., similar to those to be found in the marine ordinances and other sea-codes, besides appointing a tribunal for their administration. It is quite long, containing thirty sections, of the last of which a part has been quoted. It was probably annulled when the first charter was vacated in 1684.

When the charter of the Province of Massachusetts Bay was granted, in 1691, all "*admiral court, jurisdiction, power, or authority,*" was reserved to the crown, to be exercised by virtue of commissions to be issued under the great seal.* Some of the commissions issued to the judges of the Admiralty Court provinces may be found in the books, and they confer jurisdiction over all maritime causes and cases in the most unqualified terms.† But until lately, little was known as to what jurisdiction was actually exercised by the judges under these commissions. In the office of the District Court for Massachusetts there was only one imperfect volume of the records of the Vice-Admiralty Court of the province. This is not half filled, and contains only a few cases which relate to matters of prize, revenue, and wages. The other

* Ancient Charters, p. 36.

† A commission is quoted at length in Benedict's Admiralty, 83, which is stated to be a translation of one issued to Roger Mompesson in 1703, as judge of Vice-Admiralty in the provinces of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, the Jerseys, New York, and Pennsylvania. In this commission, among other contracts specified, are "*policies of assurance.*"

volumes were supposed to have been taken to Halifax, at the time of the evacuation of Boston, and to have been lost or destroyed. Lately, two volumes have been found among the papers of a former registrar of the court, and have been deposited in the library of the Boston Athenæum; they are the second and third volumes, beginning in 1718, and extending to 1733. The first is missing. The one in the clerk's office extends from 1740 to 1744 only; and the rest are also missing.* An examination of these two volumes discloses that the court exercised jurisdiction over all maritime cases. Besides numerous suits for wages, and liberations, and assaults, they contain records of over fifty cases of libels on maritime contracts. There may be found libels for contribution, both *in rem* and *in personam;* on charter-parties, on contracts of affreightment for freight, for non-delivery or damage to goods; between owners for an account; by masters *in rem* for wages and disbursements; against a mate for non-performance of his contract; for surveys, condemnations, and sales; of material-men, for supplies in home port *in rem;* against mate, for error in making a bill of lading; by builder of a ship, for its price *in rem*, after it had been delivered; by passengers, and various other cases. In one case, a consignee sued a master for non-delivery: he answered that the goods were thrown overboard for the common safety; the court found that the jettison was justifiable, and sent the case to commissioners to adjust the average. This decision anticipated that of *Dupont* v. *Vance*† more than a century. Another case resembles *Taylor* v. *Carryl*.‡ It was a suit *in rem*, by an assignee of a master and mate, for wages, &c. The libel alleged that the vessel had been attached by a creditor at common law. The court ordered the marshal to take possession and sell; and, after satisfying the claim of the libellant, to pay the residue into the registry, to answer the claim of the attaching creditors. In

* It is not known that any of the records of the other Vice-Admiralty courts are in existence. They were probably carried off or destroyed at the time of the Revolution.

† 19 Howard, 162. ‡ 20 Id. 583.

Taylor v. *Carryl*, a divided court held that an attachment at common law could not be so subjected to a maritime lien. If a similar jurisdiction was exercised in the admiralty courts of the other colonies, there would be no doubt as to what the framers of the Constitution had in mind.* There is one case reported in Pennsylvania, *Talbot's Case*,† which shows that the Court of Admiralty of that province exercised jurisdiction over all maritime cases. An act of Assembly gave the judge of admiralty cognizance of all suits of maritime jurisdiction not cognizable at common law. Literally construed, this would have limited the jurisdiction to matters of prize. But the Supreme Court held that it could not have been so intended, and that the true construction was, that the jurisdiction embraced all suits of a maritime nature not properly cognizable at common law, and, consequently, all those relating to maritime matters over which the common law had usurped or otherwise obtained jurisdiction; thus extending the jurisdiction to the largest limit ever claimed for it. That the framers of the Constitution, and the lawyers of that day, were familiar with a different and more extensive jurisdiction in the colonies than was practiced in the English Court of Admiralty, is asserted by Wayne, J., in his opinion in *Waring* v. *Clarke*, and the authorities cited by him maintain the assertion. It will be found, on examining the records referred to, that no objection was made to the extensive jurisdiction exercised. It seems to have been considered a matter about which there could be no doubt. In one case only was there a plea to the jurisdiction. A master sued *in rem*, in the home port, for wages and disbursements. Such a plea was interposed and overruled.

Thus it appears that the jurisdiction claimed by Story, J., Ware, J., and others, for the admiralty courts of the United States, is not anything new and before unknown, but only that it is not so extensive as that which was actually exercised by the colonial courts.

If the jurisdiction, known to have been exercised by the

* Opinion of Mr. Justice Wayne, 5 Howard, 454. † 1 Dallas, 95

admiralty courts before the Revolution, is to be taken as the rule, it must be admitted that every case which can properly be defined as maritime, is a proper subject for the jurisdiction of the United States District Court; and, of course, marine insurance.

The same conclusion must be drawn from the fact that admiralty jurisdiction was exercised by the Vice-Admiralty Court of Massachusetts, over all maritime contracts and cases. The judge who presided in that court was at the same time the judge of the Vice-Admiralty Courts of New York, Pennsylvania, the Jerseys, New Hampshire, Connecticut, Maine and Nova Scotia,* and it must have been that he held and exercised the same jurisdiction, when holding court in the other colonies or provinces included in his commission, that he did when sitting in Massachusetts.

The argument, to be derived from *history*, is conclusive in favor of a literal construction of the words of the Constitution and statute giving the courts of the United States jurisdiction over all admiralty and maritime cases. For it appears that the commissions, issued to the judges of the Vice-Admiralty courts, before the Revolution, conferred jurisdiction over all maritime cases without restrictions, sometimes specifying "*policies of assurances*," and that this jurisdiction was exercised to its fullest extent, without any regard to the practice of the English Court of Admiralty, in most, if not in all, of the colonies or provinces which afterwards became the United States. It is impossible to suppose that this practice was not known to the statesmen and lawyers who framed the Constitution, or that they contemplated any limit to the jurisdiction which the Court of Admiralty they created might exercise over maritime contracts and cases. It appears from *The Federalist*, that, in the Convention, no disposition was shown to deny the National judiciary the cognizance of maritime cases; and it does not appear that any

* Benedict, Admiralty Practice, 88, note, contains a memorandum of a commission to Roger Mompesson, dated April, 1703, appointing him judge of admiralty in these colonies. Maine and Nova Scotia then were parts of the Province of Massachusetts Bay.

objection was made to this grant in the State conventions which adopted the Constitution.*

Another argument in favor of the exercise of a large jurisdiction over maritime contracts, and contracts of marine insurance especially, is that it tends to promote uniformity of principle and practice throughout the different States in the administration of law. The practical reasons in support of such a jurisdiction generally, are stated by Taney, C. J., in *Taylor* v. *Carryl*. Of all maritime contracts, that of insurance is probably the one most extensively in use. It is known and practiced in all civilized countries. It is important that the rules, practice, and laws which relate to it should be the same throughout the world, so far as is possible. That they vary in different places is a source of much confusion and embarrassment, and has been greatly lamented by jurists. This court cannot, of course, influence courts of other countries directly, but it can do much towards establishing uniformity of law and practice in the construction and administration of the law of insurance in this country by exercising jurisdiction over the subject. It can, by so doing, establish rules and principles for the regulation of this contract, which will bind all the other courts of the United States. Now, the contract and the rights and liabilities of the parties to it, are construed differently in almost every State. Probably in no two States are the laws and practices, concerning insurance, the same. In Massachusetts, an insurer may take a vessel into his possession and repair it, without being held to have accepted an abandonment. This court, and some State courts, hold that he cannot. This court holds that if a ship be voluntarily stranded and lost, and the cargo saved thereby, it and its insurers are subject to a contribution for the loss. In Massachusetts, until lately, and in other States, a different rule prevails. This court holds that an insurer is not liable for the damage which the offending vessel in a collision is obliged to pay. The contrary is the rule in the courts of

* See Elliot's Debates.

Massachusetts. Numberless illustrations might be adduced to show the want of uniformity and chaotic state of the law and practice of insurance; but it is, unhappily, too notorious. If a suit on a contract of insurance can be maintained in the admiralty, it must be decided according to the rules and principles of this court, and that would establish absolute uniformity in one court in every State in the Union, and have a strong tendency to establish it in the State courts, because of the great dignity of the court, the respect paid to its decisions, and its controlling influence over all matters over which it exercises jurisdiction. If the admiralty cannot exercise this jurisdiction, it must be left principally to the State courts, and the differences of opinion and practice, so much deplored, will remain and increase. The jurisdiction of the Federal courts, at law and in equity, being generally dependent on the citizenship of the parties, cannot often be invoked; and the decisions of these courts, however highly respected, are not conclusive and binding on the State courts in matters depending on private contracts. If, on the other hand, the jurisdiction of the admiralty over insurance should be established, the great advantage of its process, the celerity of its proceedings, and its other advantages, will cause it to be largely resorted to, and the thirty-seven District Courts, and all the Circuit Courts, being subject to one rule, uniformity of principle and decision will be established through all the States, the advantages of which in a nation of such commerce as this, and where contracts of insurance are made, a thousand or more every day, cannot be overstated.

The libellants therefore submit, that to exercise jurisdiction over policies of marine insurance is the established law and practice of the Circuit Court for the first circuit held by justices of this court; that such practice is in conformity with the universal maritime law and usage; with the decisions of this court affirming jurisdiction over charter-parties, and maritime contracts generally; with the jurisdiction exercised by the Vice-Admiralty courts before the Revolution, which must have been known to the makers of the Constitution; and is imperatively required to carry into effect the

provisions of the Constitution touching the jurisdiction of its courts and the regulation of commerce, and to establish uniformity of principle and practice throughout the Union in one of the most important branches of commercial law.

It cannot now be questioned that the framers of the Constitution intended to vest in Congress the power to establish courts to exercise admiralty jurisdiction over all admiralty and maritime cases.

Congress, in the exercise of its discretion, might have conferred upon the courts it was to create such jurisdiction as it should see fit, and limit it to certain cases, but nothing of the kind was done. The Judiciary Act confers on the District Courts unqualified jurisdiction over all civil admiralty and maritime cases.

If, then, the contract of marine insurance is "*maritime*," it is a subject over which the District Courts of the United States must exercise jurisdiction.

Mr. H. C. Hutchins, contra, against the jurisdiction:

A policy of marine insurance is not a *maritime contract* within the meaning of that clause of the Constitution which delegates to the judicial power of the United States cognizance of "all cases of admiralty and maritime jurisdiction."

1. Because this clause is to be construed with reference to the restricted jurisdiction of the admiralty as recognized both in this country and England at the time when the Constitution was adopted. And admiralty has never claimed jurisdiction over insurance in England.

2. The decisions of the American courts at the period of the Revolution, and immediately after, conclusively prove the restricted jurisdiction of admiralty as fixed by the Constitution.

In *L'Arina* v. *Manwaring*,* A. D. 1803, Bee, J., said:

"Bills of lading, *policies of insurance*, and bottomry bonds, where the vessel is not hypothecated according to the marine law, *are all suable at common law only*. Yet these contracts are all more or less connected with a voyage."

* Bee, 200.

So in *Dean* v. *Angus*,* per Hopkinson, J., as early as 1785, the same is intimated. So in *The Two Friends*,† per Bee, J. (A. D. 1786), it was held that admiralty extended only to maritime causes, and did not embrace "*any transactions or contracts which arise on land.*" So again in 1784, it was held in Pennsylvania that admiralty jurisdiction was confined to "*things done upon the seas.*"‡ A shipwright cannot sue in the admiralty.§ Material-men could not sue there either.‖ Nor could contracts for necessaries be sued, if furnished before the voyage was begun. Nor ransom bills. Nor charter-parties.¶ Nor was there any jurisdiction over cases of hypothecation, where the hypothecation took place before the commencement of the voyage, not even if the ship was hypothecated for necessaries without which the ship could not proceed to sea.** Nor could a master sue for his wages; nor a physician, for his services on a voyage.†† This last case limits the jurisdiction to such claims as are either of themselves, or in their origin, *liens* on the ship; and this was the rule which Judge Peters said he always observed in determining whether a given case was within the jurisdiction. Certainly such a rule could not apply to policies of insurance; for they create no lien.

The cases cited above are the decisions of Judges Bee, Hopkinson, and Peters, all men of the revolutionary era, who were well acquainted with the limits of the admiralty jurisdiction as understood by the jurists and statesmen who framed the Constitution. They furnish the most trustworthy means for construing the admiralty powers as conferred by the Constitution.

3. No case can be found in the history of the admiralty of this country prior to the case of *De Lovio* v. *Boit*, in 1815, that

* Bee, 375, 376. † Ib. 435. ‡ Talbot *v.* The Commanders, 1 Dallas, 98.

§ Clinton *v.* The Brig Hannah and Ship General Knox, Bee, 419, per Hopkinson, J. (A. D. 1781).

‖ O'Hara *v.* Ship Mary, Bee, 100, per Bee, J. (A. D. 1798).

¶ Ib. 345, per Hopkinson, J. (A. D. 1785).

** Turnbull *v.* The Ship Enterprise, Bee, 345, 375 (A. D. 1785).

†† Gardner *v.* Ship New Jersey, 1 Peters, Admiralty, 223 (A. D. 1806).

affirms the jurisdiction of admiralty over a policy of insurance before or after the Revolution. The only one from which jurisdiction in admiralty over insurance may be even inferred, is *Stevens* v. *Sandwich*,* in the District Court of Maryland, which holds that a shipwright may sue in admiralty, making no distinction between home and foreign ports. But this decision may be considered as overruled in *People's Ferry Co. of Boston* v. *Beers et al.*† It decides nothing with reference to insurance.

4. The extension of admiralty jurisdiction is in abridgment of trial by jury, so carefully guarded by the Constitution. The encroachments of the admiralty were among the grievances of our revolutionary fathers.‡ Is it reasonable, therefore, to suppose, that, after they had achieved their independence, they would have formed a Constitution which guaranteed the very thing they before complained of?

5. The doctrine of *De Lovio* v. *Boit* has never been affirmed outside the first circuit, but has frequently been questioned in the Supreme Court of the United States, and by some of the judges expressly denied. It should also be remarked that Davis, J., who had a large experience as an admiralty judge, dismissed the libel in the District Court for want of jurisdiction, as appears by the record, although this is not stated in the decision. In *Ramsay* v. *Allegre*,§ Johnson, J., in referring to the case, said, that a contrary decision had been made in the sixth circuit, and that they must both fall together, as *nisi prius* decisions were of no weight in the Supreme Court. In *Waring* v. *Clarke*,‖ the question of jurisdiction came up, and Justices Woodbury and Daniel dissented in favor of a *limited jurisdiction*. In *Jackson* v.

* Gardner *v.* Ship New Jersey, 1 Peters, Admiralty, 233, note, per Winchester, J.

† 20 Howard, 393.

‡ See address by the Continental Congress, Oct. 21, 1774, to the people of Great Britain, drawn by John Jay, afterwards Chief Justice of the United States; also Waring *v.* Clarke, 5 Howard, 484; Bains *v.* Schooner James et al., 1 Baldwin, 544, 550, 551.

§ 12 Wheaton, 614, 622, 638. ‖ 5 Howard, 461, 467.

Steamboat Magnolia,* Campbell, J., says he thinks he speaks the universal opinion of the legal profession in saying that the judgment in *De Lovio* v. *Boit* was "erroneous." So also in *Taylor et al.* v. *Carryl*,† Taney, C. J., in pronouncing his opinion in regard to admiralty jurisdiction, and referring to a note in 1 Kent, 371, 372, said:

"I think it is stated too broadly, broader than this court has sanctioned; *for, as regards the jurisdiction in policies of insurance, I believe it has never been asserted in any circuit but the first, and certainly it has never been brought here for adjudication.*"

And in *Cutler* v. *Rae*,‡ the case is virtually overruled. In *Gloucester Insurance Co.* v. *Younger*,§ Curtis, J., refers to the case of *Cutler* v. *Rae*, last cited, and says it goes pretty far towards overruling *De Lovio* v. *Boit;* and although he adhered to the latter case in deciding the case before him, for special reasons, yet he intimated a doubt whether the doctrine would be sustained in the appellate court.

6. Aside from the authorities, it is submitted, from the reason of the thing, that a policy of insurance is not a maritime contract. It is an agreement to indemnify the owner of the ship, cargo, or freight, against loss by perils of the seas. The suit is an action for damages for breach of the agreement. There is no lien, and the contract is in no sense maritime. It begins and ends on land. A maritime contract is where the thing to be done is itself, and in its essence, maritime.

Suppose a policy upon a vessel upon the stocks, or after she is launched, and while waiting for her equipments or for a harbor risk, and the vessel is burnt by negligence or design, would admiralty take jurisdiction? Here is no voyage, no perils of the sea. The parties are the same, the subject-matter the same. What is the real distinction between such a policy and the present one? Is it said that the distinction is in the fact, that, in one case the vessel is water-borne or afloat, and in the other not? Suppose a policy upon a cargo

* 20 Howard, 335. † Ib. 615. ‡ 7 Ib. 729. § 2 Curtis, 333.

temporarily landed by reason of a disaster to the ship, and, while on shore, is destroyed by fire, or plundered. In such a case, the policy still attaches.* But would admiralty take jurisdiction?

7. It is not enough that as good a remedy may be afforded in admiralty as at common law. Such a rule would open the door of admiralty to suits of every kind, and end in confusion. So long as a master cannot sue for his wages in admiralty;† nor part owners, for matters of account between them;‡ nor a mortgagee, to enforce payment of his mortgage;§ nor a shipbuilder, for building a ship;‖ nor materialmen who furnish supplies, for a vessel in a home port;¶ nor any owner, for contribution by way of general average,**— it is not easy to see how, or on what principle, a policy of insurance can be regarded as within the limits of admiralty jurisdiction. It is against law, precedent, and reason.

If these libels are dismissed, no harm comes to the plaintiff; for he is only sent to other tribunals of admitted jurisdiction.

Reply: The decisions in Bee's Reports of an early date, to the effect that the admiralty courts have no jurisdiction over matters suable at common law, and a few more found elsewhere, are entitled to no consideration now, and it would be a waste of time to examine them in detail. They are opposed to the decisions of this court. The jurisdiction exercised by the colonial courts of admiralty before the Revolution, was, as has been shown, liberal and comprehensive, and gives no support to the construction for which the respondents contend. If the existence and contents of the records lately found had been earlier known, the courts would have been saved the necessity of considering arguments against the admiralty jurisdiction, based on the practical jurisdiction

* Bryant *v.* Com. Ins. Co., 13 Pickering, 543, 558.
† 11 Peters, 175. ‡ Ib. § 17 Howard, 399.
‖ People's Ferry Co. *v.* Beers, 20 Id. 393.
¶ Pratt *v.* Reed, 19 Id. 359. ** Cutler *v.* Rae, 7 Id. 729.

exercised in England and in the colonies, and much litigation have been prevented.

Again, it is urged that the extension of admiralty jurisdiction was one of the grievances which led to the Revolution, and therefore it is not reasonable to suppose that the framers of the Constitution would have perpetuated the very evil of which they complained. But it is matter of history that the extension complained of related exclusively to revenue and criminal cases, that the evil was the taking away of trial by jury in cases where it previously existed. The civil jurisdiction was exercised under the King's commission, always, without a jury. It never was matter of legislation or of complaint, nor extended by statute.

It is said that a cargo insured might be destroyed while ashore; and it is asked if the Admiralty Court would then exercise jurisdiction. The answer is, that undoubtedly it would, if insurance is a maritime contract. The accident of the loss happening on land, does not alter the nature of the contract, if the cargo is covered by the policy.

It is said that the doctrine of *De Lovio* v. *Boit* is unsound, has not been approved of by the profession generally, and that it has been overruled by this court. It may be admitted that it has been sometimes questioned and sometimes denied by individual justices of this court, but never by the court or a majority of it. It has not been approved of by Daniels, Baldwin, Campbell, or Woodbury, Justices; but it may be said to have had the support of Marshall, Chief Justice, and Washington, Wayne, McLean, Justices, not to mention others now living; and the principles on which it is founded have been repeatedly affirmed in the decisions of this court sustaining jurisdiction over charter-parties, averages, and other maritime cases.

It is insisted that the case is *virtually overruled* by the decision in *Cutler* v. *Rae*. But we now know that *Cutler* v. *Rae* was not thoroughly considered; that the printed argument in favor of the jurisdiction was not before all of the court, and was not alluded to in conference; that the decision was made by a divided court, Catron, J., not giving an opinion,

because he was "not satisfied either way," "that the remaining eight judges were at first equally divided, and that it was finally disposed of rather from acquiescence in what was thought to be English authority against the jurisdiction, than from a close and searching scrutiny into the practice and jurisdiction of courts of admiralty."*

Mr. Justice BRADLEY delivered the opinion of the court.

This case comes before us on a certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts on appeal from the District Court of that district. When this division of opinion occurred the Circuit Court was being held by the associate justice of this court allotted to the first circuit and the circuit judge of that circuit, sitting together. It becomes necessary, therefore, in the first place, to decide whether a difference of opinion between these judges sitting in the Circuit Court may be certified to this court under the act of April 29, 1802. The language of the act is broad enough to include the case. It is as follows: "Whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided." But it has been suggested that, although the case is included in the terms of the act, it is not within its meaning, because the constitution of the circuit has been changed by the recent act creating circuit judges, passed April 10, 1869. There is nothing in this act which alters the powers of the court, or obviates the difficulty which a certificate of division was intended to meet. That difficulty arose from

* See the statement by Wayne, J., in the Appendix to 8 Howard; also Dike v. The St. Joseph 6 McLean, 573; Taylor v. Carryl, 20 Howard, 583.

the fact that the court was constituted of two judges, between whom a difference of opinion would be likely often to occur, and thus block the wheels of justice. Other things being equal, a division of opinion is far more probable between *two* persons than is an equal division between any other even number of persons. This renders it desirable, when a court consists of the former number, to have some method provided for overcoming the intrinsic difficulty. Such a method was provided by the act of 1802 to meet the then constitution of the court, which consisted of a justice of the Supreme Court and the district judge. The act of 1869 has created a new circuit judge, it is true, but he is invested with precisely the same power and jurisdiction in his circuit as the justice of the Supreme Court has therein, whilst the powers of the latter, as judge of the circuit, are the same as before, and the court is to be held either by one of them or the district judge, or any two of the three. Thus the same necessity exists as before for the power to certify questions to the Supreme Court. As the mischief remains the same, and the terms of the act of 1802 are general and adequate to continue the remedy, such a construction of it as will have that effect seems to be fairly warranted.*

We, therefore, conclude that the case is properly brought before us by certificate.

The case, as thus brought before us, presents the question, whether the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

This precise question has never been decided by this court. But, in our view, several decisions have been made which determine the principle on which the case depends. The general jurisdiction of the District Courts in admiralty and maritime cases has been heretofore so fully discussed that it is only necessary to refer to them very briefly on this occasion.

* See Ex parte Zellner, 9 Wallace, 244.

The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. Congress, by the Judiciary Act passed at its first session, 24th of September, 1789, established the District Courts, and conferred upon them, among other things, "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

As far as regards civil cases, therefore, the jurisdiction of these courts was thus made coextensive with the constitutional gift of judicial power on this subject.

Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes

committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the *high* seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs.

With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.

Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it.

But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. "Its boundary," says Chief Justice Taney,* "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." "Courts of admiralty," says the same judge in another case,† "have been found necessary in all commercial coun-

* The Steamer St. Lawrence, 1 Black, 527.

† The Genesee Chief, 12 Howard, 454.

tries, not only for the safety and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States."

In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long-established rules of the English courts.

First, as to the *locus* or territory of maritime jurisdiction; that is, the place or territory *where* the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide. "Are we bound to say,"—says Justice Wayne, delivering the opinion of the court in *Waring* v. *Clarke*,*—"Are we bound to say, because it has been so said by the common law courts of England in reference to the point under discussion, that *sea* always means *high sea* or *main sea?* . . . Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law than the designation of it by the common law courts? . . . We think, in the controversy between the courts of admiralty and common law upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries."

* 5 Howard, 462.

It was a long time, however, before the full extent of the admiralty jurisdiction was firmly established. The Judiciary Act expressly extended it to seizures, under laws of impost, navigation, or trade of the United States, where made on waters navigable from the sea by vessels of ten or more tons burden as well as upon the high seas, thus at once ignoring the English rule; but for some time it was held that the jurisdiction could not go further, and that this grant was confined to tide-waters. But in the case of *The Genesee Chief*,* decided in 1851, it was expressly adjudged that tide was no criterion of admiralty jurisdiction in this country; that it extended to our great internal lakes and navigable rivers as well as to tide-waters. "It is evident," says Chief Justice Taney,† "that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and, we think, are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." This judgment has been followed by several cases since decided, and the point must be considered as no longer open for discussion in this court.

Secondly, as to *contracts*, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty juris-

* 12 Howard, 443. † Id. 457.

diction over bottomry bonds, although it involved an inconsistency with their rules in almost every other case. In *Menetone* v. *Gibbons*,* Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that case there happened to be a seal on the bond, of which a strong point was made. Justice Buller answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the court of admiralty has or has not jurisdiction depends on *the subject-matter*." Had these views actuated the common law courts at an earlier day it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of *The New Jersey Navigation Company* v. *Merchants' Bank*,† which was a libel *in personam* against the company on a contract of affreightment to recover for the loss of specie by the burning of the steamer Lexington on Long Island Sound, Justice Nelson, delivering the opinion of the court, says:‡ "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. . . . On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." [The last distinction based on tide, as we have seen, has since been abrogated.] Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits by ship-carpenters and material-men on contracts for repairs, materials, and supplies, and by pilots for pilotage: in none of which would it have been allowed to the admiralty courts in England.§ In the subsequent case of

* 3 Term, 269. † 6 Howard, 344. ‡ Ib. 392.

§ See cases cited by Justice Nelson, 6 Howard, 390, 391.

Morewood v. *Enequist*,* decided in 1859, which was a case of charter-party and affreightment, Justice Grier, who had dissented in the case of The Lexington, but who seems to have changed his views on the whole subject, delivered the opinion of the court, and, amongst other things, said: "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'" He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of The Lexington, and that they had then decided "that charter-parties and contracts of affreightment were 'maritime contracts,' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*." The case of *The People's Ferry Co.* v. *Beers*,† being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract *made* on land and to be *performed* on land, Justice Grier remarked: "The court decided in that case that a contract to build a ship is *not a maritime contract*;" but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases.

In the case of *The Moses Taylor*,‡ it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract and cognizable in ad-

* 23 Howard, 492 † 20 lb. 401. ‡ 4 Wallace, 411

miralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of *The Belfast*,* it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of interstate commerce. But as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says: † "Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality."

It thus appears that in each case the decision of the court and the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a *maritime contract*. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court.

The subject could be very copiously illustrated by reference to the decisions of the various District and Circuit Courts. But it is unnecessary. The authoritative decisions of this court have settled the general rule, and all that remains to be done is to apply the law to each case as it arises.

It only remains, then, to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract.

* 7 Wallace, 624.

† 7 Ib. 637.

It is objected that it is not a maritime contract because it is made on the land and is to be performed (by payment of the loss) on the land, and is, therefore, entirely a common law transaction. This objection would equally apply to bottomry and respondentia loans, which are also usually made on the land and are to be paid on the land. But in both cases payment is made to depend on a maritime risk; in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and payment of the freight. It is true that in the latter case a maritime service is to be performed in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the seas excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. Of course these contracts do not always run precisely parallel to each other, as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them on the question whether they are or are not, maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties.

And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce,—jet-

tison, abandonment, average, salvage, capture, prize, bottomry, &c.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A. D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that act, after mentioning the great benefit arising to commerce by the use of policies of insurance, has this singular statement: "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and if any have grown the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men, by reason of their experience, fittest to understand and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several assurer by suits commenced in her majesty's courts, to their great charges and delays." The commission created by this act was to be directed to the judge of the admiralty for the time being, the recorder of London, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants. The act was thus an acknowledgment of the jurisdiction to which the case properly belonged. Had it not been for the jealousy exhibited by the common law courts against the court of admiralty, in prohibiting its cognizance of policies of insurance half a century before,* the

* 4 Institutes, 139.

latter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious, and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the law maritime relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then, as remarked by Sir W. D. Evans, "the inadequacy of the existing law to settle, *proprio vigore*, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the extrinsic aid of personal consent."* The contrivances to which Lord Mansfield resorted to remedy in a measure these difficulties are stated by Mr. Justice Parke in the introduction to his work on insurance.

These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a previsional division of risk; first, amongst those engaged in the same enterprise; and, next, amongst associations of ship-owners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier,

* Evans's Statutes, vol. ii, p. 226, 3d ed.

and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every ship-owner and merchant in Lisbon and Oporto was bound to contribute two per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur.* The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guaranty against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century,† and the tradition is, that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities. Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the Ordinances of Barcelona, A. D. 1435; of Venice, A. D. 1468; of Florence, A. D. 1523; of Antwerp, A. D. 1537, &c.‡ Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The *Guidon de la Mer*, which appeared at Rouen at the close of the sixteenth century, was an elaborate treatise on the subject; but, in its discussion, the principles of every other maritime contract were explained. In the celebrated marine ordinance of Louis XIV, issued in 1681, it forms the subject of one of the principal titles.§ As is well known, it has always formed a part of the Scotch maritime law.

Suffice it to say, that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in nearly every

* 2 Pardessus, Lois Maritimes, 369; 6 Id. 303.

† Id. vol. 2, pp. 369, 370; vol. 4, p. 566; vol. 5, pp. 331, 493.

‡ Id. vol. 5, pp. 493, 65; vol. 4, pp. 598, 37. § Lib. 3, title 6.

one of those collected by Pardessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?

But an additional argument is found in the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty or other marine courts.* The French Ordinance of 1681 touching the Marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of assurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea."† The Italian writer, Roccus, says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and principles laid down in the book called 'The Consulate of the Sea,' printed at Barcelona in the year 1592."‡

It is also clear that, originally, the English admiralty had jurisdiction of this as well as of other maritime contracts. It is expressly included in the commissions of the Admiral.§ Dr. Browne says: "The cognizance of policies of insurance was of old claimed by the Court of Admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom."‖ But the intolerance of the common law courts prohibited the exercise of it. In the early case of *Crane* v. *Bell*, 38 Hen. VIII, A. D. 1546, a

* See Benedict's Admiralty, § 294, ed. 1870.
† Sea Laws, 256.
‡ Roccus on Insurance, note 80.
§ Benedict, § 48.
‖ 2 Browne's Civil and Admiralty Law, 82.

prohibition was granted for this purpose.* Mr. Browne says, very pertinently: "What is the *rationale*, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings."†

Another consideration bearing directly on this question is the fact that the commissions in admiralty issued to our colonial governors and admiralty judges, prior to the Revolution, which may be fairly supposed to have been in the minds of the Convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them.‡

The discussions that have taken place in the District and Circuit Courts of the United States have not been adverted to. Many of them are characterized by much learning and research. The learned and exhaustive opinion of Justice Story, in the case of *De Lovio* v. *Boit*,§ affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the first circuit.‖ In 1842 Justice Story, in reaffirming his first judgment, says that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of the other judges was he did not know.¶ Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct.

The answer of the court, therefore, to the question propounded by the Circuit Court will be, that the District Court

* See 4 Institutes, 139.

† 2 Civil and Admiralty Law, 88.

‡ Benedict, chap. ix.

§ 2 Gallison, 398.

‖ Gloucester Insurance Co. *v.* Younger, 2 Curtis, 332–333.

¶ Hale *v.* Washington Insurance Co., 2 Story 183.

for the District of Massachusetts, sitting in admiralty, HAS JURISDICTION to entertain the libel in this case.

ANSWER ACCORDINGLY.

PARMELEE *v.* LAWRENCE.

1. To authorize the re-examination of a question brought here as within the 25th section of the Judiciary Act, the conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record. And the question must have been necessarily involved in the decision, so that the State court could not have given a judgment without deciding it. (*Railroad Company* v. *Rock*, 4 Wallace, 177, affirmed.)

   Accordingly, where no question of such conflict was made in the pleadings, nor in the evidence, nor at the hearing in the court where the suit was brought; and the question was first made in the Supreme Court where the certificate of the presiding judge showed only that it was taken in argument and overruled, the writ was dismissed.
2. The office of the certificate from the Supreme Court, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question within the true construction of the 25th section.

ON motion to dismiss a writ of error to the Supreme Court of Illinois, brought here on the assumption that the case was shown to be within the 25th section of the Judiciary Act; the idea of the plaintiff in error having been that a statute of the State of Illinois, on the subject of interest, was brought in question in this suit, and was upheld by the court below, though repugnant to the Constitution of the United States, as impairing the obligation of contracts.

It appeared by the record that Parmelee & Co. filed their bill in chancery, in the Superior Court of Chicago, against one Lawrence, in which they sought to enforce the specific performance of what they alleged to be a contract, by Lawrence, to convey to them certain lots in Chicago for the consideration of $50,000, and interest at 10 per cent., free and clear of incumbrance. The bill set forth that they were

ready to pay on receiving such a conveyance, but that Lawrence was unable to make title to the land; that he had demanded the money, and was threatening to eject them.

Lawrence in his answer set up that the transaction was not, as represented in the bill, a naked agreement to convey, but was a mortgage to secure the loan of $50,000, and he tendered a reconveyance on payment of the principal and interest. He also filed his cross-bill for a foreclosure of the mortgage in the usual form.

The complainants, in answer to this cross-bill, asserted as before, that the agreement had been simply an agreement to sell; but further insisted that, if the agreement was a mortgage, then the loan was usurious, and that Lawrence thereby forfeited, under the laws of Illinois, threefold the whole interest so received. They also set up, that the rate of interest was 12 per cent., and that they had given Lawrence their bond for the 2 per cent. interest, above the ten as already mentioned.

The cause was finally heard on the cross-bill, answer, replication, and proofs in the case. The Superior Court decreed that the plaintiffs should pay to the defendant the amount of the loan remaining due, with 6 per cent. interest from date of the last payment, but he to retain the 12 per cent. already paid. The defendant appealed to the Supreme Court, which reversed this decree, holding that the usurious interest already paid should be credited on the principal, and that interest should be allowed at the rate of 10 per cent. The cause was remanded to the Superior Court for a new trial, where a decree was rendered in conformity with the above opinion, and this was afterwards affirmed by the Supreme Court.

The record showed that the litigation resulted in a question as to the rate of interest to be allowed to Lawrence, the lender, according to the laws of Illinois, and that neither in the pleadings, nor in the evidence, nor at the hearing in the Superior Court, was any question made as to the validity of any statute of the State on the ground of its repugnancy to the Constitution of the United States. This question was

first made before the Supreme Court on the appeal. The certificate of the presiding judge showed that the objection was taken in the argument there and overruled, and this furnished the only evidence that any Federal question was raised in the case.

Messrs. G. Payson and C. A. Gregory, in support of the motion, argued that the certificate alone was not sufficient to show the existence of any Federal question, citing the *Railroad Company* v. *Rock*.*

Mr. Beckwith, contra.

Mr. Justice NELSON delivered the opinion of the court.

In *Lawler et al.* v. *Walker et al.*,† it is said that the 25th section of the Judiciary Act required something more definite than the certificate of the Supreme Court to give this court jurisdiction.

The conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it. The decision in this case was approved, and applied in *Railroad Company* v. *Rock*. The certificate was as full in that case as in the present, but it was the only evidence of the fact that a Federal question had been presented.

The judge, in delivering the opinion of the court in that case, observed that "it is probable that counsel in the argument of the case in the Supreme Court of Iowa, insisted that these matters were involved, and that the chief justice felt bound to certify, when requested, that they were drawn

* 4 Wallace, 177.

† 14 Howard, 152.

in question. But if the record," he proceeds, "does not show that they were necessarily drawn in question, this court cannot take jurisdiction to reverse the decision of the highest court of a State upon the ground that counsel brought them in question in argument." We will add, if this court should entertain jurisdiction upon a certificate alone in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question within the true construction of the 25th section.

MOTION TO DISMISS GRANTED.

VIRGINIA *v.* WEST VIRGINIA.

1. This court has original jurisdiction, under the Constitution, of controversies between States of the Union concerning their boundaries.
2. This jurisdiction is not defeated because in deciding the question of boundary it is necessary to consider and construe contracts and agreements between the States, nor because the judgment or decree of the court may affect the territorial limits of the jurisdiction of the States that are parties to the suit.
3. The ordinance of the organic convention of the Commonwealth of Virginia, under which the State of West Virginia was organized, and the act of May 13th, 1862, of the said Commonwealth, constitute a proposition of the former State that the counties of Jefferson and Berkeley and others might, on certain conditions, become part of the new State; and the provisions of the constitution of the new State concerning those counties are an acceptance of that proposition.
4. The act of Congress admitting the State of West Virginia into the Union at the request of the Commonwealth of Virginia, with the provisions for the transfer of those counties in the constitution of the new State, and in the acts of the Virginia legislature, is an implied consent to the agreement of those States on that subject.
5. The consent required by the Constitution to make valid agreements between the States need not necessarily be by an express assent to every proposition of the agreement. In the present case the assent is an irresistible inference from the legislation of Congress on the subject.

6. The condition of the agreement on which the transfer of these two counties was to be made was, that a majority of the votes cast on that question in the counties should be found in favor of the proposition.
7. The statutes of the Virginia legislature having authorized the governor of that State to certify the result of the voting on that proposition to the State of West Virginia, if, in his opinion, the vote was favorable, and he having certified the fact that it was so, under the seal of the State to the governor of West Virginia, and the latter State having accepted and exercised jurisdiction over those counties for several years, the State of Virginia is bound by her acts in the premises.
8. The State of Virginia cannot under such circumstances be permitted to set aside the whole transaction in a court of equity, on the ground that no fair vote was taken, that her own governor was deceived and misled by the election officers, with no charge of fraud or improper conduct on the part of West Virginia, nor can she withdraw her consent two years after the vote was taken and the transfer of the counties accomplished.

ON original bill to settle the boundary line between the States of Virginia and West Virginia, the case as existing in well-known public history and from the record being thus:

A convention professing to represent the State of Virginia, which assembled in Richmond in February, 1861, attempted by a so-called "ordinance of secession" to separate that State from the Union, and combined with certain other Southern States to accomplish that separation by arms. The people of the northwestern part of the State, who were separated from the eastern part by a succession of mountain ranges and had never received the heresy of secession, refused to acquiesce in what had been thus done, and organized themselves to defend and maintain the Federal Union. The idea of a separate State government soon developed itself; and an organic convention of the State of Virginia, which in June, 1861, organized the State on loyal principles —"the Pierpont government"—and which new organization was acknowledged by the President and Congress of the United States as the true State government of Virginia—passed August 20th, 1861, an ordinance by which they ordained that a new State be formed and erected out of the territory included within certain boundaries (set forth) including within those boundaries of the proposed new State

the counties of, &c. [thirty-nine counties being named]. These counties did not include as within the proposed State the counties of either Greenbrier, Pocahontas, Hampshire, Hardy, Morgan, *Berkeley*, or *Jefferson;* but the third section of the ordinance enacted that the convention might change the boundaries described in the first section of the ordinance so as to include within the proposed State the counties of Greenbrier and Pocahontas, or either of them, and also the other counties just above named, or either of them, "and also all such other counties as lie contiguous to the said boundaries or to the counties named," if the said counties to be added, or either of them, by a majority of the votes given, &c., should declare their wish to form part of the proposed State, and should elect delegates to the said convention, &c. The name of the new State as ordained by the ordinance was Kanawha.

The convention provided for by the ordinance met in Wheeling, November 26th, 1861, and made a "Constitution of West Virginia." Certain counties named, forty-four in number, "formerly part of the State of Virginia," it was ordained should be "included in and *form part* of the State of West Virginia." No one of the counties of Pendleton, Hardy, Hampshire, Morgan, Berkeley, or Jefferson, were among these forty-four. The constitution proceeded, in a second section:

"And if a majority of the votes cast at the election or elections held as provided in the schedule hereof, in the district composed of the counties of Pendleton, Hardy, Hampshire, and Morgan, shall be in favor of the adoption of this constitution, the said four counties shall be included in and form part of the State of West Virginia; and if the same shall be so included, and a majority of the votes cast at the said election or elections, in the district composed of *Berkeley*, *Jefferson*, and Frederick, shall be in favor of the adoption of this constitution, then the three last-named counties shall also be included in and form part of the State of West Virginia."

All through the constitution, as, *ex. gr.*, in the fixing of

senatorial and representative districts, and of judicial circuits, provision was made for the case of these two sets of counties coming in, or of one set coming in without the other. A separate section ordained that—

"Additional territory may be admitted into, and become part of this State, with the consent of the legislature."

And it provided for the representation in the Senate and House of Delegates of such new territory.

By the terms of this constitution it was to be submitted to a vote of the people on the first Thursday in April, 1862; and on a vote then taken it was ratified by the people of the forty-four counties first named, and by those of Pendleton, Hardy, Hampshire, and Morgan. But no one of the counties of Berkeley, Jefferson, or Frederick, apparently, voted on the matter; owing, as was said by the defendant's counsel at the bar, to the fact, "that, from the 1st of June, 1861, to the 1st of March, 1862, during which time these proceedings for the formation of a new State were held, those counties were in the possession, and under the absolute control, of the forces of the Confederate States; and that an attempt to hold meetings in them to promote the formation of the new State would have been followed by immediate arrest and imprisonment."

All this being done, the legislature of Virginia, as reorganized, passed, on the 13th May, 1862, an act, in title and body, thus:

An Act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State.

§ 1. *Be it enacted by the General Assembly*, That the consent of the legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, within the jurisdiction of this State, to include the counties of Hancock, &c. [forty-eight counties being named (being the forty-four first mentioned, with Pendleton, Hardy, Hampshire, and Morgan), but the counties of Berkeley, Jefferson, or Frederick, not being included], *according to the boundaries and under the provisions set*

forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861.

§ 2. That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of *Berkeley*, *Jefferson*, and *Frederick*, shall be included in and form part of the State of West Virginia WHENEVER the voters of said counties shall ratify and assent to the said constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

§ 3. That this act shall be transmitted by the Executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of *West Virginia* into the Union.

§ 4. This act shall be in force from and after its passage.

Under this act, no elections apparently were held; and on the 31st December, 1862,* Congress passed

An Act for the admission of the State of "West Virginia" into the Union, and for other purposes.

Whereas, The people inhabiting that portion of Virginia known as West Virginia, did by a convention assembled in the city of Wheeling, on the 26th November, 1861, frame for themselves a constitution with a view of becoming a separate and independent State; *and whereas*, at a general election held in the counties composing the territory aforesaid, on the 3d of May last, the said constitution was approved and adopted by the qualified voters of the proposed State; *and whereas*, the legislature of Virginia, by an act passed on the 13th day of May, 1862, did give its consent to the formation of a new State within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia, and to embrace the following named counties, to wit [the forty-eight counties mentioned in the above-quoted Virginia act of May 13, 1862, were here set forth by name, and not including Berkeley or Jefferson]; *and whereas*, both the con-

* 12 Stat. at Large, 633.

vention and the legislature aforesaid have requested that the new State should be admitted into the Union, and the constitution aforesaid being republican in form, Congress doth hereby consent that the *said forty-eight counties* may be formed into a separate and independent State; therefore,

Be it enacted, &c., That the State of West Virginia be, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatsoever, &c.

The act contained a proviso that it should not take effect until after the proclamation of the President of the United States, hereinafter provided for. It then proceeded to recite that it was represented to Congress that since the convention of 26th November, 1861, which framed and proposed the constitution for the said State of West Virginia, the people thereof had expressed a wish to change the 7th section of the 11th article of said constitution, by striking out the same, and inserting the following in its place. The article [on the subject of slavery] was then set forth. It was therefore further enacted that whenever the people of West Virginia should, through their said convention, and by a vote to be taken, &c., make and ratify the change aforesaid, and properly certify the same under the hand of the president of the convention, it should be lawful for the President of the United States to issue his proclamation stating the fact, and that thereupon this act should take effect, and be in force from and after sixty days from the date of the proclamation.

This proclamation President Lincoln did issue on the 20th April, 1863,* reciting the act, with, however, a condition annexed; reciting that proof of compliance with the condition, as required by the second section of the act, had been submitted to him, and in pursuance of the act declaring and proclaiming that the act should take effect, and be in force from and after sixty days from his proclamation.

Next in the history came certain acts of the State of Vir-

* 13 Stat. at Large, 731.

ginia; among them one passed January 31, 1863, and which, with its title, ran thus:

An Act giving the consent of the State of Virginia to the County of Berkeley being admitted into, and becoming part of, the State of West Virginia.

Whereas, By the constitution for the State of West Virginia, ratified by the people thereof, it is provided that additional territory may be admitted into and become part of said State, with the consent of the legislature thereof, and it is represented to the General Assembly that the people of the county of *Berkeley* are desirous that said county should be admitted into and become part of the said State of West Virginia: Now, therefore,

1. *Be it enacted by the General Assembly*, That polls shall be opened and held on the fourth Thursday of May next, at the several places for holding elections in the county of Berkeley, for the purpose of taking the sense of the qualified voters of said county on the question of including said county in the State of West Virginia.

2. The poll-books shall be headed as follows, viz.: "*Shall the county of Berkeley become a part of the State of West Virginia?*" and shall contain two columns, one headed "*Aye*," and the other "*No*," and the names of those who vote in favor of said county becoming a part of the State of West Virginia shall be entered in the first column, and the names of those who vote against it shall be entered in the second column.

3. The said polls shall be superintended and conducted according to the laws regulating general elections, and the commissioners superintending the same at the court-house of the said county shall, within six days from the commencement of the said vote, examine and compare the several polls taken in the county, strike therefrom any votes which are by law directed to be stricken from the same, and attach to the polls a list of the votes stricken therefrom, and the reasons for so doing. The result of the polls shall then be ascertained, declared, and certified as follows: The said commissioners shall make out two returns in the following form, or to the following effect:

"We, commissioners for taking the vote of the qualified voters of Berkeley County on the question of including the said county in the State of West Virginia, do hereby certify that polls for that purpose were opened and held the fourth Thursday of May, in the year 1863, within said county, pur-

suant to law, and that the following is a true statement of the result as exhibited by the poll-books, viz.: for the county of Berkeley becoming part of the State of West Virginia, votes; and against it votes. Given under our hands this day of , 1863;"

which returns, written in words, not in figures, shall be signed by the commissioners; one of the said returns shall be filed in the clerk's office of the said county, and the other shall be sent, under the seal of the secretary of this commonwealth, within ten days from the commencement of the said vote, *and the governor of this State, if of opinion* that the said vote has been opened and held, and the result ascertained and certified pursuant to law, *shall certify the result of the same under the seal of this State, to the governor of the said State of West Virginia.*

4. If the governor of this State shall be of opinion that the said polls cannot be safely and properly opened and held in the said county of Berkeley, on the fourth Thursday of May next, he may by proclamation postpone the same, and appoint in the same proclamation, or by one to be hereafter issued, another day for opening and holding the same.

5. If a majority of the votes given at the polls opened and held pursuant to this act be in favor of the said county of Berkeley becoming part of the State of West Virginia, then shall the said county become part of the State of West Virginia when admitted into the same with the consent of the legislature thereof.

6. This act shall be in force from its passage.

Then followed, four days later, on the 4th of February of the same year, 1863, an act relating to the admission of several other counties, including *Jefferson*, thus:

An Act giving consent to the admission of certain counties into the new State of West Virginia upon certain conditions.

1. *Be it enacted by the General Assembly of Virginia*, That at the general election on the fourth Thursday of May, 1863, it shall be lawful for the voters of the district composed of the counties of Tazewell, Bland, Giles, and Craig to declare, by their votes, whether said counties shall be annexed to, and become a part of, the new State of West Virginia; also, at the same time, the district composed of the counties of Buchanan, Wise, Russell, Scott, and Lee, to declare, by their votes, whether the counties

of the said last-named district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Alleghany, Bath, and Highland, to declare, by their votes, whether the counties of such last-named district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Frederick and *Jefferson*, or *either* of them, to declare by their votes whether the counties of the said last-named district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Clarke, Loudoun, Fairfax, Alexandria, and Prince William, to declare, by their votes, whether the counties of the said last-named district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Shenandoah, Warren, Page, and Rockingham, to declare, by their votes, whether the counties of the said last-named district shall be annexed to, and become a part of, the State of West Virginia; and for that purpose there shall be a poll opened at each place of voting in each of said districts, headed "*For annexation*," and "*Against annexation*." And the consent of this General Assembly is hereby given for the annexation to the said State of West Virginia of such of said districts, or of either of them, as a majority of the votes so polled in each district may determine; provided that the legislature of the State of West Virginia shall also consent and agree to the said annexation, after which all jurisdiction of the State of Virginia over the districts so annexed shall cease.

2. It shall be the duty of the *governor of the Commonwealth to ascertain and certify the result as other elections are certified.*

3. In the event the state of the country will not permit, or from any cause, said election for annexation cannot be fairly held on the day aforesaid, it shall be the duty of the governor of this Commonwealth, as soon as such election can be safely and fairly held, and a full and free expression of the opinion of the people had thereon, to issue his proclamation ordering such election for the purpose aforesaid, and certify the result as aforesaid.

4. This act shall be in force from its passage.

Under these two acts elections of some sort were held

and the governor certified the same to the State of West Virginia, and that State thereupon extended her jurisdiction over the counties of Berkeley and Jefferson, and still maintained it.

Next came an act of the State of Virginia, passed December 5th, 1865:

An Act to repeal the second section of an act passed on the 13th day of May, 1862, entitled An act giving the consent of the legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State; also, repealing the act passed on the 31st day of January, 1863, entitled An act giving the consent of the State of Virginia to the county of Berkeley being admitted into, and becoming part of, the State of West Virginia; also, repealing the act passed on the 4th day of February, 1863, entitled An act giving consent to the admission of certain counties into the new State of West Virginia, upon certain conditions, and withdrawing consent to the transfer of jurisdiction over the several counties in each of said acts mentioned.

Whereas, It sufficiently appears that the conditions prescribed in the several acts of the General Assembly of the restored government of Virginia, intended to give consent to the transfer, from this State to the State of West Virginia, of jurisdiction over the counties of *Jefferson* and *Berkeley*, and the several other counties mentioned in the act of February 4th, 1863, hereinafter recited, have not been complied with; and the consent of Congress, as required by the Constitution of the United States, not having been obtained in order to give effect to such transfer, so that the proceedings heretofore had on this subject are simply inchoate, and said consent may properly be withdrawn; and this General Assembly, regarding the contemplated disintegration of the Commonwealth, even if within its constitutional competency, as liable to many objections of the gravest character, not only in respect to the counties of Jefferson and Berkeley, over which the State of West Virginia has prematurely attempted to exercise jurisdiction, but also as to the several other counties above referred to:

1. *Be it therefore enacted by the General Assembly of Virginia*, That the second section of the act passed on the 13th day of May, 1862, entitled An act giving the consent of the legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State be, and the same is hereby, repealed.

2. That the act passed on the 31st day of January, 1863, entitled An act giving the consent of the State of Virginia to the county of Berkeley being admitted into and becoming part of the State of West Virginia, be, and the same is, in like manner, hereby repealed.

3. That the act passed February 4th, 1863, entitled An act giving consent to the admission of certain counties into the new State of West Virginia upon certain conditions, be, and the same is, in like manner, hereby repealed.

4. That all consent in any manner heretofore given, or intended to be given, by the General Assembly of Virginia to the transfer, from its jurisdiction to the jurisdiction of the State of West Virginia, of any of the counties mentioned in either of the above-recited acts, be, and the same is hereby, withdrawn; and all acts, ordinances, and resolutions heretofore passed purporting to give such consent are hereby repealed.

5. This act shall be in force from and after the passage thereof.

On the 10th of March, 1866,* Congress passed a

Joint Resolution giving the consent of Congress to the transfer of the Counties of Berkeley and Jefferson to the State of West Virginia.

Be it resolved, &c., That Congress hereby recognizes the transfer of the counties of Berkeley and Jefferson from the State of Virginia to West Virginia and consents thereto.

In this state of things, the Commonwealth of Virginia brought her bill in equity against the State of West Virginia in this court on the ground of its original jurisdiction of controversies between States under the Constitution, in which it was alleged that such a controversy had arisen between those States in regard to their boundary, and especially as to the question whether the counties of Berkeley and Jefferson had become part of the State of West Virginia or were part of and within the jurisdiction of the Commonwealth of Virginia; and the prayer of the bill was that it might be established by the decree of this court that those

* 14 Stat. at Large, 350.

counties were part of the Commonwealth of Virginia, and that the boundary line between the two States should be ascertained, established, and made certain, so as to include the counties mentioned as part of the territory and within the jurisdiction of the State of Virginia.

The stating part of the bill was largely composed of the substance of four acts of the General Assembly of the Commonwealth, already presented at large, in the statement, copies of them being made exhibits and filed with the bill.

The bill, in addition to the substance of these statutes, alleged that no action whatever was had or taken under the second section of the act of 1862,* but that afterwards the State of West Virginia was admitted into the Union, under an act of Congress and proclamation of the President, without including either the counties of Berkeley, Jefferson, or Frederick.

It further alleged that an attempt was made to take the vote in the counties of Jefferson and Berkeley at the time mentioned in the acts of January 31st, and February 4th, 1863,† but that, owing to the state of the country at that time, no fair vote could be taken; that no polls were opened at any considerable number of the voting places; *that the vote taken was not a fair and full expression;* all of which was well known to the persons who procured the certificate of such election. It also alleged that it having been *falsely and fraudulently suggested, and falsely and untruly made to appear to the governor of the Commonwealth*, that a large majority of the votes was given in favor of annexation, he certified the same to the State of West Virginia, and that thereupon, without the consent of Congress, that State extended her jurisdiction over the said counties of Berkeley and Jefferson, and over the inhabitants thereof, and still maintained the same.

The State of Virginia, of course, in coming before this court with this case, relied upon that clause of the Federal Constitution which ordains that "no State shall, *without the assent of Congress*, enter into any agreement or compact with

* *Supra*, p. 43.

† *Supra*, pp. 45, 47.

any other State," and that one also which ordains that "the judicial power shall extend . . . to controversies between two or more States."

To the bill thus filed the State of West Virginia appeared and put in a general demurrer. It was not denied that West Virginia had from the beginning continued her assent to receive these two counties.

The case was elaborately argued at December Term, 1866, by *Messrs. B. R. Curtis and A. Hunter, in support of the bill, and by Messrs. B. Stanton and Reverdy Johnson, in support of the demurrer; and again at this term by Mr. Taylor, Attorney-General of Virginia, Messrs. B. R. Curtis, and A. Hunter, on the former side, and Messrs. B. Stanton, C. J. Faulkner, and Reverdy Johnson, contra.*

In support of the bill it was argued, among other things, that a State was incapable under the Constitution of making any contract with another State; that States might negotiate with each other, might express a mutual willingness to do the same thing, but that this was all; that Congress by the act of 1862, assenting to the admission of a State composed of but forty-eight counties, had not given its assent to a State having in it the counties of Berkeley and Jefferson; that Congress had never assented to the admission of those counties until its joint resolution of 1866; that previous to that time Virginia had withdrawn, as she had a right to do, her once offered assent to what Congress could alone complete; that the transfer could exist only by the concurrent assent of all these parties; that therefore no transfer had been made by the joint resolution. Even if this were not so, and if fair elections under the acts of 1863 would be sufficient, the allegations of the bill as to the character of the elections relied on—allegations of partial and fraudulent elections—which allegations on a demurrer were to be taken as true—concluded the matter; for if *no* elections had ever taken place, then even the condition upon which as between the two States the counties were to pass to West Virginia, had never taken effect.

In support of the demurrer the principal points were, that although this court had jurisdiction over "controversies between two States," it was only over controversies in which some question in its nature judicial was involved. This court could not settle a controversy of arms, or force, such as came near arising between Ohio and Michigan, on the matter of their boundary; nor would it settle a political one. *Georgia* v. *Stanton** decided that. Now, the main question here involved was the political jurisdiction over two counties, and their inhabitants. There was no land that Virginia claims as her individual land. The question then was a political question; one for Congress. Of the disputed questions of boundary which had arisen in this country, Congress had settled most.† In the few cases, where this court had acted, including the case of *Rhode Island* v. *Massachusetts*,‡ where there was an old colonial agreement of 1710, there had always been some proper subject of *judicial* action involved; a question of the specific performance of contract, a question of property, or the like. Even in the great English case of *Penn* v. *Lord Baltimore*, A. D. 1750,§ before Lord Hardwicke, to settle the lines between Delaware and Maryland, there was an agreement for settling the boundary; a proper head of equitable jurisdiction. The dicta and much of the argument of Baldwin, J., who gave the opinion in the Rhode Island case, were unnecessary to the judgment. Other cases have followed that.

In reply to the other side it was contended that the boundary, as contemplated both by the State of Virginia and the proposed State, was not confined to the limits specifically stated, but was capable of being opened, to the extent provided for, by the two bodies; that this capacity was inherent in the State as constituted; that Congress in 1862 received the State with this capacity; that the right of voting was subsequently exercised by the two counties under the Virginia acts of 1863; that the condition thus became executed, and the two counties transferred to the State of West Vir-

* 6 Wallace, 50. † 8 Stat. at Large, 751, title, Boundary, in Index.
‡ 12 Peters, 724. § 1 Vesey, 444.

ginia; that the court could not go behind the official returns of the vote; and, finally, that the purpose of one of the clauses of the Constitution, relied on in the argument of the other side, was not to prevent the States from settling their own boundaries so far as merely affected their relations to each other, but to guard against the derangement of their Federal relations with the other States of the Union, and the Federal government, which might be injuriously affected if the contracting parties might act upon their boundaries at pleasure; and that in this case the boundary having been settled by themselves, between Virginia and the new body to which she was in 1862 assisting to give existence, Virginia could not subsequently revoke her assent against the wish of the other party.

Mr. Justice MILLER delivered the opinion of the court.

The first proposition on which counsel insist, in support of the demurrer is, that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute.

This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well-considered cases have been decided. Without entering into the argument by which those decisions are supported, we shall content ourselves with showing what is the established doctrine of the court.

In the case of *Rhode Island* v. *Massachusetts*,* this question was raised, and Chief Justice Taney dissented from the judgment of the court by which the jurisdiction was affirmed, on the precise ground taken here. The subject is elaborately discussed in the opinion of the court, delivered

* 12 Peters, 724.

by Mr. Justice Baldwin, and the jurisdiction, we think, satisfactorily sustained. That case, in all important features, was like this. It involved a question of boundary and of the jurisdiction of the States over the territory and people of the disputed region. The bill of Rhode Island denied that she had ever consented to a line run by certain commissioners. The plea of Massachusetts averred that she had consented. A question of fraudulent representation in obtaining certain action of the State of Rhode Island was also made in the pleadings.

It is said in that opinion that, "title, jurisdiction, sovereignty, are (therefore) dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it, so that great as questions of jurisdiction and sovereignty may be, they depend on facts." And it is held that as the court has jurisdiction of the question of boundary, the fact that its decision on that subject settles the territorial limits of the jurisdiction of the States, does not defeat the jurisdiction of the court.

The next reported case, is that of *Missouri* v. *Iowa*,* in which the complaint is, that the State of Missouri is unjustly ousted of her jurisdiction, and obstructed from governing a part of her territory on her northern boundary, about ten miles wide, by the State of Iowa, which exercises such jurisdiction, contrary to the rights of the State of Missouri, and in defiance of her authority. Although the jurisdictional question is thus broadly stated, no objection on this point was raised, and the opinion which settled the line in dispute, delivered by Judge Catron, declares that it was the unanimous opinion of all the judges of the court. The Chief Justice must, therefore, have abandoned his dissenting doctrine in the previous case.

That this is so is made still more clear by the opinion of the court delivered by himself in the case of *Florida* v. *Georgia*,† in which he says that "it is settled, by repeated decisions, that a question of boundary between States, is

* 7 Howard, 660. † 17 Id. 478.

within the jurisdiction conferred by the Constitution on this court." A subsequent expression in that opinion shows that he understood this as including the political question, for he says "that a question of boundary between States is necessarily a political question to be settled by compact made by the political departments of the government. . . . But under our form of government a boundary between two States may become a judicial question to be decided by this court."

In the subsequent case of *Alabama* v. *Georgia*,* all the judges concurred, and no question of the jurisdiction was raised.

We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding.

In the further consideration of the question raised by the demurrer we shall proceed upon the ground, which we shall not stop to defend, that the right of West Virginia to jurisdiction over the counties in question, can only be maintained by a valid agreement between the two States on that subject, and that to the validity of such an agreement, the consent of Congress is essential. And we do not deem it necessary in this discussion to inquire whether such an agreement may possess a certain binding force between the States that are parties to it, for any purpose, before such consent is obtained.

As there seems to be no question, then, that the State of West Virginia, from the time she first proposed, in the constitution under which she became a State, to receive these

* 23 Howard, 505.

counties, has ever since adhered to, and continued her assent to that proposition, three questions remain to be considered.

1. Did the State of Virginia ever give a consent to this proposition which became obligatory on her?

2. Did the Congress give such consent as rendered the agreement valid?

3. If both these are answered affirmatively, it may be necessary to inquire whether the circumstances alleged in this bill, authorized Virginia to withdraw her consent, and justify us in setting aside the contract, and restoring the two counties to that State.

To determine these questions it will be necessary to examine into the history of the creation of the State of West Virginia, so far as this is to be learned from legislation, of which we can take judicial notice.

The first step in this matter was taken by the organic convention of the State of Virginia, which in 1861 reorganized that State, and formed for it what was known as the Pierpont government—an organization which was recognized by the President and by Congress as the State of Virginia, and which passed the four statutes set forth as exhibits in the bill of complainant. This convention passed an ordinance, August 30, 1861, calling a convention of delegates from certain designated counties of the State of Virginia to form a constitution for a new State to be called Kanawha.

The third section of that ordinance provides that the convention when assembled may change the boundaries of the new State as described in the first section, so as to include the "counties of Greenbrier and Pocahontas, or either of them, and also the counties of Hampshire, Hardy, Morgan, Berkeley, and Jefferson, or either of them," if the said counties, or either of them, shall declare their wish, by a majority of votes given, and shall elect delegates to the said convention.

It is thus seen that in the very first step to organize the new State, the old State of Virginia recognized the peculiar condition of the two counties now in question, and provided that either of them should become part of the new State upon the

majority of the votes polled being found to be in favor of that proposition.

The convention authorized by this ordinance assembled in Wheeling, November 26, 1861. It does not appear that either Berkeley or Jefferson was represented, but it framed a constitution which, after naming the counties composing the new State in the first section of the first article, provided, by the second section, that if a majority of the votes cast at an election to be held for that purpose in the district composed of the counties of Berkeley, Jefferson, and Frederick, should be in favor of adopting the constitution, they should form a part of the State of West Virginia. That constitution also provided for representation of these counties in the Senate and House of Delegates if they elected to become a part of the new State, and that they should in that event constitute the eleventh judicial district. A distinct section also declares, in general terms, that additional territory may be admitted into and become part of the State with the consent of the legislature.

The schedule of this constitution arranged for its submission to a vote of the people on the first Thursday in April, 1862.

This vote was taken and the constitution ratified by the people; but it does not appear that either of the three counties of Jefferson, Berkeley, and Frederick, took any vote at that time.

Next in order of this legislative history is the act of the Virginia legislature of May 13, 1862, passed shortly after the vote above mentioned had been taken.* This act gives the consent of the State of Virginia to the formation of the State of West Virginia out of certain counties named under the provisions set forth in its constitution, and by its second section it is declared that the consent of the legislature of Virginia is also given that the counties of Berkeley, Jefferson, and Frederick, shall be included in said State "*whenever* the voters of said counties shall ratify and assent to said consti-

* *Supra*, p. 42.

tution, at an election held for that purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe."

This act was directed to be sent to the senators and representatives of Virginia in Congress, with instructions to obtain the consent of Congress to the admission of the State of West Virginia into the Union.

Accordingly on the 31st of December, 1862, Congress acted on these matters, and reciting the proceedings of the Convention of West Virginia, and that both that convention and the legislature of the State of Virginia had requested that the new State should be admitted into the Union, it passed an act for the admission of said State, with certain provisions not material to our purpose.

Let us pause a moment and consider what is the fair and reasonable inference to be drawn from the actions of the State of Virginia, the Convention of West Virginia, and the Congress of the United States in regard to these counties.

The State of Virginia, in the ordinance which originated the formation of the new State, recognized something peculiar in the condition of these two counties, and some others. It gave them the option of sending delegates to the constitutional convention, and gave that convention the option to receive them. For some reason not developed in the legislative history of the matter these counties took no action on the subject. The convention, willing to accept them, and hoping they might still express their wish to come in, made provision in the new constitution that they might do so, and for their place in the legislative bodies, and in the judicial system, and inserted a general proposition for accession of territory to the new State. The State of Virginia, in expressing her satisfaction with the new State and its constitution, and her consent to its formation, by a special section, refers again to the counties of Berkeley, Jefferson, and Frederick, and enacts that whenever they shall, by a majority vote, assent to the constitution of the new State, they may become part thereof; and the legislature sends this statute to Congress with a request that it will admit the new

State into the Union. Now, we have here, on two different occasions, the emphatic legislative proposition of Virginia that these counties might become part of West Virginia; and we have the constitution of West Virginia agreeing to accept them and providing for their place in the new-born State. There was one condition, however, imposed by Virginia to her parting with them, and one condition made by West Virginia to her receiving them, and that was the same, namely, the assent of the majority of the votes of the counties to the transfer.

It seems to us that here was an agreement between the old State and the new that these counties should become part of the latter, subject to that condition alone. Up to this time no vote had been taken in these counties; probably none could be taken under any but a hostile government. At all events, the bill alleges that none was taken on the proposition of May, 1862, of the Virginia legislature. If an agreement means the mutual consent of the parties to a given proposition, this was an agreement between these States for the transfer of these counties on the condition named. The condition was one which could be ascertained or carried out at any time; and this was clearly the idea of Virginia when she declared that *whenever* the voters of said counties should ratify and consent to the constitution they should become part of the State; and her subsequent legislation making special provision for taking the vote on this subject, as shown by the acts of January 31st and February 4th, 1863, is in perfect accord with this idea, and shows her good faith in carrying into effect the agreement.

2. But did Congress consent to this agreement?

Unless it can be shown that the consent of Congress, under that clause of the Constitution which forbids agreements between States without it, can only be given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement.

The attention of Congress was called to the subject by the very short statute of the State of Virginia requesting the admission of the new State into the Union, consisting of but three sections,* one of which was entirely devoted to giving consent that these two counties and the county of Frederick might accompany the others, if they desired to do so. The constitution of the new State was literally cumbered with the various provisions for receiving these counties if they chose to come, and in two or three forms express consent is there given to this addition to the State. The subject of the relation of these counties to the others, as set forth in the ordinance for calling the convention, in the constitution framed by that convention, and in the act of the Virginia legislature, must have received the attentive consideration of Congress. To hold otherwise is to suppose that the act for the admission of the new State passed without any due or serious consideration. But the substance of this act clearly repels any such inference; for it is seen that the constitution of the new State was, in one particular at least, unacceptable to Congress, and the act only admits the State into the Union when that feature shall be changed by the popular vote. If any other part of the constitution had failed to meet the approbation of Congress, especially so important a part as the proposition for a future change of boundary between the new and the old State, it is reasonable to suppose that its dissent would have been expressed in some shape, especially as the refusal to permit those counties to attach themselves to the new State would not have endangered its formation and admission without them.

It is, therefore, an inference clear and satisfactory that Congress by that statute, intended to consent to the admission of the State with the contingent boundaries provided for in its constitution and in the statute of Virginia, which prayed for its admission on those terms, and that in so doing it necessarily consented to the agreement of those States on that subject.

* *Supra*, p. 42.

There was then a valid agreement between the two States consented to by Congress, which agreement made the accession of these counties dependent on the result of a popular vote in favor of that proposition.

3. But the Commonwealth of Virginia insists that no such vote was ever given; and we must inquire whether the facts alleged in the bill are such as to require an issue to be made on that question by the answer of the defendant.

The bill alleges the failure of the counties to take any action under the act of May, 1862, and that on the 31st of January and the 4th of February thereafter the two other acts we have mentioned were passed to enable such vote to be taken. These statutes provide very minutely for the taking of this vote under the authority of the State of Virginia; and, among other things, it is enacted that the governor shall ascertain the result, and, if he shall be of opinion that said vote has been opened and held and the result ascertained and certified pursuant to law, he shall certify that result under the seal of the State to the governor of West Virginia; and if a majority of the votes given at the polls were in favor of the proposition, then the counties became part of said State. He was also authorized to postpone the time of voting if he should be of opinion that a fair vote could not be taken on the day mentioned in these acts.

Though this language is taken mainly from the statute which refers to Berkeley County, we consider the legal effect of the other statute to be the same.

These statutes were in no way essential to evidence the consent of Virginia to the original agreement, but were intended by her legislature to provide the means of ascertaining the wishes of the voters of these counties, that being the condition of the agreement on which the transfer of the counties depended.

The State thus showed her good faith to that agreement, and undertook in her own way and by her own officers to ascertain the fact in question.

The legislature might have required the vote to have been reported to it, and assumed the duty of ascertaining and making known the result to West Virginia; but it delegated that power to the governor. It invested him with full discretion as to the time when the vote should be taken, and made his opinion and his decision conclusive as to the result. The vote was taken under these statutes, and certified to the governor. He was of opinion that the result was in favor of the transfer. He certified this fact under the seal of the State to the State of West Virginia, and the legislature of that State immediately assumed jurisdiction over the two counties, provided for their admission, and they have been a part of that State ever since.

Do the allegations of the bill authorize us to go behind all this and inquire as to what took place at this voting? To inquire how many votes were actually cast? How many of the men who had once been voters in these counties were then in the rebel army? Or had been there and were thus disfranchised? For all these and many more embarrassing questions must arise if the defendant is required to take issue on the allegations of the bill on this subject.

These allegations are indefinite and vague in this regard. It is charged that no fair vote was taken; but no act of unfairness is alleged. That no opportunity was afforded for a fair vote. That the governor was misled and deceived by the fraud of those who made him believe so. This is the substance of what is alleged. No one is charged specifically with the fraud. No particular act of fraud is stated. The governor is impliedly said to have acted in good faith. No charge of any kind of moral or legal wrong is made against the defendant, the State of West Virginia.

But, waiving these defects in the bill, we are of opinion that the action of the governor is conclusive of the vote as between the States of Virginia and West Virginia. He was in legal effect the State of Virginia in this matter. In addition to his position as executive head of the State, the legislature delegated to him all its own power in the premises. It vested him with large contro as to the time of taking the

vote, and it made his *opinion* of the result the condition of final action. It rested of its own accord the whole question on his judgment and in his hands. In a matter where that action was to be the foundation on which another sovereign State was to act—a matter which involved the delicate question of permanent boundary between the States and jurisdiction over a large population—a matter in which she took into her own hands the ascertainment of the fact on which these important propositions were by contract made to depend, she must be bound by what she has done. She can have no right, years after all this has been settled, to come into a court of chancery to charge that her own conduct has been a wrong and a fraud; that her own subordinate agents have misled her governor, and that her solemn act transferring these counties shall be set aside, against the will of the State of West Virginia, and without consulting the wishes of the people of those counties.

This view of the subject renders it unnecessary to inquire into the effect of the act of 1865 withdrawing the consent of the State of Virginia, or the act of Congress of 1866 giving consent, after the attempt of that State to withdraw hers.

The demurrer to the bill is therefore sustained, and the

BILL MUST BE DISMISSED.

Mr. Justice DAVIS, with whom concurred CLIFFORD and FIELD, JJ., dissenting.

Being unable to agree with the majority of the court in its judgment in this case, I will briefly state the grounds of my dissent.

There is no difference of opinion between us in relation to the construction of the provision of the Constitution which affects the question at issue. We all agree that until the consent of Congress is given, there can be no valid compact or agreement between States. And that, although the point of time when Congress may give its consent is not material, yet, when it is given, there must be a reciprocal and concurrent consent of the three parties to the contract. Without

this, it is not a completed compact. If, therefore, Virginia withdrew its assent before the consent of Congress was given, there was no compact within the meaning of the Constitution.

To my mind nothing is clearer, than that Congress never did undertake to give its consent to the transfer of Berkeley and Jefferson counties to the State of West Virginia until March 2, 1866. If so, the consent came too late, because the legislature of Virginia had, on the fifth day of December, 1865, withdrawn its assent to the proposed cession of these two counties. This withdrawal was in ample time, as it was before the proposal of the State had become operative as a concluded compact, and the bill (in my judgment) shows that Virginia had sufficient reasons for recalling its proposition to part with the territory embraced within these counties.

But, it is maintained in the opinion of the court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia, when it admitted West Virginia into the Union. The argument of the opinion is, that Congress, by admitting the new State, gave its assent to that provision of the new constitution which looked to the acquisition of these counties, and that if the people of these counties have *since* voted to become part of the State of West Virginia, this action is within the consent of Congress. I most respectfully submit that the facts of the case (about which there is no dispute), do not justify the argument which is attempted to be drawn from them.

The second section of the first article of the constitution of West Virginia was merely a proposal addressed to the people of two distinct districts, on which they were invited to act. The people of one district (Pendleton, Hardy, Hampshire, and Morgan) accepted the proposal. The people of the other district (Jefferson, Berkeley, and Frederick) rejected it.

In this state of things, the first district became a part of the new State, so far as its constitution could make it so, and the legislature of Virginia included it in its assent, and

Congress included it in its admission to the Union. But neither the constitution of West Virginia, nor the assent of the legislature of Virginia, nor the consent of Congress, had any application whatever to the second district. For though the second section of the first article of the new constitution had proposed to include it, the proposal was accompanied with conditions which were not complied with; and when that constitution was presented to Congress for approval, the proposal had already been rejected, and had no significance or effect whatever.

MORGAN *v.* THORNHILL.

No appeal lies to this court from a decree of the Circuit Court of the United States, exercising the supervisory jurisdiction conferred upon it by the second section of the Bankrupt Act of 2d March, 1867.

ON motion to dismiss an appeal from the Circuit Court from the District of Louisiana; the case being this:

"An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867,* and which gives to the District Courts exclusive original jurisdiction in matters of bankruptcy, authorizes them to declare corporations bankrupt upon certain proceedings had.

By the 2d section of the act it is enacted:

"That the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all *cases and questions* arising under this act, and except when special provision is otherwise made, may upon *bill, petition*, or *other process* of any party aggrieved, hear and determine the case *as* a court of equity. The powers and duties hereby granted may be exercised either by said court or by any justice thereof, in term time or in vacation."

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* 14 Stat. at Large, 518.

Statement of the case.

By the 8th section of the act it is further provided:

"That appeals may be taken from the District Court to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts in cases at law, under the jurisdiction created by this act, when the debt or damages claimed amount to more than $500; and any supposed creditor may appeal whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal from the decision of the District Court to the Circuit Court."

And by the 9th:

"That in cases arising under this act no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute exceeds $2000."

Under this bankrupt act the District Court at New Orleans on the 11th of January, 1870, on the petition of one Thornhill, a creditor, decreed the Bank of Louisiana to be bankrupt. The charter of the bank had previously to this date been declared, on proceedings in one of the State courts, forfeited under a statute of the State, and its affairs had been placed in the hands of one Morgan and others, as commissioners, to liquidate them. These commissioners were in possession of the property of the bank. The decree of the District Court in bankruptcy superseded the action under the State law, ordering as it did "that the parties holding any of the property of the said bank, surrender the same to the proper officers of this court," and being followed up soon afterwards (June, 1870) by injunctions against the commissioners to refrain and desist from making any transfer or disposition of any part of the assets of the bank, or any payment out of them, and from all litigation or compromise about them.

Hereupon Morgan and the other commissioners filed their *petition* (no *appeal* being in any way taken in the matter) in the Circuit Court for the District of Louisiana. In this they "represent" what had been done in the District Court; and having set all this forth proceed:

"Now your petitioners in their said capacities of commissioners of the Bank of Louisiana, respectfully represent that they are aggrieved, and the creditors of said bank are also aggrieved and injured by the proceedings, orders, and judgment rendered in said cases, and believe the same to be erroneous and contrary to law; that the issuing and continuance of said injunctions has been, since the month of June last, and still is, working great injury to the creditors of said bank; that petitioners are prohibited thereby from defending or prosecuting the many suits now pending in which the said bank is a party, or to appear and protect its interests in any litigation now pending in which the said bank is interested, or to institute such legal proceedings as are necessary to interrupt prescription on claims held by them as commissioners; that the judgment rendered in said suit is erroneous."

The petition concluded with this prayer:

"And your petitioners pray that the orders made in said cause be suspended in their operation and legal effect, and *that the superintending and revising jurisdiction conferred upon this court in such cases* by the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, may be exercised by your honor, and that the said orders be examined, and, if found not to be warranted by law, set aside or rescinded, and that your petitioners be allowed to proceed with the execution of the trusts conferred upon them by law."

The Circuit Judge, *at chambers*, affirmed the action in the District Court, holding that the act of the State of Louisiana was suspended by the Bankrupt Act, and that the proceedings in the State court, under whose judgment the charter of the bank was dissolved and the commissioners appointed, were void for want of jurisdiction.

An appeal was afterwards granted by one of the justices of this court, and the bond approved, and supersedeas directed to be issued, the appeal having been prayed and the bond approved within the ten days from the rendition of the decree.

Argument against the jurisdiction.

Mr. C. Cushing, for the creditors in bankruptcy, appellees in the case, now moved to dismiss the appeal.

1st. Because the decree was rendered by the circuit judge by virtue of the special power conferred on the Circuit Court or the judge thereof to exercise "a general superintendence and jurisdiction of all cases and questions arising under" the Bankrupt Act, conferred by the 1st section of said act, to be exercised by the said Circuit Court or the judge thereof "in term time or vacation." From which class of decree no appeal lies.

2d. Because it was not final.

In support of his motion he argued: The 8th section of the Bankrupt Act regulating appeals, makes no change in the general law of appeals, except in reference to the amount and time within which an appeal must be taken, in which it is less favorable than the general law on regulating appeals.

An appeal, therefore, from the District Court can only be taken to the Circuit Court in the cases in which it can be taken ordinarily; that is, it must be taken from a final decree of the District Court. In all other cases where the Circuit Court acts in matters of bankruptcy, it is by virtue of the special, comprehensive, and almost universal power of superintendence conferred by the 2d section of the act. By that section, the Circuit Court has a general "superintendence of all cases and questions arising under" the Bankrupt Act. The only exception to this general jurisdiction of superintendence is in the case of appeals and writs of error.

It is submitted that the cases in which an appeal lies to the Supreme Court of the United States under the Bankrupt Act are necessarily limited to such final decrees made in the Circuit Court as have been made in cases brought there by appeal as originating there.

This case did not come into the Circuit Court by appeal from the District Court, nor did it originate in the Circuit Court. It was brought before the circuit judge by petition, invoking the special revisory jurisdiction of the circuit judge. The revisory power given by the 2d section embraces *all*

Argument in support of the jurisdiction.

"*questions*" which can arise under the act. The word decree or judgment is not used. Obviously and wisely the action of the Circuit Court on these *questions* was meant to be summary. On any other view every "question" that could arise in proceedings in bankruptcy could be brought here, though there was no judgment, no decree, no order.

It is a familiar principle of law, that the appellate jurisdiction of this court does not include a decree under a law conferring a new and special jurisdiction, in which no remedy by appeal is granted.* The decree or order appealed from in this case was made under a law conferring a new and special jurisdiction on the circuit judge. From the exercise of this special jurisdiction no appeal is given. And as this court exercises its appellate jurisdiction only under the acts of Congress, the burden is on the appellants to show that an appeal lies in their case. It is to be noted, too, in this case, that the general superintendence granted to the circuit judge by the 2d section of the Bankrupt Act is to be exercised by him in court or at chambers. This is a controlling fact, to show that no right of appeal was intended to be given from the decisions of the circuit judge in the exercise of this power of superintendence. The exercise of the appellate power of this court is confined almost exclusively to the final judgments or decrees of the Circuit Court rendered in term time. This court, in *United States* v. *Nourse*,† commenting on the fact that in the case then before the court the judge of the court below was authorized to act at chambers, say:

"From a decision of the district judge *out of court*, how could the government appeal to the Circuit Court?"

2. The decree is not a final decree, having been rendered out of court. Only interlocutory decrees are so rendered.

Messrs. W. M. Evarts and P. Phillips, contra:

The revisory power of the Circuit Court, in one form or

* United States *v.* Nourse, 6 Peters, 470, 493. † Cited *supra.*

another, and it may be by an appeal as well as a petition, extends, in virtue of the 2d section, over the whole matter intrusted to the jurisdiction of the District Court, and if the act had been silent as to an appeal to this court from the Circuit Court, it would have been maintainable under the acts of 1789 and 1803.*

But the act is not silent. The 9th section declares that no appeal or writ of error shall be allowed in any case from the Circuit to the Supreme Court, unless the matter in dispute shall exceed $2000. It is accordingly evident that Congress assumed that appeals would be taken from the Circuit Court, and contented itself with alone regulating the amount which gave the jurisdiction. If, therefore, the decree is final, and the amount in controversy exceeds $2000, the appeal is well taken. Now the District Court, by its judgment, had taken from the administrators appointed by the laws of the State an estate worth many hundreds of thousands of dollars. This judgment was, by the decree of the Circuit Court, affirmed, and the rights set up in the petition of review were denied.

It is urged by Mr. Cushing that no appeal lies in this case because the matter was "before the circuit judge by petition invoking the special revisory jurisdiction." That is, though it be admitted that the decree is final, and the amount in controversy exceeds $2000, no appeal lies because the case was not carried from the District Court in the form of an appeal or writ of error under the 8th section. But it is a mistake to suppose that the appellate power is confined to any particular form. It is ordinarily exercised by appeal or writ of error. In many cases under statute it is done by a certificate of division; or the legislature may provide that it should be exercised by certiorari, petition for review, or by any other process deemed convenient.

It is further objected that no appeal lies when this special jurisdiction is exercised, because it is provided that the decree may be rendered "by the court or by any justice

* Ex parte Zellner, 9 Wallace, 246.

thereof in term time or *in vacation.*" But terms of court are the arbitrary creations of statute, which may be modified or abolished by statute. Is it any less the exercise of judicial power to decide a case in vacation? If this judicial power be exercised by a subordinate tribunal, what is there in the nature of things which should free it from the supervision of the superior court? If there be a lack of formality in the discharge of judicial functions in vacation it would seem to be more, not less, important that such proceeding should be reviewed by the superior court.

The 8th section provides that appeals may be taken from the District to the Circuit Court in *all cases in equity*, and writs of error in cases at law where the amount in controversy exceeds $500. Appeal is also allowed to any *creditor* whose claim is rejected, or to an *assignee* dissatisfied with the allowance of a claim.

It is tacitly admitted that the present appeal would be sustained if the case had originated under the 8th section and been carried to the Circuit Court, and yet in the large jurisdiction conferred by the 2d section, it is maintained that the design of Congress was to exclude the appellate jurisdiction of this court. This seems unreasonable.

The petition of review filed in the Circuit Court, presented a case under the act for adjudication. The jurisdiction to hear and determine it is not contested. After providing in the 2d and 8th sections for the exercise of the appellate power of the Circuit Court, the 9th section declares as follows:

"That in cases arising under this act no appeal or writ of error shall be allowed in any case from the Circuit Court to the Supreme Court, unless the matter in dispute should exceed $2000."

The affirmative form of this proposition is that an appeal or writ of error shall be allowed in cases arising under this act where the amount in controversy exceeds $2000. This would include all cases, and if so important a portion of the

Restatement of the case in the opinion.

Circuit Court's jurisdiction was intended to be excepted, we should expect to find a special exclusion.

2. A decree which changes and transfers the right of property in litigation is a final decree, for if otherwise irreparable injury would be incurred before redress could be had.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Exclusive original jurisdiction, in all matters and proceedings in bankruptcy, is conferred by the acts of Congress upon the District Courts, but in case of a vacancy in the office of a district judge, or in case the district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge may make all necessary rules and orders preparatory to the final hearing, and cause the same to be entered or issued, as the case may require, by the clerk of the District Court.†

Certain occurrences, during the late civil war, so crippled the resources of the Bank of Louisiana that the directors became unable to comply with the requisitions of their charter. Proceedings were accordingly instituted by the attorney-general of the State, under the act "to provide for the liquidation of banks," in the proper court of the State, to forfeit the charter of the bank, and on the twentieth of May, 1868, a decree was entered in the case that the charter of the bank be declared forfeited, and that its affairs be liquidated according to law.

Pursuant to that decree the appellants were appointed commissioners for that purpose, and the record shows that they accepted the trust, that they took the required oaths, that they gave the necessary bonds, that they entered upon the discharge of their duties, and that they continued to administer the affairs of the bank until the twentieth of May of the following year, when the appellees, or the first three named, filed a petition in the District Court for that district,

* Thompson *v.* Dean, 7 Wallace, 345.

† 14 Stat. at Large, 517; 16 Id. 174.

Restatement of the case in the opinion.

praying that the bank and the said commissioners, in their character as such, might be declared a bankrupt, and that a warrant might issue to take possession of the estate of the bank in the hands of the commissioners.

They represented in their petition that the bank and the commissioners had each, within six months preceding the date of the petition, committed an act of bankruptcy, that the corporation had for a long time suspended payment of its commercial paper, and that the commissioners had, within the same period, made certain payments, and transferred certain assets of the bank in payment of its debts, with intent to give a preference to certain creditors of the bank. Special reference to the supplemental petition is unnecessary, as the representations of the petition are substantially the same, and the two were heard together in the court below.

Three several injunctions were granted in the case by the district judge sitting in bankruptcy, and on the eleventh of January, 1870, the District Court entered a decree that the bank was a bankrupt. Within ten days from the date of the decree a petition for a review of those orders and decrees was filed by the commissioners in the Circuit Court, under the second section of the Bankrupt Act, and the Circuit Court having first heard the parties, on the second of March, 1870, entered a decree affirming the orders and decrees of the District Court. Application was immediately made by the commissioners for an appeal to this court, which was refused by the circuit judge, but it was ultimately granted by one of the associate justices of this court, more than ten days, however, subsequent to the date of the decree of the Circuit Court.

Seasonable application for the appeal having been made and a sufficient bond tendered, the appellants contended, and still contend, that the appeal as subsequently allowed operated as a supersedeas from the date of the first application. Different views, however, were entertained by the district judge, and on the twenty-ninth of March, 1870, he passed an order directing the marshal to resume possession

of all such portion of the assets of the bank as he had surrendered to the commissioners.

Dissatisfied with that order the commissioners applied to the associate justice of this court assigned to that circuit to vacate that order and to enforce the supersedeas supposed to have been created by the appeal as allowed in pursuance of the last application. His opinion was that the appeal, as allowed, related back to the date of the original application for the same to the circuit judge, and that it operated as a supersedeas, the same as it would have done if it had been granted within ten days from the date of the decree dismissing the petition for a review and affirming the decree adjudging the corporation a bankrupt.

Influenced by those views he made a decree that all the orders in the cause subsequent to the twenty-first of January, 1870, should be vacated and annulled, leaving the injunction of that date granted by the circuit judge in full force. Certain other orders, nevertheless, were subsequently made by the district judge; as, for example, he passed an order for the appointment of receivers, and another giving the appointees authority to pay rents, expenses, and charges incurred by them out of the funds of the bank. Special objection is made by the appellants to those orders as forbidden by the supersedeas, but the main purpose of the appeal when taken was to reverse the decree of the Circuit Court affirming the decree of the District Court, and dismissing their petition praying for a reversal of that decree.

Since the appeal was entered the appellees have filed a motion to dismiss the same, upon the ground that no appeal lies to this court from a decree of the Circuit Court rendered in the exercise of the special jurisdiction conferred upon that court by the first clause of the second section of the Bankrupt Act.*

Circuit Courts have a general superintendence and jurisdiction, by virtue of that clause, of all cases and questions arising under that act, within and for the districts where the

* 14 Stat. at Large, 518.

proceedings in bankruptcy are pending, and the provision is, that those courts may, upon bill, petition, or other proper process, of any party aggrieved, except when special provision is otherwise made, hear and determine the case (as) in a court of equity, but the next clause of the same section provides that the powers and jurisdiction thereby granted may be exercised either by said court or by any justice thereof, in term time or vacation, and neither of the two clauses makes any provision for an appeal in any such case to this court, whether the case or question presented or involved in the bill, petition, or other proper process is submitted to the court or to a justice thereof, or whether the case or question is heard or determined in vacation or in term time.

Apart from those two provisions the third clause of the section provides that Circuit Courts *shall also have* concurrent jurisdiction with the District Courts of *all suits at law or in equity* which may or shall be brought by *the assignee* in bankruptcy against any person claiming *an adverse interest*, or by *such person* against *such assignee* touching any property or rights of property of such bankrupt transferable to or vested in such assignee.

Controversies, in order that they may be cognizable under that clause of the section, either in the Circuit or District Court, must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other. All three of those conditions must concur to give the jurisdiction, but where they all concur the party suing may, at his election, commence his suit either in the Circuit or District Court, and if in the latter, it is clear that the case, when it has proceeded to final judgment or decree, may be removed into the Circuit Court for re-examination by writ of error, if it was an action at law, or by appeal if it was a suit in equity, provided the debt or damage claimed amounts to more than five hundred dollars, and the writ of error is seasonably sued

out and the plaintiff in error complies "with the statutes regulating the granting of such suits," or the appeal is claimed and the required notices are given within ten days from the judgment or decree.*

Such a suit, however, by or against such assignee, or by or against any person claiming an adverse interest in any such property or rights of property, cannot be maintained in any court whatsoever unless the same shall be brought within two years from the time the cause of action, for or against such assignee, accrued; which shows very satisfactorily that the jurisdiction conferred by the third clause is other and different from the special jurisdiction and superintendence described in the first clause of the section.

Where such a suit, between such parties, touching such subject-matter, proceeds in a Circuit Court to a final judgment or decree, and the debt or damage claimed or the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, no doubt is entertained that the judgment or decree may be removed into this court for re-examination by writ of error, if the judgment was rendered in a civil action, or by appeal if the decree was entered in a suit in equity, as in other similar cases falling within the appellate jurisdiction of this court.†

Creditors whose claims are wholly or in part rejected may appeal from the decision of the District Court to the Circuit Court of the same district, if the appeal is claimed and the required notices are given within ten days from the entry of the decree or decision, but the appellant in such a case is required to file in the clerk's office a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law, and the assignee is required to plead or answer thereto in like manner, and like proceedings shall thereupon be had as in an action at law, except that no execution shall be awarded against the assignee for the amount of the debt found due to the creditor.

* 14 Stat. at Large, 520.

† 14 Stat. at Large, 521. 1 Id. 84.

Assignees, also, who are dissatisfied with the allowance of a claim preferred by a creditor, may also appeal from the decision of the District Court to the Circuit Court of the same district at any time within ten days from the entry of the decree or decision, but it is certain that neither the creditor nor the assignee can appeal to this court from the decree of the Circuit Court in such a case, as the express enactment is that the final judgment of the court shall be conclusive and that the list of debts shall, if necessary, be altered to conform thereto.

Confirmation of that view is also derived from the succeeding clause in the twenty-fourth section of the act, which provides that the prevailing party shall be entitled to costs, and that the costs, if they are recovered against the assignee, shall be allowed out of the estate of the bankrupt.*

Authority is also given to any creditor opposing the discharge of a bankrupt to file a specification in writing of the grounds of his opposition, and the court in such case may, *in its discretion*, order any question of fact so presented to be tried at a stated session of the District Court; and the better opinion perhaps is that the trial contemplated by the section, if ordered, is a trial by jury.†

Debts contracted by a debtor and provable under the Bankrupt Act, if the same amount to two hundred and fifty dollars, authorize the creditor or creditors to file a petition praying that the debtor may be adjudged a bankrupt, and the fortieth section of the same act provides that, upon the filing of the petition, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time specified in the order, why the prayer of the petition should not be granted. Prior to the return day of the order it is required that notice shall be given to the debtor, and the provision is that the court shall, if the debtor so demand on the same day, order a trial

* 14 Stat. at Large, 528.

† 14 Stat. at Large, 532; Gordon et al. *v.* Scott et al., 2 Bankrupt Register, 28; In re Eidom, 3 Id. 39; In re Lawson, 2 Id. 125.

by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy.*

Appellate jurisdiction, in its strictest sense, as exercised under the Judiciary Act, is certainly conferred upon the Circuit Courts in four classes of cases by the express words of the Bankrupt Act, without any resort to construction: (1.) By appeal from the final decree of the District Courts in suits in equity commenced and prosecuted in the District Courts by virtue of the jurisdiction created by the third clause of the second section of the act. (2.) By writs of error sued out to the District Court in civil actions finally decided by the District Courts, in the exercise of jurisdiction created by the same clause of that section. (3.) By appeal from the decisions of the District Courts rejecting wholly or in part the claim of a creditor, as provided in the eighth section of the act. (4.) By appeal from the decisions of the District Courts allowing such a claim when the same is opposed by the assignee.

Appeals from the District Courts to the Circuit Courts are not allowed in any case unless the appeal is claimed and notice given thereof to the clerk of the District Court, to be entered in the record of the proceedings, and also to the assignee, creditor, or the proper party in equity, within ten days from the date of the decision or decree, nor unless the appellant, at the time of claiming the same, also gives bond in the manner required by law in case of such an appeal from a subordinate to an appellate tribunal.

Whether a writ of error will lie from the Circuit Court to the District Court where the debtor opposes the petition that he may be adjudged a bankrupt, and the question whether he has committed an act of bankruptcy is tried by a jury, as provided in the forty-first section of the act, is not a question involved in the case before the court. Nor is the question presented in the case whether a writ of error will lie from the Circuit Court to the District Court where an issue

* 14 Stat. at Large, 537.

of fact is framed, as provided in the thirty-first section of the act, and the same is tried by a jury at a stated session of the District Court.

Suffice it to say at this time that such cases, when tried by a jury, if the Circuit Court has any jurisdiction upon the subject, must be removed into the Circuit Court by a writ of error, as they, when tried by a jury, are excluded from the special jurisdiction conferred in the first clause of the section, by the very words of the clause. Where "special provision is otherwise made" the case is excluded from the general superintendence and jurisdiction of the Circuit Court by the exception introduced, as a parenthesis, into the body of that part of the section.

Special provision is made in such cases, within the meaning of that exception, when the case is tried by a jury, and there is not a word in the act having the slightest tendency to show that Congress intended that a fact found by a jury in a District Court should be re-examined in a summary way by the Circuit Court, and it is not pretended that a party may appeal and be entitled to a second trial by jury, unless the first verdict is set aside for error of law. Such cases may be tried by the District Court without a jury, and in that event no doubt is entertained that the case is within the supervisory jurisdiction of the Circuit Court.

Due notice was given to the bank of the petition filed in the Circuit Court that the corporation should be adjudged a bankrupt, and the commissioners, as the legal representatives of the bank, appeared and made defence, but they did not demand in writing, or otherwise, a trial by jury, and the case was heard and determined by the court. Subsequent to the decree adjudging the bank a bankrupt, the commissioners presented a petition to the circuit judge, praying for a reversal of that decree, by virtue of the special jurisdiction conferred upon the Circuit Court in the first clause of the second section of the Bankrupt Act, and the petition was heard at chambers, and a decree was entered dismissing the petition, and affirming the decree of the District Court.

Opinion of the court.

Independent of the Bankrupt Act the District Courts possess no equity jurisdiction whatever, as the previous legislation of Congress conferred no such authority upon those courts since the prior Bankrupt Act was repealed.* Whatever jurisdiction, therefore, they possess in that behalf is wholly derived from the Bankrupt Act now in force.

Undoubtedly the jurisdiction conferred by the third clause of the second section is of the same character as that conferred upon the Circuit Courts by the eleventh section of the Judiciary Act, and it follows that final judgments in civil actions and final decrees in suits in equity rendered in such cases, where the sum or value exceeds two thousand dollars, exclusive of costs, may be re-examined in this court when properly removed here by writ of error or appeal, as required by existing laws.

Concurrent jurisdiction with the District Courts of all suits at law or in equity are the words of that clause, showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution.

Cases arising under that clause, where the amount is sufficient, are plainly within the ninth section of the Bankrupt Act, and as such may be removed here for re-examination, but the revision contemplated by the first clause is evidently of a special and summary character, substantially the same as that given in the prior Bankrupt Act, as sufficiently appears from the words "general superintendence," preceding and qualifying the word "jurisdiction," and more clearly from the fact that the jurisdiction extends to mere questions as contradistinguished from judgments or decrees as well as to cases, showing that it includes the latter as well as the former, and that the jurisdiction may be exercised in chambers as well as in court, and in vacation as well as in term time.

Much stress was laid, in argument in support of the theory that an appeal will lie to this court from a decision of the Circuit Court rendered under the first clause of the second

* Ex parte Christy, 3 Howard, p. 311.

section, upon the fact that the case or question, as therein provided, may be heard and determined in a court of equity, as the phrase reads in the printed volume of the Statutes at Large, but that phrase, even if correctly printed, must be read and considered in connection with the succeeding clause, and when so read and considered it is plain that the meaning is the same as it would be if it read "as a court of equity," or "as in a court of equity;" that it merely prescribes the rule of decision by which the court is to be governed, and that it is entirely consistent with the subsequent clause before referred to, which provides that the case or question may be heard and determined by a justice of the court as well as by the court, and in vacation as well as in term time, which is palpably inconsistent with the theory that Congress intended that an appeal from the decision of any case or question under the first clause should be allowed to this court.

But the phrase "hear and determine the case in a court of equity," as printed in the fourteenth volume of the Statutes at Large, is erroneously transcribed from the act of Congress as it passed the two Houses and was approved by the President. Correctly transcribed it reads "hear and determine the case *as in a court of equity*," which shows, without any resort to construction, that all Congress intended by the phrase was, to prescribe the rule of decision, whether it was made in court or at chambers or in term time or vacation.

Decrees in equity, in order that they may be re-examined in this court, must be final decrees rendered in term time, as contradistinguished from mere interlocutory decrees or orders which may be entered at chambers, or, if entered in court, are still subject to revision at the final hearing.

Adopt the theory of the appellees and the proceedings in bankruptcy might be protracted indefinitely, as every question arising in the courts may be transferred first to the Circuit Court and then to this court, which would tend very largely to defeat all the beneficent purposes of the Bankrupt Act. For these reasons the appeal is

DISMISSED FOR WANT OF JURISDICTION.

THE PROTECTOR.

An *appeal* dismissed because taken in the name of William A. Freeborn & *Co.*; the court holding that no difference existed between writs of error and appeals as to the manner in which the names of the parties should be set forth.

ON motion to dismiss an *appeal;* the case being this:

By the 22d section of the Judiciary Act it is enacted that decrees in civil actions may be brought here by *writ of error.* By the 32d section of the act it is enacted:

"That no summons, writ, declaration, return, process, judgment, or *other proceeding* in civil causes in any of the courts of the United States, shall be *abated, arrested, quashed,* or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleadings, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer which the party demurring shall specially set down. . . . And the said courts respectively shall and may . . . from time to time amend all and every such imperfection, defect, and want of form, except, &c., and may at any time *permit either of the parties to amend any defect in the process or pleadings,* upon such conditions as the said courts respectively shall in their discretion and by their rules prescribe."

An act of March 3, 1803, enacts that decrees in admiralty must, if brought here, be brought by *appeal,* and enacts:

"Such appeals shall be subject to the *same* rules, regulations, and *restrictions,* as are presented in law in cases of *writs of error,* and that the said Supreme Court shall be and hereby is authorized and required to receive, hear, and determine such appeals."

In this state of statutory law William A. Freeborn, James F. Freeborn, and Henry P. Gardner, of the city of New

York, merchants, filed a libel in the District Court for the Southern District of Alabama against the ship Protector. That court dismissed the libel "at the costs of the libellants, and ordered execution therefor to issue against the libellants." This decree was confirmed by the Circuit Court. An appeal was then taken to this court. The petition for appeal was entitled William A. Freeborn *& Co.*, and prayed for an appeal in the name of William A. Freeborn *& Co.* The allowance of the appeal was in the same name and style. The bond recited the appeal in the name of William A. Freeborn *& Company.* The citation also directed the party to appear in the cause wherein William A. Freeborn *& Company* were appellants.

Who constituted the Co. or Company, nowhere appeared in the proceedings *on appeal.*

Mr. Phillips, *for the appellees*, now moved to dismiss the case for want of jurisdiction.

In support of his motion: There is no doubt that if this were a writ of error, the writ would have to be dismissed as vicious.* Is the rule different when applied to appeals? When a decree is joint against several all must appeal, without there is a summons and severance, and, as a consequence of this, whether the cause is to be removed by writ of error or appeal, all the parties must be named in the process by which the removal is effected.† By searching the record in the case we could doubtless gather the fact, that the three named libellants did compose the firm of William A. Freeborn & Co., and a like result might have been obtained in all the cases in which the court has dismissed writs of error.

Mr. Blount, *contra*, *opposed the motion*, and moved on his side:

1st. To amend the proceedings on appeal by the libel in the cause; and 2d, to amend the libel so as that a decree

* Deneale *v.* Stump, 8 Peters, 526; Smith *v.* Clark, 12 Howard, 21.

† Owings *v.* Kincannon, 7 Peters, 403.

might be rendered for interest and damages above the demand.

1st. It has been frequently decided that on an appeal to the Supreme Court in an *admiralty* cause, the cause is before that court as if in the inferior court. The libel here setting forth the names of all the parties who compose the firm of William A. Freeborn & Co., the *whole record* and proceedings being before this court, and the trial being *de novo*, the case is one for amendment under the thirty-second section—a section most remedial in its intent and broad in its language. It is the settled practice in admiralty proceedings *where merits appear upon the record*, but the libel is defective to allow the party to assert his rights in a new allegation.*

2d. In *Weaver* v. *Thompson*,† an appellee in admiralty was allowed to amend his libel in the appellate court so as to make a claim there for damages above costs, caused by a vexatious appeal.

The court having taken the matter into advisement, GRANTED THE MOTION TO DISMISS; an opinion, as given further on, being read from the bench, and holding that there was no difference in respect of the manner in which the names of the parties should be set forth between writs of error and appeals.

Mr. Carlisle hereupon submitted a motion for reargument, with a brief, thus:

1. In granting the motion to dismiss, it has been assumed that the same rule is applicable as in cases of writs of error. But it is respectfully submitted that this is not so.

The act of 1803 provides, "*That such appeals shall be subject to the same rules, regulations, and restrictions* as are prescribed in law *in case of writs of error*, and that the said Supreme Court shall be, and hereby is, authorized and required *to receive*, hear, and determine such *appeals*."

Now it would render the act nugatory if there were to be *no* difference, after its passage, between writs of error and

* The Adeline, 9 Cranch, 244. † 1 Wallace, Jr., 843.

appeals. The very object of the act was to recognize and establish these as two distinct modes by which the appellate jurisdiction might be acquired; and the inherent distinctions between the one proceeding and the other were to be observed, notwithstanding the general language above quoted, which general language was intended to apply only as to the substantial conditions on which *the right* to appeal should attach. The appeal must be always prayed and allowed in the court below or by a justice of the Supreme Court; and in either case these proceedings form *part of the record in the court below*, and are not, as in cases of writs of error, process out of *this* court. *Copies* only come here with the transcript, and this court is required to receive them only as parts of that transcript, and as "proceedings in that cause."

It would seem, therefore, that the reason of the rule, in cases of writs of error (viz., that it is an original writ and a new suit) does not apply. The whole record—appeal, allowance, and all—comes together as the same old suit; and it would be strange indeed if the appellate court, which is required to receive, hear, and determine the suit, should have any difficulty in ascertaining who are appellants and who appellees.

In the case of a writ of error there is nothing to amend by. In the case of an appeal there is everything. Here is simply an abbreviated description, not repugnant to the record, but plainly pointing to it, and is made certain by being filed in the cause below, and being sent up as part of the proceedings in that cause.

2. The order dismissing this appeal proceeds on the ground that the defect is a jurisdictional one. But it is submitted that a distinction is to be observed between jurisdiction of the subject-matter shown by the record [*the case*] and jurisdiction of the parties. No consent, stipulation, or waiver can confer jurisdiction of the first kind; nor can it confer jurisdiction of the parties, unless it appears that the court *may* take jurisdiction between such parties. But it is submitted that all mere informalities and irregularities may be

cured by the voluntary appearance of parties of whom the court may take jurisdiction in a proper case. If it were otherwise, then it is hazarding nothing to say that an examination of the records of this court would show hundreds of decrees and judgments, in most important causes, to have been and to be mere nullities for want of jurisdiction. To avoid the waiver of such an objection to the jurisdiction, it is the common practice and understanding of the bar that the appearance must be expressed and limited to be "*special;*" and, to avoid questions of fact in this respect, not many terms ago, the clerk, by direction of the court, caused the precipe to be used in such cases to be printed, using the word "*special.*"

The opinion originally read, and which had been retained until the motion to reargue was disposed of, was now delivered to be reported.

Mr. Justice NELSON had thus delivered it:

The motion made by the appellees to dismiss the case from the docket for want of jurisdiction, is grounded upon a defect of the title of the parties in the appeal as allowed. The title is, "*William A. Freeborn & Co.* v. *The Ship Protector and owners.*" This defect in a writ of error has been held fatal to the jurisdiction of the court since the case of *Deneale et al.* v. *Stump's Executors*,* down to the present time.† Nor can the writ be amended, according to repeated decisions of this court.‡ The only question before us is, whether the same rule applies to appeals in admiralty. Originally, decrees in equity and admiralty were brought here for re-examination by a writ of error, under the twenty-second section of the Judiciary Act. This was changed by the act of March 3, 1803, by which appeals were substituted in place of the writs of error in cases of equity, admiralty, and prize; but the act

* 8 Peters, 526.

† The Heirs of Wilson *v.* The Life and Fire Insurance Company of New York, 12 Id. 140; Smyth *v.* Pevine & Co., 12 Howard, 327; Davenport *v.* Fletcher, 16 Id. 142.

‡ Porter *v.* Foley, 21 Howard, 393; Hodge et al. *v.* Williams, 22 Id. 87.

provides "that the appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error."

In *Owings et al.* v. *Andrew Kincannon*,* the appeal was dismissed because all the parties to the decree below had not joined in it. Chief Justice Marshall, in delivering the opinion of the court, referred to the case of *Williams* v. *The Bank of the United States*,† which was a writ of error, where it was held that all the defendants must join, and applied the same rule to the case of an appeal. He cited the act of 1803, and observed that "the language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error." But the case of *Francis O. J. Smith, appellant*, v. *Joseph W. Clark et al.*,‡ is more direct to the point before us. It was a motion to docket and dismiss in the case of an appeal, under the 43d rule of the court. The certificate of the clerk, upon which it was founded, described the parties as in the title above. Chief Justice Taney, in giving the opinion of the court, stated that the certificate conformed to the rule in all respects but one, and that was in the statement of the parties. The respondents were stated to be Joseph W. Clarke *and others*, from which it appeared that there were other respondents, parties to the suit, who were not named in the certificate. He then referred to the case of a writ of error,§ where it was held that all the parties must be named in the writ, and the name of one or more of them, *and others*, were not a sufficient description; and, also, to the case of *Holliday et al.* v. *Baston et al.*,‖ where the same principle was applied to a writ of error docketed under the 43d rule, and observed the same reason for requiring all the parties whose interests were to be affected by the judgment, to be named in the writ of error, applied with equal force to the case of an appeal from a decree. And the motion to docket and dismiss for the above defect was overruled. The opinion of the court in the present case is, that no distinction in respect

* 7 Peters, 403. † 11 Wheaton, 414. ‡ 12 Howard, 21.
§ Deneale *v.* Stump, 8 Peters, 526. ‖ 4 Howard, 645.

to the question before us can be made between the case of an appeal under the act of 1803, and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction, apply with equal force to the former. This result disposes of the motions on the part of the appellant to amend the petition of appeal, citation, and bond, and also the motion to amend the libel.

MOTION TO DISMISS GRANTED.

Mr. Justice SWAYNE (with whom concurred Mr. Justice BRADLEY) dissenting:

I dissent from the conclusions announced by the court in this case. The defect objected to is, in my judgment, amendable under the 32d section of the Judiciary Act of 1789, and I think an amendment should be permitted to be made.

UNITED STATES v. TYNEN.

1. When there are two acts of Congress on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first.

   Accordingly, the thirteenth section of the act of Congress of 1813 "for the regulation of seamen on board the public and private vessels of the United States," which defined certain offences against the naturalization laws, and prescribed their punishment, was held to be repealed by the act of Congress of 1870, "to amend the naturalization laws, and to punish crimes against the same, and for other purposes," which declared not only that the commission of the several acts mentioned in the thirteenth section of the law of 1813 should constitute a felony, but that also a great number of other acts of a fraudulent character, in connection with the naturalization of aliens, should constitute a similar offence, and made the infliction of a larger punishment for each offence discretionary with the court.

2. By the repeal of an act, without any reservation of its penalties, all criminal proceedings taken under it fall. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence.

Statement of the case.

ON certificate of division in opinion between the judges of the Circuit Court for the District of California; the case was thus:

Tynen, the defendant, was indicted under the thirteenth section of the act of Congress of March 3d, 1813, entitled "An act for the regulation of seamen on board the public and private vessels of the United States." The general object of the act, as expressed in its title, was carried out in the first eleven sections.

They declared that it should not be lawful, after the termination of the war then existing with Great Britain, to employ on board any public or private vessels of the United States any persons except citizens of the United States, or persons of color natives of the United States; and they required naturalized citizens thus employed to produce to the commanders of public vessels, or collectors of customs, as the case might be, a certified copy of the act by which they were naturalized, setting forth the naturalization and the date thereof. They also contained various clauses to give effect to these requirements, but, at the same time, declared that the provisions of the act should not preclude the employment, as seamen, of the subjects or citizens of any foreign nations, which should not have prohibited, by treaty or special convention with the United States, the employment on board of her public or private vessels of native citizens of the United States, who had not become citizens or subjects of such nation.

The twelfth section declared that no person living within the United States after the act took effect should be admitted to become a citizen who should not, for the continued term of five years next preceding his admission, have resided within the United States, without being at any time absent therefrom.

Then followed the thirteenth section, upon which the indictment was found. That section declares it to be felony "to falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, any certificate or evidence of citizenship referred to in the act, or to pass,

utter, or use as true any false, forged, or counterfeited certificate of citizenship, or to make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued, and to whom it may, of right, belong;" and prescribes as punishment for the offence imprisonment for a period of *not less than three* nor more than *five* years, OR a fine in a sum not less than $500 nor more than $1000, at the discretion of the court.

The indictment charged the defendant with the second of the offences here designated; that he did wilfully, falsely, and feloniously pass, utter, and use as true a false, forged, and counterfeited certificate of citizenship purporting to have been issued by one of the District Courts of California, and setting forth, with particularity, a compliance with the several requirements of the law for the naturalization of aliens.

The indictment did not allege what use was made by the defendant of the forged certificate, or any purpose for which it was uttered; and the defendant demurred. The several grounds of demurrer—reduced to substantially one—were that the indictment did not charge that the certificate or evidence of naturalization was forged to accomplish any purpose contemplated by the act of Congress under which the indictment was found, or for any other unlawful purpose, or with intent to injure the United States, or any State, person, corporation, or association.

Upon this demurrer the question arose whether the indictment charged any offence against the laws of the United States, and whether it were necessary for the indictment to aver that the certificate or evidence of citizenship mentioned in it was produced to the commander of a public vessel of the United States or to a collector of the customs, as provided in previous sections of the act, when naturalized citizens were employed as seamen on board of the public or private vessels of the United States. Upon these questions the judges of the Circuit Court were opposed in opinion, and a certificate of division having been prepared accordingly the case was sent to this court. While pending here,

on the 14th July, 1870, Congress passed an act entitled "An act to amend the naturalization laws and to punish crimes against the same, and for other purposes,"* which embraced the whole subject of frauds against the naturalization laws. It declared all the acts mentioned in the thirteenth section of the law of 1813 felonies, but also declared a great number of other acts of a fraudulent character in connection with the naturalization of aliens felonies, in addition, and made the infliction of a larger punishment for each offence discretionary with the court. Thus it authorized imprisonment AND fine, either or both, in the court's discretion, where the former act gave one OR the other only; and where the act of 1813 made the imprisonment *not less than three* years and the fine not less than $500, the new act made the imprisonment not less than *one* year and the fine not less than $300.

The matter now to be considered by this court was, what was the effect of this act of July 14th, 1870, upon the provisions of the thirteenth section of the act of 1813; and if it worked a repeal of those provisions, what was the proper action to be taken by the court on the certificate of division?

Mr. Akerman, the Attorney-General, and Mr. B. H. Bristow, Solicitor-General, for the United States; no one appearing for the defendant.

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

An opposition of opinion, like that in the court below, occurred between the judges of the Circuit Court for the Southern District of New York, in a similar case which came before this court at the December Term of 1868, but as the opposition arose upon a motion to quash the indictment, the case was dismissed for want of jurisdiction.† In the present case the questions presented have ceased to be materia', and, consequently, it has become unnecessary to determine them,

* Approved July 14th, 1870, 16 Stat. at Large, 254.

† United States *v.* Rosenburgh, 7 Wallace, 580.

for, since they arose in the Circuit Court, Congress has passed a statute amending the naturalization laws, and prescribing certain punishments for their violation, which has worked a repeal of the provisions of the 13th section of the act of 1813. That statute, which was approved on the 14th of July, 1870, declares not only that the commission of the several acts mentioned in the 13th section of the law of 1813 shall constitute a felony, but that also a great number of other acts of a fraudulent character in connection with the naturalization of aliens, shall constitute a similar offence, and has made the infliction of a larger punishment for each offence discretionary with the court. The act of 1813 imposes as punishment, either imprisonment or fine, at the discretion of the court. The act of 1870 authorizes either of these punishments, or both, in the like discretion of the court. The act of 1813 allows the imprisonment to run between three and five years, and the fine to extend between five hundred and one thousand dollars. The act of 1870 fixes the imprisonment between one and five years, and the fine between three hundred and one thousand dollars.

There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.*

Now between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes

* Davies *v.* Fairbairn, 3 Howard, 636; Bartlet *v.* King, 12 Massachusetts, 537; Commonwealth *v.* Cooley, 10 Pickering, 36; Pierpont *v.* Crouch, 10 California, 315; Norris *v.* Crocker, 13 Howard, 429; Sedgwick on Statute Law, 126.

the punishment for the offences designated imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.

Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this also it permits what the first act forbids.

Again, the act of 1813 declares that the fine, when imposed, shall not be less than five hundred dollars. The act of 1870 allows the fine to be as low as three hundred dollars, thus authorizing what the first act declares shall not be done.

When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offences shall be subsequently treated.

One of the earliest cases on this subject is that of *Rex* v. *Cator*, reported in 4th Burrow.* There were two English statutes against enticing and seducing artificers in the manufactures of the kingdom into foreign service. The penalty under the first statute was, for the first offence, a fine of one hundred pounds and three months' imprisonment; for the second offence, the fine was discretionary and imprisonment for twelve months. Under the second statute the penalty was, for the first offence, a fine of five hundred pounds and twelve months' imprisonment; for the second offence the fine was one thousand pounds and two years' imprisonment. The latter act, said Lord Mansfield, seems to be a repeal of the former act; it was made to supply the deficiencies of the former. Accordingly, the defendant, who had been convicted under both statutes, was sentenced under the last. In *Rex* v. *Davis*,† it appeared that there were two statutes

* Page 2026.

† 1st Leach, Crown Cases, 271.

against killing deer in an inclosed park. The first statute made the offence a felony punishable with death. The last statute punished the first offence with a fine, and made the second offence a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offence of felony.

There are numerous cases in the modern reports to the same effect. We will cite only one, which was decided in this court, that of *Norris* v. *Crocker et al.** In that case the defendants were sued in an action of debt to recover the penalty of five hundred dollars upon the 4th section of the act of Congress of February, 1793, respecting fugitives from justice and persons escaping from the service of their masters. That section provided that any person who should, knowingly and willingly, obstruct or hinder the claimant, his agent, or attorney, in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent, or attorney, when arrested by the authority given by the act, or should harbor or conceal him, after notice that he was a fugitive from labor, should forfeit and pay for each of these offences the sum of five hundred dollars, to be recovered by the claimant in an action of debt.

Pending the action brought under this section against the defendants, Congress, in 1850, passed an act amendatory of and supplementary to the act of February, 1793, the seventh section of which embraces the offences specified in the act of 1793, and creates new offences, and affixes to each a different punishment from that named in the old act, prescribing a fine not exceeding one thousand dollars, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit and pay, by way of civil damages, to the party injured, the sum of one thousand dollars for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative

* 13 Howard, 429.

remedies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending, that had accrued to him; and that the court would not favor repeals by implication. But the court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was "not open to controversy, that when a new statute covers the whole subject of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that the former statute is repealed by implication, as the provisions of both cannot stand together."

By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker* the court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case, "The repeal of the law imposing the penalty is of itself a remission."* In the case at bar, when the 13th section of the act of 1813 was repealed, there was no offence remaining for the court to punish in virtue of that section.

It follows that in this case no answer can be returned to the questions certified to us, but that the case must be remanded to the court below with directions

TO DISMISS THE INDICTMENT.

* State of Maryland *v.* The Baltimore and Ohio Railroad Co., 3 Howard, 534.

NEW ALBANY *v.* BURKE.

A city subscribed to the stock of a railroad and issued bonds for a part of the subscription, agreeing to issue them for the rest of it when the road should be completed up to a certain point. The sale of the bonds was the chief source which the railroad company had of raising money to make it. The right of the city to subscribe to the road and to issue bonds being denied by taxpayers of the city, they filed bills to enjoin the levy of any tax to pay interest on the bonds. Their value in the market was thus largely destroyed. The company being in debt had pledged the bonds to creditors for a part only of their nominal value, and the embarrassments of the company increasing, the creditors threatened to sell the bonds for whatever they would bring. It being doubtful whether, with the questioned right of the city to issue them, the bonds would bring the principal and interest due on the debts for which they stood pledged, the company applied to the city to pay the sums due, take back the bonds pledged, and be discharged from the issue of the balance of the bonds (not yet issued), which the impossibility of now completing the road showed could never, by the terms of the original agreement, be called for by the company. The arrangement was concluded in 1857, both city and company acting in good faith and for the interests of the road as well as for those of the city. In 1868 a purchaser of a judgment against the company, to execution on which, in 1858, a return of *nulla bona* had then been made, filed a bill against the city, alleging that the compromise was illegal, and praying an ascertainment of what the city owed on its subscription (assuming it to be yet existing), and an application of so much as would pay his judgment. The court admitting that "the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, and that had the company released the city without equivalent consideration, or given its bonds away, its action would have been fraudulent, and might have been set aside by a court of equity;" *Held:*

1. That this transaction was not invalid.
2. That there were laches in filing the bill.

APPEAL from the Circuit Court for the District of Indiana; the case being thus:

Burke and others, complainants in the court below, were equitable owners of a judgment recovered on the 14th day of November, 1857, in the Circuit Court of Floyd County, Indiana, against the New Albany and Sandusky City Junction Railroad Company, an insolvent corporation. The judgment was obtained in a suit brought by certain trustees to foreclose a mortgage given by the company to secure the

payment of 110 bonds of $1000 each, and such proceedings were had in the suit that there was not only a decree of foreclosure and an order to sell the mortgaged property, but a personal judgment against the company. The mortgaged premises were sold under the order, and, the proceeds of sale having proved insufficient to satisfy the judgment, an execution was issued for the residue, which, December 1, 1858, was returned unsatisfied. Nothing further was done until January 29, 1868, when Burke having purchased the interest of several of the equitable owners of the judgment, this bil, was filed by him and the other equitable owners whose interests he had not acquired, against the railroad company, the city of New Albany, and others. It averred the ownership of the judgment by the complainants, the failure of the company to put any portion of its railroad into operation or to lay any part of the track thereof, and its having become insolvent about the 30th day of April, 1857. It charged further that the company, having expended all its means, abandoned all further efforts to build the road, and that its roadbed and right of way had been sold. It also charged that since the year 1858 it had not kept up its organization or elected any new officers. The bill then proceeded to charge that the city of New Albany was indebted to the company in the sum of $393,000, besides interest, growing out of a subscription to its capital stock, made on the 19th of November, 1853, in part payment of which 200 bonds of $1000 each had been delivered to the company, and that certain other parties, whom the bill made defendants, were indebted in smaller sums in a similar manner. The bill further charged that none of these bonds except 7 had been negotiated by the company, but that, on the contrary, 197 of them had been returned to the city in pursuance of an illegal compromise, and that the city subscription to the stock had been cancelled. The complainants therefore charged that the city still remained a debtor to the company, and they prayed relief that the amount of debt that might be ascertained, and that so much thereof as was necessary to satisfy the judgment might be decreed to be thus applied.

Statement of the case.

To this bill the city of New Albany set up several defences; some of form, some to the merits. Among these last, it set up:

1st. That the city was not indebted to the company when the bill was filed; that the adjustment by the city and the company was, at the time it was made (September 7th, 1857), a compromise, made in good faith, by which the city ceased to be indebted to the company, and that the adjustment was effective and valid as against all persons.

2d. That if the complainants had rights against the city and might have impeached the validity of the arrangement by which the city recovered its bonds and obtained a cancellation of its subscription, they had slept so long upon these rights that a court of equity would not afford them relief.

These two defences were the only ones which the court considered; the others having been of such a character, as that if these two were sufficient, it was unnecessary to say anything about *them*.

As to the facts, it appeared that in November, 1853, pursuant to an ordinance of the common council of the city, a subscription had been made by the city to the stock of the railroad of $400,000, payable in city bonds, upon the call of the company, and that the council assumed the power to pass an ordinance which some persons asserted to be void, but which others considered had been subsequently ratified, if void originally, by an ordinance of March 7th, 1855; the railroad company now, upon the passage of this ordinance of ratification, agreeing and binding itself that not more than $250,000 of bonds should be called for until the road should be completed and put into order to its junction with the Ohio and Mississippi Railroad, and then but for the purpose of furnishing it, &c. Pursuant to the subscription, the officers of the city delivered to the railroad company 200 city bonds, for $1000 each, payable to bearer, and redeemable in ten and payable in twenty years. At the time of thus delivering the bonds the railroad company was actively engaged in prosecuting its enterprise, and represented to the officers of the city that it was essential to the completion of

its road that the company should obtain money by the sale of the bonds. Shortly, however, after the delivery of the bonds, and while all of them, except 7, remained unsold, several suits were instituted by taxpayers of the city to resist the payment of a tax levied for the payment of interest; the ground of the suits being that the subscription was void. These suits led to protracted litigation, and raised such doubts as to the validity of the bonds, as to render it impossible for the railroad company to sell or negotiate them except at a ruinous sacrifice. In August, 1857, the railroad company represented to the city that in consequence of this failure to obtain money on the bonds, the company had found itself without means to carry on the work, and had abandoned its enterprise. It had apparently expended all the cash and real estate received by it in payment for stock, and had pledged the 200 city bonds (except the 7 sold) to different persons, for sundry sums, borrowed for the purpose of prosecuting the work. It thus had no means to pay the amounts so borrowed upon pledge of the city bonds, and it appeared that unless the city provided the means, the whole of the bonds were in danger of being sold for the payment of the loans, and that owing to the doubts cast upon their validity, the whole of them would not have sold for more than sufficient to pay the sums for which they were pledged.

The railroad company therefore proposed to the city that if the latter would provide means for the payment of the sums so borrowed, and redeem the bonds from the pledgees, they should be returned to the city and cancelled.

The city, relying, apparently, on the representation of the railroad company as to the condition of its affairs, passed an ordinance, published immediately afterwards, by which it accepted the proposition of the railroad company, upon condition that the latter would cancel the subscription of the city, and consent to the repeal of all ordinances and amendments relating thereto. This condition was accepted by the railroad company, and the agreement was carried into effect. The city paid the sums of money for which the bonds were pledged, amounting to more than $36,000. All the bonds,

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except the 7 that had been sold, were returned to the city and cancelled, and the subscription of stock was cancelled.

The arrangement seemed to have been made in good faith by the city, and for the purpose of preventing the large amount of its bonds being sacrificed for the payment of the debts for which they stood pledged.

As to the second of the above-mentioned defences, it seemed that neither the complainants nor any other person, had ever controverted the validity of the adjustment made between the city and the railroad company, nor instituted proceedings to have it set aside as fraudulent and void, until the bill of complaint in this case was filed, more than ten years after the agreement was concluded. However, one of the complainants was a non-resident of Indiana, and swore that he never knew of the city subscription until after the suit was brought. It was shown, nevertheless, that he had gone to New Albany in 1858, in order to examine the company's concerns. His attorney knew of it, and one witness thought that he did also.

The court below decreed in favor of the complainants for the balance due on their judgments, amounting to over $70,000 in the aggregate, against the railroad company and the city, and dismissed the bill as to the other defendants. The city appealed to this court.

Messrs. Burke, Porter, and Harrison, in support of the ruling below:

Is the compromise set up by the city valid?

1. Clearly not, upon the principles settled by this court in the case of *Bell* v. *Railroad Company*,* that the officers of a municipal corporation authorized, by special statute and vote of the people, to subscribe for stock in a railroad company, have no power to compromise such subscription and abandon the enterprise, and that all their power is derived from the statute and the vote of the people, and that whenever the subscription is made and the corporate bonds de-

* 4 Wallace, 598.

livered, their power ceases, and they have no more power to compromise the subscription or abandon the enterprise than any other residents of the municipality.

2. The compromise, as the case shows, was fraudulent in fact, and it can hardly be doubted that there was a design upon the part of the city and railroad officers to withdraw from the reach of creditors all the available means of the railroad company.

3. The compromise is still more clearly fraudulent in law.

The transaction was an attempt upon the part of the officers of an insolvent and failing corporation, which had expended all its cash and other subscriptions in a vain attempt to construct its railroad, and had no means to meet the demands of clamorous creditors, to release its principal debtor and stock subscriber from the payment of what was due to the company without receiving the money due. Now repeated judicial decisions have settled the rule, that the officers of a money corporation are trustees for the creditors, and that they cannot give away the assets of the corporation, release its debtors without payment, or do any other act prejudicial to its creditors. That the capital stock of such a corporation is a trust fund irrevocably pledged to the creditors of the corporation, and that such capital stock cannot be diminished or squandered under the name of dividends or otherwise. No court has more firmly adhered to this rule than this court. In one case* the court say:

"When that portion of the capital, not paid in cash, is required to pay the creditors of the company, the stockholders cannot be allowed to refuse payment unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash."

II. Another objection urged is, staleness; that this suit should have been commenced sooner. But it appears that some of the owners of the judgments were non-residents of Indiana, and that they had no knowledge of the facts on which equitable relief is demanded.

* Ogilvie v. Knox Insurance Company, 22 Howard, 380.

Moreover, the bonds of the city, the interest of which is now sought to be subjected, were not to fall due for twenty years, that is, not until 1874; and there was at no time interest enough due on them to pay the amount due on complainant's judgment, up to about the time this bill was filed.

Mr. T. A. Hendricks, contra.

Mr. Justice STRONG delivered the opinion of the court.

Assuming that the subscription made by the city to the capital stock of the company in 1853, though undoubtedly invalid at first, became valid by the ratification ordinance adopted March 7, 1855; that thereby the city came under obligation to give its bonds to the company in payment for the stock, so far as they had not already been given, we come directly to the question, what was the effect of the arrangement made in August and September, 1857? Here the situation of the parties at the time is of importance to be considered.

The railroad company had undertaken to build a railroad from New Albany to Sandusky City, and it had commenced the work, relying mainly upon the bonds of the city to raise the money necessary. It had, however, been disappointed. Suits had been commenced for injunctions to restrain the collection of a tax for paying the interest, and the consequence was that the bonds could not be sold without a ruinous sacrifice, if sold at all. These suits were still pending. Meanwhile the company had borrowed thirty-six thousand dollars, pledging the bonds to the amount of eighty thousand dollars as collateral security. The loan had fallen due, and the holders were demanding payment, and threatening to sell the collaterals. The company was utterly unable to redeem the pledge. Its available means were completely exhausted. It could neither go on with its work nor in any manner relieve itself. According to the weight of the evidence the bonds pledged, together with all the others still held by the company, would not have sold for enough to have paid the thirty-six thousand dollars borrowed.

Turning now to the condition of the city. It had ratified its invalid subscription with an irrevocable engagement on the part of the company, that not more than $250,000 should be called for until the railroad should be completed and put in running order at least to its junction with the Ohio and Mississippi Railroad, and then only for the purpose of furnishing the road with depots, rolling stock, &c. It had paid its bonds to the extent of $200,000 on the subscription, and it was liable to be called upon for $50,000 more. For the remainder it was liable only upon a contingency that has never happened, and that never can happen. The consideration for its subscription, it is true, had not failed, though the motive that induced it, namely, the construction of the railroad, no longer existed. The credit of the bonds which it had issued was gone, and had it issued the remaining fifty thousand dollars, they could not have been sold for more than $8000 or $10,000. It was in these circumstances that the company applied to the city, stating its own helplessness, and it was then that the arrangement was made by which the city assumed to pay the debt of $36,000 due by the company, and sundry other moneys, and in consideration thereof obtained from the company one hundred and ninety-three bonds, which had not been negotiated, and a cancellation of the stock subscription. Was this transaction valid?

The bonds were negotiable instruments, payable to bearer in not less than ten and not more than twenty years, and, of course, passing from hand to hand by delivery. Had the whole subscription been paid, it must have been with similar bonds. And the manifest design of the subscription was to create bonds for sale in the market as the convenience or the necessities of the railroad company might require. There was no restriction in the contract upon the power of disposition, and none at law, or in equity, unless it be that the company could not part with the bonds in fraud of its stockholders or its creditors. And it had the right, which all other debtors had at the time, to make preferences among its creditors—to pay one rather than another. It is not to be disputed that, situated as the company was at the time

when the contract of August and September, 1857, was made, with the debt of $36,000 pressing upon it, and with no other means of relief, it might have sold the entire lot of two hundred and forty-three bonds which it held, or was entitled to call for, at the best price that could have been obtained, and might have applied the entire proceeds, had they been needed, to pay that single debt. Of this, neither the stockholders nor the other creditors could have complained. What more has been done now? No doubt such a course would have involved an equal sacrifice to the company, and would, in the end, have been more disastrous to the city. Time has revealed that the bonds were worth more than they could have been sold for, but we are to look at the circumstances as they were when the transaction took place, in considering what was its nature and whether it was legal. But if a sale by the company at the market price, and an application of the whole proceeds to the payment of the $36,000 debt, would have been unimpeachable, why is it less so because the city became the purchaser? Beyond doubt, the city might lawfully buy its own bonds. Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction, or the arrangement of August and September, 1857, was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued, and others of which it was under obligation to issue, at the call of the vendor. The price paid was $36,000, besides some thousands more which the purchaser undertook to pay. Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. Certainly it did not place the company in any worse position than it must have held had it not been made.

It is, however, contended by the complainants, that the arrangement was fraudulent, both in law and in fact, and that neither the common councils of the city nor the directors of the railroad company had power to make it. In support of the proposition, that the transaction was *ultra vires*, we are referred to *Bell* v. *Railroad Company*,* but that case is very unlike the present. There a popular vote, under legislative sanction, had instructed the police board to subscribe a defined amount, leaving to them no discretion. The police board were agents to carry out the popular will, with limited powers. It was not, therefore, for them to subscribe a less amount, or make any other contract, than the one they had been directed to make; and this court well said that a municipal corporation, like the board of police, could not modify or alter the stock subscription voted by the people in the absence of power from the legislature. The decision, however, was placed upon other grounds. But in the present case the common council were free to exercise their own discretion. They were under no obligation to subscribe at all, and they might take as little or as much stock as they pleased, not exceeding six hundred thousand dollars. Besides, as we have seen, the arrangement assailed by the complainants was not a modification of the subscription previously made, or a bonus given for a release. It was rather a purchase of the city debt. We think it was not beyond the power of the contracting parties.

And we are not able to perceive that it was fraudulent, either in law or in fact. It may well be doubted whether the complainants can be heard in alleging fraud. It is clear the arrangement made is binding upon the railroad company, through which, as well as against which, they claim. They can, therefore, have no standing in court, unless the arrangement was absolutely null for want of power in the parties to make it, or unless it was fraudulent as against them, and therefore voidable at their suit. We have already seen that it was not a nullity, and the bill does not charge

* 4 Wallace, 598.

that it was fraudulent. It avers that the arrangement and compromise and attempted cancellation of the subscription were entirely null and void, but it does not allege that they were fraudulently made. In urging fraud now the complainants are setting up a case not made by the pleadings. But it is not necessary to place our decision on this ground. No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent, and might have been set aside by a court of equity. But certainly it was in the power of the directors to apply the subscription on bonds taken in payment to the extinguishment of debts, and, if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged. It is, therefore, a question of fact to be determined by the evidence, whether the bonds and the balance of the city's subscription were thus applied. Upon this subject we have already remarked at considerable length. We may add the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market.

We will not pursue this branch of the case further. Were it even conceded that the arrangement of August and September, 1857, might have been set aside at the instance of creditors of the company, the laches of the complainants is fatal to their bill. This suit was not brought until the 29th day of January, 1868. The contract assailed was consummated September 8, 1857. It was not made in secret. There was no attempt at concealment. On the contrary, the ordinance of the city was published at the time. The insolvency of the company, as well as its abandonment of its work on the railroad, was known. It is asserted in complainants' bill. Injunction suits were then pending against the city.

The return of *nulla bona* to the complainants' execution against the railroad company was made on the first of December, 1858. Then their right, if any they had, to attack the compromise as fraudulent was perfect. Yet they remained inactive more than nine years, and it was not until after a speculator had purchased a large part of the judgment that this bill was brought. An attempt has been made to excuse this long delay, by the testimony of one of the complainants that he had never heard of the compromise of the city's subscription until a time which was subsequent to the commencement of the suit. But he does not say that he had not full possession of the means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been any concealment; and the possession of such means of knowledge is, in equity, the same as knowledge itself.* Moreover, the other evidence in the case is irreconcilable with this statement of the witness. He had attorneys who knew of the compromise from the first. He himself went to New Albany, in the spring of 1858, for the purpose of making a thorough examination of the affairs of the company, and another witness thinks he was then informed of the arrangement. There is not the slightest evidence that any other one of the complainants was not fully apprised of what had been done from the time of the transaction, and certainly they all had the fullest means of knowledge. No excuse is, therefore, shown for their long delay, and it is difficult to see why they are not barred by the rule in equity analogous to the statute of limitations. Upon this subject it is unnecessary to cite authorities. They are to be found in numbers in the decisions of this court, as well as elsewhere. It is not to be questioned that a direct suit at law, founded upon alleged fraud in making the compromise, would have been barred by the Indiana statutory limitation of six years. It cannot be maintained that supine negligence and lapse of time are less efficient in a court of equity.

These views of the case render it unnecessary to consider

* Farnam *v.* Brooks, 9 Pickering, 212; 2 Story's Equity, § 1521

the other defences set up against the complainants' right to recover.

DECREE REVERSED, and the cause remanded, with instructions to DISMISS the complainants' bill as against the city of New Albany.

DOWS *v.* CITY OF CHICAGO.

A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant.

APPEALS from decrees of the Circuit Court of the United States for the Northern District of Illinois in two suits; one original, the other a cross suit. The bill in the original suit was filed by the complainant to restrain the collection of a tax levied by the city of Chicago upon shares of the capital stock of the Union National Bank of Chicago, owned by him. The bank was organized and doing business in the city of Chicago, under the general banking act of Congress, and the complainant was a citizen and resident of the State of New York.

The principal grounds alleged for the relief prayed were, that there was, in the tax of the shares of the bank, a want of uniformity and equality with the tax of other personal property in Illinois, as required by the constitution of that State; and that the shares of the bank followed the person of the owner, and were incapable of having any other situs than that of his domicile, and were not, therefore, property within the jurisdiction of the State.

Other objections, relating principally to the manner in which the tax lists were prepared, the want of notice of the assessment to the complainant, and the absence of any deductions for debts, were also urged, tending more to show

irregularities in the proceedings than invalidity in the tax. No special circumstances respecting the tax, or its enforcement, were alleged in support of the equitable jurisdiction of the court.

The bill in the cross suit was filed by the Union National Bank of Chicago, and, besides alleging the illegality of the tax assessed, on various grounds, averred that if the shares were permitted to be sold, irreparable damage would not only be done to each of the shareholders, but also to the bank, which would be thereby subjected to great loss of standing and other injury, for the redress of which the law afforded no remedy; and that such also would be the result if the bank paid the taxes, and was subjected to suits by each of the shareholders by reason of doing so; and that in either event a multiplicity of suits would be rendered necessary to adjust the rights of the parties. A demurrer was interposed to the bills, original and cross. The Circuit Court sustained the demurrers to both, and the complainants in the two cases electing to abide by their bills, the court entered decrees dismissing the bills. From these decrees appeals were taken.

Messrs. M. F. Fuller and J. H. Roberts, for the appellants.

M. F. Tuley, contra.

Mr. Justice FIELD delivered the opinion of the court.

According to the view we take of this case, it is unnecessary to consider the force of any of the objections urged by the appellants to the decrees rendered. Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of

equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived. Such was the case of *The Bank of Utica* v. *The City of Utica*,* where the tax was illegal, and the chancellor stated that the complainant had a complete remedy at law, but as the parties submitted themselves to the jurisdiction of the court, he passed upon the case and enjoined the defendants from collecting the tax. So in the case of *The Utica Manufacturing Company* v. *The Supervisors of Oneida County*,† a demurrer to a bill filed to restrain an illegal tax having been overruled, the chancellor affirmed the ruling, stating, however, that as no question was raised by counsel respecting the jurisdiction of the court, he had not considered whether it was a proper case for equitable cognizance.

Numerous cases are found in the reports where jurisdiction has been taken under similar circumstances and the collec-

* 4 Paige, 399. † 1 Barbour's Chancery, 432.

tion of an illegal tax restrained, but our attention has not been called to any well-considered case where a court of equity has interfered by injunction after its jurisdiction was questioned, except upon some one of the special circumstances mentioned.

The decision of the Court of Appeals of New York in *Heywood* v. *The City of Buffalo*,* is in conformity with the views here expressed. In that case the court held the general rule to be that a court of equity will not entertain an action by the party aggrieved for relief against an erroneous or illegal assessment, but said that this rule was subject to three exceptions, substantially these: where the enforcement of the assessment would lead to a multiplicity of suits, or where it would produce irreparable injury, or where the assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity. Whenever a case was made by the pleadings falling within either of these exceptions, the court said that equity would interfere to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud upon the title, but would not interfere where none of these circumstances existed. In *Susquehanna Bank* v. *The Supervisors of Broome County*,† the same doctrine was substantially repeated, the court declaring that a bill to restrain the collection of a tax would not lie unless the case was brought within some acknowledged head of equity jurisdiction.

The Supreme Court of Illinois is equally clear upon this question. In the case of *Cook County* v. *The Chicago, Burlington, and Quincy Railroad Company*,‡ the subject was considered, and the court said that it had been unable to find any decision, in its previous adjudications, asserting a right to bring a bill to restrain the collection of a tax illegally assessed, without regard to special circumstances. It concludes an examination of its former decisions by stating, that while it was considered settled that a court of equity would never entertain a bill to restrain the collection of a tax, except in

* 14 New York, 534. † 25 Id. 312. ‡ 35 Illinois, 465.

cases where the tax was unauthorized by law, or where it was assessed upon property not subject to taxation, it had never held that jurisdiction would be taken in these excepted cases without special circumstances, showing that the collection of the tax would be likely to produce irreparable injury, or cause a multiplicity of suits.

Upon principle this must be the case. The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action.

We see no ground for the interposition of a court of equity which would not equally justify such interference in any case of threatened invasion of real or personal property.

The cross-bill filed by the bank presents different features. That institution insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the State, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and were it an original bill the jurisdiction of the court might be sustained on that ground. But as a cross-bill it must follow the fate of the original bill.

DECREES AFFIRMED IN BOTH SUITS.

THE COLLECTOR *v.* DAY.

It is not competent for Congress under the Constitution of the United States to impose a tax upon the salary of a judicial officer of a State.

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

The Constitution of the United States ordains that

"Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States."

And an amendment to it, that

"The powers not delegated to the United States are reserved to the States respectively, or to the people."

With these provisions in force as fundamental law, Congress by certain statutes passed in 1864, '5, '6, and '7,* enacted that

"There shall be levied, collected, and paid annually upon the *gains, profits*, and *income* of every person residing in the United States, . . . whether derived from any kind of property, rents, interest, dividends, or salaries, or from any *profession*, trade, *employment or vocation*, carried on in the United States or elsewhere, or from any other source whatever, a tax of 5 *per centum* on the amount so derived, over $1000."

Under these statutes, one Buffington, collector of the internal revenue of the United States for the district, assessed the sum of $61.50 upon the salary, in the years 1866 and 1867, of J. M. Day, as judge of the Court of Probate and

* Statutes of the 30th of June, 1864, c. 173, § 116, 13 Stat. at Large, 281; of the 3d of March, 1865, c. 78, § 1; Ib. 479; of the 13th of July, 1866, c. 184, § 9; 14 Id. 137; and of the 2d of March, 1867, c. 169, § 13; Ib. 477.

Insolvency for the County of Barnstable, State of Massachusetts. The salary was fixed by law, and payable out of the treasury of the State. Day paid the tax under protest, and brought the action below to recover it.

The case was submitted to the court below on an agreed statement of facts, upon which judgment was rendered for the plaintiff. The defendant brought the case here for review; the question being, of course, whether the United States can lawfully impose a tax upon the income of an individual derived from a salary paid him by a State as a judicial officer of that State.

Mr. Akerman, Attorney-General, and Mr. John C. Ropes (with a brief of Mr. Ropes), for the collector, plaintiff in error:

In the exercise of its *granted* powers, the Federal government is supreme. Under the general power of taxation, every man and every thing throughout the country (exports excepted) are subject to taxation in the discretion of Congress, provided that the power be exercised for the purposes declared in the Constitution, and not for unauthorized purposes, and that the conditions of its exercise, prescribed in the Constitution, uniformity, &c., be complied with.

1. What was granted to the Federal government was the power of taxation *for certain purposes* (the common debts, the common defence, the general welfare), for none of which were the particular States bound any longer to provide. These burdens were now thrown on the general government, and the resources on which each State had been able to draw to meet the requisitions of the Congress of the Confederation for money to defray these burdens, were naturally placed at the direct disposal of the United States. The idea was, not to exempt certain classes of persons or objects from their share of the public burdens; to exempt a judge of probate, for instance, from his share of the tax necessary to meet the interest on the public debt, or support the army and navy; but merely to lay these public duties on the general government instead of the States. With the duties went also the power to discharge them; the general government

took by the Constitution an exclusive right to tax imports, and shared with the States the rights of taxation retained by them. Nobody was to be exempted; nobody was to be taxed any more than he had been before. It was simply a change of the sovereign charged with the public duty, and who was therefore clothed with the power to discharge that duty. When the United States repays to a particular State money expended by that State for the public welfare, and originally raised by State taxation from the incomes of State officers among others, nobody imagines that the State officers can claim their share of this tax from the State. Why should they not therefore pay it in the first instance to the United States?

So a section of the statute now under consideration, taxing the issues of State banks so excessively as to drive their notes out of circulation, has been held constitutional.* And the court were unanimous in the opinion, that Congress can tax the *property* of the banks and of all other corporate bodies of a State, the same as that of individuals.

It will not be pretended, on the other side, that the income of an individual derived exclusively from State stock would be exempted from this income tax. Yet the courts have recognized a strong analogy between the taxation of the *issues* of a bank, of the *office* of an officer, and of *stock as such:* is there not a similar analogy between *income* derived from the *business* of the bank, from the *dividends* of the stock, and from the *salary* of the office? If one is taxable, are not they all?

Again: who are to be thus exempted from bearing all direct share in the maintenance of the National government? Is the exemption to be confined to judges of State courts? or are *all* officers of the State and municipal governments to be equally exempt? If not, why not?

Further: suppose the defendant in error had been drafted into the army under a general conscription law, would his office have saved him? If it would, how far is this exemp-

* Veazie Bank *v.* Fenno, 8 Wallace, 533

tion to extend? Are justices of the peace and aldermen exempt? And is it to be supposed that the number of persons exempt in a particular State from military duty depends on the laws of that State; that the fact of a man's holding a commission as a State judge exempts him from serving in the army of the United States in time of war?

It will doubtless be urged that within the sphere of their jurisdiction, the States are as independent of the Federal government, as the government, within its sphere, is independent of the States; and that a government whose officers are taxed cannot be considered independent.

But this independence of the States is confined to a certain sphere by the terms of the objection. That is to say, it is an independence consistent with the supreme authority of another government over its citizens, and its property, for certain of the most important purposes of government. Can that State be in any sense independent, all of whose citizens may, against their will, be drafted into the army; and all of whose citizens, except its officers (to adopt the defendant's theory), may be at any time deprived by another government of a percentage of their income to defray the expense of a war, to which, perhaps, they are all opposed? Is it any more an abridgment of the independence and sovereignty of a State to tax the agents of the people, than to tax the people themselves?

None of these abstract theories are pertinent to the case. The people, acting through the States, have given to the general government certain duties to perform, and a general power of taxation to enable it to perform those duties. Whoever and whatever would have been liable for such taxation had the States been independent, and retained these charges in their own hands, are made liable for the same taxation from the new government. The sphere of the latter was limited by express provisions; by restricting the objects for which taxes could be levied; by defining the mode of levying them so as to insure uniformity throughout the country; by excluding exports from all liability to taxation; and, in general, by conferring upon the general gov-

ernment *a few only* of the powers possessed by a nation. But when the general government acts within its prescribed limits and for its prescribed purposes, its power overrides everything in the country, and there is no limit to its reach. It is of no avail to plead that a man is a State officer, or that his income was paid him by the State; if the government need him or his money for legitimate purposes, they can take both in the way pointed out by the Constitution; exactly as the government of his own State could have done had it retained the powers which it has expressly granted to the United States.

Do we then assert for the general government that it can tax the State governments out of existence? By no means: no more than it can tax the people out of existence. The United States taxes must be uniform; they can be levied only for certain definite objects; they must be conformed to the general principles and practice of taxation. Whatever injury they do to the State governments is an *incidental* injury. The taxes would have to be levied by the States themselves if they had not granted the power to do so to the United States. No more money is exacted of the citizen in one case than in the other. The power of the general government is only to be exercised for certain purposes, and then only under certain conditions. These provisions were thought adequate to guard against encroachment on the part of the Federal government in the matter of taxation; and as long as the Federal government levies its taxes with the *uniformity* required by the Constitution, there is and can be no danger to the State governments, for the reason that the officer can be taxed no more than the citizen,—the burden falls on all alike. Whatever burden the people of the United States are willing to impose on themselves can be borne by the State officers in common with the rest of the people, without any injury to the State *governments*.

The difficulty about this subject has arisen from the mistake of applying the language used by this court, when the propriety of subjecting the powers and property of the United States to the varying taxation of the different States, was in

question, to a case where the United States proposes to impose its uniform taxes on the persons and property in all the States, over which and over whom it holds, by virtue of an express grant, a concurrent power of taxation with the States themselves.

It has been decided that a State cannot tax the means used by the general government to execute its granted powers;* because, in the first place, the Constitution expressly provided that in the exercise of these powers, the general government should be supreme; because, in the next place, exemption from State taxation was implied in the very grant itself; and also, because it would be practically impossible to carry out the powers granted to the general government if their execution was to be hindered by the taxation which any State might see fit to impose on the means used to carry them out. So far as this question was concerned, it was as if the several States had granted these powers to a foreign government; had guaranteed that in the exercise of these powers the laws of that government should be supreme; and had then undertaken to tax the banks, stock, and the other means used to carry out these powers. And had the foreign government, in its turn, granted similar powers to the several States, and had then undertaken to tax the agents and means used by the State to carry out these powers, the same reasoning would exempt the officers and agencies of the State. But this is not our case. There never was any grant of powers by the United States to the several States. Consequently there is no parallel. The States reserved to themselves whatever rights of government they did not grant to the United States; they granted to the United States a concurrent right with themselves of taxation for certain objects; and if in the exercise of that right the United States taxes officers and private citizens alike, it does so by virtue of that grant of concurrent taxation.

All that we contend for is the common liability of State officers for their *property*. If indeed Congress should impose

* See *infra*, 121.

a *license tax* on all State officers—should require a man to pay fifty dollars, for instance, in order to discharge the duties of a judge of probate, or State treasurers to pay to the United States 5 per cent. of all moneys in their hands—the constitutionality of the enactments might well be doubted. It might be tested by the inquiry whether they were passed to carry out *the purposes* for which the right of taxation was given to Congress; whether, in fact, their purpose was not manifestly to injure the State governments.

But taxation of the *incomes* of State officers derived from their salaries is exactly that taxation which the State makes. Therefore, the right to do the same for certain objects was granted to the United States under the general power of *concurrent* taxation.

It will be said that the tax in this case is in reality a tax on the revenues of the State, which are withdrawn from the taxing power of Congress. But inasmuch as a tax in all respects similar is imposed on the State officers by the State itself, we have, if this proposition be true, the singular spectacle of a State taxing its own revenues. The same observation may be made regarding the operation of the income tax on the salaries of United States officers. The truth is, that in no proper sense is a tax upon income derived from a salary paid by a State or by the United States a tax upon the State treasury, or upon that of the United States.

A similar consideration is an answer to the suggestion that this income tax is a tax upon the State officers, as such. It is no more so than the like tax imposed by the State itself. The propriety of making all officers bear their proportion of the public burdens has commended this course alike to the States and the general government; but shall we say that the State taxes the *office* of a judge of probate? Or that the United States taxes the *office* of a major-general? Is it not clear that when the salary has been paid, it belongs to the officer who receives it, and that he must contribute out of his substance as well to the support of the army and navy of his country as of the schools and poor-houses of his State? Is there any subjugation of State authority here?

2. But adopt the general theory of the other side, that this case is controlled by the cases in which the right of the States to tax the agencies of the Federal government has been denied, we submit, that according to these cases the tax in question can be sustained.

The cases referred to are cases of attempted direct interference by the States with the means used by the general government to carry out its powers; the difference between them and the present case is striking, and material.

In *McCulloch* v. *Maryland*,* the leading case, the State of Maryland undertook to tax the issues of notes of a bank of the United States. The court held that this was a tax on the means used by the general government to execute one of their powers, and that the sovereignty of the State did not extend to those means. But the court said that the real estate of the bank, and the property of the citizens of the State in the bank, which are subject to the sovereignty of the State, were liable to State taxation.

In *Weston* v. *Charleston*,† the city of Charleston undertook to tax "*six and seven per cent. stock* of the United States." The court said that this was a tax upon the *contract* subsisting between the United States and the individual—a tax on the *power to borrow money* on the credit of the United States, which was not within the sovereignty of the State.

In *Dobbins* v. *The Commissioners of Erie County*,‡ the case stated shows that the plaintiff had been rated and assessed with county taxes "as an officer of the United States, *for his office, as such*, valued at $500." And the statute of Pennsylvania authorized an assessment upon "*all offices* and posts of profit." The court held that the statute could not comprehend the *offices* of the United States, and that is *the point adjudged*. The dicta and reasoning in the opinion, or of the judge who delivered it, are of no authority. The case fell precisely within the principles laid down in *McCulloch* v. *Maryland*, and followed in *Weston* v. *Charleston;* namely, that a State cannot tax the *means* used by the government of the

* 4 Wheaton, 316. † 2 Peters, 449. ‡ 16 Peters, 435.

Union to execute its *powers*. The court also held that no State could diminish by taxation the amount of the compensation paid by the United States to their officers; but that this principle could not serve also to exempt State officers from taxation by the United States, is more than intimated in the following sentence from the opinion of the court:

"The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve; without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, *or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation in common with itself, for the benefit of both.*"

If now we apply to the tax in question the test laid down by Chief Justice Marshall in *McCulloch* v. *Maryland*—if we measure the power of taxation by the extent of sovereignty—we find a distinct grant from the States to the United States of sovereignty, and of the sovereign power of taxation over all the objects of taxation (except exports)—exclusive as regards imports—concurrent with the States as regards everything else. We find this defendant's income derived from his salary as judge of probate, regarded as a proper object of taxation by the State, and taxed as other property; the inference is unavoidable that it is equally taxable by the United States.

But if it be argued that the sovereignty of the States requires that the same exemptions should be made from the taxation of the United States, which have been made from the taxation of the States in favor of the means used by the general government to execute its sovereign powers—we maintain—

a. That it has never yet been held that a State cannot tax the income of an officer of the Federal government *as property.**

b. But the conclusive answer to this argument is, that this

* See Melcher *v.* Boston, 9 Metcalf, 78, 77.

court has already decided otherwise in *Veazie Bank* v. *Fenno*. We refer specially to this case. It was a case almost parallel to *McCulloch* v. *Maryland* — where the question was, whether a tax of 10 per cent. on the issues of a State bank was valid; and the court held it was valid. It held, in *Veazie Bank* v. *Fenno*, by a majority of the court, that the United States could lawfully tax the operations of a State bank, even with the purpose of driving its issues of notes out of circulation.

But to this point it is not necessary for us to go in the case before us. All the court were agreed that the property of the banks, and of all other incorporated institutions of the States, could be taxed by the United States the same as that of individuals; that is to say, that property acquired under a grant from a State, in the exercise of one of its sovereign powers, is subject to that uniform taxation which the Federal government can impose upon all the property in the country. Now all that we contend for in this case is, that property, paid to an individual as an officer of a State by a State, in the exercise of its constitutional power to have such officers, is subject to the same taxation from the Federal government.

Mr. Dwight Foster, contra.

Mr. Justice NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In *Dobbins* v. *The Commissioners of Erie County*,* it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be inter-

* 16 Peters, 435.

fered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of *McCulloch* v. *Maryland*,* and *Weston* v. *Charleston*,† were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch* v. *Maryland*.‡ "If the States," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the States." Again,§ "That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied." And, in *Weston* v. *The City of Charleston*, he observes:‖ "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of each State and corporation may prescribe."

It is conceded in the case of *McCulloch* v. *Maryland*, that the power of taxation by the States was not abridged by the grant of a similar power to the government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the

* 4 Wheaton, 316. † 2 Peters, 449. ‡ 4 Wheaton, 432.
§ Ib. 427. ‖ 2 Peters, 466.

States against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins* v. *The Commissioners of Erie*, which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

Opinion of the court.

The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County* v. *Oregon*.* "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved." Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative

* 7 Wallace, 76.

body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent

power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins* v. *The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank* v. *Fenno*,* in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch* v. *Maryland*, namely, "That the power to tax involves the power to destroy."

* 8 Wallace, 533.

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY, dissenting.

I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of

a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

TRANSPORTATION COMPANY *v.* DOWNER.

1. The terms "dangers of lake navigation" include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them.

2. When a defendant—a transportation company—shows that a loss of goods, which it had contracted to carry from one port to another, was occasioned by a danger of lake navigation, from losses by which it had exempted itself by its bill of lading, the plaintiff may show that the danger and consequent loss might have been avoided by the exercise of proper care and skill on the part of the defendant; in which case the defendant will be liable notwithstanding the exemption in the bill of lading. The burden of establishing the absence of such care and skill on the part of the defendant rests with the plaintiff.

Statement of the case.

3. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This case was an action against the Western Transportation Company to recover damages sustained by the plaintiff from the loss of eighty-four bags of coffee belonging to him which the company had undertaken to transport from New York to Chicago. The company was a common carrier, and in the course of the transportation had shipped the coffee on board of the propeller Buffalo, one of its steamers on the lakes. The testimony showed that the steamer was seaworthy, and properly equipped, and was under the command of a competent and experienced master, but on entering the harbor of Chicago in the evening she touched the bottom, and not answering her helm, got aground, and during the night which followed kept pounding, and thus caused the hold to fill with water. The result was, that the coffee on board was so damaged as to be worthless.

The bill of lading given to the plaintiff by the transportation company at New York, exempted the company from liability for losses on goods insured and losses occasioned by the "dangers of navigation on the lakes and rivers." The defence made in the case was, that the loss of the coffee came within this last exception.

Upon the trial the plaintiff having shown that the defendant had the coffee for transportation, and that the same was lost, the defendant then showed by competent evidence that the loss was occasioned in the manner above stated, that is, by one of the "dangers of lake navigation." The plaintiff then endeavored to prove that this danger and the consequent loss might have been avoided by the exercise of proper care and skill. The defendant moved the court to instruct the jury as follows:

Argument for the plaintiff in error.

"If the jury believe from the evidence that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading offered in evidence, that is to say, if it was occasioned by perils of navigation of the lakes and rivers, then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence."

The court refused to give this instruction and the defendant excepted, and at the request of the plaintiff, gave instead, the following, to the giving of which the defendant also excepted, viz.:

"The bill of lading in this case excepts the defendant from liability, when the property is *not* insured, from perils of navigation. It is incumbent on the defendant to bring itself within the exception, and it is the duty of the defendant to show that it has not been guilty of negligence."

The plaintiff recovered, and the defendant brought the case here on writ of error.

Messrs. J. N. Jewett and G. B. Hibbard, for the plaintiff in error:

The case of *Clark* v. *Barnwell*,* in this court, shows that the doctrine for which we contended below is the true one, and the principle of that case has been recognized and established in numerous other cases.†

Mr. J. T. Mitchell, contra:

The weight of authority is in favor of the instruction complained of.

In *Whitesides* v. *Russell*,‡ a steamboat ran on a rock in the Ohio River and knocked a hole in her bottom, whereby her

* 12 Howard, 272, 280.

† Hunt *v.* The Cleveland, Newberry, 221; The Neptune, 6 Blatchford, 193

‡ 8 Watts & Sergeant, 44.

cargo was damaged. The bill of lading excepted losses by "dangers of the river," and the carrier was held to have the *onus* of proving, not only how the loss occurred, but that he had used due diligence and skill.

So in *Hays* v. *Kennedy*,* where Lowrie, C. J., says:

"From the very nature of the relation the burden of the proof of a loss by inevitable accident is thrown upon the carrier. He must prove not only an accident which the law admits as inevitable in its character, *but also that he was guilty of no fault in falling into the danger*, or in his efforts to extricate himself from it."

In *Graham* v. *Davis*,† the Supreme Court of Ohio decided this precise point. The case was ably argued and elaborately considered both on principle and on authority, and the decision is entitled to great weight. The reason of it is stated by Ranney, J., with clearness.

This rule is established also in other States.‡

If the case of *Clark* v. *Barnwell*—relied on by the other side for the position that it is sufficient for the carrier to show an accident, which may or may not be a danger of navigation (that is, such a danger as reasonable skill and care could not avoid), to put on the plaintiff the burden of proving negligence—can be considered as deciding so broad a proposition, then it is erroneous in principle and against the great weight of authority. It is supported only by a Nisi Prius opinion of Lord Denman, and the cases in the United States courts, which have followed it as authority, without examining the ground upon which it rested. The principal State courts in which it has been cited have refused to follow so clear a departure from established principles.

But the decision does not in reality go to the extent claimed. In that case, the carrier *proved affirmatively* that his ship was tight and staunch, well equipped and manned,

* 41 Pennsylvania State, 378. † 4 Ohio State, 362.

‡ Swindler *v.* Hilliard, 2 Richardson, 268; Baker *v.* Brinson, 9 Id. 201; Berry *v.* Cooper, 28 Georgia, 543; Turney *v.* Wilson, 7 Yerger, 340; Hill *v.* Sturgeon, 28 Missouri, 327.

and that the cargo was well stowed and dunnaged.* He, in fact, proved all the elements of proper skill and care on his part. The case was argued and decided on the *evidence*, not on the burden of proof. The subject of the burden of proof was not argued at all, and the remarks of the court upon it were not necessary to the result arrived at. The decision was right on the evidence, and it is fairly inferrible from the report, that all that was meant to be laid down as to the burden of proof was, that *after the carrier had proved due care and skill* (which he had done in that case), the plaintiff was still at liberty to rebut that evidence, and assume the burden of proving negligence. This is unexceptionable doctrine, and the case is authority for so much, but not for anything more.

Mr. Justice FIELD delivered the opinion of the court.

On the trial the plaintiff made out a *primâ facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this *primâ facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, "dangers of lake navigation," include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the

* See p. 281.

plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred. In *Clark* v. *Barnwell*,* the precise point was involved, and the decision of the court in that case is decisive of the question in this. And that decision rests on principle. A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *primâ facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. Thus, in *Scott* v. *The London and St. Catharine Dock Company*,† the plaintiff was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant, and the court said, "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

So in *Curtis* v. *The Rochester and Syracuse Railroad Company*,‡ the Court of Appeals of New York held that the mere fact that a passenger on a railroad car was injured by the train running off a switch was not of itself, without proof of

* 12 Howard, 272.

† 3 Hurlstone & Coltman, 596.

‡ 18 New York, 543.

the circumstances under which the accident occurred, presumptive evidence of negligence on the part of the company. The court said that carriers of passengers were not insurers, and that many injuries might occur to those they transported for which they were not responsible, but as railroad companies were bound to keep their roads, carriages, and all apparatus employed in working them, free from any defect which the utmost knowledge, skill, and vigilance could discover or prevent, if it appeared that an accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arose, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have seen or discovered it.

It is plain that the grounds stated in these cases, upon which a presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff.

For the error in the refusal of the instruction prayed and in the instruction given, the judgment must be REVERSED, and the cause

REMANDED FOR A NEW TRIAL.

Statement of the case in the opinion.

AMY v. THE SUPERVISORS.

1. The State and National courts being independent of each other, neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. *Riggs* v. *Johnson County* (6 Wallace, 265), affirmed.
2. Where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from such nonfeasance or malfeasance. A mistake as to what his duty is and honest intentions will not excuse him.

AMY having obtained a judgment for money against Desmoines County, Iowa, in the Circuit Court for the District of Iowa, and not being paid, procured from the same court a mandamus against Burkholder, and several others, the supervisors of the county, to compel the levy of a tax. The mandamus not being obeyed, he sued them personally. They set up certain defences, to which he demurred. The court overruled the demurrer, and he brought the case here.

Mr. J. Grant, for the plaintiff in error, submitted a brief.

No opposing counsel.

Mr. Justice SWAYNE stated the case particularly, 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 Iowa.

The plaintiff in error was the plaintiff in the court below. The declaration contains two counts. The first count alleges substantially that the plaintiff recovered a judgment against the county of Desmoines in the said Circuit Court; that afterwards such proceedings were had that a peremptory writ of mandamus was issued from that court and duly served upon the defendants as supervisors of said county, whereby they were commanded to levy a tax sufficient to pay the judgment and costs; that in September, 1868, it was their duty to levy such a tax, and that they neglected to do

so, whereby the plaintiff sustained damage to the amount of $12,108\frac{3}{100}$.

The second count sets forth substantially the same facts; and, further, the provisions of the code of Iowa prescribing the duty of the defendants, as supervisors, under such circumstances, and declaring that a failure on their part to perform the duty enjoined, should render them personally responsible for the debt. It is further averred in this count that the judgment is in full force and unsatisfied, and that the defendants have levied no tax and made no provision for its payment, and that the plaintiff is thereby damaged in the sum stated in the first count.

The defendants, by their answer, set up three defences:

(1.) Nil debet.

(2.) That the District Court of Desmoines County had enjoined them from levying a tax to pay the judgment; that they were nevertheless proceeding to levy such tax when they were attached by order of that court for contempt of its process, and compelled to give bonds to answer said charge of contempt and to obey the injunction, and that those bonds were still in force and obligatory upon them.

(3.) That before the peremptory writ of mandamus was issued the legislature of Iowa repealed the statutory provision, whereby they were made individually liable for the delinquency charged against them, and that, by reason of such repeal, they are not so liable.

The plaintiff demurred to the answer. The court overruled the demurrer and gave judgment for the defendants.

The counsel for the plaintiff in error has filed an able and elaborate brief. None has been submitted in behalf of the defendants. A few remarks will be sufficient to dispose of the case.

The Circuit Court had authority to issue the writ of mandamus. It was the process resorted to by the plaintiff to procure satisfaction of his judgment. The State court was powerless to prevent its execution. In so far as concerned the process in question the injunction was a nullity. In such

cases the two sets of tribunals—State and National—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. Where either is in possession of the *res* sought to be reached, the process of the other must pause until that possession has terminated. But this rule has no application in the case before us. These principles are a part of the checks and balances of our dual and combined polity, and are indispensable to the harmonious and beneficial working of the system. If the ground assumed by the State court in this case can be maintained, the Constitution of the United States, and the laws made in pursuance thereof, as regards their judicial administration, instead of being the supreme law of the land, would be subordinated to the authority of the courts of every State in the Union. If this writ may be paralyzed by the injunction relied upon, a writ of *fieri facias* and a writ of *levari facias* may be defeated in the same way. In point of principle there is no distinction between them. Every judgment of a court of the United States may thus be rendered fruitless of any beneficial result. These views are conclusively maintained by *Riggs* v. *Johnson*,* and the principle involved has since been reaffirmed in the cases which followed, and were controlled by that judgment.

It is not necessary to consider the effect of the repeal of the provision of the code which enacted that the delinquent parties shall be personally liable. There is a common law liability which was not affected by the repeal. The statute was only cumulative on the subject.

The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender. The question of the rule

* 6 Wallace, 166.

by which the measure of damages is to be ascertained is not before us, and we do not feel called upon to express any opinion upon the subject.

The defences set up in the answer of the defendants are clearly bad. The demurrer should have been sustained.

The judgment of the Circuit Court is REVERSED, and the cause will be remanded with instructions to that court to proceed

IN CONFORMITY TO THIS OPINION.

NOTE.

AT the same time with the preceding case was decided another case, which came here on certificate of division between the judges of the Circuit Court for Wisconsin. The case, namely, of

FARR *v.* THOMSON ET AL.

In which the preceding case was affirmed.

The declaration in this case presented, in all substantial respects, the same state of facts as the declaration in the case just decided. After argument by *Mr. M. H. Carpenter, for the plaintiff, no one appearing contra*, Mr. Justice SWAYNE announced the judgment of the court to the effect that the former case decided this. The question certified to the court—which was whether the declaration showed a sufficient cause of action—was accordingly answered by it

IN THE AFFIRMATIVE.

SMITH *v.* SAC COUNTY.

1 In a suit on a negotiable security when the defendant has shown strong circumstances of fraud in the origin of the instrument, this casts upon the holder the necessity of showing that he gave value for it before maturity.

Statement of the case.

2. In a case submitted to the court without a jury which finds the facts constituting such fraud, and does not find that the plaintiff gave value for the paper, the judgment was rightfully given for the defendant.

ERROR to the Circuit Court for the District of Iowa.

Samuel Smith sued the County of Sac, Iowa, on certain interest coupons attached to bonds purporting to have been issued by the county for the erection of a court-house.

According to the form of pleading in the Iowa courts, by petition and answer, which is adopted in the Circuit Court for that district, the plaintiff set out in a petition the adoption by vote of the people of the county, at a special election held July 7th, 1860, of a proposition submitted to them by the county judge, providing for the erection of a court-house, to cost $10,000, and the issuing of the bonds to that amount, &c.; that the proposition and the result of the vote thereon were duly recorded as required by law; that the bonds with coupons were issued accordingly; and after describing, by number and otherwise, twenty-five of the coupons, averred that the plaintiff was the owner and holder of them, that he received them in good faith before maturity *and paid value therefor*, and that the same are valid and legal claims against the county. Copies of the proposition submitted, the record of the vote thereon, and the bonds and coupons were made part of the petition. The bonds were payable to bearer, signed by the county judge, and with the county seal affixed, and recited on their face that they were "issued by the said county, in accordance with a vote of the legal voters thereof, at a special election holden on Saturday, the 7th day of July, A. D. 1860, pursuant to a proclamation made by the county judge of said county, according to the statutes of the State of Iowa in such case made and provided, for the purpose of erecting a court-house in Sac City, the county seat of said county, as per said proclamation." The concluding clause reads thus:

"In witness whereof, I, Eugene Criss, county judge of said County of Sac, have hereunto affixed my name, and caused the seal of Sac County to be attached, *at Sac City*, this first day of October, A. D. 1860."

Statement of the case.

The coupons were payable to the holder, and signed by the county judge. The answer opened thus:

"The defendant for answer denies that any such election as is set out in the petition was called or held; denies that the electors of said county (a majority of them) are in favor of building a court-house and issuing bonds in payment therefor; denies that any such bonds or coupons were issued, or any such contract let for building a court-house; denies that the county judge had any authority to call such election, or make such contract, or issue such bonds or coupons; defendant further denies each and every allegation in plaintiff's petition."

Various statements, intended to defeat the claim, were then made.

It was stated by counsel at the bar, that the Revised Code of Iowa* enacts that an answer shall contain "a general denial of *each* allegation of the petition, or else of any knowledge or information thereof, sufficient to form a belief, OR a specific denial of each allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. And also enacts† that every material allegation of the petition, not controverted by the answer, must for the purposes of the action be admitted to be true."

The case was submitted to the court, under the act of Congress authorizing the trial of issues of fact in the Circuit Courts, by the court, without a jury, and which‡ provides that "the finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury;" and further, that

"When the finding is special, the review may also extend to the *determination of the sufficiency of the facts found to support the judgment.*"

The court, on the evidence, found as the facts:

"1st. That an order and proclamation was made by Eugene

* § 2880. † § 2917.

‡ Act of March 3, 1865, § 4, 13 Stat. at Large, p. 501.

Criss, county judge of Sac County, for submitting to the vote of the people of the county, 'whether or not a court-house should be erected in the same, to cost $10,000, in bonds, &c., and whether or not a tax should be levied,' &c., as the same was alleged in the plaintiff's petition.

"2d. That an election was held on the 7th July, 1860, in pursuance of the said order and proclamation; and that the proposition was adopted by a majority of the votes cast at said election.

"3d. That the proposition and order for the submission of the same, together with a statement of the result of the election, was afterwards, by and under the direction of the said county judge, entered and recorded at large in the office of the said county judge in the 'Minute-Book' of the county judge and county court.

"That by the said record entry the said order for the submission of the said proposition to the vote of the people purported to have been made at a session of the county court on the 4th day of June, A. D. 1860; but that the said record was not in fact made and entered in the 'Minute-Book' at that time, nor until after the execution and delivery of the bonds, as hereinafter found; and that the said order was entered in said 'Minute-Book' in June, 1861, after the said county judge had ceased to have any power or jurisdiction over the financial business of the county.

"4th. That the said county judge of said county, having entered into a contract in behalf of said county, with one W. N. Meservy, for the erection by the said Meservy of a court-house in and for said county, did execute, October 1st, 1860, in behalf of the county, by affixing thereto his signature as such county judge, and the lawful seal of said county, and deliver to Meservy, in pursuance of the terms of the contract, ten bonds, purporting to be the bonds of the county, dated, &c., and coupons annexed, for the annual instalments of interest to grow due thereon as aforesaid, being for one hundred dollars each, and payable to bearer at said bank, or receivable for taxes at the county treasury of said county, at the option of the holder. Said bonds and coupons were all expressed in the same words and figures as set forth in the plaintiff's petition.

"5th. That the said county judge in fact signed, sealed, and delivered said bonds and coupons as aforesaid at Fort Dodge,

in the *County of Webster and State of Iowa, and not within the County of Sac; and that the contractor, Meservy, gave one of said bonds for* $1000 *as a gratuity to the county judge as soon as the same were delivered by said county judge to said Meservy; and no court-house was in fact ever built by said contractor, or any other person, in pursuance of said contract.*

"6th. That the plaintiff, Smith, was, at the time of commencing this action, and still is, the holder and owner of twenty-five of the coupons, being those declared on; that he became such holder, by transfer thereof to him *before maturity*, and after the entry of said proceedings in the 'Minute-Book,' as hereinbefore found; that the said coupons were, at the commencement of this action, and still were, wholly unpaid.

"And, as matter of law 'arising upon, and resulting *from the facts hereinbefore found*,' the court was of opinion and adjudged that the said bonds and coupons were *wholly void* as against the said County of Sac, and that the defendant was entitled to judgment."

To this opinion and judgment the plaintiff excepted.

On the case coming here the point was raised whether a finding that the plaintiff had had value for his bonds was not indispensable to sustain the judgment. There was not, as will have been observed, any finding of that fact, nor did the record present evidence to show it.

Mr. J. N. Rogers, for the plaintiff in error (after remarking upon the insufficiency of the answer to raise the question or put in issue the facts of good faith and consideration paid for the bonds):

It is sufficiently obvious, from the very terms of this adjudication, that the question whether or not the plaintiff was a holder in good faith and for value did not in fact at all enter into the decision of the case in the mind of the judge who pronounced it; but that he held the bonds to be "wholly void as against the said county," irrespective of the attitude of the holder.

The question now arises, however, whether this court can import into the special finding, by intendment, the addi-

tional fact that plaintiff is not a holder in good faith and for value, on the ground that fraud in the issue of the bonds is found; that this cast on the plaintiff the burden of proving himself to be a holder for value without notice; and that the verdict does not find affirmatively that he *was* such holder.

Can the verdict be thus aided by intendment?

Assuming, for the purposes of the argument (what, however, is not law), that a *special* verdict can supersede the necessity of a plea, and by specially finding matter of defence not pleaded, and therefore not in issue, entitle a defendant to judgment thereon; and further assuming (what is not the case), that the facts found do amount, as mere matter of law, to fraud, and not merely to evidence tending to show fraud, we submit that a *plea* of such fraud, had one been interposed, would have been fatally defective on demurrer, if it did not contain an allegation that plaintiff took with notice, or without giving value. What, then, it is necessary that the plea should allege, is it not equally necessary that the verdict should find? Otherwise, one-half of the issue, as material as the rest, is left undetermined on the record. *How* it would have been determined, had it been determined at all, this court, on error, cannot say. The rule as to the burden of proof is merely a rule of evidence to govern the court or jury on the trial in making up the verdict. It cannot supply the place of or supply defects in the verdict. There is no legal certainty that, because a fact is not specifically found in a special verdict, it was not proved. Hence arises the absolute necessity for the rule, which the authorities recognize, that a special verdict to be good must find *all* the facts essential to entitle one party or the other to judgment, and that it cannot be aided by intendment or presumption. If it were not so, the parties would be left at the mercy of the judge or jury trying the case; for the parties can exercise no control over either judge or jury in framing the verdict. They cannot compel a finding either way upon any particular issue of fact. A material fact may be thoroughly proven, and yet a jury bringing in a special verdict

may omit to find it, through inadvertence or otherwise; and a judge may do the same thing, if not so probably from inadvertence, from mistaken views of the law as to what facts are material and what are not. If he has formed an opinion that certain facts, of the existence of which he is satisfied, are sufficient to authorize a judgment, he will not be likely to trouble himself to pass on other issues which he regards as immaterial, especially if to do so would require the weighing and sifting of conflicting evidence. In such case he will be apt to pass them over in silence.

Now, in such a case, the party against whom the judgment is rendered, on a finding of facts insufficient in themselves to support the judgment, is absolutely *remediless*, if the court of error is at liberty to add to the verdict by intendment, on the ground that a state of facts which he was bound to prove, *not* being *affirmatively* found, must be presumed not to exist. He may have proved it beyond question, or by a preponderance of evidence, and yet the court or jury may have omitted to find it, for one or the other of the reasons already suggested. If the fact is found *either way*, and the finding is against evidence, a motion for a new trial on that ground will afford the remedy. But if there is an entire *omission* to find *either* way upon the issue, and a finding upon it is an essential element in the facts on which judgment is to be based, there is *no* remedy, except to hold the verdict defective, and award a *venire de novo*. If in a court of error, it can be aided by intendment; if a fact essential to support the judgment, but not found by the verdict, can be assumed, because the burden was on the opposite party to prove the *contrary*, and the *contrary* is not found, then there is no safety for the rights of parties in case of a special verdict, since the judge or jury may find or *omit* to find upon such issues as they please, and are subject to no control in the selection.*

* 2d Tidd's Practice (4th Am. ed., 1856), p. 896 (marginal page 897), *note* A; where all the authorities, and particularly the *American* cases are cited. See, also, Barnes *v.* Williams, 11 Wheaton, 415; Blake *v.* Davis, 20 Ohio, 231; Gould's Pleadings, chap. 10, § 62.

We are advised and *believe* that the plaintiff *is* a holder *bonâ fide* and for value, and can fully substantiate the fact by proof, and we submit that if the court is disturbed by want of a finding of that fact, that the ends of justice will be better satisfied by the award of a *venire de novo*, which will give both parties full opportunity to establish all material facts, than by resting an affirmance of this judgment upon a defence not pleaded, and on a fact not found, and (to say the least) perhaps not existing.

Mr. Galusha Parsons, contra.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff sets out in his petition all the proceedings, by vote of the county, which he deems necessary to authorize the issue of the bonds, with a copy of one of the bonds and coupons, and after describing, by number and otherwise, twenty-five of the coupons, avers that he is the owner and holder of them, that he received them in good faith before maturity and paid value therefor, and that the same are valid and legal claims against the county.

The defendant answers, denying each and every allegation of the petition, and then sets up that the bonds were issued without authority of law, failure of consideration, and other defences.

The denials of the first part of the answer, though not strictly in the form required by the rule, put in issue every material fact alleged in the petition. It therefore made an issue on the plaintiff's allegation that he became the holder of said coupons before maturity, and that he paid value therefor, so far as that might become material to be shown on the trial.

The parties having by stipulation submitted the case to the court without a jury, and the court made a special finding of facts, on which it held the law to be for defendant, and rendered a judgment accordingly, the question before us is, whether the judgment is justified by the facts found?

Treating the bonds and coupons sued on in this case,

which are payable to bearer, as negotiable paper, and conceding to its fullest extent the protection which commercial usage throws around such paper in the hands of a *bonâ fide* purchaser for value before maturity, it is nevertheless undoubtedly true that circumstances may be shown in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he *did* give value for it before maturity. This principle is asserted in the text books of Chitty,* Story,† Parsons,‡ and others, and is so laid down and sustained by numerous citations of authorities by the learned American annotator of Smith's Leading Cases, p. 752. In one of the latest of the English cases, *Hall* v. *Featherstone*,§ Pollock, C. B., says: "If there are any circumstances in the nature of fraud or illegality which can be left to the jury, proof of these circumstances will cast on the plaintiff the *onus* of showing that he gave value for the bill." To which Martin, Baron, added: "I think there was, at the close of the defendant's case, evidence for the jury in support of the plea. The authorities have established a principle which is contrary to the general rule, by which a defendant is bound to prove all the facts necessary to constitute a defence." And Bramwell said: "The cases have established that if there be fraud or illegality in the inception of a bill or in the circumstances under which it was taken by the person who indorsed it to plaintiff, he must prove consideration. That is established beyond controversy."

With this statement of the law on that subject, we approach the examination of the facts found by the court.

The fifth finding is, "that the county judge in fact signed, sealed, and delivered said bonds and coupons at Fort Dodge, in the County of Webster, and State of Iowa, and not within the County of Sac: and that the contractor, Meservy, gave one of said bonds as a gratuity to the county judge as soon

* Chitty on Bills, 260, 648. † Story on Promissory Notes, § 196.
‡ 2 Parsons on Notes and Bills, 438.
§ 3 Hurlstone & Norman, 284.

as the same were delivered by said county judge to said Meservy, and no court-house was ever built by said contractor or any other person in pursuance of said contract."

Now the coupons sued on, being part of the transaction here referred to, was there not enough in what the court finds to devolve upon the plaintiff the necessity of showing that he purchased for value? In the language of Chief Baron Pollock, "were there not circumstances in the nature of fraud, proof of which cast on the plaintiff the *onus* of showing that he gave value for the bonds?" They are circumstances from which no court or jury could fail to find fraud in the inception of the bonds on which he sued. Besides he had, perhaps unnecessarily, but expressly, averred that he had paid value, and this had been denied by defendant, so that the issue was fairly raised by the pleadings. He not only failed to prove that he gave value, but it does not appear that he offered any evidence to that effect. The bill of exceptions, which recites much that was offered and submitted in evidence, is silent on this point.

The sixth finding of the court is that the plaintiff was, at the time of commencing this action, and still is, the holder and owner of the twenty-five coupons declared on in the petition, that he became such holder by *transfer* thereof to him before maturity, and after the entry of the proceedings on the minute-book, &c.

It must be taken, then, that plaintiff did not show that he was a holder for value. There is neither finding nor evidence that he gave value, and the statement that he became the holder by *transfer* before maturity, does not imply that he was a purchaser in any sense or received them on any consideration whatever.

Under these circumstances the plaintiff can occupy no better position than Meservy, to whom the bonds were originally delivered by the county judge.

If Meservy had been plaintiff, ought the judgment to have been other than what it is on the record presented to us?

He contracted to build the court-house and never built it

or attempted to do so. He received under this contract ten thousand dollars of what purported to be the bonds of the county. These bonds were signed, and the county seal, which was necessary to their validity, affixed by a person assuming to act as county judge in another county, at the place where Meservy resided, and as soon as the transaction was completed one of the bonds was given by Meservy as a gratuity to the person who had thus played the part of county judge. That the county judge should have left his own county and his official place of business, should have put the seal of the county in his pocket, and gone to meet Meservy in a place without the limits of his jurisdiction, should there have concocted these bonds, and on delivering ten of them to Meservy have received back one of them without any consideration but Meservy's satisfaction at the completion of the transaction, and that this should create in Meservy's favor a right of action against the county, is more than we can affirm. That the court-house was not built is only the natural result of such a proceeding. That the bonds should turn up in the possession of some one else was to be expected. But to hold that, after all this was shown in defence, such holder should have a judgment on those bonds, without any proof that he purchased them for value or that he gave any consideration for them at all, is in our judgment pushing the doctrine which gives sanctity to negotiable paper beyond any just principle or any decided case.

We think the judgment of the Circuit Court was right, and it is accordingly

AFFIRMED.

Mr. Justice CLIFFORD, dissenting.

Coupons attached as interest warrants to bonds for the payment of money lawfully issued by municipal corporations are negotiable instruments, and as such, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferable by delivery and are subject to the same commercial rules and regulations, so far as

respects the title and rights of the holder, as negotiable bills of exchange and promissory notes.*

Holders of such instruments, if the same are indorsed in blank or are made payable to bearer, stand upon the same footing as the holders of negotiable bills of exchange or promissory notes, and are as effectually shielded from the defence of prior equities between the original parties to the instrument, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.†

Such instruments are protected from defences of the kind when in the possession of an indorsee, not merely because they are negotiable but also because they are regarded as commercial instruments, and as such are favored as well on account of their negotiable quality as their general convenience in mercantile affairs.‡

Bonds for the payment of money, with interest warrants attached, are now universally classed with bills of exchange and promissory notes as negotiable instruments, and as such are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men, and any course of judicial decision calculated to withdraw such instruments from the operation of the general rules of commercial law usually applied in controversies respecting the title to the same, or to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy.§

On the first day of October, 1860, ten bonds, each for the sum of one thousand dollars, payable to bearer, one each succeeding year till the whole sum was paid, with interest at the rate of ten per centum per annum, were issued by the defendant corporation "for the purpose of erecting a court-

* White *v.* Railroad Co., 21 Howard, 575; Murray *v.* Lardner, 2 Wallace, 110; Moran *v.* Miami Co., 2 Black, 722; Mercer Co. *v.* Hacket, 1 Wallace, 83; Gelpcke *v.* Dubuque, 1 Id. 176; Meyer *v.* Muscatine, 1 Id. 385.

† Chester *v.* Dorr, 41 New York, 282; Turnbull *v.* Bowyer, 40 Id. 460.

‡ Thomson *v.* Lee County, 3 Wallace, 327; Park Bank *v.* Watson, 42 New York, 492.

§ Goodman *v.* Simonds, 20 Howard, 364.

house in Sac City, the county seat of the county," as alleged in the recitals of each bond. They were numbered from one to ten inclusive, and they also contained the recital that they "were issued by the county in accordance with a vote of the legal voters thereof" at a special election, holden on the day therein mentioned, pursuant to a proclamation made by the county judge, according to the statutes of the State in such case made and provided.

Annexed to the several bonds were the coupons, one or more, as provided in the same, for the payment of the annual interest, and the plaintiff being the holder of twenty-five of those coupons instituted the present suit to recover the amount, together with six per cent. interest from their maturity, and he alleged in his declaration that he was the holder and owner of the coupons therein described; that he received the same in good faith before their maturity, and that he paid value for the same at the time of their transfer; that the bonds and coupons were issued by the county under and by virtue of a legal and competent authority conferred upon the officers and agents of the county, and that the same are valid and legal claims against the defendant corporation.

Most of the allegations of the declaration are denied in the answer, but the defendants do not specifically deny that the plaintiff paid value for the coupons at the time he became the holder and owner of the instruments. They deny that any such election as that set forth was ever called or held, or that the county judge had any authority to call such an election or to make any contract to build a court-house or to issue any such bonds or coupons, or that any such bonds or coupons were ever issued, and they append to those specific denials a general denial of each and every allegation of the declaration, which really amounts to nothing in any case in that jurisdiction, as the code of the State, which is adopted by the Circuit Court, provides that every material allegation of the declaration not denied in the answer shall be considered as admitted.* Where the general issue may

* Revision, 531.

be pleaded the rule would be different, but the code expressly abolishes the general issue and adopts the rule that every material allegation of the declaration is admitted unless it is specifically denied in the answer.*

Apart from the preceding denials, the defendants also allege that the bonds and coupons were issued without authority, and that the plaintiff, at the time he purchased the same, had full knowledge of those facts.

Special matters in avoidance of the claim of the plaintiff are also set up as a defence in the third article of the answer, in which the defendants allege that the county judge, or the person claiming to act as such, entered into a contract for the building of a court-house at Sac City, the county seat of the county, to be commenced and completed at the times therein specified; that the county judge agreed and undertook in behalf of the county to pay the contractor for erecting and completing the court-house the sum of ten thousand dollars, and to issue the bonds of the county to that amount, as described in the declaration; that the bonds and coupons were subsequently issued in pursuance of the contract, and that they were delivered to the contractor, but that the contractor wholly failed and refused to build the court-house, whereby the consideration of the bonds and coupons wholly failed; and the defendants allege that the plaintiff, at the time he purchased the bonds, had full and complete knowledge of all these facts, and that he took the same subject to the rights and equities of the defendant corporation.

Before the trial the parties filed a stipulation in writing, agreeing that the case might be heard and determined by the court, without the intervention of a jury, and the record shows that it was so determined. Where the case is so tried the finding of the court may be either general or special, and the express provision is, that the finding shall have the same effect as the verdict of a jury.†

Exceptions may be taken to the rulings of the court made in the progress of the cause, and when the rulings are duly

* Revision, 508, 519.

† 13 Stat. at Large, 501.

presented by a bill of exceptions, they may be re-examined in this court by writ of error, if it is an action at law, or by appeal if it is a suit in equity. Evidently, when the finding is general, the legal effect of the proceeding is in every respect the same as the verdict of a jury at common law, as nothing is open to re-examination except the rulings of the court; but when the finding is special, it is expressly enacted that "the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

Special findings were made by the court, from which it appears that the questions, whether a court-house should be erected, to cost ten thousand dollars in the bonds of the county, and whether a tax sufficient to liquidate the demands as they became due should be annually levied, were duly submitted to the voters of the county; that the propositions were adopted, at a special election held on the day therein mentioned, by a majority of all the votes cast at the election, and that the proposition and the order for the submission of the same, together with a statement of the result of the election, were afterwards entered and recorded at large in the minute-book of the county court, as alleged by the plaintiff; that the county judge made the contract for the erection of a court-house, as alleged, and that he executed in behalf of the county the ten bonds described in the declaration, affixing thereto his signature as such county judge and the lawful seal of the county, and that he delivered the same to the contractor, in pursuance of the terms of the contract, and that correct copies of the bonds and coupons are contained and set forth in the record. Had the findings of the court stopped there, all undoubtedly would agree that the plaintiff ought to recover, as it is universally admitted that the transferee of a negotiable instrument, made payable subsequent to its date, holds it clothed with the presumption that it was negotiated to him, at the time of its execution, in the usual course of business and for value, and without notice of any equities between the prior parties to the instrument.*

* Goodman v. Harvey, 4 Adolphus & Ellis, 870; Goodman v. Simonds, 20 Howard, 365; Noxon v. De Wolf, 10 Gray, 346.

Such is the settled rule of commercial law applicable to negotiable instruments, and it was so framed and is so administered in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value, and this principle is so comprehensive in respect to such negotiable instruments as pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation, the law presumes that the party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party impeaching his title.*

In the ordinary course of business the holder is presumed to be *primâ facie* a holder for value, and he is not bound to introduce any evidence to show that he gave value for the instrument until the other party has clearly proved that the consideration of the instrument was illegal, or that it was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder.†

Possession, even without any explanation, is *primâ facie* or presumptive evidence that the holder is the proper owner or lawful possessor of the instrument, and Judge Story says that nothing short of fraud, not even gross negligence, is sufficient to overcome that presumption and invalidate the title of the holder as inferred from possession.‡

In this last case Lord Denman said: The owner of a bill is entitled to recover upon it if he came by it honestly, and that fact is implied *primâ facie* by possession, and to meet the inference so raised, fraud, felony, or some such matter, must be proved.§

* Wheeler *v.* Guild, 20 Pickering, 551; Collins *v.* Martin, 1 Bosanquet & Puller, 648; Miller *v.* Race, 1 Burrow, 452; Peacock *v.* Rhodes, 2 Douglass, 633; Grant *v.* Vaughan, 3 Burrow, 1516; Lawson *v.* Weston, 4 Espinasse, 56.

† Story on Bills, 4th edit., § 416; Byles on Bills, 10th ed. 119; Mills *v.* Barber, 1 Meeson & Welsby, 425; Sistermans *v.* Field, 9 Gray, 336.

‡ Story on Bills, § 415; Uther *v.* Rich, 10 Adolphus & Ellis, 784; Bailey *v.* Bidwell, 13 Meeson & Welsby, 73; Raphael *v.* Bank of England, 33 English Law and Equity, 276; Stephens *v.* Foster, 6 Carrington & Payne, 289, Arbouin *v.* Anderson, 1 Adolphus & Ellis, N. S. 498.

§ Wyman *v.* Fisk, 3 Gray, 238; Bailey *v.* Bidwell, 13 Meeson & Welsby, 76; Smith *v.* Braine, 16 Adolphus & Ellis, N. S. 244.

Coupon bonds of the ordinary kind, payable to bearer, said the court in the case of *Murray* v. *Lardner*,* pass by delivery, and a purchaser of them in good faith is unaffected by want of title in the vendor, adding, what is undoubted law, that the burden of proof on a question of such faith lies on the party who assails the possession.†

Apply those rules in a suit in the name of the transferee against the maker, and it is clear that the plaintiff, where the case is tried to the jury under the general issue, has nothing to do except to prove the signatures to the instrument and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value at its date in the usual course of business, without notice of anything to impeach his title.‡

Clothed, as the instrument is, with those several presumptions, the plaintiff is regarded as a *bonâ fide* holder for value, without notice of any equities between the antecedent parties, and therefore is entitled to recover upon the instrument notwithstanding any defect or infirmity in the title of the person from whom he derived it, as, for example, even though such person may have acquired it by fraud, or even by theft or robbery.§

Comment was made at the argument upon the matter stated in the third finding, that the order for the submission was not, in fact, recorded in the minute-book of the county court at the time it purports to have been entered; but the same finding shows that it purports to have been recorded at that time; and the sixth finding shows that the plaintiff became the holder and owner of the twenty-five coupons described in the declaration, before maturity, and after the entry of the proceedings in the minute-book, which shows to a demonstration that he, as the transferee of the coupons,

* 2 Wallace, 121.

† Ranger *v.* Cary, 1 Metcalf, 369.

‡ Pettee *v.* Prout, 3 Gray, 503; Bank *v.* Leighton, Law Rep., 2 Exchequer, 61; Way *v.* Richardson, 3 Gray, 413.

§ Chitty on Bills, 12th ed. 257; Bank of Bengal *v.* Macleod, 7 Moore's Privy Council, 35; Backhouse *v.* Harrison, 5 Barnewall & Adolphus, 1105.

cannot be affected by any delay of the recording officer in entering the proceedings in the minute-book of the county court.

Money may be borrowed by a county to aid in the erection of public buildings, and it is well settled law that a municipal corporation, in exercising such an authority, may issue its bonds as the means of accomplishing the object.*

When a corporation has power, under any circumstances, to issue negotiable securities, the settled rule in this court is that the *bonâ fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.†

Objection to the validity of the bonds and coupons is also made because the third finding of the court shows that the proceedings were not recorded till after the county judge had ceased to have jurisdiction over the financial business of the county. Reference is there made to the fact that the power to make such orders and to submit such questions to the people of the county had, before the proceedings were recorded, been transferred from the county judge to the supervisors of the county, but this court held, in the case of *Supervisors* v. *Schenck*,‡ that such an irregularity would not invalidate such securities in the hands of subsequent holders without notice, and there can be no doubt that the rule as there laid down is correct. By the findings it appears that the plaintiff became the holder and owner of these coupons before maturity and after the proceedings were correctly entered in the minute-book, and it is not found, nor could it be, that he had any notice whatever of the supposed irregularities.§

* Code, § 114; Revision, § 250; Hull et al. *v.* Marshall Co., 12 Iowa, 142; Rogers *v.* Burlington, 3 Wallace, 666; Seybert *v.* Pittsburg, 1 Id. 272.

† Supervisors *v.* Schenck, 5 Id. 784; Gelpcke *v.* Dubuque, 1 Id. 203; Savings Co. *v.* New London, 29 Connecticut, 174; Tash et al. *v.* Adams, 10 Cushing, 252.

‡ 5 Wallace, 780.

§ State *v.* Delafield, 8 Paige, 533; S. C., 2 Hill, 177.

Evidence that he had notice of any defect in the title is entirely wanting, but the case of the plaintiff in respect to the payment of value does not depend solely nor chiefly upon the presumption to that effect, which always arises in favor of a transferee from the possession of the instrument. Usually that presumption is considered sufficient, but the case of the plaintiff is much strengthened from the fact that the allegation in the declaration that he paid value for the coupons is not specifically denied in the answer. Taken together, as these several matters must be, they establish the conclusion that the plaintiff did pay value for the coupons at the time of the transfer, and if so, then he clearly is entitled to recover, as it is expressly found by the court that they were transferred to him before maturity, and it is not pretended that he had any notice whatever of the supposed defects in the proceedings, or of any equities between the obligors of the bonds and any prior holder of the coupons.

No court-house was ever built by the contractor, but a valid contract for the erection of such a public building was made between the contractor and the county judge, acting in behalf of the county, at the time the bonds and coupons were executed and delivered, and it is well-settled law that such an executory contract is a good consideration for a negotiable instrument, and that the failure to perform the contract is no defence to the negotiable instrument in the hands of an innocent holder. If one will issue his negotiable paper and send it into the world in consideration of an engagement of the party with whom he deals to do some act for his benefit in the future, he declares in effect that he will pay the note or bill according to its terms to any one who shall become the holder for value in the usual course of business.*

Considerations founded upon reciprocal promises of the parties are of common occurrence in business, and bills and notes supported by such considerations have always been held valid, and the principle is as applicable to corporations as individuals.

* Davis v. McCready, 17 New York, 232.

Interest warrants or coupons, each for the sum of one hundred dollars for the annual instalments of interest, were annexed to each bond, payable at the Metropolitan Bank in the city of New York, and the concluding recital of each bond was as follows: "In witness whereof I, Eugene Criss, county judge of said County of Sac, have hereunto affixed my name and caused the seal of Sac County to be attached, at Sac City, the first day of October, A. D. one thousand eight hundred and sixty."

Title and possession of such coupons are one and inseparable, as the holder is entitled to the same privileges and immunities as an indorsee having taken a note by indorsement in the course of business before it has become due. He is not subject to any equities as between the promisor and the original payee, nor to the set-off of any debt, legal or equitable, which the latter may owe to the former.

By giving a negotiable instrument payable to bearer at a future day the maker of the instrument promises to pay the amount to any person to whom it may be transferred before the day of payment, without claiming to set-off any demand which he then has or may acquire against the promisor. Possession is plenary evidence of title "until other evidence is produced to control it."*

Where the theory that the plaintiff paid value for the instrument depends solely upon the *primâ facie* presumption arising from the possession of the instrument the defendant may, if the pleadings admit of such a defence, prove that the instrument originated in illegality or fraud, and the rule is, if he establishes such a defence, that a presumption arises that a subsequent holder gave no value for it, and it is also true that such a presumption will support a plea that the holder is a holder without consideration, unless the presumption is rebutted by the plaintiff by showing that he gave value, in which event the plaintiff is still entitled to recover.†

* Pettee *v.* Prout, 3 Gray, 503; Magee *v.* Badger, 34 New York, 248; Hoge *v.* Lansing, 35 Id. 137.

† Fitch *v.* Jones, 5 Ellis & Blackburne, 238; Smith *v.* Braine, 16 Queen's

But the defendant is not permitted to put the plaintiff to proof of the consideration he gave for the instrument unless the defendant can prove that the instrument was obtained from the defendant or from some intermediate party by undue means, as by fraud or force, or that it was lost or stolen, or that it was originally infected with illegality.*

Nothing of the kind was found by the Circuit Court, and the only evidence introduced to support any such theory was what is detailed in the fifth finding of the court, by which it appears that the county judge signed, sealed, and delivered the bonds and coupons to the contractor at Fort Dodge, in the county of Webster, in that State, and not in the county of Sac, as recited in the respective bonds; and that the contractor gave one of the bonds as a gratuity to the county judge as soon as the same were delivered to him by the contractor.

Such evidence, if it had been introduced to a jury, might possibly have had some slight tendency to prove fraud in the inception of the instruments, and it may also be conceded that the fact reported that the contractor gave one of the bonds to the county judge, would have been admissible in evidence, as a circumstance tending to prove the same theory, but if the jury did not find that the instruments were fraudulent in their inception a court of errors could not supply the omission, as the act of Congress does not give to this court power to do more than "to review the questions presented in the bills of exceptions and to determine, where the finding is special," whether the facts found are sufficient to support the judgment.

Unless the finding is special the act of Congress does not give this court jurisdiction to re-examine anything except the rulings of the court, but when the finding is special the court may also determine the question whether the facts

Bench, 244; Hall *v.* Featherstone, 3 Hurlstone & Norman, 287; Tucker *v.* Morrill, 1 Allen, 528; 2 Parsons on Bills and Notes, 438.

* Byles on Bills, 10th ed. 119; Harvey *v.* Towers, 6 Exchequer, 656; Mather *v.* Maidstone, 1 C. B., N. S. 273; Mills *v.* Barber, 1 Meeson & Welsby, 425; Percival *v.* Frampton, 2 Crompton, Meeson & Roscoe, 180.

found are sufficient to support the judgment, showing to a demonstration that the special findings of the court are regarded as governed by the same rules as the special verdict of a jury.

They must be governed by the same rules as a special verdict because they are required to be reviewed "upon a writ of error," where the suit is an action at law, and the twenty-second section of the Judiciary Act provides that there shall be no reversal of a judgment in an action at law for any error of fact in any case removed here under that section.*

Forty-five years ago this court decided that matters of fact in actions at law, brought here by writ of error, could not be submitted to the judgment of this court, and the rule adopted on that occasion has never been qualified by any subsequent decision.†

Authority to determine issues of fact brought here under that provision does not exist in this court, no matter what may be the evidence as reported in the record, as the power to try and determine the facts is, by the express terms of the act, vested in the Circuit Court and not in the Supreme Court. All this court can do is to re-examine the rulings, if any, presented in the bill of exceptions and to determine whether "the facts found," that is, the facts found by the Circuit Court, are sufficient to support the judgment rendered thereon by that court; and in making that determination the Supreme Court, acting as a court of errors, must be governed exclusively by the facts found in the Circuit Court to which the writ of error is addressed.

Fraud in the inception of the bonds and coupons is not found by the Circuit Court, and in the absence of such a finding it is settled law that the holder is presumed to be a holder for value in the usual course of business, and without notice of any equities between the antecedent parties. He is presumed to be a holder for value, and the Supreme Court,

* 1 Stat. at Large, 85.

† Barnes *v.* Williams, 11 Wheaton, 416; Shankland *v.* Washington, 5 Peters, 397; Suydam *v.* Williamson, 20 Howard, 434.

as a court of errors, cannot import into the special finding by intendment anything which the finding does not contain. Mere evidence of fraud cannot be taken into consideration by this court in a case brought here by a writ of error under that act of Congress, as the jurisdiction of the court is expressly limited to a review or re-examination of the questions whether the findings of the Circuit Court are sufficient to support the legal conclusion adopted by the Circuit Court. Such findings cannot be enlarged by intendment any more than a special verdict, and it is the very essence of a special verdict that the jury should find the facts on which the appellate court is to pronounce the judgment according to law, and the court in giving judgment is confined to the facts so found.

Repeated decisions of this court have determined that every special verdict, in order to enable the appellate court to act upon it, must find the facts and not merely state the evidence of facts, as where it states the evidence merely without stating the conclusions of the jury a court of errors cannot act upon such matters even though the evidence reported may be sufficient to justify the assumed conclusion.*

Jurisdiction to adjudicate upon evidence in a suit brought here under the twenty-second section of the Judiciary Act is not conferred upon this court, nor can this court perform the office of a jury by drawing the conclusions of fact from the evidence given at the trial, nor is it in the power of the parties to impose such a jurisdiction upon this court, as the jurisdiction and power of the court are settled and defined by the Constitution and the laws of Congress.†

Nothing short of conclusions of fact will answer the requirement of the law in a court of errors, whether the foundation of the judgment is an agreed statement, a special verdict, or a special finding under the recent act of Congress, as in the case before the court. What is required is that the findings shall contain the conclusions of fact, or, as the rule

* Suydam v. Williamson, 20 Howard, 432.

† Ewing *v.* Burnet, 11 Peters, 41; United States *v.* Laub, 12 Id. 1; Richardson *v.* Boston, 19 Howard, 263.

is stated in a recent decision of this court, "a statement of *the ultimate facts* or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest."*

Whether the foundation of the judgment be a statement of facts, a special verdict, or a special finding, the statement must be sufficient *in itself, without inferences* or comparisons or balancing of testimony or weighing evidence, to justify the application of legal principles which must determine the case.†

Where the essential facts in a special verdict are not *distinctly* found by the jury the Supreme Court will not re-examine them, but the court will award a new venire and remand the cause to the court below, as an appellate court of errors cannot intend what is not found, nor can a judgment be rendered in any case where the special verdict is defective in stating the evidence of the fact instead of the fact itself, which is the precise difficulty in the present record.‡

Sufficient facts, however, are not reported in this record to warrant a jury in finding that the bonds and coupons described in the declaration were fraudulent in their inception, but if that were so still there ought to be a new trial, that the plaintiff may have an opportunity to show that he paid value for the coupons, in which event he would be entitled to a verdict.

Full authority was vested in the county judge to execute the bonds, and the mere fact that he was temporarily in another county of the State when he signed his name to the same and affixed the seal of the county thereto is not of itself sufficient to invalidate the bonds, even if the evidence be admissible to contradict the recitals which the bonds contain, as those facts are not necessarily evidence of any fraud-

* Burr *v.* Des Moines Co., 1 Wallace, 102.

† Seward *v.* Jackson, 8 Cowen, 412; United States *v.* Adams, 6 Wallace, 111; Mumford *v.* Wardwell, Ib. 432; 3 Blackstone's Com. 378.

‡ Barnes *v.* Williams, 11 Wheaton, 416; 2 Tidd's Practice, 4th Amer. ed 896.

ulent intent. He may have been detained there by sickness or accident, and he may have executed the bonds while there to prevent delay or a breach of the agreement as to time with the contractor.

Negotiable securities of a corporation which upon their face appear to have been duly issued by the corporation and in conformity with the provisions of their charter are valid in the hands of a *bona fide* holder thereof without notice, although such securities were in point of fact issued at a place and for a purpose not authorized by the charter of the corporation.*

Unquestionably these securities are in due form and purport on their face to have been executed at Sac City in the county of Sac, and there is not a scintilla of evidence that the plaintiff, as a subsequent transferee, had the slightest knowledge that the recitals did not speak the truth.

Evidence was also offered, as appears by the fifth finding, that the contractor gave one of the bonds as a gratuity to the county judge as soon as they were delivered in execution of the contract. Such evidence might have some tendency to prove fraud in the transaction, but it is not the same thing as fraud. On the contrary, it was only a circumstantial fact from which an inference of fraud might or might not be drawn by a jury or other tribunal authorized to draw such inference from all the evidence in the case.

Inferences of fact, said Tindal, C. J., in *Tancred* v. *Christy*,† "must be drawn by the jury, and cannot be drawn by a court of errors." Ultimate facts, said Mr. Justice Miller, or propositions which the evidence is intended to establish, is what is required, and not the evidence on which those ultimate facts are supposed to rest, and he added that the finding must be sufficient in itself, *without inferences* or comparisons or balancing of testimony or weighing evidence.‡

* Supervisors *v.* Schenck, 5 Wallace, 784; Stoney *v.* Life Ins. Co., 11 Paige, 635.

† 12 Meeson & Welsby, 323.

‡ Burr *v.* Des Moines Co., 1 Wallace, 102; 1 Archbold, Practice, 11th ed. 451.

Apply those rules to the present case, and it is clear that the findings are not sufficient to support the judgment, and that there should be a new venire, giving the defendants an opportunity to show, if they can, that the bonds were fraudulent in their inception, and the plaintiff an opportunity to show, if he can, that he paid value for the coupons at the time of the transfer.

THE SAPPHIRE.

1. A foreign sovereign can bring a civil suit in the courts of the United States.
2. A claim arising by virtue of being such sovereign (such as an injury to a public ship of war) is not defeated, nor does suit therefor abate, by a change in the person of the sovereign. Such change, if necessary, may be suggested on the record.
3. If an injury to any party could be shown to arise from a continuation of the proceedings after a change in the person of the sovereign, the court in its discretion would take order to prevent such a result.
4. If a vessel at anchor in a gale could avoid a collision threatened by another vessel and does not adopt the means for doing so, she is a participant in the wrong, and must divide the loss with the other vessel.

THIS was an appeal from the Circuit Court of the United States for the District of California.

The case was one of collision between the American ship Sapphire and the French transport Euryale, which took place in the harbor of San Francisco on the morning of December 22, 1867, by which the Euryale was considerably damaged. A libel was filed in the District Court two days afterwards, in the name of the *Emperor Napoleon III*, then Emperor of the French, as owner of the Euryale, against the Sapphire. The claimants filed an answer, alleging, among other things, that the damage was occasioned by the fault of the Euryale. Depositions were taken, and the court decreed in favor of the libellant, and awarded him $15,000, the total amount claimed. The claimants appealed to the Circuit Court, which affirmed the decree. They then, in July, 1869, appealed to this court. In the summer of 1870, Na-

Argument against the right of Napoleon III.

poleon III was deposed. The case came on to be argued here February 16, 1871. Three questions were raised:

1. The right of the Emperor of France to have brought suit in our courts.

2. Whether, if rightly brought, the suit had not become abated by the deposition of the Emperor Napoleon III.

3. The question of merits; one of fact, and depending upon evidence stated towards the conclusion of the opinion (see *infra*, pp. 169, 170), where the point is considered.

Mr. C. B. Gooderich, for the appellant:

1. The sovereign of a country, the public rights or property of which have been destroyed, or injured, by a citizen of another country, cannot maintain suit against such citizen, in the judicial tribunals of the country to which such citizen belongs, to recover compensation for the injury. The remedy, and the only remedy, of the foreign sovereign is by diplomatic correspondence and arrangement between the two countries. The repose of nations, and their intercourse with each other, cannot be maintained, if sovereign rights are to be ascertained and adjudicated by a suit, in the name of the foreign sovereign, against a private citizen by whom they may have been violated.*

The case before the court illustrates the propriety of the principle and reason upon which the position is taken. The claimants cannot call upon Napoleon, to answer interrogatories, upon oath, under the admiralty rule which requires libellants to answer. The owners of the Sapphire, in their answer, *say that the collision was caused by the fault of the French transport.* Admitting this to be true, still they cannot obtain a warrant for the arrest of a vessel belonging to the navy of France,† and which is in our harbor in the charge of an officer of the French navy.

* Duke of Brunswick *v.* The King of Hanover, 6 Beavan, 1; S. C., 2 House of Lords Cases, N. S. 1; Hullet *v.* The King of Spain, 1 Dow & Clark, 169; S. C., 1 Clark & Finelley, 333; Prioleau *v.* United States and Andrew Johnson, Law Reports, 2 Equity Cases, 659.

† Brown *v.* Duchesne, 19 Howard, 183.

Argument in favor of the right of Napoleon III.

There should in every proceeding be a mutuality of remedy. In the case of specific performance, whenever from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being performed, against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.

The case of *Prioleau* v. *United States and Andrew Johnson*,* presents in its result difficulties attending a suit in the name of a foreign government, which can be surmounted only by holding that a foreign sovereign cannot maintain suit in the courts of another country, against its citizens, for the purpose of vindicating his sovereign rights. In the assertion of individual private rights he may have suit.

The cases cited say, that a foreign sovereign, by the institution of a suit, submits to the jurisdiction of the court divested of his sovereign rights; must answer to a cross-bill, upon oath; make discovery, or put some one forward, as party to the suit, who can. This shows that his sovereign rights cannot with propriety become the subject of a suit.

2. But supposing that the suit could yet be maintained if Napoleon III were now Emperor, it would seem certain that it cannot be continued, he being now deposed, and reduced to the state of a private person. The Euryale is a vessel of the French government; a government with which he has nothing whatever now to do; being banished and a fugitive.

3. [The counsel then discussed the question of fact.]

Mr. C. Cushing, contra (*a brief of Mr. Melton Andrews being submitted on the merits*), stated that suits had been maintained in Great Britain, in the name of the United States, within the last five years, in the following cases, he himself having been counsel in the same, namely: The Sumter (Admiralty), The Rappahannock (Admiralty), The Gibraltar (Admiralty), The Tallahassee (Admiralty), The Alexander (Admiralty),

* Law Reports, 2 Equity Cases, 659.

Prioleau (Chancery), Wagner (Chancery), Tait (Law), Gudgeon (Chancery), Blakely Company (Rolls), and in British America, in the case of Boyd and others (Chancery), and The Georgia (Admiralty).

Indeed the right of a government to sue in the courts of Great Britain is a right recognized from the time of Rolle's Abridgement (Temp. James I).*

The courts in England hold, indeed, that a sovereign cannot be forced into court by suit, and to that extent some of the cases cited on the other side go. But they admit that, if a foreign sovereign appears in court voluntarily as plaintiff, the defendant may then sue him by cross-bill or otherwise. That is not to deny his right to sue, but only to declare its consequences.

2. The right to sue having been in this case one in which the name of the late Emperor was used only as representing the government, survives his deposition. Substitution on the record of the name of any new government of France, is matter as of course.

3. [The counsel then discussed the question of fact.]

Mr. Justice BRADLEY delivered the opinion of the court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810.† The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing

* Title "Court de Admiralty," E. 3; S. C., 1 Rolle's Reports, 133.

† King of Spain *v.* Oliver, 2 Washington's Circuit Court, 431.

out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.*

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such enures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the

* King of Spain *v.* Hullett, 1 Dow & Clarke, 169; S. C., 1 Clarke & Finelly, 333; S. C., 2 Bligh, N. S. 31; Emperor of Brazil, 6 Adolphus & Ellis, 801; Queen of Portugal, 7 Clarke & Finelly, 466; King of Spain, 4 Russell, 225; Emperor of Austria, 3 De Gex, Fisher & Jones, 174; King of Greece, 6 Dowling's Practice Cases, 12; S. C., 1 Jurist, 944; United States, Law Reports, 2 Equity Cases, 659; Ditto, 1b. 2 Chancery Appeals, 582; Duke of Brunswick *v.* King of Hanover, 6 Beavan, 1; S. C., 2 House of Lords Cases, 1; De Haber *v.* Queen of Portugal, 17 Q. B. 169; also 2 Phillimore's International Law, part vi, chap. i; 1 Daniel's Chancery Practice, chap. ii, § ii.

Statement of the case as respects merits, in the opinion.

real and substantial ownership of the Euryale has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

The remaining question relates to the merits of the case. And on the merits of the case, as presented by the record, we think that the court below erred in imposing the whole damage upon the Sapphire. We think that the Euryale was equally in fault, and that the damage ought to be divided between them. It is not our general practice to scrutinize very carefully the weight of evidence in cases of collision, where the evidence is substantially conflicting, and where both District and Circuit Courts have concurred in a decree upon the merits. Our views upon this subject will be found quite fully expressed by Mr. Justice Clifford in the case of *The Baltimore.** But this case depends upon a narrow point, the evidence on which is in our view so decidedly adverse to the sole liability of the Sapphire that it becomes our duty to notice it.

The Euryale came to anchor in the harbor on the 14th of December, about six hundred yards from the wharf. She was of four hundred and fifty tons burden, drew thirteen feet of water, and had out fifty-six fathoms of chain, and an anchor weighing 3500 pounds. The Sapphire, of thirteen hundred tons burden, came to anchor about the 18th of December, about three hundred yards (as alleged both in the libel and answer) to the southeasterly of the Euryale, at a point farther up the harbor, and farther from the wharf. She had out about fifty fathoms of chain, and an anchor weighing 3600 to 3800 pounds, and she was heavily laden, drawing about twenty-three feet of water.

* 8 Wallace, 382.

On the night of the 21st of December it commenced to blow pretty strong from the southeast, by midnight blowing a six-knot breeze, and it kept increasing up to the time of the collision at five o'clock the next morning, when it seems to have been blowing a gale. At half-past three in the morning the tide changed from ebb to flood, the direction of flood-tide being southeasterly, directly contrary to that of the wind. And the captain of the Euryale says (and he is not contradicted) that the wind was twice as strong as the tide. The weight of the evidence is that the Sapphire, under the force of the wind, dragged her anchor and got inside of the Euryale; that is, between her and the city. At a few minutes past five the collision occurred.

The libellant insists that the Sapphire was in fault in two points: 1st, in anchoring too near the Euryale in the first instance; 2d, in not having out sufficient anchors. We think that the first charge is not sustained. Experienced pilots testified that two hundred and fifty yards distance is a good and sufficient berth in that harbor. And it is to be noted that the master of the Euryale made no complaint of too great proximity, although she and the Sapphire were lying in the same relative position for several days. On the other point, we agree with the District and Circuit Courts that the Sapphire was in fault. Had a second anchor been put out at an earlier period the collision in all probability would not have occurred. Indeed, the captain of the Sapphire gave orders to the first officer that if she was likely to start, to put the second anchor down. But it was not done till the collision itself broke the ring-stopper and let it down. A more careful watch would have led to the discovery of the vessel's having started, and would have prevented the catastrophe which ensued.

But we are also satisfied that the Euryale was not free from fault. The captain was not on board. The first officer, though on board, was not on deck from eleven o'clock until after the collision. Le Noir, the third officer, was officer of the deck that night. He was called up by the head, or chief, of the watch at three o'clock to observe that the Sapphire

was approaching nearer to them than she had been. He attributed it to her letting out more chain, and returned below, and did not come on deck again until five o'clock, a few moments before the collision, when it was too late to avoid it. The instant he came on deck he ordered done the thing that could have saved them had it been done earlier—the jib to be hoisted. It would have sheered the vessel off, and allowed the Sapphire to pass her. Such is the testimony of the libellant's own witnesses. It is the judgment of the first officer of the ship. Why was not this done before? Why was not the officer, on such a night, in such a gale, at his post? At four o'clock the man in charge of the watch saw the Sapphire approaching, and says he made a report to that effect. The first officer says that no report was made to him. But the third officer, who was officer of the deck, does not say that it was not made to him. If the fact was not communicated to the proper officer, that was in itself a fault. If it was communicated and not attended to, the case of the libellant is not bettered. But the evidence is very strong that the officer received the information. Deveaux, the head of the watch, says that he reported the fact at four o'clock; and Bioux, who had charge of the watch between four and five o'clock, says that between those hours he saw the Sapphire with the wind astern, and heading the current, coming towards the Euryale; that she continued to approach gradually, and that he reported this to Mr. Le Noir between four and five o'clock. Here, then, was a clear neglect of proper precautions for an entire hour immediately preceding the collision.

We cannot avoid the conviction that there was a want of proper care and vigilance on the part of the officers of the Euryale, and that this contributed to produce the collision which ensued. Both parties being in fault, the damages ought to be equally divided between them.

Decree of the Circuit Court REVERSED, and the cause remitted to that court with directions to enter a decree

IN CONFORMITY WITH THIS OPINION

COAL COMPANY *v.* BLATCHFORD.

1. In controversies between citizens of different States, where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, if there are several co-plaintiffs, each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued in those courts, or the jurisdiction cannot be entertained.
2. Executors and trustees suing for others' benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in the courts of the United States, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified; and if they are not personally qualified by their citizenship, the courts of the United States will not entertain jurisdiction, although the parties they represent may be qualified.
3. The cases of *Browne* v. *Strode* (5 Cranch, 303) and *McNutt* v. *Bland* (2 Howard, 10) commented upon and explained.
4. When the citizenship of the parties is averred in the bill of complaint, and it thus appears that some of the plaintiffs are disqualified by their citizenship from maintaining the suit, the defect may be taken advantage of by demurrer, or without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only when the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment.

APPEAL from the Circuit Court for the Western District of Pennsylvania. The case was this:

The eleventh section of the Judiciary Act enacts:

"That the Circuit Courts shall have original cognizance . . . of all suits of a civil nature, &c., where an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

With this provision in force, R. M. Blatchford and J. B. Newman filed their bill for the foreclosure of a mortgage executed by the Susquehanna and Wyoming Valley Railroad and Coal Company to them as trustees, to secure the payment of the company's bonds and for the sale of the mortgaged property. The mortgage conferred upon the plaintiffs the usual rights and powers of mortgagees, and contained stipulations authorizing them to use different

remedies in case default was made in the payments provided.

The bill stated that the defendant was a corporation created and organized under the laws of the State of Pennsylvania; that the plaintiff, Blatchford, was a citizen of the State of New York; that the plaintiff, Newman, was a citizen of the State of Pennsylvania, and that they as trustees sued solely for the use of Henry Beckett, an alien and a subject of the Queen of Great Britain, and Joseph Loyd, a citizen of New Jersey, both residing in New Jersey. The defendant demurred to the bill on the ground that the plaintiff Newman and the defendant corporation, being citizens of the same State, the court had not jurisdiction of the cause. The court overruled the demurrer, and an answer and replication having been filed, the case was heard on the pleadings; and a decree rendered for the plaintiffs. From this decree the appeal was taken; and the question presented for consideration here was whether the jurisdiction of the Federal court depended upon the citizenship of the trustees, who were the plaintiffs, or of the parties for whose benefit the suit was averred to have been brought.

Mr. Theodore Cuyler, in support of the jurisdiction:

The jurisdiction of the Circuit Courts, when it is founded upon the citizenship of the parties, rests upon that of the *real* and not of the *nominal* parties to the suit. This is decided in *Browne* v. *Strode*,* where this court says that the courts of the United States have jurisdiction in a case *between the citizens of the same State*, if the plaintiffs are only nominal plaintiffs, *for the use of an alien*. By a law of the State of Mississippi sheriffs were required to give bond *to the governor* for the faithful performance of their duty. "The fact that the governor and the party sued are citizens of the same State, will not," say this court, in *McNutt* v. *Bland*,† "oust the jurisdiction of the Circuit Court of the United States, *provided the party for whose use the suit is brought is a*

* 5 Cranch, 303.

† 2 Howard, 10.

citizen of another State." So again the court declares in *Wormley* v. *Wormley*,* that the court will not suffer its jurisdiction in an equity cause to be ousted by the circumstances of the joinder or non-joinder of merely formal parties, who are not entitled to sue or liable to be sued in the United States courts. In *Irvine* v. *Lowry*,† the doctrine of *Brown* v. *Strode* is strongly affirmed.

In this case nothing can be actually decreed in favor of Newman, the party referred to in the demurrer. Both he and Blatchford, his co-trustee, are, in the language of Judge Baldwin, in *Irvine* v. *Lowry*, "the mere instruments or conduits through whom the legal right of the real plaintiff could be asserted."

At all events, the objection should have been taken by plea in abatement. It is too late when coming on demurrer.

Mr. E. F. Hodges, for the appellant, contra.

Mr. Justice FIELD delivered the opinion of the court.

The eleventh section of the Judiciary Act of 1789 vests in the Circuit Courts original jurisdiction of suits of a civil nature, at law and in equity, when the matter involved exceeds, exclusive of costs, the sum or value of five hundred dollars, in three classes of cases: 1st, when the United States are plaintiffs or petitioners; 2d, when an alien is a party; and, 3d, when the suit is between a citizen of the State where the suit is brought and a citizen of another State.

In the last two classes the designation of the party, plaintiff or defendant, is in the singular number, but the designation is intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons, all of whom are entitled to sue, or are liable to be sued, in the Federal courts.‡ In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue,

* 8 Wheaton, 422. † 14 Peters, 293.

‡ Strawbridge v. Curtiss, 3 Cranch, 267.

and, if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained. Executors and trustees suing for others' benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in the Federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified. This has been repeatedly adjudged. It was so adjudged as early as 1808, in *Chappedelaine* v. *Dechenaux*,* where the complainants, though citizens of France, brought suit, one as residuary legatee and the other as administrator *de bonis non* of a testator, who had been a citizen of Georgia, against the defendant, who was a citizen of that State. Counsel, on opening the question of jurisdiction, was stopped by the court, Mr. Chief Justice Marshall observing that the impression of the court was that the case was clearly within the jurisdiction of the courts of the United States; that the plaintiffs were aliens; and, although they sued as trustees, they were entitled to sue in the Circuit Court. This ruling was followed in *Childress* v. *Emory*;† and in *Osborn* v. *The Bank of the United States*, the Chief Justice laid it down as a universal rule that, in controversies between citizens of different States, the jurisdiction of the Federal courts depended not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record.

These authorities are conclusive of the present case. The defendant is a corporation created under the laws of Pennsylvania. One of the plaintiffs, Blatchford, describes himself in the bill as a citizen of the State of New York, and the plaintiff Newman describes himself as a citizen of Pennsylvania, and they both describe themselves as trustees, who sue solely for the use of Henry Beckett, an alien and a subject of the Queen of Great Britain, and of Joseph Loyd, a citizen of New Jersey. The demurrer of the defendant raises the objection that the plaintiff, Newman, is a citizen of the

* 4 Cranch, 307. † 8 Wheaton, 669.

same State with the defendant, and that the court has in consequence no jurisdiction of the case. If there were no other parties, the suit clearly would not lie, for the eleventh section of the Judiciary Act only authorizes a suit between citizens of different States, not between citizens of the same State. And the objection, according to the construction we give to that section and to the authorities cited, is equally available when a disqualified party is joined with others who are qualified.

The cases of *Browne* v. *Strode*,* and *McNutt* v. *Bland*,† upon which the plaintiffs rely, do not aid them. In the first case the action was on a bond given by an executor for the faithful execution of his testator's will, in conformity with the statute of Virginia, which required all such bonds to be made payable to the justices of the peace of the county where administration was granted, but allowed suits to be brought upon them at the instance of any party aggrieved. The object of the action was to recover of the defendant, a citizen of Virginia, a debt due by the testator to a British subject, and was brought in the name of the justices of the peace of the county, who were also citizens of that State. It was held that the Circuit Court had jurisdiction.

In *McNutt* v. *Bland* the action was on a bond given by a sheriff of a county in Mississippi. By the law of that State sheriffs were required to execute bonds to the governor of the State and his successors, conditioned for the faithful performance of the duties of their office, which bond could be prosecuted at any time by any party injured until the whole amount of the penalty was recovered. The action in the case cited was brought in the name of the governor for the use of citizens of New York, against the defendants, who were citizens of Mississippi. Upon demurrer it was held by this court that the Circuit Court had jurisdiction.

"In this case," said the court, "there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants. As

* 5 Cranch, 303. † 2 Howard, 10.

the instrument of the State law to afford a remedy against the sheriff and his sureties, his name is on the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party; both look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law." The court then cites the case of *Browne* v. *Strode*, and states the principle, on which it was decided, to be, "that where the real and only controversy is between citizens of different States, or an alien or a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists."

There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in *McNutt* v. *Bland*, prevent the institution or prosecution of the actions or exercise any control over them. The justices of the peace in the one case, and the governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved.

In the case at bar the plaintiffs are the real prosecutors of the suit. They are parties to the mortgage contract negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual obligations of mortgagors are made. The right to use different remedies is expressly provided upon default in the payments stipulated, and the adoption of either rests at the option of the plaintiffs. So long as they do not refuse to discharge the trusts reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them.

The case is not one where a plea in abatement was re-

Statement of the case.

quired to raise the question of citizenship. Here the citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the court is apparent, and a defect of this character thus disclosed may be reached on demurrer or taken advantage of without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only where the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits.

It follows, from the views expressed, that the decree of the court below must be REVERSED, and that the cause must be remanded with directions to the court to dismiss the bill

FOR WANT OF JURISDICTION.

UNITED STATES v. O'KEEFE.

1. By the proceeding known as a "petition of right," the British government accords to citizens of the United States the right to prosecute claims against it.
2. Accordingly, British subjects, if otherwise entitled, may recover by process in our Court of Claims the proceeds of captured and abandoned property; a privilege granted only to the citizens or subjects of such foreign governments as accord to our citizens the right to prosecute claims against such governments in their courts.

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

By act of Congress of 1855,* establishing the Court of Claims, persons are authorized to sue the United States. The words of the enactment are:

"And the said court SHALL hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein."

* 10 Stat. at Large, 612.

Statement of the case.

When the court gives judgment for the claimant, the judgment is paid by the Secretary of the Treasury as of course, unless within a time specified the United States appeal to this court; Congress making always, in the annual appropriation bill, an appropriation for judgments in the Court of Claims.

By the terms of a later act (that of July 27, 1868),* the right to recover from the United States, by process in the said court, the proceeds of captured and abandoned property, is confined to "citizens or subjects of any government which accords to citizens of the United States *the right to prosecute claims against such government in its courts.*"

With these statutes in force, one O'Keefe, *a subject of Great Britain*, brought suit in the Court of Claims to recover from the United States the proceeds of certain captured and abandoned cotton. The question was, conceding his right otherwise to recover, whether Great Britain gave our citizens *the right* to prosecute claims against her, in her courts.

The Court of Claims found as a fact,

"That the government of England accords to its subjects *and aliens* the right to prosecute claims against it by petition of right given by the common law of England, and *regulated by statute* 23*d and* 24*th Victoria*, *July* 3, 1860, as to the mode of procedure; in which the petition addressed to the King is, by his fiat indorsed thereon, directed to a court of his kingdom, to hear and determine the case. The fiat, *except in a very extraordinary case*, is granted as a matter of right to any suppliant, subject *or alien*. The petition is in form addressed to the grace and favor of the King, but in practice is left at the office of the Home Secretary, and the fiat is then obtained *as a matter of official routine.*"

By the act of 23d and 24th Victoria, thus referred to in the above finding, and so made part of it, it is enacted that:

"§ 2. *The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to her Majesty for her Majesty's gracious consideration, and in order that*

* 15 Stat. at Large, 243.

her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

"§ 3. *Upon her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the solicitor to the treasury,* with an indorsement thereon in the form or to the effect in the schedule [No. 2] to this act annexed, praying for a plea or answer on behalf of her Majesty within twenty-eight days."

The solicitor mentioned in the last section is to transmit the petition to the department of the government having charge of the subject to which it relates; and proceedings are there to be taken to have the thing judicially heard. In case of failure on behalf of her Majesty, or other person called upon to plead, answer, or demur, in due time, either to such petition, or at any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the court or a judge for an order, that the petition be taken *pro confesso;* which, on proofs, &c., it may be. After judgment, it is made lawful for the commissioners of her Majesty's treasury, and they are required, to pay the amount of any moneys and costs as to which a judgment shall be given, &c., *out of any moneys in their hands for the time being applicable thereto, or which may be thereafter voted by Parliament for that purpose,* provided such petition shall relate to any public matter; and in case the same shall relate to any matter affecting her Majesty in her private capacity, the amount to which the suppliant is entitled shall be *paid to him out of such funds or moneys as her Majesty shall be graciously pleased to direct to be applied for that purpose.*

The 15th section of the act enacts that the judges of the courts of law, or three or more of the judges of the Court of Chancery, &c., shall make all such general rules and orders in their said respective courts of law and equity for regulating the pleading and practice on such petitions of right, and for the effectual execution of the act, and of its intention and object, as they may think fit, necessary, reasonable, or proper, and frame writs and forms of proceeding; "provided always," however, the statute goes on to say,

"That it shall be lawful for the Queen's most excellent Majesty, by any proclamation inserted in the London Gazette, or for either of the houses of Parliament, by any resolution passed at any time within three months next after such rules, orders, and regulations shall have been laid before Parliament, to suspend the whole or any part of such rules, orders, or regulations, and in such case the whole, or such part thereof as shall be so suspended, shall not be binding and obligatory on the said courts."

The Court of Claims, considering that this act of the British government did "accord to citizens of the United States *the right* to prosecute claims against such government in its courts," and considering further, that on the merits O'Keefe had made out his case, held as matter of law that he was entitled to judgment. The United States appealed.

Mr. Akerman, Attorney-General of the United States, and Mr. Talbot, Assistant Attorney-General, for the appellant:

The facts found are not sufficient to support the conclusion of law rested upon them. The court does not find that the government of Great Britain grants to any person an independent right to sue that government. The sovereign's permission that the suit may be brought in court, is not granted as a matter of course, but at the royal discretion, which withholds it when the sovereign deems fit. A right differing from this altogether, is that which was provided by statute of the United States establishing the Court of Claims. That statute enacts that the said court SHALL hear and determine all claims . . . which shall be suggested to it by way of petition. Suppose that this enactment should read: "The said court, *the President in each case consenting thereto*, shall hear and determine all claims founded," &c. Can there be a doubt that the privilege then granted would be different from the right now provided? Certainly not. The right to sue the United States in the Court of Claims, which is now unconditioned, would then be subject to the will of the Executive. No petitioner could obtain hearing in that court until he first obtained the consent to such hearing of the President, the supreme head of the depart-

ments, against the action of one of which he wished to obtain a judgment.

There is another respect in which the remedy by petition of right lacks an essential element of a genuine remedy by process of law. The 15th section of the act of Parliament shows that proceedings in courts upon a petition of right, are subject to the direct control of the royal authority. The sovereign may, by proclamation, suspend the rules adopted by the courts to regulate such proceedings, so that the same "shall not be binding and obligatory on the said courts." The proceeding, by petition of right, has none of the freedom of a *right* to prosecute a claim. The jurisdiction of the Court of Claims, on the other hand, is based upon a *law of the land.* The jurisdiction of an English court depends upon the arbitrary will of a ruler. The right, in return for which the American right is to be accorded, should be substantially like the American right. It is not substantially like the American right, when it depends for its exercise upon the arbitrary will of the government, no matter what may have been the general custom of the government in the exercise of such arbitrary will, no matter how liberal the actual practice in the past may have been.

Messrs. J. J. Weed and T. Wilson, with a brief of Messrs. Cooley and Clark, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is insisted that Great Britain does not accord to our citizens the right to prosecute claims against her government in her courts, because the mode of proceeding in that country for the recovery of claims against the government depends on the will of the Crown, while with us the right is absolute.

It is a familiar principle that all governments possess an immunity from suit, and it is only in a spirit of liberality, and to promote the ends of justice, that they ever allow themselves to be brought into court. If the privilege be granted at all, necessarily the regulations concerning it and

the mode of proceeding will differ, as much as the governments themselves differ.

In England, it is easy to see that the method of redressing injuries to which the Crown is a party, would be different from the remedy adopted in this country in case the United States be the aggressor, because of the principle underlying the English constitution, that the King can do no wrong. On this account, although it would not do to issue mandatory process against the sovereign, yet the law being unwilling that private rights should be invaded in the conduct of public affairs and not redressed, has furnished the subject who is thus injured with a mode of obtaining redress, which is consistent with the idea of kingly prerogative. The law allows him by petition to inform the King of the nature of his grievance, and "as the law presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved."*

This valuable privilege, secured to the subject in the time of Edward the First, is now crystallized in the common law of England. As the prayer of the petition is grantable *ex debito justitiæ*, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject.

It does not exist by virtue of any statute, nor does the recent legislation in England concerning it do more than to regulate the manner of its exercise and to confer on the petitioner the privilege, not before granted, of instituting his proceeding in any one of the superior courts of common law or equity in Westminster.

In this condition of the law regarding the petition of right, which is conceded to aliens as well as subjects, how can it be contended that the British government does not accord to citizens of the United States the right to prosecute claims against it in its courts? It is of no consequence that,

* 3 Blackstone's Commentaries, 255.

theoretically speaking, the permission of the Crown is necessary to the filing of the petition, because it is the duty of the King to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases, and this proves nothing against the existence of the right. It is easy to see that cases might arise, involving political considerations, in which it would be eminently proper for the sovereign to withhold his permission, but Congress did not legislate with reference to such a state of things. It would be a severe rule of interpretation that would exclude all British subjects from the Court of Claims, because in a few sporadic cases, from motives of state policy, the petition of right was denied. And we cannot impute to the legislature an intention that would produce such a result, in the absence of an express declaration to that effect. Evidently Congress meant to confer on the British subject the right to sue in the Court of Claims under the act relating to captured and abandoned property, if, in the ordinary course of the administration of justice in England, the law secures to the American citizen the right to prosecute his claim against the government in its courts. That the petition of right accomplishes this object, cannot admit of question. If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights. Indeed, it is not less practical and efficient than a suit in the Court of Claims. And in one important particular the two proceedings are alike, for both end with the recovery of the judgments. After they are obtained, it depends in England on the Parliament, and in this country on Congress, whether or not they shall be paid.

We all agree that O'Keefe had the right to bring his action in the Court of Claims, and the judgment of that court is therefore

AFFIRMED.

Statement of the case.

LEON *v.* GALCERAN.

1. A suit for mariners' wages *in personam* is maintainable at common law, and is within the exception of the ninth section of the Judiciary Act defining the admiralty jurisdiction.
2. It is no objection to the jurisdiction of a State court in such a suit that the process of sequestration or attachment has been used to bring the vessel on which the services were rendered under the dominion of the court, for the purpose of subjecting it to such judgment as might be rendered in the cause.
3. And a bond given to relieve the vessel so sequestered or attached is properly sued on in a State court.

GALCERAN and *two other sailors* brought each a suit *in personam*, in one of the State courts of Louisiana, against Maristany, owner of the schooner Gallego, to recover mariners' wages, and had the schooner, which was subject to a lien and "privilege" in their favor, according to the laws of Louisiana, similar in some respects to the principles of the maritime law, sequestered by the sheriff of the parish. The writ of sequestration was levied upon the schooner, which was afterwards released upon Maristany's giving a forthcoming bond, with one Leon as surety, for the return of the vessel to the sheriff on the final judgment. Judgments having been rendered by default against Maristany, the owner, *in personam*, for the amounts claimed, with the mariner's lien and privilege upon the property sequestered, a writ of *fi. fa.* was issued and demand made without effect, of the defendant in execution, by the sheriff, for the return of the property bonded. On the return of the sheriff that the property bonded could not be found, suits (the suits below) were brought in the same court by the three sailors against Leon, to enforce *in personam* against him the obligation of the forthcoming bonds, and judgments were rendered *in personam* against Leon, the surety, in their favor, for the amounts fixed by the original judgments. From the judgments thus rendered in the court below (that having been the highest court in Louisiana where a decision in the suit could be had), Leon took these writs of error.

Arguments in favor of and against the jurisdiction.

Messrs. Cushing and Drew, for the plaintiff in error.

Even if the State court could entertain a personal action against the owner, it had no jurisdiction over the vessel by conservatory writ and proceeding *in rem* to enforce a maritime lien by seizure before judgment. This is settled in *The Moses Taylor*,* and in *The Hine* v. *Trevor*.† Having no jurisdiction, therefore, over the vessel in a proceeding *in rem*, the *judicial bond* given in that court for its delivery was null and void; and the court having no authority of law, or jurisdiction over the subject-matter, the *order* of the court to bond is also an absolute nullity.

"The rule, that as one binds himself he shall remain bound, may be true in mere conventional obligations, but the effect of *judicial* bonds must be tested by the law directing them to be taken. That which is superadded must be rejected and that which is omitted supplied. So, if there be no law authorizing such a bond to be taken, or if the prerequisites required for the taking thereof be not fulfilled, the bond will not bind; there is error, and the consideration fails."‡

Galceran, by brief signed propriâ persona, contra:

The right of mariners to bring suits *in personam* against the owners of the vessel on which they have earned their wages, in the State courts, is expressly reserved to them by the Judiciary Act of 1789, under the proviso, "*saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.*"

This is the right which has been exercised in this case. The State court had jurisdiction over the subject-matter of the controversy, inasmuch as the suits were brought *in personam*, which is clearly a common law remedy, and judgments obtained personally against the owner of the vessel.

The writ of sequestration was issued as a mesne or conservatory process, to preserve intact *pendente lite*, a lien and privilege granted by law, and to secure the presence of the

* 4 Wallace, 411. † Ib. 555.

‡ 2 Hennen's Louisiana Digest, new edition, p. 1023, *verbo* 6.

vessel within the territorial jurisdiction of the State court, until after the final judgments, to be then subjected to execution and sale to satisfy said judgments; and inasmuch as the writ was only resorted to as a means of enabling the State court more effectually to exercise its lawful jurisdiction and to secure in advance the execution of valid personal judgments on transitory property pledged by law to their payment, it follows that the writ was as lawful as the suit itself, to which indeed it was a mere appendage or incident, and as the writ of *fi. fa.* issued on the personal judgments and of which the writ of sequestration was the mere precursor.

The only thing which the Federal Constitution and the Judiciary Act of 1789 seem to have taken away from the State courts is the "cognizance of civil causes of admiralty and maritime jurisdiction," when the same are sought to be brought solely *in rem* against the offending vessel itself as a party defendant to the suit, according to the peculiar forms of the proceedings *in rem* of the admiralty courts, the judgments and sales of which are binding on the whole world, *erga omnes*.

The writ of sequestration has no analogy whatever with the admiralty process, as understood and defined by writers on admiralty law.*

It cannot be pretended that vessels are not liable to seizure under executions issued upon judgments rendered by State courts. How, then, can it be contended that a writ of attachment or any other mesne or conservatory process, which only anticipates and subserves the writ of *fi. fa.*, cannot be lawfully resorted to, when sanctioned by the State law, to prevent the departure of the vessel *pendente lite*, in order to subject it afterwards under execution to the payment of the creditor's personal judgment, for which she is legally pledged?

Mr. Justice CLIFFORD delivered the opinion of the court.

Mariners in suits to recover their wages, may proceed against the owner or master of the ship *in personam*, or they

* See article 269 and following of the Louisiana Code of Practice.

may proceed *in rem* against the ship or ship and freight, at their election.

Where the suit is *in rem* against the ship or ship and freight, the original jurisdiction of the controversy is exclusive in the District Courts, as provided by the ninth section of the Judiciary Act, but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the District Court, or he may, at his election, proceed in an action at law either in the Circuit Court, if he and his debtor are citizens of different States, or in a State court as in other causes of action cognizable in the State and Federal courts exercising jurisdiction in common law cases, as provided in the eleventh section of the Judiciary Act.*

He may have an action at law in the case supposed either in the Circuit Court or in a State court, because the common law, in such a case, is competent to give him a remedy, and wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act.

Services, as mariners on board the schooner Gallego, were rendered by each of the appellees in these cases, and their claims for wages remaining unpaid, on the eighth of August, 1868, they severally brought suit *in personam* against Joseph Maristany, the sole owner of the schooner, to recover the respective amounts due to them as wages for their services as such mariners.

Claims of the kind create a lien upon the vessel under the laws of that State quite similar to the lien which arises in such cases under the maritime law. They accordingly applied to the court where the suits were returnable for writs of sequestration, and the same having been granted and placed in the hands of the sheriff for service, were levied upon the schooner as a security to respond to the judgments which the plaintiffs in the respective suits might recover

* 1 Stat. at Large, 78; The Belfast, 7 Wallace, 642, 644.

against the owner of the vessel, as the defendant in the several suits.

Such a writ when duly issued and served in such a case has substantially the same effect in the practice of the courts of that State as an attachment on mesne process in jurisdictions where a creditor is authorized to employ such a process to create a lien upon the property of his debtor as a security to respond to his judgment. Neither the writ of sequestration nor the process of attachment is a proceeding *in rem*, as known and practiced in the admiralty, nor do they bear any analogy whatever to such a proceeding, as the suit in all such cases is a suit against the owner of the property and not against the property as an offending thing, as in case where the libel is *in rem* in the Admiralty Court to enforce a maritime lien in the property.

Due notice was given of the suit to the defendant in each case, and he appeared and made defence. Pending the suits the schooner, which had previously been seized by the sheriff under the writ or writs of sequestration, was released on motion of the defendant in those suits and was delivered into his possession, he, the defendant, giving a bond to the sheriff, with surety conditioned to the effect that he would not send the property out of the jurisdiction of the court nor make any improper use of it, and that he would faithfully present the same in case such should be the decree of the court, or that he would satisfy such judgment as should be recovered in the suit.

Judgment was recovered by the plaintiff in each case against the owner of the schooner, and executions were issued on the respective judgments, and the same were placed in the hands of the sheriff. Unable to find any property of the debtor or to make the money the sheriff returned the execution unsatisfied, and the property bonded was duly demanded both of the principal obligor and of the present plaintiff in error, who was the surety in each of the forthcoming bonds.

Given, as the bonds were, on the release of the schooner, they became the substitute for the property, and the obligors

refusing to return the same or to satisfy the judgments, the respective judgment creditors instituted suits against the surety in those bonds. Service having been duly made, the defendant appeared and filed an exception to the jurisdiction of the court in each case, upon the ground that the cause of action was a matter exclusively cognizable in the District Courts of the United States, but the court overruled the exception and gave judgment for the plaintiff, whereupon the defendant sued out a writ of error in each case and removed the same into this court.

Briefly stated, the defence in the court below was that the action was founded on a bond given for the sale of the schooner seized under admiralty process in a proceeding *in rem*, over which the State court had no jurisdiction *ratione materiæ*, "and that the bond was taken *coram non judice* and is void." Enough has already been remarked to show that the theory of fact assumed in the exception is not correct, as the respective suits instituted by the mariners were suits *in personam* against the owner of the schooner and not suits *in rem* against the vessel, as assumed in the exception. Were the fact as supposed, the conclusion assumed would follow, as it is well-settled law that common law remedies are not appropriate nor competent to enforce a maritime lien by a proceeding *in rem*, and consequently that the jurisdiction conferred upon the District Courts, so far as respects that mode of proceeding, is exclusive.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the admiralty courts, but whenever a maritime lien arises the injured party may pursue his remedy by a suit *in personam* or by a proceeding *in rem* at his election. Such a party may proceed *in rem* in the admiralty, and if he elects to pursue his remedy in that mode he cannot proceed in any other form, as the jurisdiction of the admiralty courts is exclusive in respect to that mode of proceeding, but such a party is not restricted to that mode of proceeding, even in the Admiralty Court, as he may waive his lien and proceed

in personam against the owner or master of the vessel in the same jurisdiction, nor is he compelled to proceed in the admiralty at all, as he may resort to his common law remedy in the State courts, or in the Circuit Court, if he and his debtor are citizens of different States.

Suitors, by virtue of the saving clause in the ninth section of the Judiciary Act conferring jurisdiction in admiralty upon the District Courts, have the right of a common law remedy in all cases "where the common law is competent to give it," and the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property.

Attempts have been made to show that the opinion of the court in the case of *The Moses Taylor*,* and the opinion of the court in the case of *The Hine* v. *Trevor*,† are inconsistent with the views here expressed, that the court in those cases do not admit that a party in such a case can ever have a remedy in a State court, but it is clear that every such suggestion is without foundation, as plainly appears from the brief explanations given in each case by the justice who delivered the opinion of the court. Express reference is made in each of those cases to the clause in the ninth section of the Judiciary Act which gives to suitors the right of a common law remedy where the common law is competent to give it, and there is nothing in either opinion, when the language employed is properly applied to the subject-matter then under consideration, in the slightest degree inconsistent with the more elaborate exposition of the clause subsequently given in the opinion of the court in the case of *The Belfast*,‡ in which all the members of the court as then constituted concurred. Those explanations are a part of the respective opinions, and they expressly recognize the right of the suitor to his common law action and remedy by attachment as provided in the saving clause of the ninth section of the Judiciary Act.

Common law remedies are not competent to enforce a maritime lien by a proceeding *in rem*, and consequently the

* 4 Wallace, 411. † Ib. 555. ‡ 7 Wallace, 642.

original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts, which is precisely what was decided in each of the three cases to which reference is made. Authority, therefore, does not exist in a State court to hear and determine a suit *in rem*, founded upon a maritime contract in which a maritime lien arises, for the purpose of enforcing such a lien. Jurisdiction in such cases is exclusively in the District Courts, subject to appeal as provided in the acts of Congress, but such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the States to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.*

Even where a maritime lien arises the injured party, if he sees fit, may waive his lien and proceed by a libel *in personam* in the admiralty, or he may elect not to go into admiralty at all, and may resort to his common law remedy, as the plaintiffs in these cases did, in the subordinate court. They brought their suits in the State court against the owner of the schooner, as they had a right to do, and having obtained judgments against the defendant they might levy their executions upon any property belonging to him, not exempted from attachment and execution, which was situated in that jurisdiction.

Undoubtedly they might also resort to the bond given when the schooner was released, but they were not compelled to do so if the sheriff could find other property belonging to the debtor. By the return of the sheriff it appears that other property to satisfy the executions could not be found, and under those circumstances they brought these suits against the surety in those bonds, as they clearly had a right to do, whether the question is tested by the laws of Congress or the decisions of this court.

JUDGMENT AFFIRMED.

* The Belfast, 7 Wallace, 643; The St. Lawrence, 1 Black, 529.

GENERES v. CAMPBELL.

1. The act of 3d March, 1865, providing for a trial without a jury, and a review by this court of the facts found by the judge, either generally or specially, by a sufficient bill of exceptions, is general in its terms, and embraces the State of Louisiana.
2. Though the statute of Westminster requires bills of exceptions to be *sealed*, yet as neither an act of Congress nor rule of court has made this requirement here, it is sufficient if the bill be signed by the judge.
3. When the bill of exceptions does not purport to set forth all the evidence on either of the subjects to which the exception relates, and the judgment states that it was rendered for "reasons orally assigned," and these are not found in the record, there is nothing on which error can be assigned, and the judgment must be affirmed.

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

Campbell sued Generes, November, 1868, in the court below, as indorser of a promissory note, given as the price of certain slaves, and executed at New Orleans April 4, 1861, payable in that city two years after date, at the office of Abat, Generes & Co.

The petition averred that when the note became due, April 7th, 1863, there was a civil war existing in Louisiana and other States of the Union; that all intercourse between New Orleans and the place of the then residence of the plaintiff, to wit, the parish of St. Helena, was interrupted and prohibited; that the petitioner was unable to make the presentment and demand of the note at the place of payment by reason of the existing war and the prohibition and interruption of intercourse thereby created; that the petitioner could not come from said parish; that this condition continued until the month of June, 1865; that immediately after its cessation the petitioner came to New Orleans and demanded payment of the note; and that the defendant had due notice of all of the foregoing circumstances.

The defences were, that the defendant was not liable as indorser, from want of protest and notice of protest; that the note was extinguished by prescription; that being given for a purchase of slaves, it could not now give rise to an

action. Evidence was taken by both parties. The case was tried by the court under the act of March 3, 1865. This act provides that the finding of the court upon the facts—which finding may be either general or special—shall have the same effect as the verdict of a jury; that the rulings of the court in the progress of the cause may be reviewed by this court, when properly presented by a bill of exceptions, and that where the finding is special this review may extend to the sufficiency of the facts found to support the judgment.

"For reasons orally assigned by the court," it was adjudged that the defendant's plea of prescription be overruled, and that there be judgment in favor of the plaintiff for the sum of $6300.

The defendant filed a bill of exceptions thus:

Be it known, that on the trial of this cause the counsel for defendant *argued* as follows, viz.:

The evidence shows that the plaintiff was doing business in New Orleans, and the note sued upon was dated at New Orleans, April 4th, 1861, payable at the counting-house of Abat, Generes & Co., in New Orleans, two years after its date, to the order of and indorsed by the defendant. The suit was brought on the 18th November, 1868, and the petition alleges that at the maturity of the note, to wit, the 7th April, 1863, there was a civil war existing in Louisiana and other States of the Union, and that all intercourse between New Orleans and the place of the then residence of the plaintiff, viz., the parish of St. Helena, in Louisiana, was interrupted, and that the petitioner was wholly unable to make a presentment and demand of said note. But the evidence shows that said plaintiff left New Orleans in the fall of 1861; he was doing business here; was a regular negro-trader in the city of New Orleans; had obtained possession of the note sued on, and in the course of his business; when, in the fall of 1861, the city of New Orleans being then besieged by the Federal fleet, the plaintiff closed his business and went to his summer residence on the line of the New Orleans and Jackson Railroad, in the parish of St. Helena. The said counsel argued, upon this statement of facts, that the impossibility to make a presentment of the note at its maturity was not what was

Statement of the case.

termed by the law *vis major*, but a matter entirely of plaintiff's own seeking. The plaintiff, being shown to have spontaneously so circumstanced himself as to bring upon him the alleged impossibility to act at the maturity of the note, is not entitled to the favor of the doctrine *contra non valentem*, &c. Furthermore, the said counsel argued, that long before the maturity of said note New Orleans was in possession of the government, and, in virtue of the President's proclamation inviting all loyal citizens to return, the plaintiff might have been here attending to his business, if he thought proper. It is shown by the evidence that the road from the plaintiff's house, in St. Helena, to the city of Baton Rouge, was only about fifty miles; that there were a great many people who made it a trade, throughout the duration of the war, to travel between Baton Rouge and the plantations on the river coast, to and from the Jackson railroad stations. A witness says, and he is not contradicted, "I can't say when Baton Rouge was occupied by the Federals, but I believe it was in 1862. The communications between Baton Rouge and the stations on the Jackson railroad were very frequent." Said counsel urged that, as the plaintiff had gone into the lines of the opposite side, he might have returned, and consequently the alleged *vis major* had no existence in fact.

But the court overruled the pleas of prescription and of want of protest urged by the defendant.

The said counsel furthermore urged that the plaintiff failed to make a presentment and a protest of the note so soon as freedom of action had been resumed throughout the country. It is in proof that the plaintiff returned to New Orleans in the summer of 1865, to wit, on the 12th of June, 1865, which was about two years and two months after his note had matured. No protest from that time was ever made. The present suit was filed on the 18th of November, 1868. The said counsel argued that under the circumstances shown, even if there had been hitherto a room for the plea of *vis major*, there was a clear laches in not protesting in reasonable time.

But this plea was likewise overruled by the court.

The said counsel argued, that under the provisions of the Civil Code of Louisiana, viz., art. 3420, 3487, 2512, 3488, *et seq.*, that the rule *contra non valentem* will not apply except in cases expressly mentioned, and that these exceptions do not apply to the present cause.

But this plea was likewise overruled by the court.

And lastly, the said counsel argued that the consideration of the note was proved in the evidence to be for slaves sold to the maker, and was therefore illegal. The testimony on this point is as follows: "The note, the whole of it, was given to Campbell for a purchase of slaves by my brother from him. Campbell, at that time, was a slave-dealer in New Orleans. He was a regular slave-dealer, and had his depot on Baronne Street, in New Orleans, and was engaged in that business for several years."

The said counsel argued that such actions could not be held upon general principles, and particularly were prohibited by art. 128 of the constitution of Louisiana, as follows: "Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State."

But this plea was also overruled by the court.

To all which rulings the counsel for said defendant respectfully excepts, and presents this his bill of exceptions for the signature of his honor the judge.

Signed, E. H. DURELL, *Judge.*

The reader will observe that this bill, though signed, was not sealed.

Messrs. J. A. and D. G. Campbell, prior to arguing the matter of merits, objected to the bill of exceptions as not sealed. In *Pomeroy's Lessee* v. *Bank of Indiana*,* Clifford, J., delivering the opinion of the court, is very learned and emphatic on this point. He says:

"Bills of exception in the Federal courts are required to be drawn as at the common law under the statute of Westminster II; and, *of course, they must be sealed* by the judge as therein required. *Justiciarii apponant* sigilla *sua*, is the express command of the statute; and so is the commentary of Lord Coke."

Independent of which the frame of the bill, they argued, was defective. There was no statement of facts nor proper presentation of the questions at issue.

Mr. Louis Janin, *contra*, stated, as respected the matter of a seal, that in his very long professional practice in the

* 1 Wallace, 599.

Recapitulation of the case in the opinion of the court.

State of Louisiana he had rarely if ever seen on a bill of exceptions the signature of the judge accompanied by one of those scratches of the pen that by courtesy are called "seals;" a meaningless matter in the law of Louisiana, or of the other civil law countries. What was said in *Pomeroy's Lessee* v. *Bank of Indiana* was *dictum*.

He submitted that the record presented a good enough bill of exceptions. It combined a concise and clear statement of the facts with a clear explanation of the points of law which the counsel desired the court to rule. If in a few words it differed from the usual style employed in such documents, that might be attributed to the circumstance that English was probably not the mother tongue of the counsel who drew it up. But its meaning cannot be misunderstood. It had the substantial merit of bringing the whole case, both the facts and the law, before the court. Even the statement of fact in the bill of exceptions commenced with the words, "*It is in evidence, or in proof.*"

The counsel on both sides then argued the merits of the case, and especially the question of the right to enforce by suit notes given on the sale of slaves prior to emancipation, *Mr. P. Phillips*, counsel in another case involving this point, being heard along with the Messrs. Campbell in support of the right.

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 Louisiana. The plaintiff in error was the defendant in the court below. The action was brought against him as the indorser of a promissory note. The parties, pursuant to the act of Congress of March 3d, 1865, filed a written stipulation waiving a jury, and the cause was tried by the court. A judgment was rendered against the defendant. He took a bill of exceptions. No facts were specially found by the court.

The act referred to provides that the finding of the court upon the facts—which finding may be either general or special—shall have the same effect as the verdict of a jury;

that the rulings of the court in the progress of the cause may be reviewed by this court, when properly presented by a bill of exceptions, and that where the finding is special this review may extend to the sufficiency of the facts found to support the judgment. This act is general in its terms as to the scope of its operation, and embraces the District of Louisiana.

There being no special finding of the facts, the inquiry as to their sufficiency to support the judgment does not arise.

Our examination of the case must be confined to the bill of exceptions.

It is objected that this instrument was not sealed, as well as signed, by the judge. The statute of Westminster prescribes a seal, but no act of Congress and no rule of this court contains such a requirement. Though usual in the practice of the courts of the United States, it is not necessary. The signature of the judge is sufficient.

It does not appear that the defendant objected to any of the testimony which was admitted. No question relating to the subject is presented for our consideration.

It is shown by the bill of exceptions that sundry legal propositions were argued by the counsel of Generes and were overruled by the court. The entire bill is a series of interlocutions between the counsel and the court, in which the evidence is referred to; but the bill does not purport to give all the evidence upon either of the subjects to which the exceptions relate.

In the entry of the judgment it is stated that it is given "for reasons orally assigned by the court." What those reasons were is not set forth. Whether they were that there was other evidence besides that referred to in the bill of exceptions, or that the court drew different conclusions from those deduced by the counsel, or that the court entertained different legal views from those upon which the counsel insisted, is not disclosed. Had the facts been specially found no such doubt could have existed. The case

would then have presented clearly all the propositions to which the attention of the court below was called, and in relation to which it is insisted errors were committed.

For any error in relation to the facts a writ of error is not the proper remedy. If all the testimony given were set out in the record we could not examine it with the view of determining whether it is sufficient to support the judgment.* If sufficient, the remedy was a motion for a new trial, or by having the facts specially found. In the latter case a writ of error would lie to correct the wrong, if any were done. According to the statute the finding of the court stands as would the general verdict of a jury, and has the same effect. The plaintiff in error is in the same position as if he were here complaining that the jury erred in overruling the points and propositions which were argued to them in his behalf, and had found for the plaintiff when they should have found for the defendant. The evidence was closed, and the court was sitting in place of a jury when his exceptions were taken.

We are all of opinion that the propositions upon which the plaintiff in error insists are not so presented that we can take cognizance of them.

JUDGMENT AFFIRMED.

CASE *v.* TERRELL.

1. No judgment for the payment of money can be rendered against the United States in any court other than the Court of Claims without a special act of Congress conferring jurisdiction.
2. A receiver of a National bank, whose operations have been suspended by the Comptroller of the Currency for causes specified in the National Currency Act, in no sense represents the government, and cannot subject it to the jurisdiction of the courts.
3. Nor can the Comptroller of the Currency, though he be sued himself and submit to it, subject the government to the jurisdiction of the ordinary courts to determine the conflicting claims of the United States and other creditors in the funds of such a bank.

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* Pennock *v.* Dialogue, 2 Peters, 1.

Statement of the case.

4. It is doubtful if he has a right to submit himself to the control of the courts in the discharge of duties specially intrusted to him by law.

APPEAL from the Circuit Court for the District of Louisiana.

Terrell and others, creditors of the First National Bank of New Orleans, which had failed and been put into liquidation, brought this bill in chancery in the court below against one Case, who on the failure of the bank had been appointed receiver of it, Hurlburd, Comptroller of the Currency of the United States, and one May and Beauregard, citizens of Louisiana.

The prayer for relief was that a certain admitted debt due to the United States from the bank be ascertained; that they (*the United States*) be charged with certain sums, and required to account for them, and that a writ of injunction issue restraining the comptroller from making a dividend of the funds of the bank until this account be adjusted.

Case and Hurlburd, the receiver and comptroller as aforesaid, appeared and answered; the answer of the latter being put in for him by the district attorney, and neither signed by Hurlburd nor sworn to by him. In it,

"He submits, on behalf of the United States, to the decision of the court the claims of the United States *to priority of payment* over the allowed claims of the creditors of said bank that are not disputed."

The final decree, besides making a general order on the comptroller to distribute the funds of the bank in his hands ratably among its creditors as the law directs, *decreed against the United States* in favor of the creditors of the bank for the sum of $206,039.91, and that no claim of the United States shall have any priority in the distribution of the funds of the bank except as to the bonds pledged to secure its circulation.

From this decree, Case, the receiver, and Hurlburd, the comptroller, appealed.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for Hurlburd, Comptroller; Mr. Case, propriâ persona, by brief.

Messrs. J. A. Campbell and H. B. Kelly, contra.

Mr. Justice MILLER delivered the opinion of the court.

It is seen, from the bill and decree, that while the United States was not made a defendant, and while it is well settled that it could not be sued in the court below, the only relief prayed by the bill was relief against the United States, and the only decree rendered which was not merely formal was a decree against the United States for over $200,000, and a further decree barring the right to assert her priority as a creditor of the bank in the distribution of its funds.

It is strange that in any court professing to administer the English system of equitable jurisprudence such a decree could be rendered against any one not made a party to the suit, and who had in no manner appeared in the case; and it is almost incredible that in any Federal court of this Union, except the Court of Claims, a moneyed judgment could be rendered against the United States.

The contrary has been so repeatedly decided that it is a waste of time to reargue the proposition, which will be found fully asserted in the recent cases of *De Groot* v. *United States*,* *United States* v. *Eckford*,† *The Siren*,‡ and *The Davis*.§ In the case of *United States* v. *Eckford* it was held that, although in a suit in which the United States was plaintiff, a set-off could be pleaded and allowed, yet no judgment could be rendered for a balance found to be due to the defendant by the verdict of the jury, either in the Circuit Court, where the case was tried, or in the Court of Claims, where suit had been brought on the verdict. It is true, that in the two last cases cited above it was held that in a case in admiralty, where the *res* was rightfully before the court, and was taken into possession by its officer without the necessity of suit or process against the United States, it could be subjected to certain maritime liens, though the ownership was in the government. But in these cases the government came into court of its own volition to assert its claim to the property,

* 5 Wallace, 419. † 6 Id. 484. ‡ 7 Id. 152. § 10 Id. 15.

and could only do so on condition of recognizing the superior rights of others.

We are quite at a loss to know on what principle the jurisdiction in the present case is asserted, for the briefs for the appellees are devoted wholly to the merits of the controversy. But we must suppose that it is claimed on the ground that the receiver and comptroller, both of whom appeared and answered the bill, represent the United States, and can subject the government to the jurisdiction of the court.

As to the receiver, the claim, if any such be made, is not worth serious consideration. He represents the bank, its stockholders, its creditors, and does not in any sense represent the government.

Nor can such authority be conceded to the Comptroller of the Currency. It may very well admit of doubt whether it is within his competency to submit himself, in the exercise of duties specially confided to him by acts of Congress, to the control of the courts, and especially of those which can assert no such jurisdiction by reason of their territorial limits. We are not called upon here to decide this question. But we have no hesitation in holding that however he may submit himself to the jurisdiction of those courts, and consent to be governed in his official action by their decrees, so far as they affect rights of parties who may come into court and be impleaded in the same suit, he has no authority to subject the United States to such jurisdiction, and to submit the rights of the government to litigation in any court, without some provision of law authorizing him to do so.

There is no analogy in the case before us to suits against officers of the customs or of the internal revenue to recover for illegal assessments or collections of taxes or duties, for they are suits against the officer for a tort or for money had and received, and when a judgment is rendered against him the government protects him by paying it, because the money was received for its use. But this is by virtue of statute, and the mode of proceeding is pointed out and well defined, and the remedy is limited to cases where the mode is strictly pursued.

In the answer filed for the comptroller in this case he says, or is made to say (for it is neither signed nor sworn to by him), that he "submits, on behalf of the United States, to the decision of the court the claims of the United States to priority of payment over the alleged claims of the creditors of said bank that are not disputed."

We have already said that the comptroller has no power to subject the United States to such jurisdiction.

But he here seems only to submit the question of the government's claim to priority of payment, while the court not only decides against this priority, but renders a further decree requiring repayment of money had and received from the bank, and the payment of money which the United States is supposed to have assumed to pay in a contract with private parties not before the court. If the government is liable to the bank or its receiver or its creditors, for either of these claims, it would seem that it would be, in the first case, on an implied contract for money had and received, and in the second, on the express contract to pay as alleged. When such liability is denied, or payment is refused, the Court of Claims has jurisdiction, and no other court has. The United States cannot be subjected to litigation growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy.

But it is useless to pursue the matter further. The only substantial relief asked by the bill, or granted by the decree, is against the United States. The manifest purpose of the proceeding was to subject the government to a tribunal which could rightfully exercise no jurisdiction in the premises. It was no party to the suit, nor did any party represent its interests who had authority to bind it.

DECREE REVERSED, with directions to the court below to

DISMISS THE BILL.

INSURANCE COMPANY *v.* THE TREASURER.

1. A State statute directed a county treasurer to give certificates of indebtedness to any bank in the county for the amount of tax paid on its investments in the public indebtedness of the United States, "which taxes have been judicially decided to have been illegally imposed and collected." To an alternative mandamus to compel the treasurer to give such certificates, he answered that it had *not been judicially decided* that the particular tax was illegal. A peremptory mandamus was refused by the State court. *Held*, that, although this court had since decided the tax to be illegal, yet, as it did not appear by the record that the State court passed on the legality or illegality of the tax, but might have decided the case on the construction of the State statute, this court had no jurisdiction to review the decision of the State court.
2. In order to give this court jurisdiction by writ of error under the 25th section of the Judiciary Act, it must appear, by the record, that a Federal question was raised.

THIS case was brought before the court upon a writ of error to the Supreme Court of the State of New York, under the 25th section of the Judiciary Act, or rather under the act of February 5, 1867, which has been substituted for that section.

The Phœnix Insurance Company, the plaintiff in error, was a corporation of the State of New York, doing business in Brooklyn, King's County, and was assessed for the taxes of 1863 and 1864 upon its investments in United States "certificates of indebtedness," issued pursuant to the acts of Congress, passed March 1st and 17th, 1862.* These taxes amounted to over $3000, and were paid into the county treasurer's office of King's County in December, 1863, and November, 1864. They were levied under an act of the legislature of the State of New York, passed April 29, 1863, making all banks and other moneyed corporations liable to taxation on a valuation equal to the amount of their capital stock paid in and their surplus earnings (less 10 per cent. of such surplus). Under this law authority was claimed by the State officers to include in that valuation the invest-

* 12 Stat. at Large, 352, 370.

Statement of the case.

ments made by those companies in the public indebtedness of the United States, including the National bonds or stocks, certificates of indebtedness, and all other National securities. This tax, so far as it was laid on a valuation which embraced the government *bonds or stocks*, was confessedly adjudged illegal by this court in the *Bank Tax Case*, reported in 2d Wallace, 200, which was decided in the Term of December, 1864. And as the insurance company assumed, it was also adjudged illegal in that same case, so far as it was laid on a valuation which embraced certificates of indebtedness; a position which they attempted to maintain by a reference to the original records of this court, in certain of the numerous cases which came up, and were adjudged under the general title above given of *The Bank Tax Cases*. But if the cases then brought before the court embraced certificates of indebtedness, as well as government bonds, the attention of the court was not specially directed to that fact, and the opinion does not notice it.

After this decision the legislature of New York, on the 6th of April, 1866, passed an act, as follows:

"SECTION 1. The board of supervisors of the County of Kings are authorized and directed to levy and collect by tax . . . the several sums paid in said county, by the several incorporated companies in said county, in the years 1863 and 1864, for taxes assessed on their investments in the public indebtedness of the United States, with interest thereon, *and which taxes have been judicially decided to have been illegally imposed and collected.*"

A subsequent section directed the treasurer to refund those taxes to said companies out of said moneys, requiring him, in the meantime, to issue county certificates of indebtedness for the respective amounts on receiving a certified copy of the act.

The Phœnix Insurance Company, on the 12th of May, 1866, demanded of the county treasurer (who had received a copy of the act) the county certificate of indebtedness to which, it was supposed, the act entitled it. The treasurer declined to give it. Thereupon the company sued out of

the State Supreme Court an alternative mandamus, calling on the treasurer to show cause for such refusal. His answer to the writ was that taxes on "certificates of indebtedness" *had not been judicially decided to have been illegally imposed or collected*, and, therefore, that the case was not within the purview of the act, and he had no authority to issue the certificates. He did not attempt to deny that the tax was illegal, but insisted that it had not been judicially declared illegal. This answer was filed December 3, 1866, before the decision of this court in the case of *The Banks* v. *The Mayor*,* in which the court did without doubt, decide that the "certificates of indebtedness" of the government were exempt from taxation.

Upon this alternative mandamus and the answer thereto the case went up to the Supreme Court and the Court of Appeals, which concurred in refusing to issue a peremptory mandamus. The opinion of the Supreme Court, of which counsel exhibited a short report, placed the case upon the ground that these "certificates of indebtedness" were not exempt from taxation. But no opinion of the Court of Appeals appeared in any record of the case.

The purpose of the writ of error was to have a review of the judgment by the Court of Appeals.

Mr. A. C. Bradley, with whom was Mr. E. C. Benedict, argued for the plaintiff in error:

A question of jurisdiction may suggest itself. But the case made in the writ called in question the validity of the authority of the State of New York to tax the United States certificates of the indebtedness owned by the insurance company—whereby those taxes were illegally collected, and therefore the company was entitled to have, and it was the county treasurer's duty to issue the certificates of county debt demanded. The State court, by denying the peremptory writ and giving absolute judgment for the defendant, in effect decided that the authority so questioned was valid

* 7 Wallace, 16.

and the tax legal, and that the company was not entitled to receive, nor was the treasurer bound to issue to it the certificates demanded. The case is not distinguishable from *The Bank Tax Cases*, or from *The Banks* v. *The Mayor*. The alleged invalidity in those cases was the same as in this, and the decision by the State court is as emphatic in favor of the validity in the present case as in the others.

In truth, the record in the present case presents no question, but whether certificates of indebtedness were or were not illegally taxed in the State of New York in the years 1863 and 1864; the affirmative being maintained by the insurance company, denied by the county treasurer, and the State courts having decided in favor of the latter.

2. As to the merits. That certificates of indebtedness issued by the government of the United States were not taxable, was adjudged by this court, as we apprehend, in both of the cases cited above, certainly in the last. The matter is, therefore, *res adjudicata*.

3. The case made by the insurance company was within the spirit and letter of the act of April 6, 1866, passed by the State of New York.

The last clause of the first section, "*and which taxes have been judicially decided to have been illegally imposed and collected*," is not a condition or proviso, limiting the extent of the earlier provisions, but is a statement of the reason why the act was passed, and why restitution had become a duty. Such matter is ordinarily either omitted or else inserted in the preamble; but it has here crept on to the end of a section, and appears as an adjectitious thought. It has no effect there which it would not have had if it had been inserted in a preamble or omitted altogether. In either case it would have been the duty of the board of supervisors to raise by tax the sums paid by the incorporated companies for taxes on their investments in the public indebtedness of the United States, and it would have been the county treasurer's duty, out of the moneys so raised, to refund those taxes, and as a voucher for the claim, to issue the certificates. Those taxes would have been equally illegal whether there had or had not been

any judicial decision on the subject, or whether such decision, having been in fact made, it was mentioned in the preamble, or in the body of the act, or not mentioned at all. In the statute relative to the city of New York, passed at the same session, no judicial decision was referred to. But this court, in *The Banks* v. *The Mayor*, held the taxes, nevertheless, illegal.

4. The return stated no defence to the writ.

Mr. P. H. Crooke, opposing counsel, was stopped by the court.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

The Supreme Court and the Court of Appeals concurred in refusing to issue a peremptory mandamus. The opinion of the Supreme Court is before us, and places the case upon the ground that these "certificates of indebtedness" were not exempt from taxation. But no opinion of the Court of Appeals seems to have been written. At least none appears; and we cannot tell on what ground that court placed its decision. And, indeed, it ought to appear from the record, and not from any opinion of the court, that a Federal question was raised in order to give this court jurisdiction of the case. For all that appears from the record, the decision of the Court of Appeals may have been passed simply on its construction of the State statute. It may have been placed on the ground that that statute only applied to cases "in which the taxes had been judicially decided to have been illegally imposed and collected," and that up to that time the taxation of certificates of indebtedness had not been judicially decided to be illegal. If it were placed on this ground—and, so far as the record goes, *non constat* that it was not—that would have been a decision of the case upon a construction of the State act of 1866. Now, we have repeatedly held that the construction of State statutes belongs to the State courts, and is not a Federal question which we can revise in a writ of error to a State court. It is true, if the State court gives such a construction to a State statute

as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said Constitution or laws, then a Federal question is raised, and we can review the decision on the point of the validity of the statute. But in this case it does not appear what construction was given to the State statute. All that can certainly be gathered from the record is, that the State statute, in the opinion of the Court of Appeals, did not oblige the county treasurer to issue county certificates to the plaintiffs in this particular case. For aught that appears, the court may have regarded the statute as only furnishing a remedy for cases expressly adjudicated upon. Such a construction of the statute is not without plausibility, and was insisted upon by the treasurer in his answer to the alternative writ.

Had the State courts decided against the *right* of the plaintiffs, and had it so appeared by the record, the jurisdiction of this court would have attached to the case. But that does not appear. It only appears that they have decided that the plaintiff has no *remedy* under this statute. Its right to recover the illegal tax is undisputed, but not to recover it in this way.

We are referred to the case of *The Banks* v. *The Mayor*,* where it was decided, under another act of the New York legislature, that a mandamus in a somewhat similar case was wrongfully withheld. It appears that a few days after the passage of the act relating to King's County, on which the present case arises, the legislature passed a like act relating to the city of New York, but without the descriptive words, relating to a judicial decision, which are relied on in this case. A mandamus to compel the issue of city bonds for the amount of the illegal taxes was applied for and refused. But that case was placed, both in the State courts and in this court, solely on the ground of the legality of the tax. No question respecting the construction of the State

* 7 Wallace, 16.

statute was raised, either by the record or the argument. Being satisfied, in that case, that the tax was illegal, and that the mandamus ought to have been granted, we felt bound to reverse the judgment of the State court; and nothing in the present opinion is intended to call that decision in question.

The writ of error in this case must be

DISMISSED.

INSURANCE COMPANY v. FRANCIS.

An averment in a declaration that the defendant is a corporation created by an act of the legislature of the State of New York, located in Aberdeen, Mississippi, and doing business there under the laws of the State, is not an averment that the defendant is a citizen of Mississippi.

THIS cause came up by writ of error to the District Court of the United States for the Southern District of Mississippi.

It came into the said District Court in this wise:

One Francis had brought suit in the Circuit Court of Monroe County, Mississippi, November Term, 1866, against "The Germania Fire Insurance Company of the City of New York," upon a policy of insurance. The company appeared to the suit, and demurred to the declaration. The plaintiff, at August Term, 1867, petitioned for the removal of the cause "to the Circuit Court of the United States, held in or at Oxford, in the Northern District" of Mississippi, averring that the petitioner, the plaintiff, is a citizen of Illinois, and "*that said defendant is a corporation with agents and officers in said State of Mississippi here residing and transacting the business of insurance for which said company was incorporated.*" And thereupon the judge of the Circuit Court of Monroe County ordered "that the case be removed from that court to the District Court of the United States for the Northern District of Mississippi, as prayed for."

This removal was made in pursuance of a statute of March

2, 1867,* which authorizes a transfer from a State court to a Federal court of suits in any State court "in which there is a controversy between *a citizen of the State in which the suit is brought and a citizen of another State*," if the plaintiff "will make and file in such State court an affidavit, stating that he has reason to and does believe that from prejudice or local influence, he will not be able to obtain justice in such State court."

The defendant, then in the District Court, moved to strike the case from the docket for want of jurisdiction.

The motion was overruled, with leave to the plaintiff to file a new declaration in the District Court.

At June Term, 1868, of said District Court, the plaintiff filed a declaration against the defendant as "*The Germania Fire Insurance Company, a corporation located in the City of Aberdeen and State of Mississippi, by its agent, H. D. Spratt, summoned, &c.*"

The defendant then pleaded to the jurisdiction of the District Court, because at the time the suit was brought, and at the time it was removed, the plaintiff was a citizen of the State of Illinois, and the defendant was a corporation created by the laws of New York, having its domicile and principal place of business in New York.

The plaintiff demurred, whereupon it was "ordered by the court that the demurrer of said plaintiff be extended to the declaration, and as to said declaration and the averments as to the said citizenship of said defendant that said demurrer be sustained and the plaintiff have leave to amend the declaration."

Whereupon the plaintiff amended and declared against the defendant as "The Germania Fire Insurance Company, a corporation created by an act of the legislature of the State of New York, located in the city of Aberdeen and State of Mississippi, by its agent H. D. Spratt, and doing business in said city of Aberdeen and State of Mississippi, in the district aforesaid, under and by virtue of the laws of the State of Mississippi, summoned, &c."

* 14 Stat. at Large, 558.

Argument against the jurisdiction.

To this the defendant filed four pleas to the jurisdiction, among them one because the plaintiff was a citizen of Illinois, and the defendant a citizen of New York.

The plaintiff demurred. The demurrer to the plea just mentioned was sustained, and the defendant excepted. The demurrer was not sustained as to one of the other pleas, and the defendant filed pleas to the merits, and the case was tried, and the plaintiff got verdict and judgment. The statutes of Mississippi, it appeared, authorized the location of foreign insurance companies in the State, upon certain conditions specified in it, one of which was that they would engage in writing to be suable there.*

Messrs. Carlisle and McPherson, for the plaintiff in error:

The question is here raised, whether the Federal court acquired jurisdiction by the transfer ordered and made, as hereinbefore stated.

The act of Congress under which the cause was removed from the State to the Federal court authorizes the transfer only when one party is a citizen of the State in which the suit is brought, and the other party is a citizen of a different State.

In the case at bar neither in the declaration nor elsewhere was it made to appear that either party was a citizen of Mississippi. On the contrary, the declaration filed in the District Court averred in express terms that the plaintiff was a citizen of Illinois, and also averred in legal effect that the defendant was a citizen of New York, by averring it was a corporation created by an act of the legislature of New York.†

The averment that the defendant was doing business in Mississippi, under the laws of that State, can have no effect upon the jurisdiction of the Federal courts, which under the Constitution and statutes of the United States depends solely on citizenship.

* See Revised Statutes of Mississippi, Chapter on Insurance.

† Ohio and Mississippi Railroad Co. *v.* Wheeler, 1 Black, 286; Louisville Railroad Co. *v.* Letson, 2 Howard, 497.

Argument in support of the jurisdiction below.

Mr. T. A. Hendricks, with a brief of Messrs. R. N. Bishop and D. W. Voorhees, contra:

The jurisdictional facts in this case are contained in the averments in the petition and declaration. These averments are substantially the same, and present the question whether a corporation with agents and officers residing, located, and doing business in a State under and by virtue of its laws, and suable there, is a citizen of that State, under the act of March 2d, 1867?

Neither of the cases cited on the other side establish a test or criterion for the *locality* of the citizenship of a corporation, nor do they describe a similar state of facts to those existing in this case. In this case the insurance company was "created by the State of New York, and has its principal place of business there." But, in point of fact, it was so created not to exist in New York alone—not, in the words used in Letson's case, "to perform its functions under the authority of that State," but expressly "to perform its functions" in other States, and under their authority, wherever it could get permission. This latter purpose is quite consistent with the former in the case of an insurance company, and at this day the purpose of most insurance companies is to do business in other States. Three of the very latest insurance cases before this court show this,* and the court will judicially notice the fact.

In pursuance of its charter, this company had gone into Mississippi as follows:

(*a*) In the words of the petition, and not denied by the plea, it was "a corporation with agents and officers in said State of Mississippi, here residing and transacting the business of insurance, *for which said company was incorporated.*" This, as disclosed by the record, and as inferable from the nature of an insurance company, was no temporary or incomplete residence. It had there just the same residence for the same length of time and the same character of resi-

* Paul *v.* Virginia, 8 Wallace, 168; Ducat *v.* Chicago, 10 Id. 410; Liverpool Insurance Co. *v.* Massachusetts, Ib. 566.

dence, "by its officers and agents," that it had in New York. Lord Coke says:

"Every corporation and body politic residing in any country siding, city, or town, corporate or having lands or tenements in any shire, *qua propriis manibus et sumptibus possident et habent*, are said to be inhabitants within the purview of the statute."

This corporation had, therefore, the quality of RESIDENCE in Mississippi.

(*b*) It had removed and assumed an existence there "under and by virtue of the laws of Mississippi." That a corporation can have no legal existence beyond the limits of the State incorporating it has been repeatedly decided, and is true if there is no further action on the part of other States. But when a corporation created by one State for the express purpose of transacting its business in such other States as will admit it, by the express statutory permission and authority of another State, sends its officers and agents into such State, or appoints citizens and residents of that State its officers and agents, accepts the laws and conditions annexed by that State to its admission—one of which is that it shall be suable there, and to which it in writing expressly consents, which is what the statutes of Mississippi exact, and which we may assume is what was done by this company—then it would seem both in fact and in law to exist in that State and to be a citizen there for the purpose of suing and being sued, which is the only quality or attribute of citizenship a corporation has ever been held to possess. It has, therefore, the capacity of being sued in that State.

(*c*) It had, of course, assented to the conditions in the statutes of Mississippi, and in return it was authorized and empowered by Mississippi to do business there. Its power "to perform its functions" in the State of Mississippi—to exist there—are, therefore, derived from that State, and it has to that extent at least its INCORPORATION (by which is meant its grant of power) from the State of Mississippi and has that quality of citizenship there.

The act of March 2d, 1867, under which the suit was

removed is a remedial statute and should be liberally construed. It was not intended as a jurisdictional statute; it merely provides for a change of venue on account of "prejudice or local influence." Viewed in this light, the word citizen may be construed as used in the same sense as "resident," "inhabitant," or "person," all of which words have repeatedly been held to include corporations. This view does not violate the constitutional provision which gives jurisdiction "between citizens of different States;" for, under the argument of the plaintiff in error itself, the plaintiff and defendant are citizens of different States.

But in respect to all the pleas to the jurisdiction no question remains, the defendant having filed the general issue and other pleas to the merits, and having gone to trial upon them. In *De Sobry* v. *Nicholson*,* this court held that, "the objection to jurisdiction upon the ground of citizenship, in actions at law can only be made by a plea in abatement. After the general issue it is too late. It cannot be raised at the trial upon the merits," and that the general issue waives the plea in abatement.

Mr. Justice DAVIS delivered the opinion of the court.

The act of Congress of March 2, 1867, which allows a plaintiff, under certain circumstances, to remove his cause from the State to the Federal court, authorizes the transfer only when one party is a citizen of the State in which the suit is brought and the other party is a citizen of a different State. In this case, while it appears on the face of the declaration that the plaintiff is a citizen of Illinois, it does not appear that the defendant is a citizen of Mississippi. This being so, it is not necessary to notice the subsequent pleadings, because if the court can see, on the case made by the plaintiff in his declaration, that the District Court acquired no jurisdiction over it, it is bound to reverse the judgment and direct the District Court to remand the cause to the State court in which it was instituted.†

* 3 Wallace, 420.

† Pollard & Pickett v. Dwight et al., 4 Cranch, 429.

If the declaration had averred the citizenship of the parties to be as the law requires it, the jurisdiction of the District Court would have attached, and we would be required to look further into the record in order to ascertain whether the defendant had raised the question of jurisdiction in season to avail itself of the objection in this court.*

The declaration avers that the plaintiff in error (the defendant in the court below) is a corporation created by an act of the legislature of the State of New York, located in Aberdeen, Mississippi, and doing business there under the laws of the State. This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created.† Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there.

As, therefore, the declaration is, on its face, bad in not showing that one of the parties to the suit was a citizen of Mississippi, it follows that the transfer of the cause was not authorized by law, and that the District Court had no jurisdiction to try it.

JUDGMENT OF THE DISTRICT COURT REVERSED, and the cause remanded to that court with instructions to transmit it to the Circuit Court of Monroe County for further proceedings

IN CONFORMITY TO LAW AND JUSTICE.

* De Sobry *v.* Nicholson, 3 Wallace, 423.

† Ohio and Mississippi Railroad Co. *v.* Wheeler, 1 Black, 286; Louisville Railroad Co. *v.* Letson, 2 Howard, 497.

Syllabus.

MAY v. LE CLAIRE.

1. Contracts entered into in a spirit of peace and for the settlement of unadjusted demands on both sides, will not, where executed by persons of intelligence, and under circumstances which indicate caution and a knowledge of what is done, be readily questioned in equity as in fact not fair; but, on the contrary, will be protected and enforced.
2. A purchaser by a deed of quit-claim simply, is not regarded as a *bonâ fide* purchaser without notice.
3. The knowledge of counsel in a particular transaction is notice to his client. And though the client may not actively participate in accomplishing a fraud, yet if he be looking on at what is done by another who is his confidential agent and professional adviser generally, and has been his agent and adviser in regard to a particular matter now called in question as fraudulently accomplished, and if, when all is accomplished the client take and profit by the fruits of all that has been done, he will be taken as affected with knowledge possessed by such his agent.
4. When a trustee abuses his trust—converting trust property into new forms —the *cestui que trust* has the option to take the original or the substituted property, and if either has passed into the hands of a *bonâ fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the right of the *cestui que trust*. The principle is that the wrong-doer shall derive no benefit from his wrong, and that profits which he makes belong to the *cestui que trust*. Equity will accordingly so mould and apply the remedy as to give them to him; giving, however, the party thus charged proper credits for money which *he* has paid, but which, if things had all been regularly transacted, the *cestui que trust* should have paid; making proper allowances for rent, interest, &c., and putting things on such a footing as under the circumstances does the most complete justice.
5. Hence, where a person who had improperly possessed himself of land and of personal securities which a complainant was entitled to have, and confused the personal securities by changing the form of them, died, leaving a will by which he devised his estate to numerous persons not within the jurisdiction of the court, but appointing executors who were within it, the court being unable to reach the devisees, and so to decree a conveyance of the land itself, gave a money decree against the executors embracing the value of the land, and also the sum realized from the securities. On the other hand, it gave the party thus charged credit for the payment of certain sums which *he* had paid in discharge of the complainant's debts, and which, if all things had been done properly, the complainant would have paid; making also proper allowances for rent, interest, &c., and directing an account before a master.

Statement of the case.

6. Although, where there has been a contract for the acquisition of specific pieces of property, which is now incapable of performance, parties may sometimes be remitted from a court of equity to a court of law, yet they are never so remitted where the remedy at law is not as effectual and complete as a chancellor can make it.

THIS was an appeal from a decree of the Circuit Court of the United States for Iowa, dismissing a bill filed by one James May against the executors of Antoine Le Claire and others.

The evidence in the case showed apparently the following leading facts, viz.:

1st. That May and Le Claire had, previously to February 4th, 1859, been associated in business, and that they then had mutual claims against each other.

2d. That on that day May made to Le Claire a written offer of compromise, which, about two months afterward (March 8th, 1859), was accepted by Le Claire, in writing, which acceptance was witnessed by his attorney and counsel, John P. Cook, Esquire.

3d. That this compromise consisted in a settlement and cancellation of their mutual claims by an exchange of property *of unequal values*, whereby May was to be paid his claim against Le Claire by the difference in value between the property which he was to give and the value of the property which he was to receive, that difference being about $27,000.

That the particulars of the compromise were these:

May was to release all claims against Le Claire and convey to him, free from incumbrance, a farm called Rosebank, within twelve months; Le Claire was to release all claims against May and convey to him his interest as mortgagee in certain lands which he had sold to one Adrian H. Davenport; that is to say, to assign to May five notes of $5000 each, with the mortgage given by Davenport, and also to convey certain island and river-shore lands owned by Le Claire, below the town of Le Claire, in Iowa.

That at the date of the agreement the Rosebank farm, which May agreed to convey to Le Claire freed from its incumbrances, was incumbered—

Statement of the case.

(*a*) By a mortgage to one Kettell, for $3125, payable November 1st, 1867.

(*b*) By a trust-deed to one Powers, to secure $6550, payable May 1st, 1858; overdue, therefore, like the mortgage, at the time of the compromise; this deed containing a clause authorizing Powers, the trustee, to sell the land if the amount was not paid at maturity.

4th. That in part performance of the contract on his part, May gave to Le Claire immediate possession of Rosebank, through his nephew and business agent (one Joseph A. Le Claire), and also executed and deposited with Cook & Sargent, bankers at Davenport, a deed, conveying the farm to Le Claire.

5th. That in part performance of the contract on his part, Antoine Le Claire also assigned to May the notes, mortgage, and collaterals of Davenport, and deposited them with Cook & Sargent. That this assignment was declared to be "in consideration of an amicable and full settlement between said May and myself of all matters of difference heretofore existing between us;" and was witnessed by Cook, already named, the attorney and counsel of Le Claire.

6th. That Le Claire, at the time and for a short time afterwards, was satisfied with the compromise, but afterwards became dissatisfied.

7th. That in the meantime, to wit, April 12th, 1859, Davenport offered in writing to make a settlement with May by paying him *part* of the liabilities of him, the said Davenport, which had already been assigned by Le Claire to May. That this offer was not accepted.

8th. That in the spring of 1859, May, in further execution of the contract on his part, entered into negotiations at Pittsburg, where he had once lived and was known, by which he was to obtain the means to enable him to remove the incumbrances now overdue upon the Rosebank farm; that the means thus provided were approved bankers' drafts. That while he was absent at Pittsburg Rosebank was advertised by Powers, the trustee, for sale, *on the 20th of July*, under the deed of trust, Cook urging this on and stating to

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Powers that the "compromise" was very unjust to Le Claire, who, he said, on the facts, truly understood, had owed May nothing on a settlement; that he, Cook, wished to break it up; feeling himself bound as the friend and attorney of Le Claire to protect him as far as possible against so gross an imposition. That on the day, and near the hour advertised for the sale of the farm, May and a Pittsburg friend called on Powers to make arrangements to pay the said incumbrances, and were informed by Powers that the drafts would be satisfactory and that the sale should not take place. That while May was thus in conversation with Powers, a note written by Cook was handed to Powers, who then stated that he was called out on other business, excused himself and went away; that on Powers thus withdrawing from the company of May, he joined Cook, and the two went to the court-house (without May's knowledge) and there sold the farm under the trust-deed at auction, subject to the mortgage, striking it off for $5000 to one Dessaint; a deed having been already prepared by Cook with a blank for the purchaser's name; now filled in with Dessaint's.

That previous to this sale, Cook had told Powers that he need not have bidders there; that it was unnecessary to bid against him (Cook) or Dessaint, who Cook said desired to purchase, and that if the property was struck off to either for less than the amount due both on the trust-deed (now $7400) and mortgage, he, Cook, would see both the debts paid in full. That the balance due on the trust-deed was thus afterwards paid, and that on the 28th of July, 1859, Powers sold to Cook the mortgage of May to Kettle, taking in payment Cook's own note for $3255.87, indorsed by Le Claire and one Ebenezer Cook, and that Cook sued May on the note in the Circuit Court of the United States for the Northern District of Illinois and obtained a judgment. That May complained to Powers, and to others, of the mode in which Rosebank had been sold, and that Powers promised to annul the sale on payment of the debt, and did in fact apparently make some efforts to induce Dessaint to give up

his bargain; which, however, Dessaint refused to do, saying that he had bought the farm to keep.

9th. That the said farm was now held by one Joseph A. Le Claire, *Junior*, by an apparently free and unincumbered title, as the assignee of Antoine Le Claire.

10th. That this had been accomplished by what the complainant called "a circle of conveyances," as 1st, a *quit claim* deed from Dessaint to Ebenezer Cook, dated July 27th, 1859; 2d, from Ebenezer Cook to one *George* L. Davenport, by deed dated December 16th, 1859; 3d, from George Davenport to Joseph A. Le Claire, *Junior*, by deed with special warranty only, dated January 23d, 1862, made in pursuance of a written contract of Antoine Le Claire with his nephew, Joseph A. Le Claire, Senior, dated November 21st, 1860, and in consideration of the payment, by the estate of Antoine, of two notes of E. Cook for $10,000, the payment of which was assumed, or alleged to have been assumed, by the said George Davenport.

This, in the complainant's language, "completed one circle of operations."

11th. That, on the other hand, Antoine Le Claire, on the 9th of March, 1860,—*one day* after the expiration of the twelve months within which May, by the terms of the compromise with Le Claire had bound himself to convey Rosebank unincumbered to him, Le Claire, offering to convey what he, on his part, was bound to convey, made a curt written demand on May for "a good and sufficient deed for Rosebank, and that all the incumbrances, judgments, and liens of every character be removed from said Rosebank, so that I get a clear, perfect, and unincumbered title therefor." [Rosebank, as the reader will remember, having at this time been sold some months before under the deed of trust.] That shortly, to wit, seventeen days afterwards, to wit, on the 27th of March, 1860, Le Claire entered into a written contract with Adrian Davenport, by which it was agreed that he, Le Claire, should resume title and possession of the property sold and conveyed by him to the said Davenport; that the notes given by Davenport should be

cancelled and he discharged from liability, and that, as a means to this end, Le Claire should proceed to foreclose his mortgage and buy in the property at the sale under the mortgage; it being agreed that if at the foreclosure sale the property should sell for more than the amount of the notes and interest, Davenport was to have the overplus; if for less, the notes were to be given up; that if Le Claire should acquire the title as proposed, he agreed to confirm the sales of certain parts of the property which Davenport had made; a map being referred to as showing the premises so sold. That Davenport assigned to Le Claire and placed in his hands notes of his vendees for part of the purchase-money, amounting, with interest, to about $16,000; Davenport stipulating that there were no offsets against any of the notes, except two of trifling amount, which were mentioned, and that if it should prove there were any valid offsets, he would pay the amount to Le Claire, and Le Claire agreeing that, upon the payment to him of the balance of the purchase-money by Davenport's vendees, he would convey to those holding title bonds from Davenport.

That, accordingly, in April, 1860, proceedings to foreclose the mortgage were instituted by the said John P. Cook; that to facilitate the proceedings, Davenport admitted the allegations of the bill, and a decree *pro confesso* was entered against him and subsequently liquidated at the sum of $41,708.32. That all this was done without notice to May; and that, under this decree, the mortgaged property was subsequently sold and conveyed by the sheriff to Le Claire for $20,000.

This completed what the counsel styled "the other circle of operations."

Thus by what the complainant styled "the joint effect of two parallel series of operations," Le Claire became possessed of both of the equivalents agreed to be exchanged between him and May, by the compromise of March 8, 1859, in payment of the admitted debt of about $27,000 from him to May; that is to say: Le Claire had paid his debt to May in full; he, or his relative, Le Claire, Junior, held Rosebank

by a free and unincumbered title; he still held the island and river-shore property below the town of Le Claire; and had got back all the Davenport property, which he agreed to convey, and did convey, to May.

May, on the contrary, had nothing as the result of the whole operations except a suit in chancery.

Still the great question of the case remained, whether what had occurred was the result, on the one hand, of Le Claire's superior attention and vigilance, within proper limits, and of an unembarrassed condition as to money; and on the other, of May's supineness, bad arrangements, and embarrassed condition; whether the combination of persons was purely accidental, or whether there was contrivance and design; in other words, whether each part was so connected with the whole, that, taken together, they furnished clear evidence that the result was contemplated from an early date, and that after the compromise had been made in good faith, and partially executed by both parties, the plan to break it up was conceived as an afterthought by J. P. Cook, a lawyer, and executed under his direction by Powers, Dessaint, Ebenezer Cook, the two Davenports, and the two J. A. De Claires, Senior and Junior?

Especially arose the question, how far had *Antoine Le Claire*, who the case rather showed was an old and perhaps illiterate half-breed Frenchman—part Indian—an interpreter in early times, who had grown rich by the growth of a large town, on land granted to him many years since by the bounty of the United States—how far had *he* originated the scheme, if it was one; or, if not originating it at all, how far was he to be affected by what was done by J. P. Cook and the others, assuming that what they did was a fraudulent scheme successfully carried out?

This was a matter depending largely on the *relations* subsisting between J. P. Cook, old Le Claire, and the various parties already named.

As to that matter, it appeared,

1. That Powers, the trustee who sold Rosebank, was a banker; that the firm of J. Cook & Sargent, which was com-

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posed of the *lawyer J. P. Cook*, his brother, Ebenezer Cook, and one Sargent, were also bankers; that Powers was in the habit of borrowing money from Cook & Sargent, and so under obligations to them pecuniarily.

2. That *Antoine Le Claire* had no lineal descendants; and that Joseph Le Claire was his nephew and business agent, occupied the same office with him, and, under the permission of Antoine Le Claire, was in the actual occupation of Rosebank, after the agreement of May and Le Claire, receiving the rents.

3. That George Davenport and Antoine Le Claire were intimate in their business relations, indorsers for each other, and both of them indorsers for Cook & Sargent to a considerable amount, and also indorsers for Ebenezer Cook.

4. That Dessaint was a Frenchman and an intimate friend of Le Claire, and in the habit of lending him money.

5. That Ebenezer Cook, Antoine Le Claire, George Davenport, and Dessaint, were associated in business as stockholders and directors of the State Bank.

6. That Cook & Sargent having failed, George Davenport was one of their assignees, and that Antoine Le Claire had appointed him by will one of his executors.

7. That John P. Cook was the agent and attorney of Le Claire; selected by him as the custodian of the papers relating to the matter in controversy; the subscribing witness, as already said, to the compromise agreement of March 8, 1859, and to the assignment to May, dated March 10, 1859; drew and dated the agreement, March 27, 1860, between Le Claire and Adrian Davenport, in regard to the Davenport mortgage; was one of the attorneys who, on the 24th day of April, 1860, commenced the action for Le Claire to foreclose the Davenport mortgage, and procured the decree; as attorney, held the collaterals until after Le Claire's death, and delivered them to the executor; as attorney of Le Claire, attended the sale of the mortgaged property under the decree in favor of *Le Claire* v. *Davenport*, and after Le Claire, the nephew, bid off the property, that he directed the deed to be made to Antoine Le Claire.

8. That at the time, 16th of December, 1860, when *Ebenezer* Cook (as already mentioned on p. 221), conveyed Rosebank to George Davenport, the judgment in favor of *John P.* Cook against May (mentioned on p. 220), was assigned to Davenport; the consideration, according to the statement of Davenport, having been that he agreed to pay a bill and note of Ebenezer Cook, on which he and Le Claire were liable as accommodation indorsers, both bill and note dated 20th October, 1859; maturing, respectively, three and four months from date, and both renewed by Davenport and Le Claire, Davenport admitting that Le Claire had paid at that time $1000 upon one of them.

9. That, in these money operations, the relations between some of the parties named, if not all, were quite confidential. For example: before their failure, Cook & Sargent, on the 21st of August, 1858, "in consideration of $70,000, executed to Antoine Le Claire a mortgage upon a large quantity of real estate." The mortgage recites that Le Claire had accepted various sums for their accommodation, and proposed to indorse and accept other and further sums for them, with the view of enabling them to borrow money on such acceptances. The condition was that they should pay these liabilities, and save Le Claire harmless. On the 22d of December, 1859, after their failure, they sold and assigned to Le Claire the banking-house of Cook, Sargent, Downey & Co., in Iowa City, and all the assets of that firm. The deed recites that Le Claire "had made and executed certain notes, drafts, and acceptances for the accommodation of Cook & Sargent, and was now liable to pay the same." No condition or trust was expressed. On the 12th of December, 1860, in consideration of $15,000, they assigned to George Davenport their interest in the assets of the firm of Cook, Sargent & Parker, of Florence, in the Territory of Nebraska, and covenanted that the interest thus transferred was worth $15,000. On the 2d of July, 1861, by a deed, absolute on its face, Le Claire conveyed to Dessaint a large number of tracts of land. An article of agreement, dated the 15th of the same month, recited, however, that the prior convey-

ance had been made in trust to enable Dessaint to sell and pay a debt of Le Claire to the Merchants' Branch of the State Bank of Iowa, and Dessaint stipulated that, after accomplishing this object and paying the expenses of the trust, he would reconvey to Le Claire.

Le Claire himself being dead, leaving a life interest in his estate to his wife, Marguerite (who with the George Davenport already named were found to be executors), and the remainder to collaterals, residents some abroad, May now filed this bill against both the executors, the two Cooks, Dessaint, Sargent, and such collateral devisees of Le Claire as he could reach (these being about half of those inheriting under the will), praying for specific performance, or alternatively for compensation in money, by way of substitution; and for such other relief as the court might see fit.

The case came here on a printed transcript of 612 pages; a confused mass of papers and record entries thrown together without regard to order or method. It appeared to have been originally made up by the clerk of the court below, or his deputy, for transmission to this court in twelve separate parcels, not inappropriately described in the clerk's certificate as a "bundle of papers." Many of the exhibits, together with certain accounts produced or identified by the witnesses, appeared in the transcript entirely separated from the depositions of which they formed a part, and without anything to connect them therewith.

Notwithstanding the character of the transcript the case was presented with clearness, and was elaborately argued by *Mr. J. A. Wills, for the appellant, and by Messrs. M. H. Carpenter and J. N. Rogers, contra:* Mr. Wills contending that it was not necessary to go into minute particular facts to infer fraud; that the case was one which it was impossible to view, even in outline, as a whole, without seeing a fraudulent contrivance—argued that the fraud being unkennelled, equity would certainly, in some form, grant relief; that if specific performance could not, in the complications which, with time, deaths, transfers of property, absence of parties

defendant, &c., be decreed, and if the fraudulent proceedings should thus of necessity have to stand, then that taking things, though fraudulent, on the base where the parties had put them, Le Claire's estate could be followed for the fruits of them in the hands of his executors, and so made to respond.

The counsel of the other side, asserting that the proof of fraud consisted only in an artful collocation of facts, and denying that fraud was proved, and especially that there was anything to show that, in this matter, Cook had acted as agent of Le Claire—so as to charge Le Claire's estate with a fraud committed *by attorney*—contended that the bill was defective in not bringing in all Le Claire's devisees; that specific performance was almost confessedly impracticable, and that if compensation in money was asked, the case became a claim for damages, and a case therefore for law, not for equity; that even if a case for equity, May had lost his rights by supineness in not paying off the overdue trust-deed incumbrance, time being of the essence of his contract to Powers under the trust-deed; but that if this was not so, and if he still asserted rights in Rosebank, he should file a bill to redeem.

Mr. Justice SWAYNE delivered the opinion of the court

This is an appeal in equity from the decree of the Circuit Court of the United States for the District of Iowa. The record is in a singularly defective and confused condition. But the case has been fully argued upon the merits by the counsel upon both sides, and finding enough in the record, upon looking carefully through it, to enable us to dispose of the controversy between the parties satisfactorily to ourselves without further delay, we do not deem it necessary to reverse and remand the cause, as we might otherwise do, in order that the record may be corrected and by a further appeal be brought up in the proper condition.*

* Levy *v.* Arredondo and others, 12 Peters, 218; Mandeville *v.* Burt, 8 Id. 256; Harrison *v.* Nixon, 9 Id. 483; Finley *v.* Linn, 6 Cranch, 252; Lewis *v.* Darling, 16 Howard, 1.

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The case involves no legal question of any doubt or difficulty. Its determination depends wholly upon the facts. The testimony and exhibits are very voluminous. It could serve no useful purpose elaborately to analyze them and set forth the results in this opinion. We shall content ourselves with doing little more than to announce our conclusions. We shall not deem it necessary to give in detail the evidence upon which they are founded or the processes of argument by which they are supported.

The proposition submitted by May, of the 4th of February, 1859, its acceptance on the 8th of March following by Le Claire, since deceased, and the assent of May on the same day, constituted a valid contract. There was a large difference in value between what Le Claire was to give and what he was to receive. But we have found in the record nothing which raises a doubt that the arrangement was fair and just to both parties. Le Claire was a man of property and of experience in business. The date of the proposition and of its acceptance show that he took ample time to consider the subject. The acceptance was witnessed by John P. Cook, his counsel, and one of the defendants in this case. According to the face of the proposition it involved the settlement of unadjusted demands on both sides. It was made in a spirit of peace and compromise, and was accepted in a corresponding spirit. It is the duty of a court of equity to uphold such an agreement, to protect and enforce the rights of both parties under it, and to carry it out as far as the facts, which subsequently occurred, and the settled principles of our jurisprudence, will permit.

On the 10th of March Le Claire, in pursuance of the contract, indorsed to May the notes and mortgage of Adrian H. Davenport, and placed them, with certain collaterals which he had received from Davenport to secure the payment of the notes, in the hands of Cook & Sargent. At the same time May, also, in pursuance of the contract, executed to Le Claire a deed conveying the Rosebank farm, and placed it in the hands of the same depositaries. Cook & Sargent were to deliver to each party what the other had deposited

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for him as soon as May should have removed all incumbrances from the farm, which he was bound by the contract to do within a year from its date. When Le Claire made his deposit he took from Cook & Sargent a receipt stating its object and terms.

The firm of Cook & Sargent consisted of John P. Cook, Ebenezer Cook, his brother, and George B. Sargent. They were bankers. On the 21st of August, 1858, they executed to Le Claire a mortgage upon a large quantity of real estate. The consideration stated is $70,000. The mortgage recites that Le Claire had "accepted various sums for the accommodation of Cook & Sargent, and proposes to indorse and accept other and further sums for them, with the view of enabling them to borrow money on such acceptances." The condition was that they should pay these liabilities and save Le Claire harmless. Cook & Sargent subsequently failed. On the 22d of December, 1859, they sold and assigned to Le Claire the banking-house of Cook, Sargent, Downey & Co., in Iowa City, and all the assets, real, personal, and mixed, of that firm. The consideration stated is, that Le Claire "has made and executed certain notes, drafts, and acceptances for the accommodation of Cook & Sargent, and is now liable to pay the same." No condition or trust is expressed. On the 12th of December, 1860, Cook & Sargent assigned to the defendant, George L. Davenport, their interest in the assets of the firm of Cook, Sargent & Parker, of Florence, in the Territory of Nebraska, and covenanted that the interest thus transferred was worth the sum of $15,000. On the 2d of July, 1861, by a deed, absolute on its face, Le Claire conveyed to the defendant, Louis C. Dessaint, a large number of tracts of land. On the 15th of the same month an article of agreement was entered into between them, wherein it was recited that the prior conveyance had been made in trust to enable Dessaint to sell and pay a debt of Le Claire to the Merchants' Branch of the State Bank of Iowa, and Dessaint stipulated that, after accomplishing this object and paying the expenses of the trust, he would reconvey the residue of the lands to Le Claire. These transactions show

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the relations of the parties at the dates of their occurrence, and in that view are not without importance in this case.

The incumbrances on the Rosebank farm consisted of a deed of trust, executed by May to Charles Powers, since deceased, to secure a note of May to W. H. & A. T. Strippel, for $6550, payable, with interest, on the 1st of May, 1858; a mortgage to George F. Kettle to secure a note of May to him of $3125, with interest after due, payable on the 10th of November, 1857; and the liens of several judgments not necessary to be particularly specified. At the time the contract between May and Le Claire was entered into, Le Claire was well satisfied with the arrangement. Subsequently he became dissatisfied. John P. Cook afterwards denounced it, and declared that, as the friend and attorney of Le Claire, he considered it his duty "to protect Le Claire as far as possible against so gross an imposition." The most obvious and effectual way to accomplish that object was to sell the Rosebank farm under the deed of trust, and thus put it out of the power of May to fulfil his part of the contract, and this purpose those concerned in the scheme proceeded to carry out.

In this connection we lay out of view the important declarations of Powers, the trustee, as incompetent against the other parties.

On the 12th of April, 1859, Adrian H. Davenport, regarding May as the owner of his notes and mortgage, which Le Claire had assigned and deposited, as before stated, submitted to May a written offer for a settlement and compromise, which May declined.

On the 28th of July, 1859, John P. Cook bought from Powers the note and mortgage of May to Kettle, and gave in payment his note for $3255.87, indorsed by Le Claire and Ebenezer Cook. Cook, the assignee, sued May on the note in the Circuit Court of the United States for the Northern District of Illinois and recovered a judgment.

The day after May executed his deed to Le Claire he delivered possession of the Rosebank farm to Le Claire, and

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has not since had possession or any control over the premises, or any benefit from them.

On the 20th of July, 1859, Powers, the trustee, sold this property under the deed of trust. The evidence leaves no doubt in our minds that his conduct in making the sale was grossly fraudulent. He knew that May had arranged for funds more than sufficient to discharge the debt due to his *cestui que trusts*, which were ready to be paid over as soon as May could deliver to the lender, as security, two of the notes of Davenport. We are satisfied that, with ordinary candor and fair dealing on the part of Powers and the other parties implicated, the debt secured by the deed of trust could have been speedily discharged, and all the other incumbrances removed.

But such was not the object of Le Claire and his associates, of whom Powers was clearly one. In the midst of the negotiation between May and Powers at the banking-house of Powers, with funds present, and ready to be paid over by May on the condition stated, Powers, upon the receipt of a note from John P. Cook, left abruptly, under a false pretence, and made a surreptitious sale of the property to Dessaint for $5000. A deed was ready, with a blank for the name of the purchaser, and the blank was at once filled with the name of Dessaint. The consideration mentioned in the deed is the amount of his bid. The promises of Powers to annul the sale upon the payment of the debt were obviously false, and intended only to deceive and quiet May for the time being. Measures were taken to keep away competing bidders. The amount of the debt was $7400. Dessaint testifies that he bought under an agreement with Powers that he should pay the full amount of the debt; that Powers should procure to be assigned to him May's liability for the difference between the amount of the debt and the amount at which the property should be struck off to him; and that he paid the full amount of the debt to Powers. This feature of the transaction requires no comment. Whether Dessaint was privy to the other frauds of Powers or not, a subject upon which we can hardly entertain a doubt,

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he took the title in trust for May, and subject to all May's rights, as they were before the sale and conveyance were made by Powers.*

On the 27th of July, 1859, Dessaint conveyed by a deed of quit-claim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quit-claim deed, he cannot be regarded as a *bonâ fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey.† Cook occupied the same relations to the property as Dessaint, his grantor.

Cook, on the 16th of December, 1860, conveyed to George L. Davenport. At the same time the judgment in favor of John P. Cook against May was assigned to the grantee. The conveyance and assignment were one transaction. The consideration, according to the testimony of Davenport, was that he agreed to pay a bill and note of Ebenezer Cook, on which he and Le Claire were liable as accommodation parties. The bill and note were dated on the 20th of October, 1859. They matured, respectively, three and four months from date. Both were renewed by Davenport and Le Claire. Davenport admits in his testimony that Le Claire paid at that time $1000 upon one of them.

On the 21st of November, 1860, Antoine Le Claire bound himself by a written contract to convey the property to his nephew, Joseph Le Claire. In this condition of things Antoine Le Claire died. He left no lineal heirs. By his will he gave the usufruct of his entire estate to his wife, the defendant, Maguerite Le Claire, during her life. The residue he gave, in undivided shares, to a large number of devisees. Only a few of them are parties to this litigation. Davenport testifies that Antoine Le Claire made a parol contract with him for the Rosebank farm, and, as the consideration of the purchase, agreed to pay the liabilities of Ebenezer Cook,

* Jeremy's Equity, 95. † Oliver *v.* Piatt and others, 3 Howard, 363.

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which Davenport had assumed, and that his estate has since paid them.

On the 23d of January, 1862, Davenport conveyed the premises to Joseph A. Le Claire, Jr., pursuant to directions from Joseph A. Le Claire, the vendee of Antoine Le Claire. The deed contains a covenant against all persons claiming under the grantor, and none other.

John P. Cook was the counsel of Le Claire in all his transactions touching this property. He knew everything that was done, and his knowledge was notice to his client.* But we are well satisfied, by the facts and circumstances developed in the evidence, that both he and George L. Davenport had full actual knowledge. After a careful consideration of the subject, we have found ourselves unable to come to any other conclusion. The testimony of Davenport is guarded and peculiar. Twice during his examination he declined to answer a question until time was allowed him to advise with his counsel. The proofs establish the frauds alleged in the bill.†

If Le Claire did not actively participate in the frauds perpetrated upon May, he coolly looked on, and deliberately gathered what others had sown for him. The result was that he acquired the Rosebank farm unincumbered, and put it out of the power of May to comply with his contract.

The year within which May was to convey the farm to Le Claire, unincumbered, expired on the 8th of March, 1860. On the next day Le Claire gave a formal written notice to May whereby he tendered performance on his part, and demanded performance by May. May was unable to fulfil, and Le Claire knew it. The notice was an idle ceremony.

The liabilities of Adrian H. Davenport, which Le Claire had assigned to May and deposited with Cook & Sargent, consisted of five notes of $7000 each, making an aggregate of $35,000, with interest. Le Claire withdrew them from the depositaries and cancelled the assignment. On the 27th

* Le Neve *v.* Le Neve, 2 White's Leading Cases in Equity, 23.

† Clark's Executors *v.* Van Reimsdyk, 9 Cranch, 153; S. C., 1 Gallison, 630; Jackson *v.* King, 4 Cowen, 220; Butler *v.* Haskell, 4 Dessausure, 684.

of March he entered into a new contract with Davenport, whereby it was stipulated as follows: Le Claire was to resume the title and possession of the property for which the notes and the mortgage securing them were given, provided the property could be relieved from the liens upon it, of judgments against Davenport. To this end Le Claire was to foreclose the mortgage, and if at the foreclosure sale the property should sell for more than the amount of the notes and interest, Davenport was to have the overplus. If it should bring less the notes were to be released. If Le Claire should acquire the title as proposed, he agreed to confirm the sales, which Davenport represented he had made, of certain portions of the property. A map was referred to as showing the premises so sold. Davenport assigned to Le Claire, and placed in his hands notes of the vendees for part of the purchase-money, amounting, with interest, to about $16,000. Davenport stipulated that there were no offsets against any of the notes, except two of trifling amount, which were mentioned, and that if it should prove there were any valid offsets, he would pay the amount to Le Claire. Le Claire agreed that, upon the payment to him of the balance of the purchase-money by Davenport's vendees, he would convey to those holding title-bonds from Davenport.

This agreement was carried out. A suit of foreclosure was instituted by Le Claire, and the property was sold to him for less than the amount due on the notes of Davenport. The property was thus divested of all incumbrances, and his original title was restored to him. John P. Cook, as the counsel of Le Claire, conducted the legal proceedings. May was not consulted about the agreement between Le Claire and Davenport, and was not a party to the foreclosure suit.

It has been suggested by the counsel for the appellees that if May still has the rights which he claims in respect to the Rosebank farm, he should file a bill to redeem, and having succeeded, should tender a conveyance of the property in performance of his contract with Le Claire instead

of prosecuting this suit. That course is unnecessary. Le Claire has already had the ownership, control, and full benefit of the property, and disposed of it as he thought proper. A court of equity can do no more than he did for himself. It is not pretended that there was any incumbrance upon the property when it was conveyed by George L. Davenport to Joseph A. Le Claire, Jr.

Upon the execution of the contract between May and Le Claire, Le Claire became in equity the owner of the farm. The effect of the element of fraud in his subsequent conduct is, that he must be regarded as constructively the trustee and agent of May in removing the incumbrances and acquiring the ownership and beneficial control of the property. Hence his estate is entitled to be credited with his advances and interest instead of the aggregate of the debts extinguished, and interest on that amount. Under the circumstances, time was not of the essence of the contract on the part of May, and when this liability has been accounted for to Le Claire's estate, the contract on May's part must be held to have been fully performed. May has had no benefit from this property since the date of his contract, and none from what he was to receive from Le Claire. On the contrary, he has been engaged in a long and expensive conflict for the assertion of his rights, and that contest is not yet terminated. Viewing the subject in the light of these facts, we think he is entitled to be credited with annual rent and interest from the time he parted with the possession of the farm to Le Claire.

At law, in many cases, if property be tortiously taken or converted, the tortfeasor may be sued in trespass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same results follow as if there had been an implied contract. The plaintiff is not permitted to set up his tort to defeat the action, and the recovery of a judgment will bar a further action *ex delicto* by the plaintiff.* In the same class of cases where the converted prop-

* Putnam *v.* Wise, 1 Hill, 240, note; Hill *v.* Davis, 3 New Hampshire 384; Stockett *v.* Watkins's Administrator, 2 Gill & Johnson, 326, 342

erty has assumed altered forms by successive investments, the owner may follow it as far as he can trace it and sue at law for the substituted property, or he may hold the wrong-doer liable for appropriate damages.*

There are kindred principles in equity jurisprudence, whence, indeed, these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner, the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a *bonâ fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the *cestui que trust*. The cardinal principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust*, and equity will so mould and apply the remedy as to give them to him.

In cases of specific performance, to which category the one before us belongs, parties are sometimes remitted to a court of law. But this is never done where the remedy is not as effectual and complete there as the chancellor can make it. Equity sometimes takes jurisdiction on account of the parties, and sometimes on account of the relief proper to be administered.

The same considerations which invoke the jurisdiction may control the remedy.

In this case more than half the residuary devisees of Antoine Le Claire are not before us. We cannot, therefore, decree the conveyance of real estate, but his legal representatives are before us, and we can give a money decree against them, embracing the value of the land, which we might otherwise adjudge to be conveyed.† It is not necessary that the devisees should be parties to warrant such a judgment. The presence of the executors is sufficient for that purpose.

Adrian H. Davenport, as well as Le Claire, had full notice

* Taylor *v.* Plummer, 3 Maule & Selwyn, 562.

† Peabody et al. *v.* Tarbell, 2 Cushing, 233; Andrews *v.* Brown, 3 Id. 131; Fry on Specific Performance, 447, 457; 1 Story's Equity, §§ 788, 789.

of the rights of May in respect to the securities embraced in their compromise. All those securities, including the collaterals, belonged in equity to May from the time they were deposited with Cook & Sargent. Le Claire had no right to change their form or to dispose of them, as was done in carrying out the compromise agreement. It is within the power of this court, in the exercise of its equitable jurisdiction, to annul that arrangement, and hold Davenport and Le Claire's estate liable in all respects as if the compromise had not been made. But it is also in our power to confirm the transaction, and upon the principles of constructive trusts to give May its fruits instead of pursuing the effects themselves. This, as the case is presented in the record, we deem the proper course. Le Claire's estate must account for the proceeds of the $16,000 of notes, with interest from the time he received them. As we cannot require the land which he bought at the foreclosure sale to be conveyed, his estate must account for its present value. As he violated his agreement with May, and put it out of his power to give May in specie so large a portion of the consideration May was entitled to receive, May is not bound to take the other parcels of real estate mentioned in the contract and which Le Claire bound himself to convey, and it is within the scope of our jurisdiction to give May, in money, the present value of that property also instead of the property itself. We deem it proper, under the circumstances, to do so, and Le Claire's estate must account accordingly. The collection of the judgment against May upon his note to Kettle, recovered by Cook, must be perpetually enjoined.

An account must be taken by a master, wherein Le Claire's estate must be debited with the rent of the Rosebank farm annually and interest down to the time when the account is taken.

With the amount realized from the $16,000 of notes and interest to the same period.

With the value, at the same time, of the land bought in at the foreclosure sale by Le Claire, other than that pre

viously sold by Davenport, the title to which Le Claire took in trust for Davenport's vendees.

With the value, at the same time, of the other parcels of land mentioned in the agreement between Cook and Le Claire and which Le Claire bound himself to convey to May.

Le Claire's estate must be credited with the amount paid on account of the bill and note of Ebenezer Cook, with interest to the same time.

The balance in favor of May, with interest from that time, Le Claire's executors must be required to pay to May.

These conclusions will do justice to May without disturbing the interests of any third person outside of the sphere of Le Claire's estate.

DECREE REVERSED, and the cause remanded with directions to enter a decree and proceed IN CONFORMITY TO THIS OPINION.

Mr. Justice MILLER took no part in this judgment, having in the early stages of the case been counsel of May, below.

THE FANNIE.

1 A schooner meeting a steamer approaching her on a parallel line, with the difference of half a point in the courses of the two, *held*, in a collision case, upon the evidence, to have kept on her course, and therein to have done what she ought to have done.

2 A steamer approaching a sailing vessel is bound to keep out of her way, and to allow her a free and unobstructed passage. Whatever is necessary for this, it is her duty to do, and to avoid whatever obstructs or endangers the sailing vessel in her course. The obligation resting on the sailing vessel is passive rather than active, the duty to keep on her course. If, therefore, the sailing vessel does not change her course, so as to embarrass a steamer and render it impossible, or at least difficult, for her to avoid a collision, the steamer alone is answerable for the damages of a collision, if there is one.

Statement of the case in the opinion.

3. The absence of a proper lookout unimportant when the absence of one has nothing to do with causing the disaster. *The Farragut* (10 Wallace, 334) affirmed on this point.

APPEAL from the Circuit Court for the District of Maryland.

This was a case of collision, in Chesapeake Bay, between the schooner Ellen Forrester and the steamship Fannie. The owners of the schooner libelled the steamer in the District Court for Maryland. That court decreed in their favor. The Circuit Court on appeal did the same. The owners of the steamer now brought the case here. No question of law was involved; the case resting chiefly on a conflict of evidence, as to what had or had not existed or been done, on the respective vessels at the time of the accident.

Messrs. Reverdy Johnson and Andrew Sterrett Ridgley, for the appellant; Mr. H. Stockbridge, contra.

Mr. Justice STRONG stated the admitted facts, the evidence on the disputed ones, and delivered the opinion of the court.

The substantial facts, as they are made to appear by the evidence, are these: On the morning of the 28th of April, 1868, the schooner, a vessel of sixty-nine tons burden, laden with one hundred tons of pig-iron, was proceeding down the Chesapeake Bay from Baltimore, toward the capes, on her voyage to Providence, Rhode Island. The wind was fair, blowing from the northeast, and the course of the schooner was south by east one-half east. Her speed was about seven knots an hour. She was in good condition, and her lights were displayed as required by law.

At the same time the steamer Fannie, on her voyage from Savannah to Baltimore, was proceeding up the bay at a speed of about nine knots an hour, her general course being north by west. The two vessels were thus approaching each other on nearly parallel lines, with a difference of half a point in their courses. The steamer's lights were all in their proper places, and fully displayed. About opposite

Point Lookout, where the bay is twelve miles wide, and where there are six miles in width of clear deep water, nearly in the middle of the bay, the vessels encountered each other head on, the bow of the steamer striking the bows of the schooner. The effect of the collision was to break in the bow of the schooner and cause her to sink in from five to ten minutes. The steamer passed on without stopping or slackening her speed, or offering assistance, but continued on her course to Baltimore, where she made no report of the encounter.

From this statement of the leading facts, none of which are controverted, it is very obvious there can be no excuse for the collision. There was ample sea-room for the movement of both vessels, the lights of both were well displayed, and there was no fog or stress of weather. Plainly, one or both of the vessels was grievously in fault. The District Court, after considering the evidence, held that the fault was chargeable to the steamer alone, and condemned her to pay to the owners of the schooner $10,365, and the Circuit Court on appeal made a similar decree.

In this court there has been no controversy respecting the law applicable to the case. The efforts of the appellants have been directed almost exclusively to an elaborate criticism of the evidence, in the hope of convincing us that both the District and Circuit Courts were mistaken, and that the schooner was in fault. We are not, however, thus convinced.

The duties of vessels approaching each other, as these vessels were, are too well defined to need more than a simple statement. The steamer was bound to keep out of the way of the schooner, and to allow her a free and unobstructed passage. Whatever was necessary for this, it was her duty to do, and whatever obstructed or endangered the schooner in her course it was the duty of the steamer to avoid. There was but a single obligation resting on the schooner. It was passive rather than active, the duty to keep on her course. If, therefore, the schooner did not change her course, so as

to embarrass the steamer and render it impossible, or at least difficult, for her to avoid a collision, there can be no doubt that the steamer alone is answerable for the damages. In reference to this we have carefully examined the evidence. It is to be found in the testimony of the mate and a seaman of the Ellen Forrester, who composed the watch at the time of the collision, and in the testimony of the mate and two seamen of the steamer. Both the mate and the wheelsman of the schooner state positively that there was no change in her course from the time the captain left the deck (twelve o'clock) until the collision took place. When the watch of the mate commenced, the course of the vessel was south by east one-half east. The witnesses on both sides agree that this was the right course to pursue in sailing down the bay. Bryant, the man at the wheel, was in a position to know whether the course was changed, and he could not be mistaken. It is not to be presumed that he changed the course of the vessel without orders. And the mate must know whether he gave any orders to port or starboard the wheel. The testimony of these witnesses, therefore, is not a mere statement of an inference drawn from appearances. It is direct and positive, and both of them state that the course of the schooner continued unchanged from the time the captain left the deck. In addition to this is the improbability of any change. The course south by east one-half east was the right course to be pursued in passing down the bay and out of the capes. Any deviation from it would have retarded the voyage. Either luffing into the wind, or falling off, would have been a departure from the proper course. And there was nothing to induce it. The wind was fair, and the schooner was nearly midway in the bay, with abundant sea-room on each quarter. There was no motive for a change of course, therefore, but every reason for holding on.

In opposition to this we have the testimony of Billups, the mate, and two seamen of the steamer. They infer from their observation of the schooner's lights that she changed her course twice, first luffing into the wind, and then im-

mediately bearing away to the westward. At best this is not the most satisfactory evidence, for it is liable to double mistake; mistake of the facts, and mistake of the inferences deduced from the facts. Thus it was said in the case of the steamboat *Neptune*:* "What a witness asserts he did, or did not do, on his own vessel at the time, is generally more satisfactory evidence of the facts than the opinion and belief of a dozen others formed from what they supposed they saw or heard on another vessel." But the testimony is subject to more serious objections. It is confused, contradictory, and inherently improbable. Some of it wears the appearance of being uncandid. The schooner's lights were seen from the steamer when the vessels were three or four miles apart, apparently one point off the steamer's port bow. Billups, the steamer's mate, states that he saw the red light. He leaves it to be inferred that he saw the red light only. Yet if the vessels were sailing on the courses which it is not denied they were at the time, with only a half-point difference between them, the green light of the schooner must have been as plainly visible to those on the steamer as was her red light. Billups says, that a few seconds afterwards he ordered the helm a-port. But the man at the wheel testifies that the vessels were pretty close together when the order to port was given, and that, after porting, the steamer hardly ran fifty yards before an order was given to starboard, followed by a second order to port, before the steamer had run to port twenty yards. The collision then immediately followed. In these particulars the testimony of the look-out on the steamer is substantially the same. Comparing it with the account these witnesses give of the movements of the schooner, the unreliability of their impressions becomes manifest. It is clear that the first order to port, if given at all, was not given until the vessels were close together. The course of the steamer, after she passed the light-boat off Smith's Point, was north by west. That carried her across the course of the schooner, which was, as we have seen, south

* Olcott, 495.

by east one-half east, and that accounts for the appearance of the schooner's green light, and for the impression of the mate that she was sailing across the bow of the steamer, having changed her course. It must have been then that the order to port was given, followed almost immediately by an order to starboard, and a second order to port. All this is perfectly consistent with the testimony of the witnesses for the appellees that there was no change in the course of the schooner. The account given by the appellant's witnesses is very improbable. They say the schooner luffed across the steamer's bow, and sailed on her changed course not more than fifty yards before she fell off again to the westward. Billups swears that when she thus headed across the steamer's bow she was "some feet" distant, or, as he afterwards defined, from seventy-five to a hundred feet. It was after this he ordered the helm to starboard and to port. He did not slacken the speed of the steamer, or order the engine reversed. The changes described by him in the course of the vessels could not have been made in such rapid succession as is stated by the appellant's witnesses. The schooner could not have luffed up into the wind, sailed fifty yards on her new course, and then borne away to the westward, while the steamer with unslacked speed was moving seventy-five or a hundred feet. No wonder, therefore, both the courts below held the steamer solely in fault. The evidence was wholly insufficient to justify the belief that the schooner did not keep on her course as the rules of navigation required.

We do not think it worth while to discuss the question whether the look-out on the schooner was sufficient. If it was not, it can make no difference, for the want of a proper look-out did not contribute to the disaster. If the schooner held her course, it was all that the steamer had a right to require, and, whether she had a proper look-out or not, it was her duty to do precisely what she did.

DECREE AFFIRMED.

LEVY *v.* STEWART.

Though by the articles 3505 and 3506 of the civil code of Louisiana it is provided that bills and notes are prescribed in five years from their maturity, and that this prescription runs against minors, interdicted persons, and persons residing out of the State,

Held, that the term of the late rebellion interrupted, on the principles announced in *Hanger* v. *Abbott* (6 Wallace, 534), and in the later case of *The Protector* (9 Ib. 687), the running of the prescription in favor of a creditor who during the war resided in one of the loyal States.

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

Levy, of Louisiana, gave, in August, 1860, to Stewart, of New York, three promissory notes, at six months each. They were dated on different days in the month just named and payable at New Orleans, on the corresponding days of February, 1861. Very soon after the maturity of the notes the rebellion broke out. On the 19th April, 1861, proclamation of blockade was made of the Southern coast and war soon became flagrant. However, the city of New Orleans was taken possession of by the government forces 6th May, 1862, and the Circuit Court of the United States reorganized there 24th June, 1863. The notes had been duly presented before the war, at maturity, and payment refused. Stewart now, July 27th, 1868, sued on them in the court below. The defendant pleaded what is known in Louisiana as the prescription of five years, under sections 3505 and 3506 of the civil code of the State; a plea in good degree resembling that known in most States as a plea of the statute of limitations. This prescription, however, under the code runs against minors, interdicted persons, and persons residing out of the State; herein being unlike the statutes of limitations in most of the States, or that of James I, from which most of these were copied, where the rights of such persons are specially saved. A plea alleging new facts being considered by the Louisiana practice as denied, without replication or rejoinder, the plea here was to be regarded as open to every objection of law and fact, the same as if specially pleaded.

Argument for the plaintiff in error.

It was in proof that the defendant resided in Bayou Sara, in the parish of West Feliciana, or at Clinton, in the parish of East Feliciana, at the dates at which the notes sued on were given and matured, and that he continued to reside there during the war.

That he had an agent in New Orleans during the war, and made one or two visits to New Orleans towards the close of the war.

That the plaintiffs resided in the city of New York during the whole of the above-mentioned time.

That the plaintiffs brought suit on the same cause of action on the 4th day of March, 1868.

That the defendant made a compromise and settlement of the suit with the attorney, who had brought it as the attorney at law of the plaintiffs; that in consequence of the said compromise and settlement the attorney discontinued the suit on the 8th of May, 1868.

That the attorney had no authority from the plaintiffs to enter into the compromise, or make the settlement, or discontinue the suit; and that the plaintiffs repudiated his acts in the case so soon as informed of them, and afterwards brought the present suit.

On the foregoing facts the court overruled the plea of prescription and gave judgment for the plaintiff.

The defendant excepted to the decision of the court, on the ground:

First, that the bringing of the first suit, May 4th, 1868, did not interrupt prescription; and,

Second, that by the decisions of the Supreme Court of Louisiana, the highest court in the State, the civil war did not interrupt prescription, and that the courts of the United States are bound to follow the decisions of the Supreme Court of Louisiana upon the law of prescription of the State of Louisiana.

Mr. P. Phillips, for the plaintiff in error:

The first suit, which was commenced the 8th May, 1868, and which was discontinued, can have no effect upon the

plea, for the code expressly provides, article 3485, that when a plaintiff, "after making his demand, abandons or *discontinues* it, the interruption shall be considered as having never happened."

The question then is, what effect was produced by the war on the law of prescription, when the suit is brought in Louisiana on a contract payable in Louisiana? Before considering which question of law a point of fact—a part of *the case*, in truth, though not referred to in the record—must be settled. That question of fact is,—when, for the purpose of a suit by Stewart against Levy, did the war end? It ended, we suppose, in April or May, 1865.

By proclamation of the 29th of April, 1865,* all restrictions upon commercial intercourse with so much of the State of Louisiana as lies east of the Mississippi River, and were within the lines of military occupation, were removed. *Bayou Sara and Clinton, the residence of the defendant, were at that date within the lines, and they lie to the east of the river.* This is matter of indisputable fact, personally known to all residing thereabouts, and is part of the public history of the war.

By another proclamation of the 10th of May, 1865,† it is declared that armed resistance to the authority of the government in the insurrectionary States may be regarded as virtually at an end.

We assume, then, that for the purpose of a suit the war terminated in May, 1865. With that assumption we proceed.

As the District Court of the United States was reorganized in New Orleans in 1863, there was no impediment in the way of the plaintiff, and he may have brought his suit at any time from that period to February, 1866, before the prescription of five years would have expired. From the close of the war to this latter period there were still nine months in which the parties could have brought their suit. This they did not avail themselves of, but took their first action three years after the termination of the war.

* 13 Stat. at Large, 76.

† Ib. p. 757.

Now, was this in time? We submit that it was not.

There are two well-established propositions which would seem to show this:

1. That a fixed and received construction of a State statute, by the highest court of the State, is as effectual as if written into the statute by direct legislative declaration.

2. That this court has repeatedly held that the construction of the State statute of limitations is conclusive; and that they will not only adopt the construction given by the State court, but will follow any change of construction that may be made by the State court.

On these propositions the language of the court is this:*

"The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction. A refusal in the one case as well as in the other, has the effect to establish in the State two rules of property."

"If the construction of the highest judicial tribunal of a State forms a part of its statute law, as much as an enactment by the State legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute, and why should not the same rule apply when the judicial branch of the State government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it?"

Now the five year prescription is construed by the Supreme Court of Louisiana in *Rabel* v. *Pourciau.*† It is there declared that the maxim "*contra non valentem agere, non currit prescriptio,*" does not apply to this peculiar prescription which runs against "minors, interdicted persons, and absentees."

The court further hold that war was an impediment which would excuse the party from acting while the war lasted. But if after this impediment was removed, there still re-

* Green *v.* Neal, 6 Peters, 298.

† 20 Louisiana Annual, 131.

mained the "*tempus utile*" in which the creditor could have sued before the expiration of the five years, he was bound to act within that time. This "*tempus utile*" is fixed by the decision at six months.

And this is the doctrine of many eminent French jurists. Troplong on the subject quotes a decree of the Court of Cassation, 1st August, 1829, to the effect that war does not suspend prescription when the creditor had the means of exacting his debt in another place than that declared in a state of blockade. He then says as a logical consequence, if the impediment proceeding from war or pestilence occurs in an intermediate time, and not a time bordering on the expiration of the prescription, it ought not to be taken into account, since when the creditor is free to act he has all the time that is necessary to compel his debtor to pay, for where would be from that time the "*force majeure*," which alone authorizes the suspension of prescription? By way of illustration, he says:*

"I reside in a city which is blockaded for the period of one year, and twenty years remain to avoid the thirty years prescription of my right: would it not be ridiculous to attempt a justification of negligence in not acting during this period and demanding that this period of siege should not be counted as part of the thirty years? What '*force majeure*' has paralyzed me, since for twenty years I could at any moment have avoided this impediment?"

We must pay strict attention, says he, to the fact that a hindrance founded on war is not written in the law, that it is never legalized but by an act of "*force majeure*," shown to the satisfaction of the judge, and that he should never admit it but when sustained by an irreparable and invincible obstacle. He adds:

"When the creditor has had sufficient time (*tempus utile*) to redress himself, '*force majeure*' is a vain allegation, and the time thus lost, so easy to repair, just as the time of an apoplexy, or

* Droit Civile Expliqué de la Prescription, vol. 2, p. 258.

fever, or grief. The time of prescription is in fine regulated by law, with sufficient latitude and favor, so that it is not necessary that each (every) day should be '*absolument utiles.*'"

But, independently of this, the decision already quoted of *Rabel* v. *Pourciau*, cited, is *sustained by fifteen cases*, reported in 20th and 21st Louisiana Annual;* and if any construction can be considered as part of the local statute, this must be. As thus construed, it should be enforced by this court. The appellee had nine months after the war terminated and before the prescription expired. Nor is there anything hard in this view. Prescription it must be remembered is governed by the law of the forum; in other words the law of the State in which the suit is brought. When we therefore ascertain what that law is, it governs all judicial proceedings, whether the same are instituted in the State courts or the courts of the United States administering justice in that State. A citizen of another State suing a citizen of Louisiana on a Louisiana contract, can have no cause to complain, if the law applicable to the limitation of his right to sue is the same as is applied to suits between her own citizens.

Messrs. S. M. Johnson and C. F. Peck, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Statutes of limitations exist in all the States, and with few exceptions they have been copied from the one brought here by our ancestors in colonial times.† They are regarded as statutes of repose arising from the lapse of time and the antiquity of transactions, and they also proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period.

* See specially Durbin *v.* Speller, 20 Louisiana Annual, 219; Payne & Harrison *v.* Douglass, Ib. 280; Durand *v.* Hienn, Ib. 345; Marcy *v.* Steele, Ib. 413; Norwood *v.* Mills, Ib. 422; Lemon *v.* West, Ib. 427; Watts *v.* Bradley, Ib. 523.

† Story, Conflict of Laws, § 576.

Exceptions are to be found in all such statutes; but cases where the courts of justice were closed in consequence of insurrection or rebellion are not within the express terms of any such exception, contained either in the original act or any other of later date.

Express exceptions of the kind, it is conceded, do not exist, and if none can be implied, then all debts due from one belligerent to another, as well as executory contracts involving commercial intercourse with the enemy, are practically discharged, as, if the war is of much duration, prior claims will be barred by the local statute of limitations.

Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any contract in the tribunals of the other belligerent.

Absolute suspension of the right to sue and prohibition to exercise it exist during the war by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts.*

Peace, it is said, restores the right and the remedy, but it cannot restore the remedy if the war is of much duration, unless it be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited by the existence of the war and the law of nations from enforcing his claim.

On the twenty-seventh of July, 1868, the plaintiffs in the court below commenced an action of assumpsit against the present plaintiff on three promissory notes, signed at New York and made payable at New Orleans. One, dated August 6, 1860, due six months after date, for sixteen hundred and eighteen $\frac{55}{100}$ dollars; another, dated August 23, 1860, due six months after date, for fourteen hundred and fifteen $\frac{59}{100}$ dollars; and the other, dated August 20, 1860, due six months after date, for four hundred and forty-two $\frac{17}{100}$ dollars, all of which notes, at maturity, were duly presented for

* The William Bagaley, 5 Wallace, 405; Jecker et al. v. Montgomery, 18 Howard, 111; The Hoop, 1 Robinson, 200.

payment, which being refused, they were duly protested for non-payment. Process was duly issued, and being served, the defendant appeared and pleaded as a defence the prescription of five years as established by the civil code of the State.

New facts alleged by the defendant in his answer are considered as denied by the plaintiff in the State courts without any replication, and the same rules of practice have been adopted in the Circuit Courts. Matters in avoidance, therefore, alleged in the answer, are open to every objection of law and fact the same as if specially pleaded.*

Viewed in that light, as the pleadings must be, the issue between the parties was the same as it would be in jurisdictions governed by the common law, where the plaintiff replied denying the allegations of the answer, or pleaded specially that the operation of the prescription was suspended during the late civil war, and that the plaintiff did commence his suit within five years next after the cause of action accrued.†

Testimony was taken and the parties were heard, but the court, neither party requesting a jury, overruled the plea of prescription, and entered judgment for the plaintiffs. Subsequent to the judgment a statement of facts was filed, signed by the judge and the parties, which consists of the pleadings, the notes and documents offered in evidence, the entries in the minutes of the proceedings, the judgment of the court, together with a statement of the evidence introduced. By the statement it appears that the defendant, at the dates at which the notes were given, and when they matured, resided at Bayou Sara, and that he continued to reside there during the war of the rebellion; that he had an agent in New Orleans during that period, and that he made one or two visits there towards the close of the war; that the plaintiffs resided throughout that period in the city

* Daquin *v.* Coiron, 3 Louisiana, 392; Muse *v.* Yarborough, 11 Id. 533; Swilley *v.* Low, 13 Louisiana Annual, 412; Bank *v.* Allard, 8 Martin, N. S. 141.

† Riley *v.* Wilcox, 12 Robinson's Louisiana, 648; Code, article 329.

of New York; that on the 4th of March, 1868, they brought a suit for the same cause of action; that the defendant made a compromise and settlement of the same with the attorney who instituted the suit, whereby the suit, on the eighth of May following, was discontinued; that the attorney, in making the settlement and in discontinuing the suit, acted without authority, and that the plaintiffs repudiated his acts in the case as soon as they were informed of the same, and afterwards brought the present suit.

Exceptions were taken by the defendant to the rulings and decision of the court upon three grounds, as follows: (1.) Because the bringing of the first suit did not interrupt the prescription established by the laws of the State. (2.) Because the civil war did not interrupt the prescription under the rule established by the decisions of the Supreme Court of the State. (3.) Because the courts of the United States are bound to follow the decisions of the Supreme Court of the State in respect to the law of prescription, as applied to such causes of action.

Different views, however, were entertained by the Circuit Court, and judgment was rendered for the plaintiffs. Whereupon the defendant sued out a writ of error and removed the cause into this court.

Much discussion of the first response made by the plaintiffs to the defence of prescription as set up by the defendant in his answer is unnecessary, as the court is of the opinion that the decision of the case must turn upon the second response of the plaintiffs to that defence, which is, that in computing the five years since the cause of action accrued the period during which the courts of the State where the defendant resided were closed in consequence of the late civil war must be deducted.

Regulations exist in some of the States that where a first suit is abated and a second suit is brought within a prescribed time the statute of limitation shall cease to run from the date of the first suit, but the court is not referred to any such enactment as applicable in this case, and it is believed that none such exists, as the code of the State provides that

if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened.*

Grant all that, still the question remains to be considered whether the alleged prescription was not interrupted by the fact that the courts of the State where the defendant resided were closed by the late civil war for such a period of time that the bar was not complete when the present suit was commenced.

Proclamation of blockade was made by the President on the nineteenth of April, 1861, and on the thirteenth of July in the same year Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States.†

On the twentieth of August, 1866, the President by his proclamation of that date proclaimed that the insurrection was at an end and that peace, order, and tranquillity were fully restored in all the States.‡

Permanent military possession of New Orleans, it is conceded, was taken by our forces at a much earlier period, and it is also true that the Circuit Court was organized there at the date specified in the statement of facts, but that portion of the State where the defendant resided still remained within the lines of the insurrectionists, and of course the courts of the State were closed so far as respects the rights of the plaintiffs in this case.§

Throughout the entire period between the dates of those proclamations the courts of the State were closed to the plaintiffs and they were totally incapable of instituting any suit for the enforcement of their claim.‖

Exceptions, not mentioned in the statute of limitations,

* Code, article 3485. † 12 Stat. at Large, 257–258.

‡ United States *v.* Anderson, 9 Wallace, 70; 14 Stat. at Large, App. 7.

§ The Venice, 2 Wallace, 258.

‖ The Hoop, 1 Robinson, 200; Wheaton's Law of Nations, by Lawrence, 544, 877; Esposito *v.* Bowden, 4 Ellis & Blackburne, 963; Griswold *v.* Waddington, 16 Johnson, 438.

have sometimes been admitted, and this court decided in the case of *Hanger* v. *Abbott*,* that the time during which the courts of the States in rebellion were closed to the citizens of the rest of the Union is to be excluded in suits, since brought, from the computation of the time fixed by the statutes of limitation within which suits may be brought, though no such exception is expressly admitted in the limitation act. Neither laches nor fraud can be imputed to the creditor in such a case, as the inability to sue becomes absolute by the declaration of war wholly irrespective of his consent or opposition. When the contract was made he was competent to sue, but the effect of war is to suspend his right during its continuance, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy, as was said in that case, is suspended by the two governments and by the law of nations not applicable at the date of the contract, and which comes into operation in consequence of an event over which he has no control.†

Recent decisions of the Supreme Court of the State are referred to by the defendant in which it is denied that any exception whatever is allowed in any case, in the law of prescription, as to bills and notes.‡

None of those decisions are founded upon any express enactment, and the reasons assigned for the conclusion are not satisfactory. They admit that the maxim "*contra non valentem agere non currit prescriptio*" is a maxim of universal justice, but deny that it applies to causes of action founded upon bills and notes, chiefly because "they are prescriptible against minors and interdicted persons as well as others," which the chief justice of that court, in the case first cited, held to be an unsatisfactory reason for the conclusion, and in that view the court here entirely concurs.

Suppose that the rule of that court cannot be adopted,

* 6 Wallace, 532.

† The Protector, 9 Id. 689.

‡ Rabel *v.* Pourciau, 20 Louisiana Annual, 131; Lemon *v.* West, 20 Id. 427; Smith *v.* Stewart et al., 21 Id. 75.

still it is insisted by the defendant that the suspension of the prescription ceased when the rebellion came to an end; that the suit was instituted too late, as it might have been commenced within five years next after the cause of action accrued, and certain continental authorities are referred to where that rule is apparently maintained.*

Authorities of the kind, though entitled to great respect, are not obligatory, and the court is of the opinion that the rule adopted in the case of *Hanger* v. *Abbott*,† is more consonant with justice and more in accordance with the analogies of our law than the one suggested by those commentators.

Even the Supreme Court of the State which refused to adopt that rule admits that the law ought to be so, but proceeds to show from certain prior decisions of this court that it is not so, not one of which is an authority to support the proposition for which they were invoked.

Evidently the case before the court is controlled by the decision in the case of *Hanger* v. *Abbott* and *The Protector*,‡ and the court as now constituted adheres to those decisions.

Creditors' debts due from belligerents are suspended during war, but the debts are not annulled. They are precluded during war from suing to recover their dues, but with the return of peace we return the right and the remedy.§

Where a debt has not been confiscated during war the rule is now universally acknowledged that the right to sue revives when peace is restored, and the rule is that the restoration of peace returns to the creditor both the remedy and the right, which necessarily implies that the law of limitation was suspended during the same period.

JUDGMENT AFFIRMED.

* 2 Troplong, De la Prescription, 258, &c.

† 6 Wallace, 534.

‡ 9 Id. 687.

§ Chitty on C. and M. 423; Wheaton's Law of Nations, by Lawrence, 541; Vattel, book iii, c. 6, § 77.

NOTE.—The four cases which now immediately follow, to wit, *Garnett* v. *United States*, *Mc Veigh* v. *Same*, *Miller* v. *Same*, *and Tyler* v. *Defrees*, arose under two certain acts of Congress passed in 1861 and 1862, during the late rebellion, and popularly known as the Confiscation Acts. Along with one or two others they were argued at the last term; but after being taken into advisement, were at the close of it ordered to be re-argued at this. They were now fully argued very much together. In the first of them nothing relating to confiscation was reached; the case going off on a point of jurisdiction. In the judgment in none of them did the Chief Justice or Mr. Justice Nelson participate; both being absent from the court from the causes mentioned in the memoranda of the Term.

GARNETT *v.* UNITED STATES.

Where a case has been tried in the District Court of the District of Columbia, the judgment or decree rendered therein must be reviewed by the Supreme Court of the District, before the case can be brought before this court for examination.

ERROR to the Supreme Court of the District of Columbia; the case being this:

By an act passed in 1801,* there was organized for the District the "Circuit Court of the District of Columbia, vested with all the powers of the Circuit Courts of the United States." It had "cognizance of all crimes and offences committed within said District, and of all cases in law and equity," &c.

By act of 1802,† it was provided that the chief judge of the District of Columbia should hold a District Court in and for the said District, "which court shall have and exercise within said District the same powers and jurisdiction which are by law vested in the District Courts of the United States."

On the 3d March, 1863,‡ by act of that date the courts of the District were reorganized.

The first section of that organic act established a court,

* 2 Stat. at Large, 105. † 2 Ib. 166. ‡ 12 Ib. 762.

to be called the Supreme Court of the District of Columbia, which shall have *general jurisdiction in law and equity*, and consist of four justices, one of which shall be chief justice.

The third section provided that the *Supreme* Court should possess the same powers and exercise the same jurisdiction as was then possessed and exercised by the *Circuit* Court of the District of Columbia.

The justices of the court (the act proceeds) shall severally possess and exercise the jurisdiction now possessed and exercised by the judges of the said Circuit Court. *Any one of them may hold the District Court of the United States* for the District of Columbia, in the manner, and with the same powers and jurisdiction possessed and exercised by other District Courts of the United States.

With this organization of the courts of the District of Columbia, the present suit was begun in the Supreme Court of the District of Columbia sitting for the District Court of the same, for the forfeiture of certain real property of one Garnett, under the act of Congress of 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."

The District Court decreed a condemnation of the property, and it was sold. Garnett sued out a writ of error from the Supreme Court of the District. This writ having been returned, the District Attorney moved to dismiss it, on the ground, among others, that a writ of error from that court would not lie to the District Court; and the Supreme Court dismissed the writ on that ground. An exception was duly taken to this ruling; and from the judgment of dismissal the case was brought here on writ of error.

Messrs. B. R. Curtis, Cushing, and Brent, for the plaintiff in error; Mr. Bristow, Solicitor-General, contra, for the United States.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Supreme Court of the District of Columbia.

The original proceeding was instituted in the District Court of the United States for same territory. Its object was to procure the condemnation and sale of the property of the plaintiff in error, described in the libel of the United States, pursuant to the provisions of the act of Congress of 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." The libel alleged that the property belonged to Garnett, and that he was within three of the categories defined in the 5th section, which rendered it liable to be proceeded against in the manner prescribed. His offences were specifically set forth. The property was condemned and sold. Garnett sued out a writ of error from the Supreme Court of the District of Columbia. The attorney of the United States filed a motion to dismiss the writ. The court dismissed it upon the ground that a writ of error would not lie from that court to the District Court. Garnett excepted. His bill of exceptions is found in the record.

This is the only point in the case which we have found it necessary to consider. In coming to this conclusion the learned court fell into an error.

The case was decided prior to the decision of this court in *Ex parte Bradley.** It was not seriously controverted by the counsel for the defendants in error, in the argument at the bar, that this authority is conclusive upon the subject. The proposition is too clear to require discussion. Error, and not appeal, was the proper revisory remedy.† The other objections taken to the writ are also without validity. The order dismissing it must therefore be reversed. This will restore the case to the place it occupied before the Supreme Court of the District of Columbia, when the order dismissing it was made. As that court did not pass upon the alleged errors of the District Court, we cannot consider them. Our province is to exercise appellate jurisdiction touching the proceedings of the Supreme Court of the District. We can

* 7 Wallace, 364. † Armstrong's Foundry, 6 Id. 766.

examine those of the District Court only after they have been the subject of review by the Supreme Court, and then only in connection with the action of that court in affirming or reversing them. We cannot regard them until they have received the impress of the judgment of the higher local court.

The order dismissing the writ of error is REVERSED, and the cause will be remanded to the Supreme Court of the District of Columbia, with directions to proceed in the cause

IN CONFORMITY TO LAW.

McVeigh v. United States.

1. In a libel of information for the forfeiture of property, under the act of Congress of 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," for certain offences charged against the owner, his alleged criminality lies at the foundation of the proceeding; and the questions of his guilt and ownership are fundamental in the case.
2. The owner of property, for the forfeiture of which a libel is filed under the act above mentioned, is entitled to appear and to contest the charges upon which the forfeiture is claimed, although he was at the time of filing the libel a resident within the Confederate lines, and a rebel; and he can sue out a writ of error from this court to review any final decree of the court below condemning his property.

ERROR to the Circuit Court for the District of Virginia.

On the 17th of July, 1862, Congress passed an act, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." This act provided for the seizure and confiscation of the property of persons holding certain offices or agencies under "the Confederate States," and of persons engaged in the rebellion then existing, or aiding or abetting such rebellion, who should not cease to aid, countenance, and abet such rebellion within sixty days after public warn-

ing and proclamation by the President, and return to their allegiance to the United States. The act contains numerous sections. They are set forth with fulness in a case which was decided soon after this one, and which is reported next to it, *Miller* v. *United States*, the leading case on the Confiscation Acts, and in which, rather than in this one where the main subjects were hardly reached, the provisions of the statute are inserted. To understand the present case, it is indispensable that the reader be possessed of the nature of that statute, and of its provisions. He will, therefore, have the goodness to turn forward to page 269, and to read from the words, beginning with an *, "*The Act of July 17th*, 1862, contains fourteen sections," on that page, to the words on page 273, beginning with a †, "*In order to carry out these acts;*" after which he will resume his reading here.

With this statute in force the United States filed a libel of information in the District Court for the District of Virginia, for the forfeiture of certain real and personal property of one William McVeigh, situated in Virginia. The information was in form against "all the right, title, and estate of *William McVeigh* in and to all that certain piece, parcel, or lot of land," &c., describing it particularly.

The libel alleged that subsequent to July 17th, 1862, the said McVeigh held and exercised an office and agency of honor, and trust, and profit, under the government of the Confederate States, and under one of the States of said confederacy; and that he accepted the appointment, and was elected to the office and agency after the date of the ordinance of secession of said State; and that he took an oath of allegiance to and to support the constitution of the Confederate States; and that since July, 1862, he had assisted and given aid and comfort to the rebellion, and to those engaged in the rebellion, by acting on the 18th of July, 1862, and at various times subsequently as a soldier, and as an officer, and as a non-commissioned officer in the army and navy of the Confederate States; and by contributing money and property to the aid and encouragement of those engaged in the rebellion. The libel was afterwards amended so as

to charge, in addition to the above offences, that McVeigh, on the 18th of July, 1862, was engaged in armed rebellion against the government of the United States, and notwithstanding the President, on the 25th of July, 1862, issued his proclamation warning all persons thus engaged to cease participating in aiding, countenancing, and abetting such rebellion, the said McVeigh did not within sixty days thereafter cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States.

McVeigh appeared by counsel, made a claim to the property, and filed an answer. This answer was not contained in the record, and nothing of its contents appeared except what was stated in the order of the court made on the motion of the attorney of the United States.

The attorney of the United States, however, moved that the claim, answer, and appearance be stricken from the files, as it appeared from the answer filed, that at the time of filing it the party was "a resident of the city of Richmond, within the Confederate lines, and a rebel." The court granted the motion. Subsequently the default of all persons was taken, and a decree was rendered for the condemnation and sale of the property. The case was carried to the Circuit Court, and there the decree was affirmed. It was now brought here on writ of error.

Messrs. B. R. Curtis, Brent, Wattles, Moore, Hughes, Denver, and Peck, appeared for the plaintiff in error. Mr. Curtis argued the case orally, the other counsel filing briefs.

Mr. Curtis: The claim and answer of McVeigh and the appearance of his counsel having been stricken out, of course nothing remained for him but to be defaulted, because he was not allowed to appear; and the question is, whether that was erroneous or not.

Now the act of Congress does not inflict forfeiture upon a person because he was a resident within the enemy's lines, nor because he was a rebel at the time when this answer was filed, even if it be assumed that the District Court interpreted "rebel" to mean a person giving aid and comfort to

the rebellion, of which interpretation this court has no evidence. The provision of the 5th section, which relates to persons owning property in any loyal State or Territory, or in the District, applies to those who, at any time after the passage of the act, should give aid and comfort to the enemy; but it does not apply to those who owned property within the State of Virginia, which was not one of the loyal States, but one of the Confederate. The 6th section, which provides for persons who own property and commit the described offences within the Confederate States, is limited. "If the person, &c., in any other than the loyal States shall not, &c., *cease* to aid, countenance, and abet such rebellion, and *return*" to his allegiance, his property is to be forfeited. But only then. This is a penal statute, not to be extended by implication.

Thus it did not appear by the answer of McVeigh that he was within the terms of the act. He was not within the terms as a resident within the rebel lines, nor by reason of being a rebel (whatever the District Court may, under the circumstances of the case, have construed that to be) when he filed his answer, because the 6th section does not apply to him. And it did not appear by his answer that he was a rebel by holding any of the offices that are mentioned in the 5th section. Therefore the case is this: that Congress provides such process as requires a notice to the party supposed to be guilty to come in and defend himself; and when he comes in and offers to defend himself and files an answer, then—inasmuch as the court say that on reading that answer they see (not that he has committed any one of the offences for which he is to forfeit his property) but has committed some other offence—therefore he must not be allowed to defend.

See how the action of the court below would operate. This court has decided that the question whether a person was guilty in point of fact of the offences leading to confiscation under this act must be tried by a jury.* And under

* Armstrong's Foundry, 6 Wallace, 766.

that decision we assume as a certainty that this case *must* go back to be so tried. Well; the case is called on; McVeigh appears ready to prove that he is not within the act. The judge says, "Yes; but you are a resident within the enemy's lines, and you are a rebel; you cannot be heard." How is he going to get to the jury? Manifestly he can have no trial by jury, for he can have no trial at all, and therefore—for this is the necessary consequence of his having no trial at all—he is to have his property forfeited by the decree of the court for want of a trial, not because he is found by a jury to have committed one of the offences which by force of the statute forfeit that property, but because he resides within the enemy's lines, and the judge, upon some facts which appear in his answer, pronounces the conclusion of law that he is a rebel.

Mr. Akerman, Attorney-General, Mr. Bristow, Solicitor-General, contra, for the United States:

An enemy has no standing in court, and cannot be admitted as a claimant even in prize. Whether he be an enemy or not, if contested, must be determined by the court; but it is a different issue from the issue on the merits, and is to be determined in the first instance by the court. In proceedings *in rem*, if it is admitted by the claimant that he is an enemy, his claim must be stricken out.*

Although the claim and answer are not set out in the record, yet as the order striking them from the files recites that "it appeared from the answer that the respondent, McVeigh, is, and at the time of the filing was, a resident of the city of Richmond, within the Confederate lines, and a rebel," it must be taken that this recital is true, and that it did appear in the answer that McVeigh was a resident of the city of Richmond, within the Confederate lines, and a rebel. If this fact was so, the court did right in striking out

* Mumford *v.* Mumford, 1 Gallison, 366; The Emulous, Id. 563; The Peterhoff, Blatchford's Prize Cases, 463; Halleck's International Law, 772, § 23; Hanger *v.* Abbott, 6 Wallace, 532.

his claim. For residents of hostile territory, in war, are regarded as enemies, and as McVeigh in his answer admitted substantially that he was an enemy, the action of the court was right.

In addition he is not a party to the proceedings below. The proceeding was conducted against the property alone. He cannot take a writ of error.

Reply:

Alien enemies at the common law it is true are not admitted; but even alien enemies are admitted as parties to proceedings in courts of admiralty—international courts—where they come for a purpose proper to be considered by such tribunals. Suppose a British ship, in the event of a war with England, is captured, belonging to a British owner, and he comes into a court of admiralty and files an answer and claim. If, indeed, he said, "I am an inhabitant of the enemy's country, and this is my property," he would state himself out of court. But suppose he says, "When that ship was captured, she was under your cartel; I will prove it," is there any doubt that he is to be listened to?*

But this case is peculiar. It is not within this principle with regard to alien enemies. Persons like McVeigh, though residing within the Confederate lines, and though rebels (whatever meaning was attached to this word by the District Court), were not alien enemies; they were enemies for the purpose of having war made upon them, and for the purpose of having their property confiscated if Congress took proper measures to confiscate their property as enemies; still they were citizens of the United States, and they are not to be kept out of the courts of the United States for the purpose of presenting any rights which it was proper those courts should consider. Now was it not proper that this court of the United States should consider the question whether McVeigh had committed the offences alleged in the libel to cause the forfeiture of his property? Did not

* The United States *v.* Certain Shares of Stock, 5 Blatchford, 231

Reply.

Congress intend when it enacted this law, that that should be considered, and considered in every case? It has not passed a sweeping decree of condemnation, nor called on the courts to pass sweeping decrees of condemnation against all rebels or all enemies, but it has singled out persons guilty of certain offences, and has said, that *these* offenders are to be punished by the forfeiture of their property. But are they to be punished without hearing them? In *Harris* v. *Hardeman*,* it is declared to be a principle of universal jurisprudence, and one which cannot be disregarded, that every party who is proceeded against in a court of justice, civilly or criminally, must have notice. Why? That he may appear and be heard. For from the days of Magna Charta, as Lord Coke tells us, and down to the present time, due process of law includes *actor*, *reus*, *judex;* and how is anybody to be *judex* unless he hears?

It is alleged by the opposing counsel that McVeigh was not a party. In one sense he was not a party, because when he applied and desired to be admitted as a party, the court refused to admit him; but one of the questions is whether he was not wrongfully refused, and can he not have that question decided here?

This is not a proceeding *in rem* on account of the fault in the thing, or the illegal predicament in which the property has been placed. It is a proceeding against all the property of a particular person by name, on account of his guilt. From the nature of the proceeding he is necessarily a party to that proceeding. His being so does not depend on any order of the court; it arises out of the very nature of the case. Must he not have notice? If he has notice, has he not a right to appear,—a right which cannot be denied him, any more than it can be denied to any person indicted for a crime,—to appear and defend himself? And if he not only must have notice, but has the right to appear, then will the fact that he has not been allowed to appear debar him from his writ of error?

* 14 Howard, 334.

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 Virginia.

The defendants in error filed in the District Court of the United States for that district a libel of information, under the act of July 17, 1862, to reach, for the purposes of forfeiture and sale, certain real and personal property of McVeigh, a description of which is fully set forth. The original libel was the same, *mutatis mutandis*, as that in the case of Garnett, claimant of certain real estate, against the United States.* An amendment was subsequently made, whereby a farther charge was alleged of the offence defined in the sixth section of the act. The plaintiff in error appeared by counsel, interposed a claim to the property, and filed an answer. The attorney of the United States submitted a motion, that the appearance, answer, and claim should be stricken from the files, for the reasons that the respondent was "a resident of the city of Richmond, within the Confederate lines, and a rebel." An order was made according to the motion. Subsequently a decree *pro confesso* was taken. The property was condemned as forfeited, and ordered to be sold. The Circuit Court upon error affirmed the decree, and the case is now before us for review.

It is objected that McVeigh was incompetent to sue out this writ of error. His alleged criminality lies at the foundation of the proceeding. It was averred in the libel that he was the owner of the property described, and that he was guilty of the offences charged, which rendered it liable to forfeiture. The questions of his guilt and ownership were therefore fundamental in the case. The notice by publication was given to bring him constructively before the court. It was in the nature of the substituted service of process. If he failed to appear, his absence and silence could not affect the validity of the proceedings. After the decree, *pro confesso*, he occupied the same relation to the record as a

* See *supra*, 256.

defendant against whom a judgment by default has been taken. The case is wholly unlike a proceeding purely *in rem*, where no claimant is named, and none appears until after the final decree or judgment is entered, and the case has terminated. We entertain no doubt that the plaintiff in error had the right to sue out the writ, and that the record is properly before us for examination.

In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.*

Whether the legal *status* of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an allen enemy to sue in the courts of the hostile country,† it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence. In Bacon's Abridgment,‡ it is said: "For as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery."

* Calder *v.* Bull, 3 Dallas, 388; Bonaker *v.* Evans, 16 Adolphus & Ellis N. S. 170; Capel *v.* Child, 2 Crompton & Jervis, 574.

† Clarke *v.* Morey, 10 Johnson, 69; Russel *v.* Skipwith, 6 Binney, 241.

‡ Title Alien, D see also Story's Equity Pleadings, § 53; Albrecht *v* Sussmann, 2 Vesey & Beams, 323; Dorsey *v.* Kyle et al., 30 Maryland 512, 522

Syllabus.

The judgment of the District Court is REVERSED, and the cause will be remanded to the Circuit Court with directions to proceed in it

IN CONFORMITY TO LAW.

MILLER *v.* UNITED STATES.

1. In a judicial proceeding to confiscate stocks in a railroad company under the acts of Congress of August 6th, 1861, and July 17th, 1862, the person whose property has been seized, may sue out a writ of error though not a claimant in the court below. (*McVeigh* v. *United States*, *supra*, 259, affirmed.)
2. Seizure of such stocks may be made by giving notice of seizure to the president or vice-president of the railroad company; and a seizure thus made by the marshal in obedience to a warrant and monition is sufficient to give the District Court jurisdiction.
3. Stocks and credits are attachable in admiralty and revenue cases by means of the simple service of a notice, without the aid of any statute.
4. In admiralty and revenue cases when a default has been duly entered to a monition founded on an information averring all the facts necessary to a condemnation, it has substantially the effect of a default to a summons in a court of common law. It establishes the fact pleaded, and justifies a decree of condemnation.
5. Where a court having jurisdiction of the case and of the parties enters a judgment, there is a presumption that all the facts necessary to warrant the judgment have been found, if they are sufficiently averred in the pleadings.
6. A trial by jury in cases of seizure upon land is not necessary when there are no *issues* of fact to be determined.
7. The confiscation acts of August 6th, 1861, and July 17th, 1862, are constitutional. Excepting the first four sections of the latter act they are an exercise of the war powers of the government, and not an exercise of its sovereignty or municipal power. Consequently they are not in conflict with the restrictions of the 5th and 6th amendments of the Constitution.
8. In the war of the rebellion the United States had belligerent as well as sovereign rights. They had, therefore, a right to confiscate the property of public enemies wherever found, and also a right to punish offences against their sovereignty.
9. The right of confiscation exists as fully in case of a civil war, as it does when the war is foreign, and rebels in arms against the lawful government or persons inhabiting the territory exclusively within the control of the rebel belligerent, may be treated as public enemies. So

may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory.

10. It is within the power of Congress to determine what property of public enemies shall be confiscated; and the fact that by the statutes of 1861 and 1862, only the property of certain classes of enemies is directed to be seized and confiscated, does not show that they were intended to be an exercise of mere municipal power rather than an exertion of belligerent rights.

ERROR to the Circuit Court for the Eastern District of Michigan.

This was a proceeding begun originally in the District Court for the district just named, to forfeit certain personal property belonging to one Samuel Miller, now deceased, in his lifetime, under the act of Congress of August 6th, 1861, entitled "An act to confiscate property used for insurrectionary purposes;"* and 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, and for other purposes."†

The act of August 6th, 1861, provides that during the then existing or any future insurrection against the government of the United States, after the President shall have declared by his proclamation that the laws of the United States are opposed, and the execution thereof is obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, property of any kind, *purchased or acquired, sold or given*, with intent to use or employ the same, or to suffer the same to be used or employed in aiding, abetting, or promoting such insurrection; and also any property which the owners shall knowingly use or employ, or consent to be used or employed for that purpose, shall be lawful subjects of capture and prize wherever found; and that it shall be the duty of the President to cause the same to be seized, confiscated, and condemned.

* The act of July 17th, 1862, contains fourteen sections. The first prescribes the punishment for treason; punish-

* 12 Stat. at Large, 319. † Ib. 589.

ing it with death, or in the discretion of the court with imprisonment and fine, and liberating the offender's slaves.

The second provides for the punishment of the offence of inciting, setting on foot, or engaging in any rebellion or insurrection against the authority of the United States or the laws thereof, or engaging in or giving aid and comfort to the rebellion then existing.

The third declares that parties guilty of either of the offences thus described, shall be forever incapable and disqualified to hold any office under the United States.

The fourth provides that the act shall not affect the prosecution, conviction, or punishment of persons guilty of treason before the passage of the act, unless such persons are convicted under the act itself.

The fifth section enacts:

"That to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States, that is to say:

"*First.* Of any person hereafter acting as an officer of the army or navy of the rebels, in arms against the government of the United States.

"*Secondly.* Of any person hereafter acting as President, Vice-President, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner, or consul of the so-called Confederate States of America.

"*Thirdly.* Of any person acting as governor of a State, member of a convention or legislature, or judge of any court of any of the so-called Confederate States of America.

"*Fourthly.* Of any person who having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called Confederate States of America.

"*Fifthly.* Of any person hereafter holding any office or agency under the government of the so-called Confederate States of America, or under any of the several States of the said Confederacy, or the laws thereof, whether such office or agency be

national, state, or municipal in its name or character: *Provided*, That the persons, thirdly, fourthly, and fifthly, above described, shall have accepted their appointment or election since the date of the pretended ordinance of secession of the State, or shall have taken an oath of allegiance to, or to support the constitution of the so-called Confederate States.

"*Sixthly*. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or 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 6th section makes it the duty of the President to seize and use as aforesaid all the estate, property, moneys, stocks, and credits of persons within any State or Territory of the United States, other than those named in the 5th section, who, being engaged in armed rebellion, or aiding and abetting the same, shall not, within sixty days after public warning and proclamation duly made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to their allegiance to the United States.

The 7th section provides:

"That to secure the condemnation and sale of any of such property, *after the same shall have been seized*, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any District Court thereof, or in any Territorial court, or in the United States District Court for the District of Columbia, within which the property above described, or any part thereof, may be found, or into which the same, if movable, may first be brought, which proceedings shall conform, *as nearly as may be, to proceedings in admiralty or revenue cases*, and *if* said property, whether real or personal, *shall be found* to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned *as enemy's property*, and become the property of the United States, and may be disposed of as the court

shall decree, and the proceeds thereof paid into the treasury of the United States, for the purposes aforesaid."

The 8th section authorizes the said courts to make such orders, and establish such forms of decrees of sale, and direct such deeds and conveyances to be executed, where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act, and vest in the purchasers of the property good and valid titles.

The 9th, 10th, and 11th sections relate to slaves. They declare that all slaves of persons engaged in rebellion against the government of the United States, or who should in any way give aid and comfort thereto, escaping within our lines, or captured from such persons, or deserted by them, should be deemed captives of war, and forever free; that escaping slaves of such owners should not be delivered up, and that no person engaged in the military or naval service should, under any pretence whatever, surrender slaves to claimants. They provide also for the employment of persons of African descent in the suppression of the rebellion.

The 13th section authorizes the President, at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, pardon and amnesty, with such exceptions, and at such time and on such conditions, as he may deem expedient.

The 14th section gives the courts aforesaid full power to institute proceedings, make orders and decrees, issue process, and do all other things to carry the act into effect.

Whilst this act of July 17th, 1862, was pending before the President for consideration, it was understood that he was of opinion that it was unconstitutional in some particulars, and that he intended to veto it. His objections having been communicated to members of the House of Representatives, where the act originated, a joint resolution explanatory of the act was introduced and passed by that body, to obviate his objections, which were that the act disregarded the Constitution, which, while ordaining that the Congress shall have power to declare the punishment of treason, ordains

also* that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted." This latter clause was considered by the President as a restriction upon the power of Congress to prescribe as a punishment for treason the forfeiture of the real property of the offender beyond his natural life. The Senate being also informed of the objections of the President, concurred in the resolution. It was then sent to the President, and was received by him before the expiration of the ten days allowed him for its consideration. He returned the act and resolution together to the House, with a message, in which he stated that considering the act, and the resolution explanatory of the act as substantially one, he had approved and signed both. He stated also that he had prepared the draft of a message stating his objections to the act becoming a law, a copy of which draft he transmitted. The following is a copy of the joint resolution:†

"*Resolved by the Senate and House of Representatives of the United States, in Congress assembled*, That the provisions of the third clause of the fifth section of 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' shall be so construed as not to apply to any act or acts done prior to the passage thereof; nor to include any member of a State legislature, or judge of any State court, who has not, in accepting or entering upon his office, taken an oath to support the constitution of the so-called Confederate States of America; nor shall any punishment or proceedings under said act be so construed as to work a *forfeiture* of the real estate of the *offender* beyond his natural life."

† In order to carry out these acts of August 6th, 1861, and July 17th, 1862, the President charged the Attorney-General with the superintendence and direction of all proceedings under them, and authorized and required him to give to the district attorneys and marshals such instructions and direc-

* Article III.

† 12 Stat. at Large, 627.

tions as he might find needful and convenient, touching all seizures, proceedings, and condemnations under them. Accordingly, on the 8th of January, 1863, the Attorney-General issued general instructions on the subject to district attorneys and marshals. Among these instructions the following were given with regard to the seizure of property:

"All seizures will be made by the marshal of the proper district, under written authority to be given him by the *district attorney*, specifying with reasonable certainty the property to be seized, and the owner whose right is sought to be confiscated.

"When the marshal has seized any property under such authority, he will, without any unnecessary delay, make a true return thereof in writing *to the district attorney*.

"Where the State law directs the method of seizure, it should be conformed to as nearly as may be consistently with the objects of the acts of Congress. If the thing to be seized be *personal* property, it ought to be *actually seized and safely* kept; if real estate, the marshal ought to seize all the right, title, interest, and estate of the accused party, giving notice in writing of the seizure to the tenants in possession, if any; *if stocks or other intangible property, the marshal ought (if there be no specific method prescribed by the State law) to describe the property as plainly as he can in his return, and leave the court to determine the sufficiency of the seizure.*"

‡ On the 24th of November, 1863, the District Attorney for the Eastern District of Michigan issued the following order to the marshal of that district:

OFFICE OF THE ATTORNEY OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.
DETROIT, November 24, 1863.

To CHARLES DICKEY, ESQ.,
Marshal of the United States for Eastern District of Michigan.

You are hereby directed, under and by virtue of the acts of Congress of August 6th, 1861, and July 17th, 1862, commonly called the Confiscation Acts, to seize all those 200 shares of common stock in the Michigan Southern and Northern Indiana Railroad Company, a corporation created under and by virtue

of the laws of the State of Michigan, and represented by one certificate for 50 shares, numbered 2767, and dated January 8th, 1861, and by one certificate for 150 shares, numbered 3678, and dated May 25th, 1861. And all that stock in the Detroit, Monroe, and Toledo Railroad Company, a corporation created under and by virtue of the laws of the State of Michigan, to wit:

Stock certificate, No. 113, dated March 5th, 1857,	for	100 shares.
Stock certificate, No. 120, dated March 12th, 1857,	for	100 shares.
Stock certificate, No. 129, dated April 7th, 1857,	for	100 shares.
Stock certificate, No. 187, dated Sept. 1st, 1860,	for	20 shares.
Stock certificate, No. 193, dated Nov. 1st, 1860,	for	23 shares.
Total, ...		343 shares.

Making in all 200 shares common stock of Michigan Southern and Northern Indiana Railroad Company; and 343 shares stock Detroit, Monroe and Toledo Railroad Company; and all bonds and the coupons thereto attached, issued by said companies; and all dividends declared by said companies; and all interest and other moneys due upon said stock, bonds, coupons, and dividends belonging to Samuel Miller, of the county of Amherst, in the State of Virginia. And you are further ordered to leave a copy of the said seizure, certified by you, with the clerk, treasurer, or cashier of the companies, if there be any such officer; and if not, then with any officer or person who has at the time the custody of the books and papers of the corporations, and to require a certificate of the amount of interest held by said Miller in said coupons. And you are futher directed to make true return to me, in writing, of your doings under this order.

ALFRED RUSSELL,
United States District Attorney, Eastern District of Michigan.

On the 6th of February, 1864, the marshal returned to the district attorney that he had seized the shares, bonds, and coupons attached, pursuant to his direction, stating the shares and the dates of the certificates as in the order of the district attorney. And he concluded his return as follows:

"I do further return, that I seized said stock *by serving a notice of said seizure personally upon M. L. Sykes, Jr., Vice-President of the Michigan Southern and Northern Indiana Railroad Company,*

and President of the Detroit, Monroe and Toledo Railroad Company.'

By a stipulation of counsel, the instructions of the Attorney-General, the order of the district attorney to the marshal, and the return of the marshal, were made part of the record in the cause.

On the 27th of February, 1864, the district attorney filed a libel of information in the District Court for the Eastern District of Michigan, against the property. This libel stated that the district attorney prosecuted the proceeding on behalf of the United States and of the informer subsequently mentioned—one Browning—against 200 shares of common stock in the Michigan Southern and Northern Indiana Railroad Company; and 343 shares of the Detroit, Monroe and Toledo Railroad Company; and all bonds and coupons attached (describing them as in the order of the district attorney to the marshal); "the same being the property of Samuel Miller, of Virginia, a rebel citizen, and inhabitant of the United States, who, being the owner of said property, has knowingly used and employed, and has consented to the use and employment of the same, in aiding, abetting, and promoting the existing insurrection against the government of the United States; and who, owning property in a loyal State, has assisted and given aid and comfort to the present rebellion against the authority of the United States."

The libel then proceeded to allege:

"1st. That the marshal *seized* the property on the 5th of February, 1864.

"2d. That on the 16th of August, 1861, the President by his proclamation declared that insurrection existed in the States of Virginia, North Carolina, South Carolina, Tennessee, and Arkansas; that during the said insurrection, *after* the President had declared by proclamation that the laws of the United States were opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law; and *after* August 6th, 1861, the said Samuel Miller purchased and acquired

the said stocks, and the same were sold and given to him, with intent to use and employ the same, and to suffer the same to be used and employed in aiding, abetting, and promoting such insurrection; and that being owner of the said property, he did knowingly use and employ, and did knowingly consent to the use and employment of the same in aiding, and abetting, and promoting the said insurrection.

The libel then proceeded to state, that in November, 1863, one Browning, residing in the city of New York, filed with the district attorney information concerning the property and the facts above described, and in consequence the proceedings were for the use of such informer and the United States, in equal parts.

The libel then proceeded to make the following charges against Miller.

1st. That at various times since July 17th, 1862, he had acted as an officer of the army, and also as an officer of the navy of the rebels, in arms against the government of the United States.

2d. That since that period he had acted as a member of Congress, also as a judge of a court, and also as a commissioner of the so-called Confederate States of America.

3d. That at various times since that period he had acted as a member of a convention, and also as a member of the legislature, and also as a judge of a court of the State of Virginia, and also of other States of the so-called Confederate States.

4th. That at various times since that period, having previously held an office of honor, trust, and profit in the United States, he had held an office in the Confederate States.

5th. That at various times since that period he had held offices and agencies under the government of the Confederate States, and under the State of Virginia, and under other States of the confederacy.

6th. That at various times since that period he had given aid and comfort to the rebellion, by procuring persons to enlist and join the army of the rebels, and by inducing others

to assist in arming, equipping, transporting, and maintaining such recruits.

The libel then further alleged the issue of a proclamation by the President, July 25th, 1862, warning all persons to cease participating in the rebellion, and to return to their allegiance to the United States; and that Miller being engaged in armed rebellion against the government, and in aiding and abetting it, did not within sixty days after the proclamation cease to give aid and countenance to the rebellion, and return to his allegiance.

It alleged further that the property was situated within the jurisdiction of the court, and that the libellants were entitled to have it condemned, as confiscated and forfeited to the United States, and concluded with a prayer for the usual process and monition; and that a decree of condemnation be made of the property to be disposed of to the use of the informer and the United States in equal parts.

Upon this libel process of the court was issued, directed to the marshal, commanding him "to hold the said stock—the same having been by you duly seized," until the further order of the court touching the same; and directing him to publish citation to all persons interested in a newspaper in Detroit.

On the 5th of April, 1864, the marshal returned the process, with his indorsement thus:

"I hereby certify, and return, that I have seized and *now hold* all the property described in the within writ, and *now hold* the same subject to the future order of the said court, and have given notice to all persons interested therein, by publication, as required in the within writ."

There was no personal service upon Miller nor on any one professing to represent him. No one appeared on his behalf, or in defence of the proceeding. On the 5th of April, 1864, on the day of the return by the marshal of the warrant, after the default of all persons had been entered, and after reading the proof which had been taken on the

part of the United States, a decree was entered condemning and forfeiting the property to the United States; the record not showing, however, a decree that the libel be taken *pro confesso*. By the decree a sale was ordered, and the two corporations were directed to cancel the old certificates of stock, and issue new certificates to the purchasers at such sale. It was also decreed, that after the payment of costs, the proceeds of the sale should be divided between the United States and the informer.

The proof produced at the hearing, consisted of an *ex parte* deposition of one Thatcher, taken in New York. This deposition was thus:

"I reside in New York city. I know Samuel Miller; he resides three and a half miles south of Lynchburg, in the State of Virginia. I do not know of any agent or attorney that he has in the city of New York; nor do I believe that he has any in the Northern States. I saw him about the 1st of July, 1863, at his home near Lynchburg, Virginia. I had a conversation with him there at that time. He told me that he was the owner of about $109,000 registered Indiana State bonds. He also said no interest had been paid on them since the 1st day of January, 1862, and when interest was demanded of the agent in New York he declined to pay it, saying the bonds and interest had by the acts of Congress been forfeited to the government of the United States. He also said to me, in that conversation, that he approved of the acts of the Confederate government, and that their ultimate success was as certain as it was for the sun to rise in the morning, although the sacrifices he knew would be great, and that he would be very willing to bear the sacrifices with them; and that he was then giving one-tenth of all his income for the support of the army of the Confederate government, and was also contributing, independently of the foregoing, a large amount to support the wives and children of the soldiers in arms, and other contributions of almost daily occurrence that were needed to keep matters moving. He said he was giving as much for the wives and children of the soldiers as all the rest of the county put together."

Subsequently, application was made to the District Court

to open the decree upon affidavits, which it was asserted showed the loyalty of Miller, but the District Court denied the application; and on error to the Circuit Court the decree was affirmed. The case was brought to this court on writ of error to the Circuit Court.

Messrs. W. P. Wells and S. T. Douglass, for the plaintiff in error:

I. The district attorney, undertaking to proceed in conformity to the method of procedure in revenue cases, directed a seizure to be made before the libel was filed.

What was this seizure? Nothing in the return to the writ of error shows. The warrant and return do show, however, that the seizure relied upon by the government was a seizure made before the filing of the libel, and, by stipulation, the facts concerning the seizure are placed before the court, and constitute part of the record. We thus get, and only thus, the instructions of the Attorney-General; the written directions given by the district attorney to the marshal, and the return made by the marshal to the district attorney. The general instructions of the Attorney-General, given in respect to proceedings under the confiscation acts, are detailed and explicit. The district attorney undertook to proceed under them. He gave a written direction, November 25th, 1863, to the marshal, to seize the stocks in question. In obedience to this direction, the marshal performed the acts which are called a seizure, and made a return of what he had done. That return shows that the only seizure was a notice to the president of one road where Miller's stock was and to the vice-president of another. No other act of seizure was performed. Was this sufficient?

1. In admiralty or revenue proceedings *in rem* seizure is necessary to give the court jurisdiction. The *res* must be actually or constructively within the possession of the court.* There must be an arrest of it,† a taking of possession and

* Benedict's Admiralty Practice, § 434.

† Betts's Admiralty Practice, p. 32; Admiralty Rule 29 of Supreme Court.

an exercise of control over the thing seized. This possession must be actual, open, and visible. The persons in previous possession must be dispossessed and unable longer to exercise dominion over the property. There is no such thing known to the law as constructive possession, or typical possession, in a proceeding *in rem.** The reason of this is obvious. It is in order to preserve the principle of notice to the party whose property is to be affected, which is a fundamental requisite to the validity of judicial proceedings.†

Now, in this case the property, unlike the sorts of property usually seized in revenue proceedings, and which are capable of actual possession, was intangible. No actual seizure of it could be made by the marshal. Stocks can only be seized and made the subject of legal process by express statutory provisions, which prescribe something which shall be equivalent to the seizure of other kinds of property.‡ In the absence of any statutory method of seizure prescribed in these acts of Congress, stocks therefore cannot be seized, although expressly mentioned in one of the acts. Any law which provides for *their* condemnation in a judicial proceeding should prescribe a method of seizure. If the law makes no such provision the essential requisites of a revenue seizure cannot be preserved. And there is a *casus omissus* in the statute. This view is supported by reference to the instructions of the Attorney-General. He directs that stocks shall be seized according to the methods prescribed in the State laws. But in Michigan there is no law which authorizes the taking of stocks on mesne process. They may be taken on final process, but not in the way pursued in this case.§

Such so-called seizure as was made here would preserve

* The Brig Ann, 9 Cranch, 289, 291; Taylor *v.* Carryl, 20 Howard, 599; The Silver Spring, 1 Sprague, 551.

† Mankin *v.* Chandler, 2 Brockenbrough, 127; Rose *v.* Himely, 4 Cranch, 277, The Mary, 9 Id. 144.

‡ Haley *v.* Reid, 16 Georgia, 437; United States *v.* 1756 Shares of Stock, 5 Blatchford, 231.

§ 2 Compiled Laws of Michigan, 1213, 1214.

no principle of notice. The notice by publication, which is, presumptively, likely to reach persons who have an interest in the property, and a right to appear and defend such proceedings, was in this case nugatory. The person whose property was proceeded against was in an insurgent State. Any communication to him of the published notice would have been illegal. If the requisite of notice to the owner is to be presumed, then the presumption must arise from the seizure. In respect to property which can be the subject of actual possession, the presumption is that it is left in charge of persons who represent the owner. This presumption, in respect to all kinds of property named in the acts, except stocks, would be effectual. If any property of these classes was in the Northern States, it was almost necessarily in possession of agents who could represent the owner and appear in his behalf. A seizure must, of necessity, give these agents notice. But it is otherwise in respect to stocks. The property being intangible is in charge of no agent. The evidence of it, the certificates, is presumptively in the possession of the owner of the stock. The decree here shows that the certificates were outstanding. Even if the possession of the certificates by any one in the Northern States could make him an agent of the owner, there is no pretence that there was any such possession of the certificates by an agent. The method in which the marshal sought to effect seizure shows that no service could be made upon any one in any legal relation to the real owner.

The officers of a corporation are not the agents of the stockholder or the custodians of any particular stock. They may be, in proceedings like this, and as Northern men, probably in this case were, in hostility to the stockholder. There is no such legal relation between them and the stockholder as will in any case raise the presumption which arises in other cases, that the custodian of property seized will appear and defend the owner's interests.

If the seizure, made before the libel was filed, was not a valid seizure, the court had no jurisdiction. We have seen that there was no real seizure made under the warrant of

arrest. The marshal's return upon the warrant shows only, in effect, that he held the stocks by him seized theretofore. But if he had made a seizure upon the warrant, and there had been no valid seizure before the libel was filed, the whole case fails.*

II. There was no such hearing and proof in this case as are necessary to a valid decree, even if the court had power to hear and determine the case without a jury.

The case is here by writ of error upon the judgment of the Circuit Court. It was taken to the Circuit Court from the District Court by writ of error. This is the proper method of reviewing cases of seizure on land.†

But the record contains the evidence and all the proceedings, like the transcript of an appeal in admiralty. As it is here, although brought up in a return to a writ of error, the court will not refuse to consider the evidence. Especially when, under these acts of Congress, the law officer of the government, under the power given to make the proceedings conform to admiralty or revenue proceedings, undertakes to proceed, as in this case, partly in conformity to admiralty procedure and partly as in revenue cases, the court should not hesitate to examine the evidence. The merits have been considered in a case of this kind;‡ and if the court, considering the evidence and giving the utmost effect to that in favor of the government, finds that there is not enough to support the decree, it will be reversed.§

The decree shows that the counsel for the government treated the case as one of default.

We say, then, if a valid default was entered there should have been a hearing, and the government should have proved its case. By the act of 1862, proceedings under it are to conform as nearly as may be to admiralty and revenue cases; to admiralty cases where the seizure is on water, to

* The Washington, 4 Blatchford, 101.

† Union Insurance Company *v.* United States, 6 Wallace, 760; Armstrong's Foundry, Ib. 766; United States *v.* Hart, Ib. 770.

‡ Union Insurance Company *v.* United States, 6 Wallace, 760.

§ Parsons *v.* Armor, 3 Peters, 425.

revenue ones where on land. This matter was on land. Now the act of the 2d March, 1799,* regulates these last. A hearing after default is provided for there as necessary; for *then*, says the act, "the court shall proceed and determine the cause according to law." The case of *The United States* v. *The Lion*,† decided by Judge Sprague, shows this. If a hearing was necessary, what should the government have proved? It should have *proved* the seizure, and a seizure made previous to the filing of the libel. The return by the marshal of a seizure upon the warrant is not sufficient.‡ It should have proved some offence under the acts of Congress. The libel sets forth every offence under both acts. What the government *relied* upon as ground of condemnation, *and undertook to prove*, is shown by the deposition of Thatcher. If it is requisite, in a hearing in admiralty upon default, that there should be plenary proof, whenever the circumstances make it reasonable, certainly in this class of cases, where the party has had no notice and all presumptions of notice fail, the court should have required stronger proof than was made in this case. In this connection it may be noticed that while the only proof offered by the government tended to prove (if it tended to prove anything) offences under the act of 1862, the form of the decree is as if the government relied on an offence under the act of 1861. It divides the proceeds with the informer. But full proof should have been given of whatever offences the government relied upon as grounds of condemnation. There was nothing but a single ex parte deposition, testifying to a conversation.

III. As the proceedings related to a seizure on land, the case is one of common law jurisdiction, and there should have been a trial by jury. The cases of *Union Insurance Company* v. *United States*, of *Armstrong's Foundry*, and of the *United States* v. *Hart*,§ show this.

IV. The acts of Congress in question were enacted in the

* 1 Stat. at L. 709. † 1 Sprague, 399; and see Admiralty Rule, 29.

‡ The Washington, 4 Blatchford, 101; The Silver Spring, 1 Sprague, 551.

§ 6 Wallace, 759, 766, 770.

exercise of the sovereignty of the government over the whole people of the United States, and not in the exercise of its rights as a belligerent under the law of nations. They were not enacted under the war powers of the government, for these only authorize the confiscation of the property of public enemies. Hence the acts are not valid, because not in conformity with the provisions of the Constitution, the 5th and 6th amendments to which ordain that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; that no person shall be deprived of his property without due process of law; and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. The purpose of the acts was to punish offences against the sovereignty of the United States. They are statutes against crime. They prescribe a forfeiture of the estate of the "offenders," terms strictly applicable only to punishment for crime. These remarks are specially true of the act of 1862.

Nor are the provisions of the act for confiscation confined in their operation to the property of enemies; they are applicable to the property of persons not enemies within the law of nations.

In addition, under the act of 1862, the property of all enemies is not made liable to confiscation. Whether persons are within the law depends, therefore, not on the fact of their being enemies, but on their having done or not done certain overt criminal acts described and defined by the statute.

V. But if the statutes were passed in pursuance of what are called the "war powers" of the government, equal difficulty still remains. Although there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. The power to prosecute war is only a power to prosecute it according to the law of

nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. These enactments, confiscating, as they do, private property, are not within the limits of modern and civilized warfare.

Mr. Akerman, Attorney-General, and Mr. Bristow, Solicitor-General, for the United States; Mr. G. F. Edmunds, for the purchasers of the property sold under the decree:

Miller failed to appear and claim the property when called on in the District Court, by the usual publication and notice. As a preliminary point, therefore, we submit that he is not entitled to bring up the record, or to any standing in this court. The statute providing for the seizure of the property, in the prosecution of the war, did not proceed against the property of any *particular* rebel or enemy, but against the property of any and *all* enemies. The suit was *in rem* against the property, and not *in personam* against the owner. No person is a party to a suit *in rem* except the libellant, until there is an appearance and claim put in; and no owner or person interested is at all bound to make himself a party to any suit. If he does not choose to come forward and incur the risks and responsibilities of claim and answer, he renounces all interest in the subject of the suit, and is no more a party to it than a stranger. Whether or not he had actual notice is unimportant. It is in law the same as if he had. No instance can be found before these, of an appeal or writ of error being brought even, much less sustained, in a cause *in rem*, by any person who was not a claimant in the court below, except under the English act of 1797,* which was enacted to give persons interested a right of appeal in prize cases, where they had not appeared and become parties—a privilege which, without the statute, they did not possess.

But waiving this point, if the proceedings are not absolutely void, the judgment is conclusive, and if they are void,

* 38 Geo. III, ch. 38, § 2.

the remedy for persons not before the court as a party is not by writ of error, but by suit for his property.

Both when the information was filed upon seizure, and when the condemnation and the sale of the property was had, a state of war, both in the actual and legal sense, existed between the United States and the so-called Confederate States.

The property was within the district where it was seized and proceeded against. The corporations existed in Michigan alone, and their actual operations were carried on there. The stock could be transferred there only, on the books of the corporation and on surrender of the outstanding certificates.* Even in the case of simple debts, for all purposes of appropriation to the use of creditors, &c., the *situs* of the property is the residence of the debtor. This has been familiar law from the earliest times to the present. "Garnishment," "foreign attachment," and "trustee process," in such cases, have existed in one form or another, almost as long as any branch of jurisprudence.

The act of July 17th, 1862, acting upon the fact and law of war in the public sense, in express terms made it the *duty* of the executive department of the government to seize for the use of the nation "all the *estate* and *property*, money, *stocks*, *credits*, and effects, of the persons" enumerated as among the public enemies of the United States. This language, both comprehensive and specific, necessarily included the interest of Miller in these corporations. The very word "stocks," which defines his interest, is used. Within the principles of public law, such incorporeal interests, in whatever form they may exist, are the proper subjects of confiscation, and for such purposes they are within the jurisdiction and power of the sovereign. If the real source of the interest or right to the performance of an obligation is within the territory of the sovereign, it may be cut off and destroyed.†

* United States *v.* Leroy Wiley's Stock, 5 Blatchford, 231.

† Cooper *v.* Telfair, 4 Dallas, 14; Ware *v.* Hylton, 3 Dallas, 199, 224, 226; Smith *v.* Maryland, 6 Cranch, 286.

Argument in support of the confiscation.

The power of the legislative and war-making department to confiscate the property of enemies on land cannot be questioned.* And in such cases the same power is "the sole judge of the exercise of the right, as to the extent, mode, and manner." The act of 1862 puts this species of property *by name* in the category of enemy's property, if owned under the circumstances stated in the information (and declared in the prize cases to be a case of war), that is, by a public enemy, and it requires in such case that it shall be seized and "*condemned as enemy's property, and become the property of the United States.*" When, therefore, the statute directs a "seizure" of enemy's property of this description, it cannot be defeated by the circumstance that the property is not tangible, and so not capable of manual caption or possession. The seizure is, in contemplation of law, not only the physical taking of a visible thing, but it is the taking dominion of and bringing under control the object proceeded against. The evidence of seizure varies according to the nature of the thing. In the case of intangible things it rests in symbol, or any such steps indicating dominion as the thing is capable of. The seizure itself was, when made at first by the marshal, in all respects regular and perfect. It was done by serving a notice on the officers of the corporation. There was no other mode for said seizure, and it was not less tangible than the admiralty method of seizing a ship, by posting a notice on the mast,† or of seizing goods in a warehouse, to which the officer cannot obtain access, by leaving a copy of the warrant with the warehouseman.‡

But it is of no consequence whether the seizure before information filed was perfect or not, for *then* the court took possession of the property under *its* order and *process*, and notified the fact to the corporation, and brought them under its jurisdiction by orders upon them. As this property could be in only one district, the cases holding that there

* Brown *v.* The United States, 8 Cranch, 110; Mrs. Alexander's case, 2 Wallace, 404.

† Williams & Bruce, Admiralty Practice, p. 193.

‡ Ib. 194. See also Manning, Exch. Pr., pp. 7 and 8.

must be a *prior* seizure, in order to test the jurisdiction, do not apply. But aside from these familiar general principles, when a valid statute directs a thing intangible to be seized and proceeded against, it, by necessary intendment, carries the employment of such means to effectuate the purpose, as can be adapted to the nature of the case.

The proceedings were in all respects regular, whether the seizure be regarded either as municipal or belligerent.

First. As a municipal seizure, it was just like a revenue or neutrality case, a proceeding *in rem* against the property which was before the court, and the property, and not the claimant, was the subject of the suit.*

It was a civil cause. On the filing of the information the court took control of the property by its officer in the only way possible: gave notice to all persons to appear in the regular course, and, upon default of claimants, decreed confiscation and sale upon *evidence* of the only fact the plaintiff in error would have had a right to dispute had he appeared, *i. e.*, that he was a public enemy and adhering to the Confederate States; for, if he did not in due and formal manner claim the property as his, he could not have been heard at all. And he can only be entitled (if at all) to bring this writ of error upon the assumption that the very property condemned was his, as alleged in the information. He could not, had he appeared, have been permitted to dispute the seizure against the warrant of the court or the return of the marshal.

The proceedings *after* condemnation the party has no right to question, for by the *decree itself all his right ceased absolutely*, and the property became finally vested in the United States. Whether it was disposed of as the statute required, was then solely a question between the government and its officers. And its disposition was regular.†

Plainly, according to settled principles and practice, no trial by jury was requisite or legally possible in a case *in rem* where all claimants made default, and were in contumacy,

* The Palmyra, 12 Wheaton, 1; La Vengeance, 3 Dallas, 297; The Sarah, 8 Wheaton, 391.

† Ingraham *v.* Dawson, 20 Howard, 495.

or left the property derelict. There was no issue of fact existing, and there could be none without claims and counter allegations. The information was confessed by the non-appearance of claimants, and judgment could be at once pronounced upon the facts alleged in the information and appearing on the record. This is the well-known course of the common law (save sometimes in assessing damages), and is the universal course in revenue cases, and, with some exceptions, in admiralty.

But if this be an admiralty cause, then writ of error will not lie.*

And the fact that the notice to Miller and all other claimants was constructive, does not, and cannot change the legal regularity of any of the proceedings. Constructive notice, according to the lawful practice of a court, is to all intents and purposes just as effectual as actual notice. It must be that or nothing. It is not good or bad, as there may or may not be ground for belief that it carried actual notice to the claimant. Justice could not be administered on such a principle. The only redress (when there is any) in cases of hardship, is an appeal to the *discretion* of the court, to open the default—not by writ of error.†

Nor can this court, upon a *writ of error*, which must be founded upon the *record*, consider in any case whether there was too little, or no evidence at all before the court below.‡ The evidence in a common law cause never becomes a part of the record, even if all be in the form of depositions, save when it is referred to in order to raise questions of *competency*, not *sufficiency*. If a court, in an actual trial, with both parties before it, should find for the plaintiff, without *any* evidence, there would be no redress on error, without a statement made in the record that such was the fact. But the record here shows that the court below heard depositions on the subject. The legal presumption is (even if this court could review the *quantum* of the evidence), that they were sufficient.

* San Pedro, 2 Wheaton, 132. † The Mary, 9 Cranch, 126.

‡ Minor *v.* Tillotson, 2 Howard, 392; New Orleans *v.* Gaines, 22 Id. 141; Suydam *v.* Williamson, 20 Id. 427.

Argument in support of the confiscation.

Second. As a belligerent seizure.—This was in all respects a seizure *jure belli*, and neither the provisions of the Constitution, nor the rules regulating municipal seizures, have any intrinsic application to the case. Miller was a public enemy in law and in fact, residing within the dominion of the hostile party, and, in a legal sense, engaged in levying war against the United States. Being in this condition, all his property was subject to seizure and confiscation, as well on land as sea, not for the breach of any municipal law, but under the rights of war. But under the rule laid down in *Brown* v. *The United States*,* the executive officers of the government would not be authorized to act without the direction of the legislative will. Therefore Congress passed the act of July, 1862, directing the President to exercise this right, and directed in express terms that the property seized should be "*condemned as enemy's property*," &c. The fact, therefore, that a statute provided for the confiscation, has no more tendency to show that it was a municipal proceeding, than an act of Congress declaring war would. Legislation is only an expression of the sovereign will, and so the character and effect of it must depend upon the nature of the subject upon which it acts, and not upon the fact that it is embodied into a statute.

The power, then, of Congress over the subject-matter was complete. It might have proceeded, as Maryland did in the Revolution, to final confiscation, by the mere force of the statute, without any other proceedings whatever, or it could adopt any other process it should choose. And if the fact of the owner of the property being a public enemy existed, it clearly would not be competent for him to question the conformity of the proceedings to the statute. Indeed, the express provisions of the act make the fact of his hostility a bar to all litigation on his part. The proceedings and judgment in the District Court show Miller's hostile condition, and hence it is of no consequence to inquire whether the formal steps were in conformity to the statute.

* 8 Cranch, 110.

But they will stand all fair criticism on that point. There was the seizure caused by the President through the regular channel of executive action, the information against the property seized by the proper officers of the government; the order and warrant by the court, made thereon, to its officers to hold the property; the usual notices, according to the practice of the court, to all persons in interest; the default; and then the condemnation upon actual evidence (which was unnecessary), and the final process of execution. All these steps conformed "as nearly as may be to proceedings in admiralty and revenue cases," and indeed entirely, in substance, to such proceedings.

Mr. Justice STRONG delivered the opinion of the court.

This was a proceeding under the acts of Congress of August 6th, 1861, and July 17th, 1862, to confiscate shares of stock in two corporations created by the State of Michigan. The stock had been seized by the marshal of the district, acting indirectly under orders of the President of the United States. The marshal made return to the district attorney that he had seized it, with all dividends, interest, and moneys due thereon, specifying in his return the stock-certificates by which it was represented, and describing the mode of seizure to have been serving a notice thereof personally upon the vice-president of one company, and upon the president of the other. An information was then filed in the District Court, in the nature of a proceeding *in rem*, against the stock, averring it to be the property of Samuel Miller, of Amherst County, Virgina, a rebel citizen and inhabitant of the United States. The information further averred that the said Miller was one of the persons described in the several clauses of the 5th section of the act of 1862, and also that within the States of Virginia and South Carolina, after the passage of the act, being engaged in armed rebellion against the government of the United States, and being engaged in aiding and abetting such armed rebellion, he did not, within sixty days after the proclamation (mentioned in the 6th section) had been made by the President, cease to

aid, countenance, and abet said rebellion, and did not and would not return to his allegiance to the United States. Upon the information thus filed a warrant and monition were issued, commanding the marshal to hold the stocks and property thus described, the same having been by him duly seized, until the further order of the court touching the same, and to give notice, as prescribed, that all persons having any interest in said property, or having anything to say why the same should not be condemned as enemy's property and sold, according to the prayer of the libel, might appear before the court at a time designated therein and make their allegations in that behalf. To this writ or monition the marshal returned as follows: "I hereby certify and return that I have seized and now hold all the property described in the within writ" (the stocks aforesaid), "and now hold the same subject to the future order of said court, and have given notice to all persons interested therein, by publication, as required in the within writ." The record then shows that on the day designated in the monition, after default of all persons had been duly entered, and after reading the depositions which had been taken on behalf of the United States, the shares of stock were condemned as forfeited and a writ of *venditioni exponas* was ordered, under which they were sold. After this Miller applied by petition to the District Court, praying that the decree of condemnation might be opened and set aside, but the prayer of the petition was denied. The case was then removed to the Circuit Court by writ of error, and the decree having been affirmed, the record has been brought into this court for review.

We notice at the outset an objection urged against the competency of the plaintiff in error to sue out the writ which brings the case here, on the ground that he was not a claimant in the District Court, only to say that it is set at rest by the decision made in *Mc Veigh* v. *United States*, a case decided at this term.*

Assuming, then, that the case is properly in this court,

* *Supra*, 258.

and that the plaintiff in error has a right to be heard, we proceed to notice the errors assigned.

The first is, that there was no such seizure of the stocks as gave the court jurisdiction to condemn them as forfeited, and to order their sale.

This was a fatal error, if the fact was as claimed. In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is *in rem*. In most such cases the *res* is movable personal property, capable of actual manucaption. Unless taken into actual possession by an officer of the court, it might be eloigned before a decree of condemnation could be made, and thus the decree would be ineffectual. It might come into the possession of another court, and thus there might arise a conflict of jurisdiction and decision, if actual seizure and retention of possession were not necessary to confer jurisdiction over the subject. But how can it be maintained there was no sufficient seizure in this case? The record shows one. The marshal returned to the warrant that he had seized the property, and that he then held it subject to the further order of the court. Why is not this conclusive? Can a sheriff's or marshal's return to a writ be contradicted by a plaintiff in error? It is true the return did not describe the mode of seizure, but neither the writ nor the law required that more than the fact should be stated. The return met all the exigencies of the writ. It cannot be presumed, in the face of the record, that an illegal seizure was made, or that some act was done that did not amount to a seizure. But it is said the warrant with monition did not require the marshal to seize; that it only commanded him to *hold* the stock, *the same having been by him duly seized*, until the further order of the court. Whether this was not an order to seize, as well as to hold after seizure, we need not determine. Confessedly the object of the writ was to bring the property under the control of the court and keep it there, as well as to give notice to the world. These objects would have been fully accomplished if its direction had been nothing more than to hold the property subject to

the order of the court, and to give notice. The marshal had already seized the stock, and it remained in his possession. An order to seize property already in his hands would have been superfluous. All that was needed was that, having the property, he should hold it subject to the order of the court. Thus held by its officer, the jurisdiction was complete. But the writ was larger. It commanded him to hold the property, *it having been duly seized;* and he returned a seizure. The act of Congress does not require that proceedings in confiscation shall conform precisely to those in admiralty or revenue cases, but only "as near as may be." They must be adapted to the peculiarities of the case, following proceedings in admiralty and revenue so nearly as may be, consistently with the objects Congress had in view. Yet even in admiralty it cannot be doubted, if a warrant with a monition should command a marshal to hold goods already in his possession until the further order of the court touching the same, and he should return that he had seized them, and that he held them as required, the jurisdiction of the court over them would be complete. To hold otherwise would be to sacrifice the spirit to the letter of form, the substance to the shadow.

It is insisted, however, that inasmuch as the return to the warrant is silent respecting the mode of seizure, we may look to the seizure made by the marshal under the executive order before the information was filed. That was made by direction of the district attorney, acting under authority of the President, and the marshal, in reporting his action, returned that he seized the stock "by serving a notice of said seizure personally upon the vice-president of one company, and upon the president of the other." It is assumed that the judicial seizure made under the judicial warrant was made in the same way, or that it was the same seizure, and it is argued that the action of the marshal did not amount to a seizure effectual to bring the property within the jurisdiction of the court. The first observation we have to make in regard to this is, that the plaintiff in error has no right to make any such assumption. It is justified by

nothing in the record. True, a seizure under order of the President was necessary to warrant the institution of judicial proceedings for confiscation, and it may be, therefore, a proper inquiry whether what the marshal did under the executive order amounted to such a seizure. But the marshal's return to the judicial warrant, and his report to the district attorney, speak of distinct transactions, occurring at different times and under different directions. Waiving this, however, and assuming that the manner of seizure spoken of in the return to the warrant and monition was the same as that described in the report to the district attorney, we are of opinion the seizure was good and effective, sufficient to give the court jurisdiction over the property.

The act of Congress of July 17, 1862, made it the duty of the President to cause the seizure of all the estate, property, money, *stocks*, *credits*, and effects of the persons described, and in order to secure the condemnation and sale of such property, after its seizure, directed judicial proceedings, *in rem*, to be instituted. It contemplated that every kind of property mentioned could be seized effectually in some mode. It had in view not only tangible property, but that which is in action. It named stocks and credits; but it gave no directions respecting the mode of seizure. It is, therefore, a fair conclusion that the mode was intended to be such as is adapted to the nature of the property directed to be seized, and in use in courts of revenue and admiralty. The modes of seizure must vary. Lands cannot be seized as movable chattels may. Actual manucaption cannot be taken of stocks and credits. But it does not follow from this that they are incapable of being seized, within the meaning of the act of Congress. Seizure may be either actual or constructive. It does not always involve taking into manual possession. Even in case of chattels movable, taking part of the goods in a house, under a *fi. fa.*, in the name of the whole, is a good seizure of all.* An assertion of control, with a present power and intent to exercise it, is sufficient

* Scott *v.* Scholey, 8 East, 474.

We are told there is no statute in Michigan that authorizes the service of mesne process upon a corporation for the attachment of its stock. Be it so. That does not show that stocks cannot be seized or attached when Congress orders a seizure. Federal officers and Federal courts are not dependent upon State legislation for power to lay hold of property. Can it be that the government may seize credits and corporation stocks of public enemies in those States where provision is made by State legislation for modes of seizure of such property, but may not seize similar property of the same enemies in other States where there are no such statutes? There is, however, such a thing as seizure of corporation stocks in Michigan on final process, effected by service of a copy of the writ on an officer of the corporation, and similar modes of seizure are in use in most, if not in all, the States. Garnishment almost everywhere exists. What is that but substantial attachment? It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. In all cases where the garnishee is a debtor, or where the garnishment is of stocks, it is effected by serving notice upon the debtor, or corporation. A corporation holds its stock, as a quasi trustee, for its stockholders. The service of an attachment, though it is but a notice, binds the debt or the stock in the hands of the garnishee, from the time of the service, and thenceforward it is potentially in "*gremio legis.*" The statute declares that proceedings to confiscate shall conform, as nearly as may be, to proceedings in admiralty or revenue cases. Now, it is legitimate in certain proceedings in courts of admiralty to attach credits and effects of such an intangible nature that they cannot be taken into actual possession by the marshal, and the mode of attachment is by notice, dependent upon no statutory enactment. See *Manro* v. *Almeida.** In that case, reference was made approvingly to Clerke's Praxis,† where it appears that it is consistent with

* 10 Wheaton, 492–3.

† By Hall, tit. 32, p. 70.

the practice of the admiralty, in cases where there is no property which the officer can attach by manucaption, to attach goods or credits in the hands of third persons, *by means of the simple service of a notice.* The language of this court was, that, "as goods *and credits*, in the hands of a third person, wherever situated, may be attached *by notice*, there cannot be a reason assigned why the goods themselves, if accessible, should not be actually attached, and although it is very clear that the process of attaching by notice seems given as the alternative when the officer cannot have access to the goods themselves, yet all this may be confided to the discretion of the judge who orders the process."* These are, indeed proceedings to compel appearance, but they are, nevertheless, attachments or seizures, bringing the subject seized within the control of the court, and, what is of primary importance, they show that, in admiralty practice, rights in action, things intangible, as stocks and credits, are attached *by notice to the debtor*, or holder, without the aid of any statute.

It was in this mode, known to the courts, and dependent on no statute, that the marshal seized the stock of the plaintiff in error. It is impossible for us to hold that his act was no sufficient seizure.

A single observation more upon this part of the case. The eighth and the fourteenth sections of the act of 1862 empowered the courts to make orders and decrees, to issue process, and do all other things necessary to fitly and efficiently carry out the purposes of the act, which were to seize and confiscate (*inter alia*) stocks and credits. Under this authority the court might have made an order, had it been necessary, prescribing as the mode of seizure precisely what the marshal did. And, if so, it would be difficult to maintain that, in proceeding to adjudicate upon the stocks, there was not a recognition of the marshal's action, as a valid seizure, equivalent to an antecedent order thus to seize. The decree expressly declared that the stocks had been seized.

* *Vide*, also, Conklin's Admiralty Practice, 478; Smith *v.* Miln, Abbott's Admiralty, 373; and our Admiralty Rules, 2 and 37.

Opinion of the court.

The second assignment of error is, that there was no such hearing and proof in the case as was necessary to a valid decree of condemnation. Whether this assignment is well made must be determined by the record. That shows an information containing averments of all facts necessary to warrant a decree of condemnation. It shows a warrant and monition, return of seizure and publication of notice, and a decree setting forth that the warrant of confiscation and monition having been duly made, and the default of all persons having been duly entered, it was thereupon, on motion of the district attorney, and on reading and filing the depositions taken on behalf of the United States, ordered, sentenced, and decreed by the court that the shares of stock standing in the name of Samuel Miller on the books of the companies, and belonging to him, which had been before seized by the marshal in this proceeding, be condemned as forfeited to the United States. Thus it appears a default was duly entered to a monition, founded on an information averring all necessary facts; that the decree was entered on motion, after default, and after reading depositions taken on behalf of the United States.

But it is insisted the District Court did not find that the stocks belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, which, it is said, are made necessary findings by the seventh section of the act, before a decree of condemnation can be entered.

This is not an objection to the jurisdiction of the court. We have already shown that was complete. It is an objection to the regularity of proceeding, and it assumes that the record must show affirmatively there was no irregularity. It presumes, therefore, against the record. The general rule, however, is, that in courts of record all things are presumed to have been rightly done.* In courts of limited jurisdiction, indeed, there is a presumption against jurisdiction, but when that appears they are entitled to the same presumptions in favor of their action as other courts are.

* Broome's Legal Maxims, 428.

The district and circuit courts are of limited jurisdiction, but they are not inferior courts, and they are therefore entitled to the same presumptions in their favor. Those presumptions are that the court, having jurisdiction, and having entered a judgment, did everything that was necessary to warrant its entry of the judgment. Undoubtedly the contrary may be shown in a court of error, but the burden of showing it is upon him who alleges error. The legal intendment is against him. This doctrine is abundantly sustained by the authorities. Thus, in *Railroad Company* v. *Stimpson*,* which was a patent case, Judge Story said, "It is a presumption of law that all public officers perform their official duties until the contrary is proved. And when," said he, "an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, or granted the patent, is *primâ facie* evidence that the proofs have been regularly made and were satisfactory. It is not then necessary for the patent to contain any recitals that the prerequisites to the grant of it have been duly complied with, for the law makes the presumption." And in *Grignon's Lessee* v. *Astor*,† which related to a proceeding *in rem*, and where the order of sale did not set out the facts which, under the law, must have existed before a sale could be decreed, Mr. Justice Baldwin said, "The record of the county court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition into consideration, and for these and divers other good reasons, ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them that brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes

* 14 Peters, 458.

† 2 Howard, 339.

that they were, such as to justify this action." So in *Erwin* v. *Lowry*,* Mr. Justice Catron, in delivering the judgment of the court, said, "We hold that wherever a judgment is given by a court having jurisdiction of the parties, and of the subject-matter, the exercise of jurisdiction warrants the presumption, in favor of a purchaser, that the facts, which were necessary to be proved to confer jurisdiction, were found."

It is not, however, necessary to invoke the maxim, "*omnia presumunter rite acta esse*," in support of this record. It appears, affirmatively, that all the facts were found or established which, under the act of Congress, were essential to justify the judgment. It has been observed the information set out that the stocks belonged to Samuel Miller, and that he was a person engaged in the rebellion, who had given aid or comfort thereto; that monition was duly made, and that there was default of all persons to appear and claim or show cause why the property should not be condemned as enemy's property. The default appears to have been duly entered. Were this, then, a proceeding according to the forms of a common law action, the facts averred by the information would be considered as established or confessed, and everything found necessary for a judgment. The effect of a default to appear in an admiralty or a revenue proceeding is ordinarily the same as in other actions at law. It is a virtual confession. In Benedict's Admiralty,† the practice in proceedings *in rem* is stated to be, if no one appears in response to the proclamation for all persons having anything to say why the property should not be condemned to come forward and make their allegations in that behalf, that, on motion of the libellant's proctor, the defaults are entered, and a decree of condemnation and sale is made on a brief statement by the proctor of the cause of action. When the libellant's claim may not cover the whole value of the property, there is a subsequent hearing to ascertain the amount to which the libellant is entitled, but the decree of condemnation and sale is entered on the default alone. So the same

* 7 Howard, 181.

† 2d edition, § 452.

author says,* "In cases of seizure, when no one appears, the decree of condemnation is absolute, the only question being whether the property be forfeited or not. In such cases it is usual for the district attorney, on his motion for condemnation, to state briefly the substance of the libel and the cause of forfeiture." In *United States* v. *The Schooner Lion*,† Judge Sprague admitted that in some cases condemnation followed default of necessity without a hearing, though, in the case then before him, he held that some hearing was necessary, because the act of Congress under which the forfeiture was then sought (that of fishing vessels for violations of law in obtaining fishing bounties) provided that after default the court should proceed to hear and determine the cause according to law. The act under which these proceedings have been taken makes no such requisition; and even in *United States* v. *Lion*, Judge Sprague said, to what extent there must be a hearing must depend upon the circumstances of the case. The court, said he, will at least examine the allegations of the libel to see if they are sufficient in law, and the return of the marshal, and such affidavit or affidavits as the district attorney shall submit. He added that a wilful omission by the owners to answer might of itself satisfy the court that a forfeiture should be decreed. This, in a case where the statute required a hearing after default. In the present case, though governed by no such requirement, the court did examine the depositions, and then, on motion of the district attorney, condemned the property. We have said the acts of 1861 and 1862 do not require any hearing after a default has been duly entered, as did the acts relative to forfeitures for violations of law respecting fishing bounties. It has been suggested, however, the act of 1789 directs that, in admiralty proceedings, there shall be a hearing after default. But there is no warrant for the suggestion. The act of 1789 contains no such provision. Neither the 19th section, nor any other part of the act, can be construed as making any such requirement. No change is made in the usual course of admiralty proceedings.

* § 454. † 1 Sprague, 399.

There is no essential difference between the forms of proceeding or the practice in revenue cases and those in admiralty, except where there are disputed facts. The former are described in Manning's Exchequer Practice.* There it appears that, though generally there is one proclamation to call in claimants, then an appraisement, and a second proclamation inviting bidders for more than the appraisement, many condemnations appear in the old records upon a single proclamation. Default to the first is a default of claimants; default to the second is a default of bidders.† Throughout the chapter condemnation by default is treated as in accordance with the practice of the courts in such cases. In *Attorney-General* v. *Lade*,‡ may be found an entire record of a revenue proceeding *in rem* to forfeit gold and silver coin seized for attempted exportation out of the realm contrary to acts of Parliament. The record, after reciting the information, seizure, &c., proceeds as follows: "Whereupon, proclamation being made for his said Majesty, as the custom is, that if any one would inform the court here why the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, should not, for the reasons aforesaid, remain forfeited, he might come and he should be heard, and no one appearing to do this, it is adjudged by the barons here that the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, do, for the reasons aforesaid, remain forfeited." This judgment, on review, was held to be regular, after the court had ordered precedents to be searched. It thus appears that in revenue cases, as in admiralty, default entered establishes the facts averred in the libel or information as effectively as they can be established on hearing, and warrants a decree of condemnation if the information contains the necessary averments. The second assignment of error cannot, therefore, be sustained.

The third assignment is, that as the proceedings related

* Vol. i, chap. 1, Information *in rem*. † Page 149.

‡ Parker's Reports of Revenue Cases, 57.

to seizure on land the case was one of common law jurisdiction, and there should have been a trial by jury; and we are referred to *Union Insurance Company* v. *United States*,* *Armstrong's Foundry*,† and other kindred cases. But in this cause there was a default. After the default there was no fact to be ascertained. The province of a jury in suits at common law is to decide issues of fact. When there are no such issues there can be nothing for a jury to try. This assignment is, therefore, without merit. None of the cases cited go further than to hold that issues of fact, on the demand of either party, must be tried by jury.

It remains to consider the objection urged on behalf of the plaintiff in error that the acts of Congress under which these proceedings to confiscate the stock have been taken are not warranted by the Constitution, and that they are in conflict with some of its provisions. The objection starts with the assumption that the purpose of the acts was to punish offences against the sovereignty of the United States, and that they are merely statutes against crimes. If this were a correct assumption, if the act of 1861, and the fifth, sixth, and seventh sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments of the Constitution. Those restrictions, so far as material to the argument, are, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; that no person shall be deprived of his property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of

* 6 Wallace, 759. † Ib. 766.

the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. It is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to

appropriate the property.* In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

It is also to be observed that when the acts of 1861 and 1862 were passed, there was a state of war existing between the United States and the rebellious portions of the country. Whether its beginning was on the 27th or the 30th of April, 1861, or whether it was not until the act of Congress of July 13th of that year, is unimportant to this case, for both acts were passed after the existence of war was alike an actual and a recognized fact.† War existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government. It is true the war was not between two independent nations. But because a civil war, the government was not shorn of any of those rights that belong to belligerency. Mr. Wheaton, in his work on international law,‡ asserts the doctrine to be that "the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as it respects neutral nations." It would be absurd to hold that,

* The Venus, 8 Cranch, 253. † Prize Cases, 2 Black, 635. ‡ § 296.

while in a foreign war enemy's property may be captured and confiscated as a means of bringing the struggle to a successful completion, in a civil war of equal dimensions, requiring quite as urgently the employment of all means to weaken the belligerent in arms against the government, the right to confiscate the property that may strengthen such belligerent does not exist. There is no such distinction to be made. Every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil. It is, however, unnecessary to pursue this branch of the subject farther. In the *Amy Warwick*,* and in the *Prize Cases*,† it was decided that in the war of the rebellion the United States sustained the double character of a belligerent and a sovereign, and had the rights of both.‡

We come, then, directly to the question whether the act of 1861, and the fifth, sixth, and seventh sections of the act of 1862 were an exercise of this war power, the power of confiscation, or whether they must be regarded as mere municipal regulations for the punishment of crime. The answer to this question must be found in the nature of the statutes and of the proceedings directed under them. In the case of *Rose* v. *Himely*,§ Chief Justice Marshall, in delivering the opinion of the court, said: "But admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If, as a legislator, he publishes a law ordaining punishment for certain offences, which law is to be applied by courts, the nature of the law and of the proceedings under it will decide whether it is an exercise of belligerent rights or exclusively of his sovereign power; and whether

* 2 Sprague, 123.

† 2 Black, 673.

‡ Rose *v.* Himely, 4 Cranch, 272; Cherriot *v.* Foussat, 3 Binney, 252; Dobree *v.* Napier, 3 Scott, 225; Santissima Trinidad, 7 Wheaton, 306; United States *v.* Palmer, 3 Wheaton, 635.

§ 4 Cranch, 272.

the court, in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations."

Apply this test to the present case.

It is hardly contended that the act of 1861 was enacted in virtue of the sovereign rights of the government. It defined no crime. It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet, or promote the rebellion, then a war, or to maintain the war against the government. It treated the property as the guilty subject. It cannot be maintained that there is no power to seize property actually employed in furthering a war against the government, or intended to be thus employed. It is the act of 1862, the constitutionality of which has been principally assailed. That act had several purposes, as indicated in its title. As described, it was "An act to suppress insurrection, to punish treason and rebellion, *to seize and confiscate the property of rebels*, and for other purposes." The first four sections provided for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and comfort thereto. They are aimed at individual offenders, and they were undoubtedly an exercise of the sovereign, not the belligerent rights of the government. But when we come to the fifth and the following sections we find another purpose avowed, not punishing treason and rebellion, as described in the title, but that other purpose, described in the title, as "seizing and confiscating the property of rebels." The language is, "that to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States." Then follows a description of six classes of persons, those referred to as the persons whose property should be liable to seizure. The sixth section describes still another class. Now, the avowed purpose of all this was, not to

reach any criminal personally, but "to insure the speedy termination of the rebellion" then present, which was a war, which Congress had recognized as a war, and which this court has decided was then a war. The purpose avowed then was legitimate, such as Congress, in the situation of the country, might constitutionally entertain, and the provisions made to carry out the purpose, viz., confiscation, were legitimate, unless applied to others than enemies. It is argued, however, that the enactments were for the confiscation of property of rebels, designated as such, and that the law of nations allows confiscation only of enemy's property. But the argument overlooks the fact that the rebellion then existing was a war. And, if so, those engaged in it were public enemies. The statute referred exclusively to the rebellion then in progress. Whatever may be true in regard to a rebellion which does not rise to the magnitude of a war, it must be that when it has become a recognized war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels. They are equally well designated as rebels or enemies. Regarded as *descriptio personarum*, the words "rebels" and "enemies," in such a state of things, are synonymous. And, if this is true, it is evident the statute, in denominating the war rebellion, and the persons whose property it attempts to confiscate rebels, may, at least, have intended to speak of a war and of public enemies. Were this all that could be said it would be enough, for when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution. It is always a presumption that the legislature acts within the scope of its authority. But there is much more in this case. It is impossible to read the entire act without observing a clear distinction between the first four sections, which look to the punishment of individual crime, and which were, therefore, enacted in virtue of the sovereign power, and the subsequent sections, which have in view a state of public war, and which direct

the seizure of the property of those who were in fact enemies, for the support of the armies of the country. The ninth, tenth, and eleventh sections are in this view significant. They declared that all slaves of persons engaged in rebellion against the government of the United States, or who should in any way give aid and comfort thereto, escaping within our lines, or captured from such persons, or deserted by them, should be deemed captives of war, and forever free; that escaping slaves of such owners should not be delivered up, and that no person engaged in the military or naval service should, under any pretence whatever, surrender slaves to claimants. The act then goes on to provide for the employment of persons of African descent in the suppression of the rebellion. Can it be that all this was municipal legislation, that it had no reference to the war power of the government, that it was not an attempt to enforce belligerent rights? We do not think so. We are not to strain the construction of an act of Congress in order to hold it unconstitutional.

It has been argued, however, that the provisions of the act for confiscation are not confined in their operation to the property of enemies, but that they are applicable to the property of persons not enemies within the laws of nations. If by this is meant that they direct the seizure and confiscation of property not confiscable under the laws of war, we cannot yield to it our assent. It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies. But who are to be regarded as enemies in a domestic or civil war? In case of a foreign war all who are inhabitants of the enemy's country, with rare exceptions, are enemies whose property is subject to confiscation; and it seems to have been taken for granted in this case that only those who during the war were inhabitants of the Confederate States were liable to have their property confiscated. Such a proposition cannot be maintained. It is not true even in case of a foreign war. It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in

the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside. But even in foreign wars persons may be enemies who are not inhabitants of the enemy's territory. The laws of nations nowhere declare the contrary. And it would be strange if they did, for those not inhabitants of a foreign state may be more potent and dangerous foes than if they were actually residents of that state. By uniting themselves to the cause of a foreign enemy they cast in their lot with his, and they cannot be permitted to claim exemptions which the subjects of the enemy do not possess. Depriving them of their property is a blow against the hostile power quite as effective, and tending quite as directly to weaken the belligerent with whom they act, as would be confiscating the property of a non-combatant resident. Clearly, therefore, those must be considered as public enemies, and amenable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war. Even under municipal law this doctrine is recognized. Thus in *Vaughan's Case*,* Lord Holt laid down the doctrines, "If the States (Dutch) be in alliance, and the French at war with us, and certain Dutchmen turn rebels to the States, and fight under the command of the French king, they are enemies to us, for the French subjection makes them French subjects in respect of all nations but their own." So, "if an Englishman assist the French, and fight against the king of Spain, our ally, this is an adherence to the king's enemies."

Still less is it true that the laws of nations have defined who, in the case of a civil war, are to be regarded and may be treated as enemies. Clearly, however, those must be considered such who, though subjects or citizens of the lawful government, are residents of the territory under the

* 2 Salkeld, 635

power or control of the party resisting that government. Thus much may be gathered from the *Prize Cases*. And why are not all who act with that party? Have they not voluntarily subjected themselves to that party; identified themselves with it? And is it not as important to take from them the sinews of war, their property, as it is to confiscate the property of rebel enemies resident within the rebel territory? It is hard to conceive of any reason for confiscating the property of one class that does not equally justify confiscating the property of the other. We have already said that no recognized usage of nations excludes from the category of enemies those who act with, or aid or abet and give comfort to enemies, whether foreign or domestic, though they may not be residents of enemy's territory. It is not without weight, that when the Constitution was formed its framers had fresh in view what had been done during the Revolutionary war. Similar statutes for the confiscation of property of domestic enemies, of those who adhered to the British government, though not residents of Great Britain, were enacted in many of the States, and they have been judicially determined to have been justified by the laws of war. They show what was then understood to be confiscable property, and who were public enemies. At least they show the general understanding that aiders and abettors of the public enemy were themselves enemies, and hence that their property might lawfully be confiscated. It was with these facts fresh in memory, and with a full knowledge that such legislation had been common, almost universal, that the Constitution was adopted. It did prohibit *ex post facto* laws. It did prohibit bills of attainder. They had also been passed by the States. But it imposed no restriction upon the power to prosecute war or confiscate enemy's property. It seems to be a fair inference from the omission that it was intended the government should have the power of carrying on war as it had been carried on during the Revolution, and therefore should have the right to confiscate as enemy's property, not only the property of foreign enemies, but also that of domestic, and of the aiders,

abetters, and comforters of a public enemy. The framers of the Constitution guarded against excesses that had existed during the Revolutionary struggle. It is incredible that if such confiscations had not been contemplated as possible and legitimate, they would not have been expressly prohibited, or at least restricted. We are therefore of opinion, that neither the act of 1861 nor that of 1862 is invalid, because other property than that of public enemies is directed to be confiscated. We do not understand the acts, or either of them, to be applicable to any other than the property of enemies. All the classes of persons described in the fifth and sixth sections of the act of 1862 were enemies within the laws and usages of war.

It is further objected on behalf of the plaintiff in error, that under the statute of 1862 the property of all enemies was not made liable to confiscation. From this it is inferred, that whether persons were within the law or not depended not on their being enemies, but on certain overt criminal acts described and defined by the law. The fact asserted, namely, that all enemies were not within the purview of the enactment we may admit, but we dissent from the inference. Plainly, it was competent for Congress to determine how far it would exert belligerent rights, and it is quite too large a deduction from the fact that the property only of certain classes of enemies was directed to be confiscated, that it was not intended to confiscate the property of enemies at all. If it be true that all the persons described in the fifth, sixth, and seventh sections were enemies, as we have endeavored to show they were, it cannot matter by what name they were called, or how they were described. The express declaration of the seventh section was that their property should be condemned "as enemies' property," and become the property of the United States, to be disposed of as the court should decree, the proceeds being paid into the treasury for the purposes described, to wit, the support of the army. It was, therefore, as enemies' property, and not as that of offenders against municipal law, that the statute directed its confiscation.

Upon the whole, then, we are of opinion the confiscation

acts are not unconstitutional, and we discover no error in the proceedings in this case.

DECREE AFFIRMED.

Mr. Justice FIELD, with whom concurred Mr. Justice CLIFFORD, dissenting.

I am unable to agree with the majority of the court in the judgment just rendered in this case, and will state, with as much brevity as possible, the grounds of my disagreement.

The case was brought for the forfeiture of personal property belonging to the appellant, and is founded upon what is termed the Confiscation Act of July 17th, 1862. There is, it is true, a count in the libel upon the act of August 6th, 1861, but no reliance has been placed upon it to support the forfeiture. The case has proceeded upon the theory that the stock, alleged to have been seized by the marshal, was in Michigan, and had been there since it was issued, a period anterior to the rebellion, and, of course, to the passage of the act in question, a position inconsistent with any claim that the property had been subsequently purchased to be used, or had been used, in aiding, abetting, or promoting the rebellion. No further attention will therefore be given to that act.

I shall direct my attention, in the first place, to the validity of the legislation embodied in the act of July 17th, 1862, and then assuming that legislation to be valid and in accordance with the Constitution, shall consider whether the proceedings in the case are in conformity with its requirements.

The authority for the legislation in question must be found in what are termed the war powers of the government; which, so far as they touch upon the present subjects of inquiry, are the power to declare war, to suppress insurrection, and to make rules concerning captures on land and water; or, in what is termed the municipal power of the government to legislate for the punishment of offences against the United States.

It has been held, that when the late rebellion assumed the proportions of a territorial civil war, the inhabitants of the

Confederate States, and the inhabitants of the loyal States, became reciprocally enemies to each other, and that the inhabitants of the Confederate States engaged in the rebellion, or giving aid and comfort thereto, were at the same time amenable to the municipal law as rebels. The correctness of this determination is not disputed. The question is, not as to the right of the United States to adopt either course against the inhabitants of the Confederate States engaged in the rebellion; that is, the right to treat them as public enemies, and to apply to them all the harsh measures justified by the rules of war; or the right to prosecute them in the ordinary modes of criminal procedure for the punishment of treason; but what course has Congress, by its legislation, authorized. For it is evident that legislation founded upon the war powers of the government, and directed against the public enemies of the United States, is subject to different considerations and limitations from those applicable to legislation founded upon the municipal power of the government and directed against criminals. Legislation in the former case is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. Legislation in the latter case is subject to all the limitations prescribed by the Constitution for the protection of the citizen against hasty and indiscriminate accusation, and which insure to him, when accused, a speedy and public trial by a jury of his peers.

The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. That limitation necessarily exists. When the United States became an independent nation, they became, to use the language of Chancellor Kent, "subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law."* And it is in the light of that law that the war powers of the government must be considered. The power to prosecute war

* 1 Kent's Commentaries, 1.

granted by the Constitution, as is well said by counsel, is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, subject to the condition that they are within the law of nations. There is a limit to the means of destruction which government, in the prosecution of war, may use, and there is a limit to the subjects of capture and confiscation, which government may authorize, imposed by the law of nations, and is no less binding upon Congress than if the limitation were written in the Constitution.* The plain reason of this is, that the rules and limitations prescribed by that law were in the contemplation of the parties who framed and the people who adopted the Constitution.

Whatever any independent civilized nation may do in the prosecution of war, according to the law of nations, Congress, under the Constitution, may authorize to be done, and nothing more.

Now, in *Brown* v. *United States*,† Mr. Chief Justice Marshall, in delivering the opinion of the court, said that it was conceded that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found," and added that "the mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That re-

* Thus it is forbidden by the law of nations to use poisoned weapons, or to poison wells, springs, waters, or any kind of food intended for the enemy. "Any state or general," says Halleck, "who should resort to such means would be regarded as an enemy to the human race, and excluded from civilized society." So also it is forbidden to encourage the assassination of an enemy or his generals or leaders, or to put to death prisoners of war, except in case of absolute necessity, or to make slaves of them or to sell them into slavery; or to take the lives of the aged, disabled, and infirm, or to maltreat their persons. The United States are not freed from these prohibitions because they are not inserted in the Constitution.—(Halleck's International Law, chaps. 16 and 18.)

† 8 Cranch, 122.

mains undiminished, and when the sovereign authority shall choose to bring it into operation the judicial department must give effect to its will." The question presented for consideration in that case was whether enemy's property, found on land at the commencement of hostilities with Great Britain in 1812, could be seized and condemned as a necessary consequence of the declaration of war; and the decision of the court was that it could not be condemned without an act of Congress authorizing its confiscation. The language of the eminent chief justice is perhaps subject to some qualification, if it was intended to state as a rule of public law that all property of the enemy, whether on land or water, was subject to confiscation. Mr. Wheaton, who is authority on all questions of public law, says that by the modern usage of nations, which has acquired the force of law, "private property on land is exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory," and that "this exemption extends even to the case of an absolute and unqualified conquest of the enemy's country."* And Mr. Chief Justice Marshall, in the subsequent case of *The United States* v. *Percheman*,† observed that it was unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country, and that "the modern usage of nations, which has become law, would be violated; that sense of justice and right, which is acknowledged and felt by the whole civilized world, would be outraged if private property should be generally confiscated, and private rights annulled."

But assuming the severe rule laid down by the chief justice to be the true rule, it applies only to the property of enemies, and by enemies is meant permanent inhabitants of the enemy's country. It is their property alone which is the subject of seizure and confiscation by authority of Congress, legislating under the war powers. Their property is

* Law of Nations, Lawrence's ed., p. 596. † 7 Peters, 86.

liable, not by reason of any hostile disposition manifested by them or hostile acts committed, or any violations of the laws of the United States, but solely from the fact that they are inhabitants of the hostile country, and thus in law are enemies.

If we turn now to the act of July 17th, 1862, we find that its provisions are not directed against enemies at all, but against persons who have committed certain overt acts of treason. It does not purport in any part of it to deal with enemies. It declares in its title that its object is "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The other purposes relate principally to slaves, their employment or colonization, and the power of the President to proclaim amnesty and pardon. They have no bearing upon the questions under consideration, and need not be further noticed. The first section of the act prescribes the punishment for treason thereafter committed. It punishes it with death, or, in the discretion of the court, with imprisonment for not less than five years and a fine of not less than ten thousand dollars; and it provides that the slaves of the party adjudged guilty, if any he have, shall be declared free. The second section provides for the punishment of the offence of inciting, setting on foot, or engaging in any rebellion or insurrection against the authority of the United States or the laws thereof, or engaging in or giving aid and comfort to the rebellion then existing. The third section declares that parties guilty of either of the offences thus described shall be forever incapable and disqualified to hold any office under the United States. The fourth section provides that the act shall not affect the prosecution, conviction, or punishment of persons guilty of treason before the passage of the act, unless such persons are convicted under the act itself.

Then follow the clauses which provide for the seizure and confiscation of the property of certain classes of persons, who may thereafter be guilty of certain overt acts of treason. They contain no directions whatever for the seizure of the property

of enemies, but only of persons who may thereafter violate the provisions of the act. Among the classes designated are included persons who may thereafter hold any agency under the Confederate States or under any State composing the Confederacy, and persons owning property in any loyal State or Territory of the United States or District of Columbia, who shall thereafter assist and give aid and comfort to the rebellion; persons who may or may not be enemies in the sense in which the term is used in the law of nations; that is, permanent inhabitants of the enemy's country. So through all the provisions of the act, there is not a single clause which indicates, in the slightest degree, that it was against public enemies its provisions were directed. They are applicable to all persons who may do certain acts, whether they be enemies or not within the meaning of the law of nations.

The only place in the act where the word enemies is used, is in the clause which provides that if it be found by the courts, before which proceedings are instituted, that the property seized belonged to a person engaged in the rebellion or who had given aid or comfort thereto, it should be condemned as enemies' property; that is, should be condemned in the same manner as if it were enemies' property. This clause does not provide that the property shall be condemned if found to be enemies' property, but that when condemned it shall be with the like effect as though it were such property.

It would seem clear, therefore, that the provisions of the act were not passed in the exercise of the war powers of the government, but in the exercise of the municipal power of the government to legislate for the punishment of offences against the United States. It is the property of persons guilty of certain acts, wherever they may reside, in loyal or disloyal States, which the statute directs to be seized and confiscated. It is also for acts committed after the passage of the statute, except in one particular, corrected by the joint resolution of the two houses, that the forfeiture is to be declared. If it had been the intention of the statute to confis-

cate the property of enemies, its prospective character would have been entirely unnecessary, for whenever public war exists the right to order the confiscation of enemies' property, according to Mr. Chief Justice Marshall, exists with Congress.

That the legislation in question was directed, not against enemies, but against persons who might be guilty of certain designated public offences, and that the forfeiture ordered was intended as a punishment for the offences, is made further evident by what followed the passage of the act of Congress. After the bill was sent to the President it was ascertained that he was of opinion that it was unconstitutional in some of its features, and that he intended to veto it. His objections were that the restriction of the Constitution concerning forfeitures not extending beyond the life of the offender had been disregarded. To meet this objection, which had been communicated to members of the House of Representatives, where the bill originated, a joint resolution explanatory of the act was passed by the House and sent to the Senate. That body, being informed of the objections of the President, concurred in the joint resolution. It was then sent to the President and was received by him before the expiration of the ten days allowed him for the consideration of the original bill. He returned the bill and resolution together to the House, where they originated, with a message, in which he stated that, considering the act and the resolution, explanatory of the act, as being substantially one, he had approved and signed both. That joint resolution declares that the provisions of the third clause of the fifth section of the act shall be so construed as not to apply to any act or acts done prior to its passage, "nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

The terms here used, "forfeiture" of the estate of the "offender," have no application to the confiscation of enemies' property under the law of nations. They are, as justly observed by counsel, strictly and exclusively applicable to pun-

ishment for crime. It was to meet the constitutional requirement that the punishment by forfeiture should not extend beyond the life of the offender that the joint resolution was passed. The President said to Congress, the act is penal, and does not conform to the requirement of the Constitution in the extent of punishment which it authorizes, and I cannot, therefore, sign it. Congress accepts his interpretation, and by its joint resolution directs a construction of the act in accordance with his views. And this construction, thus directed, is decisive, as it appears to me, of the character of the act.* Indeed it is difficult to conceive of any reason for the limitation of the forfeiture of an estate to the life of the owner, if such forfeiture was intended to apply only to the property of public enemies.

The inquiry, then, arises, whether proceedings *in rem* for the confiscation of the property of parties charged to be guilty of certain overt acts of treason, can be maintained without their previous conviction for the alleged offences. Such proceedings, according to Mr. Chief Justice Marshall, may be had for the condemnation of enemies' property when authorized by Congress. The proceedings in such cases are merely to authenticate the fact upon which, under the law of nations, the confiscation follows. But here the inquiry is, whether, upon the assumption that a party is guilty of a particular public offence, his property may be seized, and upon proof of his guilt, or its assumption, upon his failure to appear upon publication of citation, condemnation may be decreed. The inquiry is prompted from the supposed analogy of these cases to proceedings *in rem* for the confiscation of property for offences against the revenue laws, or the laws for the suppression of the slave trade. But in these cases, and in all cases where proceedings *in rem* are authorized for a disregard of some municipal or public law, the offence constituting the ground of condemnation inheres, as it were, in the thing itself. The thing is the instrument

* See Bigelow *v.* Forrest, 9 Wallace, 350; and McVeigh *v.* United States, *supra*, 258.

of wrong, and is forfeited by reason of the unlawful use made of it, or the unlawful condition in which it is placed. And generally the thing, thus subject to seizure, itself furnishes the evidence for its own condemnation. Thus, goods found smuggled, not having been subjected to the inspection of the officers of the customs, or paid the duties levied by law, prove of themselves nearly all that is desired to establish the right of the government to demand their confiscation. A ship entering the mouth of a blockaded port furnishes by its position evidence of its intention to break the blockade, and the decree of condemnation follows. A ship captured whilst engaged in the slave-trade furnishes, in the use to which it was subjected, the material fact to be established for its forfeiture. In all these cases the proceeding is against the offending thing. And it is true that in these cases criminal proceedings will also lie against the smuggler, or slave-trader, if arrested, and that the proceedings *in rem* are wholly independent of, and unaffected by, the criminal proceedings against the person. But in the two cases the proof is entirely different. In the one case, there must be proof that the thing proceeded against was subjected to some unlawful use, or was found in some unlawful condition. In the other case the personal guilt of the party must be established, and when condemnation is founded upon such guilt, it must be preceded by due conviction of the offender, according to the forms prescribed by the Constitution. "Confiscations of property," says Mr. Justice Sprague in the *Amy Warwick*,* "not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive, and punishment should be inflicted only upon due conviction of personal guilt."

If we examine the cases found in the reports, where proceedings *in rem* have been sustained, we shall find the distinction here stated constantly observed. Indeed, were this not so, and proceedings *in rem* for the confiscation of prop-

* 2 Sprague, 150.

erty could be sustained, without any reference to the uses to which the property is applied, or the condition in which it is found, but whilst, so to speak, it is innocent and passive, and removed at a distance from the owner and the sphere of his action, on the ground of the personal guilt of the owner, all the safeguards provided by the Constitution for the protection of the citizen against punishment, without previous trial and conviction, and after being confronted by the witnesses against him, would be broken down and swept away.

There is no difference in the relation between the owner and his property and the government, when the owner is guilty of treason and when he is guilty of any other public offence. The same reason which would sustain the authority of the government to confiscate the property of a traitor would justify the confiscation of his property when guilty of any other offence. And it would sound strange to modern ears to hear that proceedings *in rem* to confiscate the property of the burglar, the highwayman, or the murderer were authorized, not as a consequence of their conviction upon regular criminal proceedings, but without such conviction, upon *ex parte* proof of their guilt, or upon the assumption of their guilt from their failure to appear to a citation, published in the vicinage of the property, or posted upon the doors of the adjoining court-house, and which they may never have seen. It seems to me that the reasoning, which upholds the proceedings in this case, works a complete revolution in our criminal jurisprudence, and establishes the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone, or that proceedings may be taken at the same time both against the person and the property, and thus a double punishment for the same offence be inflicted.

For these reasons I am of opinion that the legislation, upon which it is sought to uphold the judgment in this case, is not warranted by the Constitution.

I proceed to consider whether, if that legislation be valid

and constitutional, the proceedings in the case are in conformity with its requirements.

The act of Congress requires the seizure of the property, the forfeiture of which is sought, to be made under directions of the President. This seizure is preliminary to the commencement of proceedings for the condemnation of the property. "After the same shall have been seized," says the statute, such proceedings shall be instituted. This preliminary executive seizure is essential to authorize the filing of a libel of information, and in that sense it is essential to give the court jurisdiction to proceed; but it does not of itself vest in the court jurisdiction over the property. The President could discharge the property from the seizure without the permission of the court or invoking its action. The mere fact that the marshal is employed as the agent in making the seizure does not alter the case. He does not then act as an officer of the court under its process. Any other person might be selected by the President as his agent. In cases under the revenue laws the seizure is often made by the collector or some officer other than the marshal, and the same thing might be done here. The preliminary seizure, if the property be movable, only determines the court in which judicial proceedings shall be instituted. To give the court control over the property something more is essential. The property must be brought into the custody of the court, and this can only be done under the process of the court. The very theory upon which all proceedings *in rem* are sustained is that jurisdiction of the court is acquired by taking the *res* into its custody. It is the seizure under judicial process, judicial seizure as distinguished from any preliminary seizure in any other way, which gives the jurisdiction, and nothing else ever has been held to confer jurisdiction in this class of cases.

Now in the case before us there was not in my judgment any preliminary seizure of the property made by order of the Executive or through his officers or agents, or any subsequent seizure under judicial process. The proceeding was instituted for the forfeiture of 200 shares of the common

stock of the Michigan Southern and Northern Indiana Railroad Company, and 343 shares of the Detroit, Monroe, and Toledo Railroad Company, and the only pretence of seizure consisted in a notice given by the marshal, previous to the suit, to the vice-president of the first company and the president of the second company that he had seized the stock in question. The marshal returned that he made the alleged seizure by giving notice in this way. Neither the president of one company or the vice-president of the other company were in possession of the stock, nor were they the agents of the owner, nor was any possession ever taken of the property by the marshal, unless such notice had the power of transmitting the possession to him. To constitute a valid seizure of property as a basis for a proceeding *in rem*, the party previously in possession must be dispossessed and unable any longer to exercise dominion over the property, and such dominion must be transferred to the officer making the seizure. No other seizure than this will sustain proceedings *in rem*, according to the established doctrine in admiralty and revenue cases, unless a different mode of seizure is specially prescribed by statute. No other mode would conserve the principle of notice to the party whose property was to be affected, which is essential to the validity of all judicial proceedings. "It is a principle of natural justice of universal obligation," says Chief Justice Marshall, "that before the rights of an individual be bound by judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessary notice to all those who have any interest in the thing and is reasonable because it is necessary and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it."*

The doctrine that notice to the owner is given by seizure

* The Mary, 9 Cranch, 144.

of the thing, rests upon the presumption that the owners of property retain possession of it themselves, or place it in the care and management of persons who will represent them and communicate to them any proceedings taken against their interest in relation to it. In this case this doctrine is entirely disregarded. The notice given to the president of one company and the vice-president of the other might, with equal propriety, have been given to any other strangers to the owner. How the marshal could get possession of a thing which he did not touch nor handle nor control, by giving notice to two individuals in Detroit, themselves having no control or possession of the property, passes my comprehension. Shares or stock in companies can only be seized in virtue of statutory provisions, which prescribe a mode of seizure equivalent to actual taking of possession. No such provisions existed in the law of Michigan, in which State the proceedings were had. The Attorney-General, in his instructions to the district attorney for carrying out the act, directed that stocks should be seized according to the methods prescribed by the State law. As no such methods were prescribed by the law of Michigan, or especially prescribed by the court, the case was one for which no provision was made.

After the libel was filed there was no new attempt to make any other seizure of the property than the one previously made. The process of the court directed the marshal to hold the stock which he had seized, referring, evidently, to the preliminary seizure. The marshal returned that he had seized and held the property, referring, as I understand it, to such preliminary seizure.

But further, the act of Congress declares that the proceedings for the condemnation of the property seized shall conform, as nearly as may be, to proceedings in admiralty or revenue cases. Here the proceedings are against property on land, and they must, therefore, conform, as nearly as possible, to proceedings in revenue cases. Now, the act of 1799 prescribes the proceedings in revenue cases, and provides that after default "the court shall proceed to hear

and determine the cause according to law."* And, in the case of *The United States* v. *The Schooner Lion*,† Mr. Justice Sprague, whose great learning justly adds weight to his opinions, gave a construction to this clause. A default had been properly entered, and it was contended by the district attorney that condemnation followed of necessity, upon default, without a hearing, but the learned judge, citing the clause mentioned, said: "This makes it imperative that there shall be some hearing before a decree of forfeiture, but to what extent must depend upon the circumstances of the case. The court will at least examine the allegations of the libel to see if they are sufficient in law, and the return of the marshal and such affidavit or affidavits as the district attorney shall submit. Where it appears that the owners have had full notice of the proceedings, and ample opportunity to intervene, and have voluntarily declined to do so, slight additional evidence will be sufficient. Indeed, a wilful omission by the owners to answer and thereby make disclosure as to material facts within their knowledge, might, of itself, satisfy the court that a forfeiture should be decreed. *But the court will require the prosecutor to introduce full proof of the allegations in the libel whenever the circumstances shall make it reasonable.*" It will hardly be pretended that the circumstances in this case did not render it reasonable that such full proof should be had, and yet no such proof was had. The only proof offered was of a doubtful admission of the claimant, and consisted of the *ex parte* deposition of a single witness to a conversation which he alleged he had had with the claimant in 1863 in Virginia.

But this is not all. The act of Congress of 1862 further provides, in prescribing the proceedings to be taken, that "if" the property seized "shall *be found* to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned." Evidently some finding of the court is here contemplated upon presentation of proofs, and it appears to me, was intended as

* 1 Stat. at Large, p. 695, § 89.

† 1 Sprague, 400.

authority for the subsequent decree, as much so as the verdict of a jury is authority for the subsequent judgment, and that without such finding the decree cannot stand. The record discloses that no such finding was made, and that no decree even was entered, as required by the 29th Admiralty Rule, that the libel be taken *pro confesso*, so as to justify the assumption that its allegations were true.

As the act is highly penal in its nature, it would seem that, according to well-received rules, it should be strictly construed, and a rigid compliance with its provisions exacted. But the very opposite course in the construction of the act appears to have been adopted by the majority of the court.

I am of opinion that the judgment of the court below should be reversed.

Mr. Justice DAVIS, also dissenting.

I concur in the views taken by the majority of the court in its opinion respecting the constitutionality of the acts of Congress under review, but I dissent from the disposition which is made of the case, believing there are errors in the record, entitling the plaintiff in error to have the judgment of the court below reversed. This is a proceeding *in rem*, and by the course of procedure in admiralty and revenue cases, to which it is assimilated, is conducted differently from suits at common law, or in equity, where there is actual service of process on the person. But all cases in court, proceed on the idea of notice to the party whose property is to be affected. This is a fundamental principle, underlying the whole structure of judicial proceedings, regardless of the form they may assume in the particular court in which they may be instituted. In courts of admiralty, and for hearing revenue cases, seizure of the thing is regarded as equivalent to personal service, on the ground that the person whose property is seized, has intrusted it to the care of some one who has the power and whose duty it is to represent him and assert his claim.*

* Mankin *v.* Chandler, 2 Brockenborough, 127; Rose *v.* Himely, 4 Cranch, 277; The Mary, 9 Id. 144.

It can be readily seen that in case tangible property which is capable of actual possession is seized, the interests of the owner will be protected by the person in whose custody it is placed. But it is different with intangible property, such as stocks in corporations, which, in their very nature, are incapable of seizure as other property. This species of property does not require to be left in charge of any person for its security and preservation, and it is evidenced by certificates which are, presumptively, in the possession of the owner of the stock, wherever he may be. How, then, can it be said that the mere service of notice on the officers of the corporations in which these stocks were held, either gave notice to the owner of the property, or brought the *res* within the control of the court? In no sense had they the control of the property, or were they the agents of the owner, or bound to appear and defend his interests. There certainly did not exist between them the legal relation, which raises the presumption in other cases, that the custodian of the property seized, will appear and defend the owner's interests. In point of fact, it may happen that the officers of the corporation are in direct hostility to the interests of the stockholders, and in this particular case it is fairly to be inferred, that the possible thing did actually occur. It is, therefore, very clear that the manner in which these stocks purport to have been seized, did not satisfy the requisites of a revenue seizure, nor convey any notice to Miller, or to any one, sustaining a fiduciary relation to him, of what was done. Nor was his condition improved by the publication of notice, because he lived in an insurgent State, and any attempt to communicate to him the contents of the publication was forbidden, and would, therefore, have been illegal.

But, it may be asked, is there no way in which this species of property can be made the subject of legal process?

The answer is, that it can only be done by statute, which shall point out the mode of proceeding. In such a case the principle of notice is preserved, for the owner is advised that his property can be condemned, and the manner of its condemnation, and naturally, in this condition of things, if it

were possible, he would delegate to some one the authority to look after his interests. But stocks cannot be seized, in the absence of any statutory provision on the subject, and the law has failed to make such provision. It is a *casus omissus*, undoubtedly, but it is not the province of this court to supply the omission. This difficulty was felt by the Attorney-General, because, in his instructions to the district attorneys, he directs that stocks shall be seized according to the methods prescribed by the State laws.

But in Michigan, there is no law which authorizes the taking of stocks on *mesne* process, and I cannot see how the fact, that they may be taken on *final* process in that State, tends to support the argument that the method pursued in this case to seize the property in the first instance was proper and legal.

But apart from this view of the subject, which, in my opinion, is fatal to the recovery in this case, there is an irregularity in the proceedings, which should reverse the judgment and send the case back for a new hearing.

There are two acts of Congress relating to the condemnation of enemies' property—one was passed in 1861, and the other in 1862. They differ materially in regard to the grounds on which condemnation can be placed. Besides, the act of 1861 divides the proceeds with the informer, which is not the case under the act of 1862. The libel sets forth every ground of condemnation under both acts, while the decree, in condemning the property, does not find any fact by reason of which it could be forfeited to the United States at all. This, in itself, is sufficient to reverse the decree. But as the decree divides the proceeds with the informer, the court must necessarily have found the property confiscable under the act of 1861, and yet if the evidence in the case, consisting of an affidavit, made in New York, of one Thatcher (who, in some way not disclosed in the record, was able to get down to Virginia in 1863, hunt up Miller, and have a private conversation with him), tends to prove anything, it is that the property was confiscable under the act of 1862. As this is a direct pro-

Statement of the case.

ceeding to reverse the judgment, these irregularities are grounds of error.

For these reasons, in my opinion, the decree in this case should be reversed.

TYLER *v.* DEFREES.

1. The Congress of the United States, to which is intrusted all the great powers essential to a perpetual union, to wit: the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and sea, is not deprived of those powers when the necessity for their exercise is called out by domestic insurrection and internal civil war.
2. The proceedings of the courts in the execution of laws made to suppress such civil rebellion, when brought before this court on review, should not be subjected to so strict a construction as to defeat the execution of the laws and render them a nullity.
3. The doctrine of the case of *Miller* v. *United States* (*supra*, 268), affirmed and held to govern the present case.
4. When under the act of July 17th, 1862, property intended for confiscation has been seized by the marshal, and the seizure is brought before the court by the filing of a libel for the forfeiture of the property, and is recognized and adopted by it, the property is subject to the control of the court in the hands of its officer; and it has jurisdiction of the case so far as a seizure of the *res* is essential to give it.
5. This is especially so of real estate lying within the territorial jurisdiction of the court, and which being incapable of removal will always be found to answer the orders and decrees of the court in the progress of the cause.

ERROR to the Supreme Court of the District of Columbia.

This was an action of ejectment to recover certain real property in the city of Washington. The defendant pleaded title from a purchaser at a sale of the property under a judicial decree, made in proceedings instituted under the Confiscation Act of July 17th, 1862. It was conceded that the plaintiff had a good title to the premises, unless that title had been divested by the sale under that decree. The issue involved was, therefore, the validity of the decree.

The provisions of the confiscation act just referred to, along with some facts in connection with it, are set out fully

in the report of *Miller* v. *United States* (the leading one of the confiscation cases), immediately preceding this one; and to the part of the report of that case beginning on page 269, with the words (prefixed by an *), "*The act of July 17th*, 1862, *contains fourteen sections*," to the words (prefixed by a ‡) "*On the 24th November*, 1863," on page 274, the reader must now please to turn. He will find there what but to avoid mere repetition would be given here; and that which makes a necessary part of the statement of the present case. After reading it, he may resume his reading here.

The facts of the present case were found by special verdict. It appeared that in June, 1863, the marshal of the District of Columbia, in pursuance of an order addressed to him by the district attorney of the United States, stating that proceedings were to be instituted for the condemnation of the same to the use of the United States, seized the property in question. His return stated that he had made seizure of the property and given notice to the tenants in possession, as directed, and accompanied his return with a copy of the notice served on the tenants, which stated that the property seized was "held subject to the order of the United States District Court, and the district attorney."

Shortly after this return the district attorney filed a libel of information for the forfeiture of the property, alleging against Tyler that since the 17th of July, 1862, he had held and exercised an office and agency, of honor, trust, and profit, under the Confederate government, and that he had given aid and comfort to the rebellion, and to those engaged in it, by acting as a soldier and as a non-commissioned officer in the army and navy of the Confederate States, and by contributing money and property to aid and encourage those engaged in the rebellion.

Upon this libel being filed, an order was made, that process issue, and that notice be given to the owner or owners of the property, and to all persons interested or claiming interest therein, to appear and answer the information on the first Monday of August then next (1863), and show cause, if any they had, why the property should not be condemned and

sold; and that notice be given by posting a copy of the order upon the door of the court-house, and by publication in the National Republican, a newspaper of the District.

A monition was accordingly issued, commanding the marshal to attach the property, and to detain the same in his custody until the further order of the court, and to give notice to all persons having or claiming any interest in the property to show cause as above stated. This process was never served by the marshal, and the only return which he made to it was a certificate that he had made the publication of notice in the designated paper.

On the 29th of July, 1863, and not on the first Monday of August, which latter day was specified as the day for the claimants and others to appear and show cause against the condemnation of the property, the court, without evidence being taken in the case, upon the papers and pleadings filed, entered a decree that the property be forfeited and condemned to the United States.

Upon this decree process issued to the marshal, to sell the property, and under the said process the property was sold, and purchased by a person through whom the defendant claimed.

Upon the facts found by the jury, the court ordered judgment in favor of the defendant. From this judgment, the case was brought to this court on writ of error.

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

I. The title of the plaintiff was not divested by the mere act of seizure made by the marshal. The act of Congress contemplates and directs the institution of judicial proceedings to accomplish a divestiture. The proceedings are indeed assimilated to proceedings in admiralty; but *judicial* proceedings of some kind are absolutely necessary in order to divest the title of the owner. Now, therefore, assuming that judicial proceedings were essentially necessary, the regularity of the proceedings in each particular instance becomes legitimate matter of inquiry, though in a collateral issue, like the present, we are restricted to the question of *jurisdiction.*

The act requires that "the proceedings should conform as nearly as possible to proceedings in admiralty and revenue cases."

The general jurisdiction in admiralty and revenue cases is regulated by the Judiciary Act of September 24th, 1789. Various decisions, in which this act has received a judicial construction, show that the *seizure* ascertains and determines the *forum* wherein judicial proceedings were to be instituted, but does not of itself subject the property to the judgment of the court.*

After the forum is ascertained, what is to be done? The act of Congress of March 2d, 1799,† provides that "all goods, &c., &c., seized by virtue of this act, shall be put into and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had as by this act are required to ascertain whether the same have been forfeited or not." And the same act‡ goes on to provide that "the collector within whose district the seizure shall be made, or the forfeiture incurred, is hereby enjoined to cause suits for the same to be commenced without delay, and prosecuted to effect, &c., &c., &c."

These sections contemplate a second seizure of the property by the marshal as an officer of the court. The act provides that the collector shall retain it *only until the institution of proceedings in court.* As soon as these proceedings are instituted, the marshal, in virtue of the process and monition of the court, must take it out of the hands of the collector and into his own custody. For "as soon as the marshal seizes the same goods under the proper process of the court, the marshal is entitled to the sole and exclusive custody thereof, subject to the future orders of the court."§

The admiralty rules have been framed under this view of the law. Rule twenty-two requires that "all informations

* See The Little Ann, 1 Paine, 41; The Washington, 4 Blatchford, 102; Keene *v.* The United States, 5 Cranch, 304; The Brig Ann, 9 Id. 289, 291.

† § 69; 1 Stat. at Large, p. 678. ‡ § 89.

§ Ex parte Hoyt, 13 Peters, 290.

and libels of information, upon seizure, &c., shall conclude with a prayer of due process, &c." And rule nine prescribes, that "in all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ships, goods, or other things to be arrested; and the marshal thereupon shall arrest and take the ships, goods, or other things, into his possession, &c."

What need of a warrant of arrest, if the property was already in the custody of the court and subject to its judgment? The office of the process was to bring it into the court. The duty of the marshal in executing the process "*is to arrest the property seized by taking it into his custody;*" and his return is to be, that he has arrested the thing, and cited all persons interested, &c., &c., as he was by the warrant ordered to do. Then, and not till then, the jurisdiction of the court attaches.

A court acquires jurisdiction only by either one of two modes: 1. As against the person, by service of process. 2. *In rem*, by arresting the thing under the order or writ of the court.*

In a proceeding either *in personam* or *in rem*, the process must be the process of the court. Now the seizure made here by the order of the district attorney was simply an executive act, not a judicial notice. The marshal, in making that seizure, acted as the agent of the district attorney, or of the executive branch of the government, not as the officer of the court. In a suit by the United States, could a court obtain jurisdiction *in personam* by an executive mandate, without any process from the court directing the defendant to appear?

Again, the object of process, either *in personam* or *in rem*, is to give notice of a pending case. Did this seizure, under the act of July 17th, 1862, give such notice? The President may seize for the purpose of *using*, and if he *chooses* he may take proceedings to condemn. Under the revenue acts,

* The Propeller Commerce, 1 Black, 580, 581.

the person making the seizure is required to proceed at once. Under this act the President may never proceed.

The evidence of seizure is the marshal's return—a jurisdictional fact which must appear in the record. But conceding that the *fact* of seizure by the officer of the court might be proved, in the absence of a return, from other sources, there is *no* proof of such seizure here. And what appears in this record?

1. A writ, and no return upon it.

2. No finding by the jury of the fact of seizure.

There is nothing to show that the marshal, as an officer of the court, ever had this property in his custody, nothing, that that was done which could give the court jurisdiction.

That the person who at one time seized this property was the same person who was marshal of the court when the monition issued, can make no difference. There is nothing to prevent that person from acting in two or more different capacities, and he did not act as the officer of the court, or in obedience to any process issuing from it, when he made this seizure.

II. The decree of sale was passed 29th July, 1863, prior to the first Monday in August, on which last day the monition and attachment were returnable, so that the legal notice prescribed was disregarded and the decree rendered without either actual or constructive notice. Of course such a sale is not judicial, but void to all intents, and in whatever way it may be presented to a court as a muniment of title.

The libel does not on its face show that the plaintiff in error had not within sixty days after public warning and proclamation by the President ceased to aid, &c., in the rebellion, as required by the sixth section of the act of 17th July, 1862.*

III. The decree of condemnation does not find the essential fact, that the property belonged to a person engaged in the rebellion. The seventh section† only authorizes the condemnation of the property seized "*if* it shall be *found* to

* See *supra*, p. 271.

† Ib. p. 271.

have belonged to a person engaged in rebellion, or who has given aid and comfort thereto." The libel alleges that the "said accused is and was on the 17th day of July, and previously thereto had been the owner" of the property seized in this case, and that the accused had engaged in the rebellion and given aid and comfort thereto. But there is no finding in regard to these facts by the court.

IV. The act of 17th July, 1862, is entitled "an act to suppress insurrection, to punish treason and rebellion, &c." Its character as a penal act is proclaimed in its title; its provisions are in harmony with its title. They are throughout punitive and highly penal; they punish with death or with imprisonment almost as bad as death, the crime of treason; they create a new crime, that of rebellion, and punish it with imprisonment or fine, or with both, at the discretion of the court, and, to all these penalties superadd those of confiscation and of civil disability, heretofore unknown to our penal code. No one can doubt, that this is a penal statute designed to punish treason and rebellion. If such be the fact, every proceeding having for its object to inflict that punishment, is in effect, and should be in form, a criminal prosecution. The proceedings in the present case fulfil none of the requirements of the Constitution for a criminal prosecution in a crime of this magnitude. The accusation is preferred not by the indictment of the grand jury, but by a libel of information filed by the district attorney. The accused was not "informed" of his accusation, unless an advertisement in a newspaper be considered such information. Finally, he was not confronted with the witnesses against him, but was tried in his absence, and the trial was by the judge, not by a jury. If it be said that this is not a criminal prosecution, because it is in the form of a civil process, we answer: 1st, that this is precisely what we complain of, and that the nature of a proceeding does not depend on its form, but, on the contrary, its form on its nature.

The conclusion is therefore inevitable, that the present case involved a criminal prosecution disguised under the

forms of a civil process. Consequently that this was not "due process of law" in the sense of the Constitution.

How will the defendant seek to escape from these unanswerable arguments?

He will say: 1st. That property may be confiscated for crime, by proceedings *in rem*, without conviction of the owner.

2d. That property confiscated under the act of July 17th, 1862, is confiscated, not for crime, but as enemy's property.

Both these propositions are incorrect. In support of the first, the defendant would doubtless rely on the decisions of this court in various cases of maritime seizure, for breaches of navigation laws,* in which it was held that the prohibition contained in the fifth amendment to the Constitution did not apply to confiscations by proceedings *in rem*, for violation of the laws of *impost, navigation, and trade.*

An examination of the principles on which these decisions are founded will show that they do not sustain the proposition for which they are cited.

Proceedings *in rem* have, from time immemorial, been employed in courts of admiralty, as means of enforcing a *jus in re*, that is a *claim* or right (such as a privilege, or lien, or an hypothecation), in the specific thing proceeded against. At a later period it was adopted in England for enforcing the forfeiture of vessels or merchandise for breaches of revenue or navigation laws; but, of course, always confined to property that was directly connected with the alleged violation of law, either as the subject of it or as the means with which it was committed. This practice existed both in the mother country and in the colonies when the Constitution was adopted, and the Supreme Court, in the cases above referred to, decided that the prohibition contained in the fifth amendment to the Constitution did not apply to this class of cases. But why did it not apply to them? For two reasons: 1st. Because they were not of a criminal nature.

* La Vengeance, 3 Dallas, 297; The Sally, 2 Cranch, 406; The Betsey, 4 Id. 443; The Samuel, 1 Wheaton, 9; The Octavia, Ib. 20; The Sarah, 8 Id 391; The Palmyra, 12 Id. 1, and others of more recent date.

2d. Because the words "due process of law," in that amendment, must be understood with reference to the laws in force at the time it was adopted; and as the confiscation of property by proceedings *in rem* against it for violations of laws of impost, navigation, and trade was a process in use at that time, it was included in the words "due process of law."

The Palmyra, one of the cases referred to, illustrates the principles on which these decisions are founded. This vessel was libelled for the violation of a special statute which declared that any vessel violating its provisions should be forfeited, but affixed no *personal* penalty to the offence. The defence set up was a want of a previous conviction of her owner. She was condemned on the grounds: 1st, that the law created no crime of which the owner *could* be convicted; 2d, that "this doctrine had never (in England) been applied to seizures or forfeitures created by statute *in rem*, *cognizable* on the revenue side of the Exchequer." That, in these cases "*the thing is primarily considered as the offender*, or rather the offence is primarily attached to the thing." "Many cases exist where the forfeiture is solely *in rem*, there is no penalty *in personam*," &c. The court adds, however, that "if the objection was presented *at common law* it must prevail."

Now, in the present case the law *does* impose a personal penalty on the owner. There *is* a crime, of which he can be convicted, and he is charged with that crime, and the law expressly declares, that the property cannot be condemned, unless that crime shall have been committed by the owner. 2d. In the present case the objection of a want of conviction of the crime, *is* presented in a case at common law. But the point to which the attention of the court is particularly called, is the care with which the right to confiscate property, by proceedings *in rem*, is confined to cases "*on the revenue side of the Exchequer*," in which "*the thing* is considered as primarily the offender." In the present case it is not pretended that the houses and lots seized, have committed the offence for which their forfeiture is demanded, or have been in any manner instrumental in, or connected

with, the said offence. On the contrary, the owner thereof is alone charged with the offence. It is evident, therefore, that these decisions afford no countenance whatever, to the novel doctrine that Congress may authorize the confiscation of property for crime, without a previous conviction of the owner, by proceeding against the property itself.

Chancellor Kent,* in commenting on these decisions, says that "it may now be considered as the settled law of this country, that all seizures under laws of impost, navigation, and trade, if made upon tide waters, navigable from the sea, are *civil cases* of admiralty jurisdiction." So far, therefore, from supposing that these decisions afford any ground for extending this mode of proceeding to any other class of cases than those of "impost, navigation, and trade," he regrets that the Supreme Court should have gone as far as they had in sustaining them, and doubts the correctness of those decisions, which permit a resort to this mode of proceeding in seizures, even of this class, which were not made on *navigable waters*, inasmuch as, in England, such seizures, when made on land, were cognizable only in the Court of Exchequer, where the trial of all facts is by jury.

He concludes his remarks on this subject by the following reflections apposite to the present case:

"These proceedings for the forfeiture of large and valuable portions of property under revenue and navigation laws, are highly penal in their consequences, and the government and its officers are always parties, and deeply concerned in the conviction and forfeiture; and if, by act of Congress, or judicial construction, the prosecution can be turned over to the admiralty side of the District Court, as being neither a criminal prosecution nor a civil suit at common law, the trial of a cause is transferred from a jury of the country to the breast of a single judge."

The second ground on which these proceedings are sough to be sustained, is equally untenable.

* 1 Commentaries, 375.

Argument against the confiscation.

Before we discuss this point, however, we ask a question. If it be true that property confiscated under the act of 1862, is confiscated on the ground that it is the property of an enemy, why in the present case was it not alleged to be the property of an enemy? Why was not its condemnation asked for, and the decree of condemnation based on that ground? There is nothing in all the proceedings looking to the condemnation of the property as that of an enemy; on the contrary, it is demanded on the ground that the owner has committed acts of treason and rebellion, crimes which cannot be committed by an enemy. If then, it be true that the property can only be condemned on the ground that it is enemy's property, the decree, for that reason alone, if for no other, would be void. But supposing the sentence of condemnation to have been based on the ground that the property belonged to an enemy, have Congress declared, or could Congress declare, the property of a citizen to be that of an enemy?

The word enemy in its legal sense has a different meaning from that in which it is ordinarily used. It has no reference to the feelings or conduct of a person, but simply to his nationality. On the other hand, no citizen, however inimical his feelings or his conduct towards his own country may be, can claim the immunities or incur the liabilities of an enemy. The word is therefore synonymous with *alien enemy*, and this is the sense in which it is used by all legal writers. To call a rebel an enemy, therefore, would be a contradiction in terms.

The act of 1862 is chargeable with no such contradiction.

The whole argument for the contrary rests upon a single ambiguous expression in the 7th section, to wit: that which declares that the property shall be condemned "as enemy's property." The defendant assumes that the words "as enemy's property," here mean, "because it is enemy's property," or "on the ground that it is enemy's property;" but how could that be, when previous sections of the act had declared the very parties whose property is thus to be condemned, to be "*traitors*" and "*rebels*," and punishes

them as such? The expression means, simply that the property shall be condemned *as if it was enemy's property*, or, *in the same manner as if it was enemy's property.*

Messrs. A. G. Riddle, S. L. Phillips, and L. Madison Day, for the defendant in error:

I. The District Court had jurisdiction in the confiscation of the property in question, both under the statute of the 17th July, 1862, and by the general law of proceedings *in rem*, the moment of seizure and institution of proceedings.

The 5th section of the Confiscation Act of 1862 declares:

"To insure the speedy termination of the present rebellion, it shall be the duty of the President to cause seizure of all the estate," &c.

And in the 7th section:

"To secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, or in the United States District Court for the District of Columbia, within which the property above described may be found."

Here is the legislative declaration of what shall give jurisdiction to a court for the purposes of condemnation and sale. Seizure, and the institution of proceedings—a libel, according to the form of the admiralty—both of which are found by the special verdict.

But, independently of any statutory regulation, in all proceedings *in rem* a court of admiralty, whether as a prize or instance court, has jurisdiction and absolute control over the thing as soon as seized and libelled.* The District Court does not derive its jurisdiction from any possession, actual or supposed, of its officers, but from the act and place of the seizure for the forfeiture; and if it at once acquires juris-

* Jennings *v.* Carson, 4 Cranch, 23.

Argument in support of the confiscation.

diction, it is not avoided by any subsequent irregularity.* In a case of seizure on land, it was held nothing more was necessary to give jurisdiction in cases of this nature, than that seizure should be made within the district.† And where it was held,‡ for the first time, that seizures made on land were cases at common law and triable by jury, it was still held that a libel stating the fact of seizure on land would give jurisdiction.

In order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually and constructively within the reach of the court. It is actually within its possession, when it is submitted to the process of the court; it is constructively so when, by a seizure, it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*.§

II. The court having had jurisdiction over *the thing*, can such an irregularity as entry of final decree before return day of monition, be relied upon in this collateral action?

It is a rule without exception, that the judgment of a court of competent jurisdiction while unreversed concludes the subject-matter as between the said parties. They cannot again bring it into litigation.‖ In *Blaine* v. *The Charles Carter*,¶ a ship had been sold under executions issued within ten days after judgment, contrary to the express provision of the 22d section of the Judiciary Act, but no writ of error was taken out. The court declared that if the executions were irregular "the court from which they issued ought to have been moved to set them aside. They were not void, because the marshal could have justified under them; and if voidable, the proper means of destroying their efficacy had not been pursued."

* Bolina and Cargo, 1 Gallison, 81, 83; 2 Parsons on Maritime Law, 535.
† Keene *v.* United States, 5 Cranch, 304.
‡ The Sarah, 8 Wheaton, 391.
§ The Brig Ann, 9 Cranch, 289, 291.
‖ United States *v.* Nourse, 9 Peters, 8; Voorhees *v.* Bank of the United States, 10 Peters, 449.
¶ 4 Cranch, 328–333.

Mr. Justice MILLER delivered the opinion of the court.

The question for our consideration is, whether the confiscation proceedings, as found in the special verdict, divested the title of the plaintiff in the lot?

These proceedings do not come before us on a writ of error to correct any irregularities or mere errors of law in the court which rendered the judgment, but they come before us collaterally as the foundation of the defendant's title.

According to the well-settled doctrine in such cases, no error can be regarded here, or could have been considered in the court below on the trial, that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property.*

Counsel for the plaintiff in error recognize this principle, but it is remarkable what a number of supposed errors in the proceedings are found by them to be jurisdictional. Almost every point that has been urged in the cases of *Garnet* v. *The United States*, and *Miller* v. *The Same*, on writ of error directly to those confiscation proceedings, is here relied on as sufficient to defeat the jurisdiction. Looking to the errors alleged, it may safely be said that if half that has been so earnestly urged by counsel in these cases be well founded, the confiscation acts would be nugatory from the difficulty of putting them judicially in force, though their constitutionality were conceded.

Undoubtedly, by the individual, whose property is thus seized and condemned for acts of hostility to his government, the course pursued would be scrutinized with an eye quick to detect errors, and it is not strange that this critical spirit should affect the argument here. When to this is added the belief, long inculcated, that the Federal government, however strong in a conflict with a foreign foe, lies manacled by the Constitution and helpless at the feet of a domestic enemy, we need not be surprised that both the power of Congress to pass such a law as the one in question,

* See Cooper *v.* Reynolds, 10 Wallace, 308, and the numerous cases there cited.

and the capacities of the courts to enforce it, should meet with a stout denial.

But we do not believe that the Congress of the United States, to which is confided all the great powers essential to a perpetual union—the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and on sea—is deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war—when States, forgetting their constitutional obligations, make war against the nation, and confederate together for its destruction.

And we are further of opinion that where, the constitutionality of the confiscation acts being established, we are called upon to sit in review on the judicial proceedings of the inferior courts in the enforcement of these statutes, we are to be governed by the reasonable and sound rules applicable to analogous cases in the courts, and not by a system of procedure so captious, so narrow, so difficult to understand or to execute, as to amount to a nullification of the statute.

The framers of the act of July 17th, 1862, appear to have anticipated much of what has been since urged in regard to the mode of proceeding in the execution of that statute. Seeing very clearly that the cases of seizure under the law would be mainly on land, and would not, in that case, be cognizable as admiralty cases, and that being founded on the principle of confiscating enemy property, they were not strictly revenue cases; their attention was called to the proper mode of procedure in the enforcement of the law.

As the act was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water, applying the confiscation, however, to the property of a limited class of enemies, instead of to all enemies, it was conceived that the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea. The same courts were to have jurisdiction, the same officers were to administer the law, and, as those courts were

already in possession of jurisdiction in revenue and admiralty cases, and as the analogies of those cases to the new jurisdiction conferred were supposed to present a mode of enforcing the law adapted to the latter in their main features, it was enacted that the proceedings under the statute should conform, as near as might be, to proceedings in admiralty or revenue cases; and, foreseeing also that in some respects they could not be strictly so conformed, the statute authorized the courts to make such orders, establish such forms of decrees and sale, and direct such deeds, when real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act.

Unquestionably, it was within the power of Congress to provide a full code of procedure for these cases, but it chose to give a direction on the subject which, adopting, as a general rule, a well-established system of administering the law of capture, looked to the fact that departures from that system might be necessary, and invested the courts with a discretion in that regard.

Five or six cases arising under this statute were argued before us at the last term, and, appreciating both the difficulty and the importance of some of the points raised in argument, they were all ordered to be argued again at this term, and have, under that order, been ably and fully reargued. They have all been disposed of but this, and the court have not hesitated, where there was a substantial departure from the mode of proceeding directed by the statute, to reverse the decree of the courts below in the cases which were here on error to those proceedings. And when we have found the proceedings to be conformable to the course of procedure of revenue and admiralty cases, we have held the decrees to be valid. The cases thus decided, and especially the case of *Miller* v. *United States*, in effect dispose of all the objections taken to the action of the court in this case, even if that action were here for review directly, instead of being presented collaterally in another suit.

But, as one point was much and earnestly pressed as peculiar to this case, and as conclusive against the validity of

the confiscation proceedings, that point will be further considered.

It is argued that there was no such judicial seizure of the land which was condemned and sold as to bring it within the jurisdiction of the court.

The record shows that the marshal of the District of Columbia, in which court the proceeding was had, and within the territorial jurisdiction of which court the land was situated, did seize the land under the instruction of the attorney of the United States for the district. No objection is made that this seizure was not full and complete. The order of the district attorney was directed to the marshal of the District of Columbia and described the property to be seized, and stated that the seizure was to be made for the purpose of instituting proceedings for its condemnation under the act of July 17th, 1862. The marshal returned on this paper that he had seized the property and given notice to the tenants in possession, and he makes a part of this return the notice served on the occupants of the premises, in which he states that it is to be held subject to the order of the United States District Court for the District of Columbia. After this the libel was duly filed in that court, and a monition was issued from it to the same marshal, ordering him to give due notice and to attach the property and to detain the same in his custody until the further order of the court in the premises. To this monition no return was made by the marshal except a certificate of publication of notice.

The proposition of the plaintiff's counsel is, that because no return of the marshal was made that he seized the property under this monition, the court had no jurisdiction of the case, and its subsequent condemnation and sale were void.

When we consider that it was the same officer and the same individual who had already seized the property, and had it in his control and possession, and that his statement to that effect was before the court, with the addition that he held it subject to the order of the court, that he was the only executive officer of the court who could make the

seizure, the point raised seems to be as narrow and unsubstantial as the second seizure would be useless.

The argument is based upon the analogy of revenue seizures, which are always of personal and movable property, and which are always made in the first instance by some other officer or individual than the marshal, and which must be taken possession of by the marshal as the representative of the court. This is usually done under a process of the court for the purpose of bringing the property under its recognized control. And this is at once the reason, and suggests the limit of the two seizures in revenue cases so much relied on by counsel.

Now, suppose the property in this case had been personal property, how could the marshal make a seizure of that which was already in his manual possession? Whose possession would he displace? Could one hand represent the seizure under the monition and the other the seizure under the act of Congress? And can it be seriously contended that this must be done to give the court jurisdiction, when the officer of the court held the property already for condemnation or discharge as the court might order?

It may, however, be said that he should have made return of the writ, that he had seized and held the property under that. Such a return as to seizure would have been false, because he had seized it before and could make no second seizure, in fact, by taking it from his own possession. And he had already informed the court that he detained the property subject to its order.

The proceeding inaugurated by the district attorney is designed to bring the property before the court. It can have no other purpose or end, unless it is released by his order. The district attorney and the marshal are both officers of the court, and for that reason are selected to institute the proceeding by which the power of the court is called into exercise. When, therefore, the property is in the course of this proceeding seized by the marshal, and when with the filing of the libel all that has been done is brought before the court and it adopts and recognizes this seizure, the property

is held by him subject to the order of the court, and is under its control, and no second seizure by the same officer can be necessary.

In regard to real estate, the argument is still more forcible. The remarks of this court in *Cooper* v. *Reynolds*, already cited, are directly in point. Speaking of the various modes of acquiring jurisdiction, it was there said, that "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 being 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 in the court."

When, therefore, the officer, as in this case, had seized the property for condemnation, and had made known that fact to the court, it was quite certain that it would be within reach of its process when condemned for sale, and when it became necessary to put the purchaser in possession of it. No change of the title or possession could be made, pending the judicial proceedings, which would defeat the final decree. The seizure was therefore, in our judgment, sufficient to subject the land to the jurisdiction of the court.

The judgment of the Supreme Court of the District of Columbia is therefore AFFIRMED.

Mr. Justice DAVIS expressed his concurrence in the judgment, though he stated that he had not been able to concur in all that was said by the court in the preceding opinion.

Mr. Justice FIELD, with whom concurred Mr. Justice CLIFFORD, dissenting.

I am compelled to dissent from the judgment of the court in this case.

I agree with the majority that as the decree of confiscation, under which the defendant asserts title to the demanded premises, comes before us collaterally, it cannot be attacked for mere errors or irregularities committed in the progress of the cause in which it was rendered. It can be only attacked for defects which go to the jurisdiction of the court, either over the subject-matter or the parties, or to render the particular decree. It is not strictly correct to say that, if the jurisdiction over the subject-matter and the parties exists in a particular case, any defect in the decree rendered can only be taken advantage of on appeal or by direct proceedings. That jurisdiction may exist and yet the decree may be so variant from that which the court was authorized to pronounce as to be void on its face. If the law, for example, authorize a pecuniary fine, the court cannot award imprisonment. If the law directs only damages to be assessed, the court cannot decree a specific performance. If the law declares that only a life estate shall be confiscated, the court cannot disregard its limitation and condemn the fee. The judgments in such cases would be void in whole or part, notwithstanding complete jurisdiction was had over the subject and the parties in controversy. There are certain limitations to the action of courts even after they have acquired jurisdiction which they cannot transcend without opening their judgments to collateral attack. In other words, jurisdiction over the subject-matter and parties does not authorize a judgment in the case of any and every kind.

All reasonable presumptions are indulged in support of judgments when collaterally attacked. So large are these presumptions that they generally answer as an explanation for the absence of all matters in the record, which are required to be taken before the judgment can be lawfully entered. As the presumptions are indulged to supply the absence of averments of the particular facts presumed, they cease to be received when the contrary of the particular supposed facts appears. Thus when a record of a judgment, rendered in an action at law upon an issue joined between

the parties, is produced, in which no verdict of a jury or finding of the court appears, upon the existence of which alone the judgment could be entered, it will be presumed that such verdict or finding was had. But, on the other hand, if it affirmatively appear in the record that no such proceeding was had, the judgment may be attacked as having been rendered without authority. It is of no avail, then, to invoke the doctrine that a judgment cannot be collaterally assailed. The doctrine does not apply to a case of this kind, for the record itself establishes the invalidity of the judgment produced.

The objections which I make to the decree, upon which the defendant asserts title, go to the jurisdiction of the court over the property condemned, to its jurisdiction to enter the decree rendered, and to the validity of the act of July 17th, 1862. Similar objections were taken by me in a dissenting opinion to the decree in the case of *Miller* v. *United States*, recently decided, but the importance I attach to them justifies their further elucidation.

First; as to the jurisdiction of the court over the property. The executive seizure of the property required by the act of Congress is preliminary to the commencement of judicial proceedings for its forfeiture. "After the same shall have been seized," says the statute, proceedings shall be instituted. Now, when the executive seizure in this case was made, what was the condition of the property before judicial proceedings were taken? Was it in the custody of the court? Clearly not. As yet the court had nothing to do with it—no more than, before suit, it has to do with a vessel seized by the collector for a violation of the revenue laws, or brought into port by a prize crew for an attempted breach of blockade. The fact that the marshal was employed as the agent of the President in making the seizure, did not change the position of the property. The President might have selected any other person as his agent with the same result. He might, at this stage, have released the property from seizure upon his own volition, without interfering with the authority of, or coming in collision with the court. As yet

no relations were established between the court and the property seized. Whatever the marshal, in making the preliminary seizure, may have said to the occupants of the premises seized, or whatever notice he may have given to them, whether it was that he held the property subject to the directions of the President, or to the order of the District Court or district attorney, in no wise affected the condition of the property, or created any relation between it and the court. The existence of any such relation did not depend upon the declaration of that officer, who, as yet, was not acting under any judicial process.

The next proceeding was the filing of the libel of information; but that did not change the relation between the court and the property. The libel was the foundation for the issue of the process of the court to bring the property within its custody; but, of itself, without such process, it worked no change in the condition of things. When was it ever pretended that the mere filing of a libel, without the issue of process, brought person or thing into the custody of the court? When the libel was filed process was ordered, and process was issued, commanding the marshal to attach the property and detain the same in his custody. By attachment under this judicial process, had it been made, the court would have acquired jurisdiction over the property, for it is by seizure under judicial process, and that alone, that the court takes the *res* into its custody. But the process thus issued was never served, and the jurisdiction of the court over the property rested upon the preliminary seizure alone. And yet we are told by the majority of the court that the objection that this preliminary seizure was insufficient to give the requisite jurisdiction, and that a new seizure, under judicial process, was necessary, is a very narrow and unsubstantial objection. I answer, that no objection is narrow or unsubstantial which goes to the jurisdiction of the court to forfeit the property of a citizen upon *ex parte* proceedings, without a hearing, for alleged public offences of which he is assumed to be guilty, because he did not appear to a citation, which the law prohibited from being commu-

nicated to him. This court has repeatedly dismissed writs of error because tested by a wrong officer, or made returnable on a day other than the first day of the term, or because they did not embrace all the parties to the record; and when it has been urged that the objections taken to them were extremely narrow and unsubstantial, the answer has been that nothing could be treated as narrow and unsubstantial, and for that reason disregarded, which was prescribed by law as the mode of exercising the appellate jurisdiction of the court. So, here, nothing can justly be considered as either narrow or unsubstantial which is required by law to give jurisdiction to a court to enforce penal statutes, in the absence of the alleged offenders against their provisions.

Second; as to the jurisdiction of the court to render the decree in the confiscation case. The act of Congress, as already stated, is highly penal in its consequences, and by all established canons of interpretation should be strictly construed.* Its every requirement should be rigidly exacted. What, then, are its requirements? It declares that the proceedings instituted for the condemnation of the property seized shall conform as nearly as may be to proceedings in admiralty or revenue cases, and if the property shall be found to have belonged to a person engaged in the rebellion, or who has given aid and comfort thereto, the same shall be condemned.

As the proceedings in the case upon which the defendant relies related to land, they should have conformed, according to those provisions, as nearly as practicable to proceedings in revenue cases. Now the statute of 1799 prescribes the proceedings in these cases, and declares that after default is made in one of them, "the court shall proceed to hear and determine the cause according to law," a clause which has been judicially held, and in my opinion correctly held, to make it imperative upon the court that there shall be some hearing before a decree of forfeiture is rendered, and "the

* 1 Kent's Commentaries, 376.

court will require," says Mr. Justice Sprague, in such cases, "the prosecutor to introduce full proof of the allegations in the libel whenever the circumstances shall make it reasonable."*

If we consider the provision of the law of 1799, and the provision of the act of 1862, for a finding, it seems impossible to escape the conclusion, that a finding upon hearing is an essential prerequisite to any decree of forfeiture in these confiscation cases. The authority to render the decree is in express terms made conditional upon a particular fact being found. If the fact designated be found, says the statute, the property shall be condemned, which is equivalent to declaring that if such fact be not found, no condemnation shall be decreed. As the record produced in the case, upon which the defendant relies, shows that no hearing was had and no finding was made, the decree of forfeiture rendered therein appears to me to be an act of judicial usurpation.

Third; as to the validity of the clauses of the act of 1862, providing for the seizure and confiscation of the property of rebels. This point I have already considered at length in the dissenting opinion in *Miller* v. *United States*, and I shall only add a few words. In that dissenting opinion I expressly stated that it had been held that, when the late rebellion assumed the proportions of a territorial civil war, the inhabitants of the Confederate States and the inhabitants of the loyal States became reciprocally enemies to each other, and that the inhabitants of the Confederate States engaged in the rebellion, or giving aid and comfort thereto, were at the same time amenable to the municipal law as rebels, and that the correctness of this determination was not disputed; that the question was, not as to the right of Congress to adopt either of these courses, but what course had Congress, by its legislation, authorized. It is indisputable, that whatever Congress may authorize to be done, by the law of nations, in the prosecution of war against an independent nation, it may authorize to be done when engaged in the prosecution

* United States v. Schooner Lion, 1 Sprague, 400.

of a territorial civil war against the domestic enemies of the United States. I contend only that the limitations, which the law of nations has imposed in the conduct of war between independent nations, should apply and govern the United States in whatever war they may prosecute. I do not doubt, and never have doubted for a moment, that the United States possess all the power necessary to suppress all insurrections, however formidable, and to make their authority respected and obeyed throughout the limits of the republic. But this recognition of the power of the government cannot be permitted to preclude a comparison of all legislation, adopted to uphold its authority, with the Constitution. And in so comparing the act of July 17th, 1862, I am unable to find in that great instrument any sanction for the clauses in the act providing for the seizure and confiscation of the property of persons charged with particular criminal acts. I do not find it in the war powers of the government, for they sanction only the confiscation of the property of public enemies. I do not find it in the municipal power of the government to legislate for the punishment of crimes, for that is subject to limitations, which secure to the accused a trial by a jury of his peers, and the right to be confronted with the witnesses against him.

It is true, as already stated, that enemies participating in the rebellion, or giving aid and comfort thereto, might have been treated as rebels and held amenable to the municipal law. Yet the terms, enemies and rebels, are not synonymous, even though the rebellion attained the proportions of a territorial civil war. A permanent resident of the Confederacy was an enemy, although he may always have opposed the rebellion and remained loyal in his feeling and action to the National government. His position as an enemy was determined by his residence, and had nothing to do with his personal disposition or conduct. But he was not a rebel, and could not have been prosecuted as such unless he was personally guilty of treasonable acts.

Congress well understood the distinction between enemies and rebels, and we are not justified in supposing that it in-

tended to disregard this distinction in its legislation, even were that practicable, as it was not.

My conclusion is that the judgment of the court below was erroneous, and should be reversed.

THE DISTILLED SPIRITS.

1. The acceptance by the collector of a false and fraudulent bond given for the removal of distilled spirits from a bonded warehouse, will not prevent a forfeiture of such spirits under the 45th section of the Internal Revenue Act of July 13th, 1866, which forfeits "distilled spirits found elsewhere than in a bonded warehouse, not having been removed therefrom according to law."
2. The removal will be illegal if effected by means of a false and fraudulent bond.
3. The 48th section of the Internal Revenue Act of June 30th, 1864, as amended by the act of 1866, which forfeits "all goods, wares, merchandise, articles or objects," if found in possession of any person in fraud of the internal revenue laws, &c., is applicable to distilled spirits notwithstanding the forfeiture of spirits is provided for in a distinct series of sections relating thereto in the same law, or in a supplementary law.
4. All the sections can stand together; and where that is the case one does not repeal or supersede the other, as repeals by implication are not favored.
5. The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence.
6. Where distilled spirits forfeited to the United States are mixed with other distilled spirits belonging to the same person (ignorant of the forfeiture) they are not lost to the government by such mixture, either on the principle of confusion of goods, or transmutation of species, even though subsequently run through leaches for the purpose of rectification. The government will be entitled to its proportion of the result.

IN error to the Circuit Court for the District of Massachusetts; the case being this:

The 48th section of the Internal Revenue Act of June

30th, 1864,* as amended by an act of July 13th, 1866, enacts that

"All goods, wares, merchandise, articles or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control of any person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, &c., and shall be forfeited to the United States."

The 45th section of this later act† enacts that

"All distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not having been paid, shall be forfeited."

By the 42d section of the same act a penalty is imposed on persons executing any false and fraudulent bond or other document for the purpose, among other things, of withdrawing from any bonded warehouse any *spirits* or other merchandise, or which shall be used in fraud of the internal revenue laws. By this section the property is forfeited and the party executing the document made liable to imprisonment.

The act of 1864 contained no specific provisions for the forfeiture of distilled spirits. The act of 1866 in certain sections (that is to say, in sections from 40 to 45) made provisions about them, including cases in which the government would be entitled to a forfeiture of such spirits. One section, the 40th, enacted that distilled spirits when inspected might be removed, under bond, without payment of tax, from the bonded warehouse of the distiller to any general bonded warehouse. Another, the 41st, that spirits or other merchandise might be removed from bonded warehouse for the purpose of being exported. Another, the 42d, already quoted, makes penal the making of any false bond or other document to evade payment of the tax; an-

* 13 Stat. at Large, 223. † 14 Id. 163.

other, the 43d, that owners of distilled spirits intended for sale, manufactured before the date of the act, should give notice to the collector to gauge and prove them; another, the 44th, that forfeited spirits should be disposed of by the commissioner of internal revenue; and another, the 45th, as already mentioned, that all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax unpaid, should be forfeited.

With these various provisions on the statute-book, the United States filed an information stating that the collector of internal revenue at Boston, in April, 1867, had seized 278 barrels of distilled spirits as being forfeited by removal from a bonded warehouse without paying the tax due thereon.

The *first* count of the information was founded on the 45th section of the act of July 13th, 1866, and alleged that the spirits were found elsewhere than in a bonded warehouse, not having been removed therefrom according to law, and the taxes not having been paid.

The *second* and *third* on the 48th section of the act of June 30th, 1864, as amended by act of July 13th, 1866, and alleged that the spirits were in the possession of one Harrington, for the purpose of being sold in fraud of the internal revenue laws, and with design to avoid the payment of taxes.

Subsequently, Harrington appeared and claimed 124 of the barrels, and a certain Boyden the remainder; and they pleaded that none of the goods became forfeited as alleged in the information, and that the allegations therein were not true. Issue was taken on each of these pleas. It appeared in proof, that in April, 1867, a large quantity of spirits were withdrawn from the United States bonded warehouses in Boston upon the pretence of an intent to transport the same to Eastport, Maine, for exportation thence. False and fraudulent bonds were given therefor, and the spirits were never attempted to be transported to Eastport, but were removed for consumption and sale in Boston and its vicinity, and the

taxes were not paid. The government contended that the spirits seized were parcel of this lot, and that the claimants were parties to, or cognizant of, the fraud. The claimants contended that part of the spirits in controversy were not a portion of the spirits fraudulently withdrawn, but were from different and distinct lots, and that the spirits claimed by Harrington had been rectified in leaches in which various lots were mixed, including, possibly, some of the lot fraudulently withdrawn, which it was impossible to identify. They further claimed that the spirits were bought in open market without knowledge of the fraud, and that such of the fraudulent lot as Harrington had bought, he had bought through Boyden as his agent. Evidence was given on both sides, tending to prove these several points.

The claimants requested the court to instruct the jury as follows:

"1. That if the spirits had been deposited in a United States bonded warehouse, and had been removed therefrom upon application to the collector of the district in which they were situate, and by his authority, for rectification or transportation for exportation, they are not liable to forfeiture.

"2. That if the said spirits had been removed from a United States bonded warehouse, upon application to the collector of the district, and upon the furnishing of bonds which were satisfactory to and accepted by him, and upon permission thereupon granted by the collector, and were seized before the expiration of the time allowed for rectification or transportation, the spirits are not liable to forfeiture.

"3. That if the said spirits had been removed from a United States bonded warehouse according to the forms of law, viz., upon application made in due form to the collector for leave to withdraw, and upon bonds being given in the prescribed form, and permission thereupon given in due form for their removal, and said spirits had been bought by the claimants of the party withdrawing, or his agent, without knowledge of the fact that the bonds were worthless, or that said spirits were removed from the warehouse with intent to defraud the government, they are not liable to forfeiture.

"4. That if a portion of the spirits proved in this case not to

have paid a tax had passed through the rectifiers in which there were other spirits, and so become mixed with them, no portion of the spirits, when rectified, would be liable to forfeiture."

The court declined to give the first and second of these instructions, but gave the third, with this qualification, that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge.

It declined to give the fourth instruction as prayed for, and instead of it instructed the jury that:

"If the rectified spirits came from vats and rectifiers in which the spirits so fraudulently withdrawn, or any portion, were mixed with other lots of similar spirits of the claimants, so that they could not be distinguished, the government were entitled to the forfeiture of a fair proportion of these spirits, although the mixture might have been innocently made, provided the jury were satisfied of such facts as would, under the instructions of the court, forfeit the spirits so fraudulently withdrawn if they had not been so mixed; and if the jury were satisfied of such facts, and also found the spirits so fraudulently withdrawn were mixed with other similar spirits of the claimants by them fraudulently, with knowledge of the fraud committed, for the purpose of destroying the identity of the spirits and defrauding the government, and were so mixed that they could not be distinguished and identified, that the entire quantity of this mixture seized was forfeited to the United States."

To the above rulings, and refusals to rule, the claimants took exceptions. The jury found against 50 barrels, claimed by Harrington, and all those claimed by Boyden; and the court decreed accordingly. On appeal to the Circuit Court, that court affirmed the decree. The case was now here on error.

Mr. R. M. Morse, Jr., for the claimants:

The question raised by the refusal of the presiding judge to give the *first* and *second* instructions prayed for by the claimants is, whether, upon the facts conceded by the gov-

ernment, the latter were entitled to a forfeiture *under either of the sections of the statute under which the information was framed.*

We submit that upon the facts conceded by the government, the forfeiture could be had only under section 42, on which, however, no count in the information is founded.

It will be noticed that the act of June 30th, 1864, contained no specific provisions for the forfeiture of distilled spirits. Under the act, therefore, all proceedings for forfeiture of spirits must have been brought under section 48. But the act of July 13th, 1866, provides in sections 40 to 45, inclusive, for all cases where the government would be entitled to a forfeiture of spirits. Hence, to give proper effect to these sections, which else would be meaningless, it must be assumed that section 48 of the act of 1864, as amended by the act of 1866, was intended to apply not to all goods, but to all goods except those for which specific provision was made in the subsequent sections. If this view is correct, then the counts under section 48 of the act of 1864, as amended, cannot be maintained.

The *third* and *fourth* prayers relate to the issues of fact submitted to the jury.

The questions of fact in controversy were:

1st. Whether the claimants, or either of them, were parties to the fraudulent withdrawal of the spirits from the warehouses.

2d. Whether they were cognizant of it.

3d. Whether the spirits seized were a part of the spirits fraudulently withdrawn.

4th. Whether they had been mixed with other liquors and then rectified; and,

5th. Whether such mixture, if made, was innocently or fraudulently made.

The fair inference from the verdicts, taken in connection with these instructions, is, that the jury found that Boyden was cognizant of the fraud, but not that he was a party to it, and that Harrington had no knowledge of the same; and that some part, if not the whole, of the spirits seized could

not be identified with the spirits originally withdrawn from the warehouses in violation of law.

We consider first the *third* prayer for instruction, which had relation only to the claim of Harrington.

The only question to be considered is, whether the knowledge of the agent at any time obtained and not communicated to the principal, is to be held to be the knowledge of the principal so as to subject to forfeiture under a severe penal statute, merchandise liable to forfeiture, by the terms of the act itself, only when the principal has knowledge of the fraud.

There is some conflict in the authorities upon this point; but the weight of authority establishes the rule to be, that the principal is not affected by the knowledge of the agent, unless the knowledge is acquired by the agent while in the employ of the principal and in the course of the very transaction in which he is employed. This doctrine was laid down in 1729, in *Fitzgerald* v. *Fauconberge*.* In *Lowther* v. *Carlton*,† Lord Hardwicke said:

"If a counsel or attorney is employed to look over a title, and if by some other transaction, foreign to the business in hand, has notice, this shall not affect the purchaser."

The doctrine was affirmed by the same judge in *Warrick* v. *Warrick*,‡ and in *Worsley* v. *Earl of Scarborough*;§ by Lord Erskine in *Hiern* v. *Mill*,‖ and by Lord Eldon in *Mountford* v. *Scott*.¶ In *Kennedy* v. *Green*,** Lord Brougham held that a client was not to be held cognizant of a fraud, *although his solicitor was the contriver and actor in the same*, because the solicitor's knowledge was not obtained in the course of his employment for that client.

In the United States the weight of authority is in support of the same doctrine.††

* Fitzgibbon, 211. † 2 Atkins, 242. ‡ 3 Id. 294. § Ib. 392.
‖ 13 Vesey, Jr. 120. ¶ 3 Maddock, 34.
** 3 Myne & Keene, 699; see also Wilde *v.* Gibson, 1 House of Lords Cases, 605.
†† Farmers' and Citizens' Bank *v.* Payne, 25 Connecticut, 444; Bank of United States *v.* Davis, 2 Hill, 452; New York Central Ins. Co. *v.* National

In England, however, it has been held that when one transaction is clearly followed by and connected with another, or *when it is clear* that a previous transaction is present to the mind of the agent when engaged in another transaction, there is no ground for the distinction by which the rule that notice to the agent is notice to the principal had been restricted to the same transaction.* But this relaxation of the rule has not generally obtained in the United States. The courts of Vermont, New Hampshire, South Carolina, Alabama, and Illinois are the only ones that have supported it; and in none of the decisions of these States does it appear that the American authorities were examined.

But even if the court should adopt the modification of the rule, as stated in *Hargreaves* v. *Rothwell* and *Dresser* v. *Norwood*, yet the instruction was wrong, as it failed to give the qualification which is held in those cases to be essential to affect the principal with the prior knowledge of his agent, to wit: that it must appear that the previous transaction is present to the mind of the agent when engaged in another transaction, or that one transaction is clearly followed by and connected with another so that that fact may necessarily be inferred.

The fourth instruction prayed for applies to the case of both claimants.

Both the prayer for instructions and the instruction of the presiding judge in the District Court assumed that the spirits were mixed with other spirits in the rectifiers, so that they could not be distinguished. The case being one of a loss of identity of the original offending spirits, we submit

Prot. Ins. Co., 20 Barbour, 468; Brown *v.* Montgomery, 6 Smith, New York, 287; Jackson *v.* Sharp, 9 Johnson, 163; Hood *v.* Fahnestock, 8 Watts, 489; Bracken *v.* Miller, 4 Watts & Sergeant, 111; Winchester *v.* Baltimore Railroad Co., 4 Maryland, 231; United States Insurance Co. *v.* Shriver, 3 Maryland Ch. 381; Willis *v.* Vallette, 4 Metcalfe, 186; Keenan *v.* Missouri Ins. Co., 12 Iowa, 126; Bierce *v.* Red Bluff Hotel, 31 California, 160.

* Hargreaves *v.* Rothwell, 1 Keen, 158; Lenehan *v.* McCabe, 2 Irish Eq. 342; Fuller *v.* Benett, 2 Hare, 394; Dresser *v.* Norwood, 17 C. B., N. S. 466

that neither the new species nor any part of it is liable to forfeiture, and this whether the mixture was innocently made or for the purpose of destroying the identity.

Mr. B. G. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The claimants insist, in the first place, that no recovery can be had under the information on the conceded facts of the case. The information contained three counts relied on: one on section 45 of the act of July 13th, 1866, and two on section 48 of the act of June 30th, 1864, as amended by act of July 13th, 1866. The first-named section declares that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not having been paid, shall be forfeited." The first count charges that the spirits in question were thus found. It is insisted that they were removed according to law.

We do not think that a removal procured by a false and fraudulent bond, though accepted by the collector, was a removal according to law, and we fail to perceive how the spirits which were thus withdrawn from the bonded warehouse can be exempted from the operation of this section.

The other section, on which the second and third counts were framed, declares that "all goods, wares, merchandise, articles or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control of any person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, &c., and shall be forfeited to the United States." It is insisted that this section does not apply to distilled spirits, inasmuch as they are provided for in a different part of the act by a distinct series of sections.

An examination of the act of 1864 will show that the first fifty-two sections are of a general character, intended to

apply to all taxes imposed by the act, and that the 48th section is especially of that character, and applies to distilled spirits as well as all other articles. By the act of 1866 this section was amended in a manner not material to the question at issue. When thus amended it still stood as it did before, having the same office and the same general application. The addition in the act of 1866 of several new sections relating to the removal of distilled spirits from a bonded warehouse, and imposing penalties and forfeitures for giving fraudulent bonds for that purpose, or for illegally removing the spirits, does not deprive the 48th section of the act of 1864 of its general application. There is nothing incongruous or repugnant between it and the new sections. Both can stand, and an information may be founded on both or either, whenever the facts will admit. It is a very common thing for cumulative remedies to be thus provided. The act of 1868, which revises the entire revenue law relating to spirits and tobacco, furnishes a striking instance of this. After providing for a large number of specific forfeitures, or forfeitures for specific breaches of the law, it follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for. Statutes *in pari materia*, like the acts of 1864 and 1866, are to be construed together, and repeals by implication are not favored if the acts can reasonably stand together.

The other points made by the claimants relate to the charge given by the court to the jury. Passing over the first and second instructions prayed for, which are not insisted on, and are not tenable if they were, the third and fourth demand attention. The substance of the third instruction prayed for was, that if the spirits were removed from the warehouse according to the forms of law, and the claimants bought them without knowledge of the fraud, they were not liable to forfeiture. The court charged in accordance with this prayer with this qualification, that if Boyden bought the spirits as agent for Harrington, and was

cognizant of the fraud, Harrington would be bound by his knowledge. The claimants insist that this is not law.

The question how far a purchaser is affected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, is one that has been much mooted in England and this country. That he is bound and affected by such knowledge or notice as his agent obtains in negotiating the particular transaction, is everywhere conceded. But Lord Hardwicke thought that the rule could not be extended so far as to affect the principal by knowledge of the agent acquired previously in a different transaction.* Supposing it to be clear, that the agent still retained the knowledge so formerly acquired, it was certainly making a very nice and thin distinction. Lord Eldon did not approve of it. In *Mountford* v. *Scott*,† he says: "It may fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances." The distinction taken by Lord Hardwicke has since been entirely overruled by the Court of Exchequer Chamber in the case of *Dresser* v. *Norwood*.‡ So that in England the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound by knowledge communicated to his

* Warrick *v.* Warrick, 3 Atkyns, 291. † 1 Turner & Russell, 274.
‡ 17 Common Bench, N S. 466.

agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. This difficulty presented itself to Lord Hardwicke's mind, and undoubtedly lay at the bottom of the distinction which he established. Had he confined it to such cases, it would have been entirely unexceptionable.

The general tendency of decisions in this country has been to adopt the distinction of Lord Hardwicke, but it has several times been held, in consonance with Lord Eldon's suggestion, that if the agent acquired his information so recently as to make it incredible that he should have forgotten it, his principal will be bound. This is really an abandonment of the principle on which the distinction is founded.* The case

* Story on Agency, § 140; Hovey *v.* Blanchard, 13 New Hampshire, 145; Patten *v.* Insurance Co., 40 Id. 375; Hart *v.* Farmers' & Mechanics' Bank, 33 Vermont, 252

of *Hart* v. *Farmers' and Mechanics' Bank*,* adopts the rule established by the case of *Dresser* v. *Norwood*. Other cases, as that of *Bank of United States* v. *Davis*,† *New York Central Insurance Co.* v. *National Protection Co.*,‡ adhere to the more rigid view.§

On the whole, however, we think that the rule as finally settled by the English courts, with the qualification above mentioned, is the true one, and is deduced from the best consideration of the reasons on which it is founded. Applying it to the case in hand, we think that the charge was substantially correct. The fair construction of the charge is, that if the jury believed that Boyden, the agent, was cognizant of the fraud at the time of the purchase, Harrington, the principal, was bound by this knowledge. The precise words were "that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge." The plain and natural sense of these words, and that in which the jury would understand them, we think, is that they refer to Boyden's knowledge at the time of making the purchase. Thus construed the charge is strictly in accordance with the law as above explained. There was no pretence that Boyden acquired his knowledge in a fiduciary character.

This result is arrived at independent of the question whether an innocent purchaser without notice can, in any case, claim precedence of the title of the United States arising by forfeiture. It has frequently been held that he cannot do so in cases of statutory forfeitures ensuing from acts done or omitted.‖ But as this point was not argued or raised we do not put the case upon it.

We see no error in the fourth instruction given. It needs

* 33 Vermont, 252. † 2 Hill, 452. ‡ 20 Barbour, 468.

§ See cases collected in note to American edition of 17 Common Bench, N. S., p. 482, and Mr. Justice Clifford's opinion in the Circuit Court in the present case.

‖ United States *v.* Grundy, 3 Cranch, 338; Same *v.* 1960 Bags of Coffee, 8 Cranch, 398; Fontaine *v.* Phœnix Insurance Company, 11 Johnson, 293; Kennedy *v.* Strong, 14 Id. 128; The St. Jago de Cuba, 9 Wheaton, 416; The Florenzo, 1 Blatchford & Howland, 60.

no learned examination of the doctrine of confusion or mixture of goods to make it apparent that if certain spirits belonging to the government by forfeiture are voluntarily mixed with other spirits belonging to the same party and passed through the process of rectification in leaches, he cannot thereby deprive the government of its property; and if the government only claims its fair proportion of the rectified spirits, he certainly cannot complain of injustice. The only result of applying the doctrine of confusion of goods would be to forfeit the entire mixture. And it cannot be claimed that the process of rectification in leaches effects such a transmutation of species as to destroy the identity of the liquor. If, after the mixture and before the rectification a certain proportion of the spirits belongs to the United States, they will not lose that proportion by the spirits being passed through the leaches for the purpose of rectification.

JUDGMENT AFFIRMED.

BANK *v.* LANIER.

1. National banks as governed by the National Currency Act of June 3d 1864, which act repeals the National Currency Act of 1863, can make no valid loan or discount on the security of their own stock, unless necessary to prevent loss on a debt previously contracted in good faith.
2. The placing by one bank of its funds on permanent deposit with another bank, is a loan within the spirit of this enactment.
3. Loans by National banks to their stockholders do not give a lien to the bank on the stock of such stockholders.
4. A bank whose certificates of stock declare the stockholder entitled to so many shares of stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, *but not otherwise*, and which suffers a stockholder to transfer to anybody on the books of the bank his stock, without producing and surrendering the certificates thereof, is liable to a *bonâ fide* transferee for value, of the same stock, who produces the certificates with properly executed power of attorney to transfer; and this is so although no notice have been given to the bank of the latter transfer.

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

Statement of the case.

The 36th section of the National Currency Act of 1863,* under which the National banks were organized, and which provides for the distribution of the stock into shares, and for its being assignable, contained this restriction, to wit, that no shareholder should have power to sell or assign his shares, so long as he should be liable to the association either as principal, debtor, or surety, or otherwise, for any debt that should have become due, while it remained unpaid.

The 12th section of the National Currency Act of June 3d, 1864, which expressly repealed this act of 1863,† gives to the banks the right, either by laws or in their articles of association, to prescribe the manner in which stock shall be transferable on their books.

The 35th section of the same act of 1864, prohibits "any loan or discount on the security of the shares of a bank's own capital stock;" also the purchasing or holding such shares unless necessary to prevent loss on a debt *previously contracted* in good faith; and directs that stock so purchased or acquired shall be sold or disposed of in six months, in default of which a receiver shall be appointed.‡ And it omits the restriction upon the transfer of shares contained in the above quoted 36th section of the act of 1863.

By the section in the act of 1864, repealing the act of 1863, it is "provided that such repeal shall not affect any act done or proceedings had, or any organization, acts or proceedings of any association organized or in process of organization under the act aforesaid."

The 37th section of the act of 1863, had contained a provision similar to this 35th section of the act of 1864, though its prohibition against the holding, by a bank, of its own stock, was less stringent.§

This act of 1864 being in force, Lanier and Handy brought suit in the court below against the First National Bank of South Bend, to obtain pecuniary satisfaction for the refusal by the bank to permit the transfer of certain shares of stock

* 12 Stat. at Large, 675. † § 62, 13 Id. 118. ‡ Ib. 110. § 12 Id. 676.

on its books to them, on the ground that the law imposed the duty on the corporation to allow the transfer, and raised an implied promise in their favor that the duty should be performed. The case made by their declaration was this:

On the 8th of July, 1865, the bank issued two certificates of stock to one Culver, which declared that he was entitled to 150 shares in the capital stock of the institution, and that these shares were transferable on the books of the bank, in person or by attorney, *only on the surrender of the certificates.* This limitation on the power of transfer was in conformity with the terms of a by-law on the subject. On the 29th of January, 1866, Lanier and Handy purchased 138 shares of this stock from Culver for value, and obtained from him *the stock certificates regularly assigned, with the usual powers of attorney to transfer the stock*, of which transaction the bank was notified on the 31st day of the same month of January. This purchase was not followed up by an immediate request for the transfer of the stock, but in the month of January, 1868, this request was regularly made and refused.

The bank, in justification of its conduct, interposed three pleas in bar, which set up two distinct defences.

The first and third pleas justified the refusal, on the ground that *at the time the stock was taken by Culver* he had pledged it as a security for such deposits as the bank might from time to time make with the house of Culver, Penn & Co., of New York, of which he was a member, and that to make the pledge more effectual, by power of attorney regularly executed, he authorized his attorney in fact to sell and transfer the stock in case the bank conceived it to be necessary, and to apply the proceeds to liquidate any balance due the bank from Culver, Penn & Co., and that 50 shares had actually been sold in pursuance of this agreement, and the proceeds applied before Culver assigned the stock certificates to the plaintiffs, and the remaining shares had been sold before the bank had notice that they were assigned.

The second plea alleged the organization of the bank under the act of 1863, and that being so organized it established certain by-laws for conducting its business and for

its protection, and to regulate the transfers of stock which were in pursuance of the authority vested in the bank by the act of Congress aforesaid, and that the same had been from the time of their adoption, and still were in force, unrepealed and unchanged; that by virtue of the 15th section of these by-laws it was provided that the stock of the bank should be assignable only on its books, *subject to the provisions and restrictions of the act of Congress;* that among the provisions and restrictions of the act was one contained in the 36th section, providing that the stock should be assignable on the books in such manner *as the by-laws of the bank should prescribe*, but that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt. And the plea averred that the provisions of the said section thirty-six, by the force of the by-laws of the said bank, and by virtue of the said 15th section of them, became and was a part of the by-laws of the bank, and regulated the transfers of the shares of stock held and owned in the same, and was still a part thereof, in full force and unrepealed by any act of the bank. And it averred further that Culver was indebted, &c.

To each of these pleas the plaintiffs filed general demurrers, which, on joinder, were sustained by the court, and the bank declining to answer further, judgment was rendered against her. She now brought the case here on error. The errors complained of being upon the rulings of the court in sustaining the demurrers to these pleas.

Messrs. McDonald and Roache, for the plaintiff in error:

1. It will be contended that the contract set up in the first and third pleas is in violation of the 35th section of the act of 1864, which prohibits any association from making any "loan or discount on the security of the shares of its own stock." Now the object of the prohibition was to compel stockholders to become borrowers on the same terms as other general customers; and inasmuch as the inhibition is limited to "loans and discounts," which must be held to mean those made in the ordinary course of dealing, it can-

not with fairness be extended to such securities as might be taken for deposits in such commercial centres as the bank might find it necessary to make for the purposes of trade and exchange.

2. The second plea presents a question of the right of the bank to hold the stock in question until the assignor had paid or discharged his liabilities to the bank. The bank was organized under the act of 1863, and its by-laws, which have remained unchanged, were formed under the provisions of the last-named act, and with express reference to the restrictions of the 36th section of that act. Now, it is averred in the plea, and we contend that the legal effect of the 15th section of the by-laws was to incorporate into it the provisions and restrictions of the 36th section of the act of 1863, in the same manner as if they had been set out at length in the by-law itself, and that the subsequent repeal of that section by the act of 1864, could not operate to affect the by-law, unless the right to impose such restrictions was taken away by the subsequent act; but so far from that being the case, the 12th section of the act of 1864 expressly confers upon such associations the right, either by by-laws or in their articles of association, to prescribe the manner in which stock shall be transferable on their books. This view of the question is strengthened by reference to the repealing section of the act of 1864.

3. It will be objected that there was no valid pledge to the bank, inasmuch as the certificates of stock were not taken possession of by the pledgee. But the certificates do not constitute the property; they are only muniments of title.

The shares of stock constitute the property; these might be pledged, and the possession, so far as such property is capable of being possessed, remains in the pledger. This results from the nature of the property being, as it is, intangible personal property, possessing more the elements of a *chose in action* than of a chattel.

It will be further insisted that if the stock was pledged, that Culver, still holding the certificates, had the power to transfer the stock by the assignment of the certificates to a

bonâ fide holder, and that such holder would take the stock free of any claim of the bank by reason of such pledge. This would impress upon them the highest rights of commercial paper. But certificates of stock are not security for money in any respect, much less are they negotiable securities. As muniments of title they may undoubtedly be assigned or pledged, but the *bonâ fide* assignee or pledgee will take them subject to all the equities that existed against the assignee.

Mr. T. A. Hendricks, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to decide whether the first and third pleas would answer the declaration, if the transaction pleaded were lawful, because the directors of the bank were forbidden by law from dealing with Culver in the manner they did. At the time this proceeding took place the Currency Act of 1863 had been superseded by the act of June 3, 1864, which expressly repealed the former act. It is, therefore, by the provisions of the latter act that the conduct of banking associations must be governed, whether they were organized before or after it became a law. And in looking into this act, we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject, that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see, that if the power were given to a bank to loan money on the security of its shares, it would imply also a power to become the owner of those shares, and this Congress intended to guard against.

These institutions were created to subserve public purposes, and not the mere private interests of their stock holders. And in no better way could this object be attained than by placing shareholders, in their pecuniary dealings

with the bank, on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use, if the shareholder, who had pledged his stock for borrowed money, should be unable to meet his obligation? To the extent of the debt the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time, were the debt secured outside of the shares of the bank. But it is unnecessary to seek for the reason of this prohibition, as the provision concerning it is explicit, and free from ambiguity.

Although the section in question forbids loans or discounts by a bank on the security of its own shares of stock, it is argued that this inhibition does not extend to the case of deposits made by one bank with another. But a deposit is nothing but a loan of money, and is within both the letter and spirit of the provision. It is well known that country banks keep on deposit in New York, with bankers and merchants, a considerable amount of money for their own convenience, for which they receive more or less of interest. But whether interest be obtained or not, these deposits are, equally with paper discounted over the counter of the bank, loans of money, and the reason of the rule is equally applicable to them.

The banker is accountable for the deposits he receives as a debtor, and the individual borrower of money from the bank sustains no other relation to it. In both cases money is borrowed, to be returned in a greater or less period of time, according to the contract of the parties. Without pursuing the subject further, it is clear that the contract between the South Bend Bank and Culver was illegal, and cannot, therefore, be pleaded in avoidance of any duty imposed on the bank. It would seem, from the date of the certificates issued to Culver, that as soon as he took the stock he pledged it, and the bank is therefore without the excuse of endeavoring to secure a pre-existing debt contracted in good faith. The contract in its inception was in violation of law, and the bank cannot complain if it is made to suffer in consequence of it.

The defence interposed by the second plea is equally unavailing to the plaintiffs in error. This plea assumes that the bank had a lien upon the stock of Culver for his indebtedness to it, without any special agreement on the subject, by virtue of the provisions of the 36th section of the Currency Act of 1863, restricting a shareholder from transferring his stock as long as he owes the bank, which remained in operation, although the section was repealed by the act of 1864, by means of a by-law adopted when the section was in force, declaring that the stock of the bank shall be transferable only on the books of the bank, *subject to the provisions and restrictions of the act of Congress aforesaid.*

If it be conceded that the by-law intended to embrace the restrictions contained in the 36th section, it is hard to see what good it accomplished, because, as long as this section was in force, it was the law of the corporation, known to all men, and did not need the aid of a by-law to render it operative. And if it be contended that a bank may, through the agency of a by-law, retain a particular section that has been repealed, it is difficult to see why it may not by the same means retain all the remaining sections of the repealed statute that are applicable to its business, and thus antagonize itself to the whole policy of Congress on the subject. But of necessity a by-law cannot operate in this way, nor is there any reason to suppose it was intended that this one should have such an effect. In the absence of any action taken by the bank on the subject since the new law went into operation, the fair inference is that this by-law is used as an afterthought to serve the purposes of this suit. Congress evidently intended, by leaving out of the law of 1864 the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were in effect notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them.

It remains to be seen whether, on the case stated, Lanier

and Handy can recover of the bank for a breach of corporate duty, notwithstanding the specific shares had already been transferred to other persons through the power of attorney which Culver gave when he attempted to pledge his stock as security for the deposits to be made with his New York house. And, in considering this question, we are relieved of any necessity of deciding between conflicting equities, for this suit does not seek to disturb the title of the adverse purchasers to the specific stock. It leaves them in possession of the property, and undertakes to subject the bank to damages for refusing to transfer the stock to the defendants in error. And, as we view this controversy, it makes no difference whether the transfers were actually made to other parties before or after the bank received notice of the assignment of the stock certificates by Culver to Lanier and Handy.

The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can

buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates.

In this state of case Lanier and Handy made their purchase of Culver. They bought for value, without knowledge of any adverse claim, in full faith that the bank would observe its engagements, and pursued in all respects the directions given in the certificates. They were not told to give notice to the bank of their purchase, nor was there any necessity for notice, because, by the rules of the bank, Culver could not transfer the stock in the absence of the certificates, and these they had in their possession. It is therefore clear, in making their purchase of Culver, that they had a right to rely on the certificates as securing to them the stock which they represented. And it is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of *bonâ fide* holders, was guilty of a breach of corporate duty, and as its conduct operated to the injury of Lanier and Handy, an action will lie in their behalf to obtain satisfaction for the injury.

These views dispose of this case, and they are sustained by recent decisions in the Court of Appeals of New York and the Supreme Court of Connecticut,* and, as we are advised, they also are supported by the Supreme Court of New Jersey in a case not yet reported.

JUDGMENT AFFIRMED.

* Bridgeport Bank *v.* New York and New Haven Railroad Company, 30 Connecticut, 270; Same *v.* Schuyler et al., 34 New York, 30.

DEWING *v.* SEARS.

On a lease where a yearly rent of "four ounces, two pennyweights, and twelve grains of pure gold in coined money" is reserved (equivalent at the time when the lease was made to $80 per annum, and at the time when suit was brought to $87.25 per annum), judgment should be entered for coined dollars and parts of coined dollars, and not for United States notes (made by statutes of the United States a legal tender), and equivalent in market value to the value in coined money of the stipulated weight of pure gold.

IN error to the Superior Court of Massachusetts, the case being thus:

Sears brought suits in one of the State courts of Massachusetts to recover rent due in different quarters upon a lease executed August 14, 1828, for the term of one hundred years, in which the yearly rent reserved was "four ounces, two pennyweights, and twelve grains of pure gold, *in coined money*," payable quarterly. By the act of April 2, 1792,* which was in force when the lease was made, the rent was just $80 per annum, or $20 a quarter, in gold coin. But by the act of June 28, 1834,† and the act of January 18, 1837,‡ which were in force when the rent sued for fell due, the rent was $85.27 per annum, or $21.31 a quarter, in gold coin.

The State court gave judgment for the market value, in United States notes, of the coined money for each quarter's rent on the days the same fell due, with interest thereon; and this judgment being affirmed in the highest court of the State, the cases were brought here for review.

Mr. Caleb Cushing submitted them on briefs of Mr. E. M. Bigelow, for the plaintiff in error; observing that the cases were not distinguishable from *Bronson* v. *Rodes* and *Butler* v. *Horwitz*;§ and that therefore the courts below should have given judgment for the rent and interest in coined money.

No opposing counsel.

* Ch. 16, § 9, 1 Stat. at Large, 248.
† Ch. 95, 4 Id. 699.
‡ Ch. 3, §§ 8 and 10; 5 Id. 137, 138.
§ 7 Wallace, 229, 258.

Mr. Justice STRONG delivered the opinion of the court.

The contract in these cases was for the payment or delivery of a specified weight of pure gold, solvable in coined money. They are, therefore, governed by the decisions heretofore made by this court in *Bronson* v. *Rodes*, and *Butler* v. *Horwitz*. It follows that the judgments entered in the Superior Court were erroneous. They should have been entered for coined dollars and parts of dollars, instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold.

JUDGMENT in each case REVERSED, and the causes remanded with instructions to enter judgment in accordance with the

FOREGOING OPINION.

RANKIN *v.* THE STATE.

Where, on an indictment for a capital offence, the Supreme Court of a State reverses a judgment of a court below, under such circumstances as that the case must go back for trial on its merits, the judgment is not a "final judgment," and therefore is not capable of being brought here under the 25th section of the Judiciary Act.

IN error to the Supreme Court of Tennessee; the case being this:

An indictment had been found in one of the State courts of Tennessee, at August Term, 1865, against a certain Rankin, and ten other persons named in the indictment, charging them with the murder of one Thornhill, on the first of June preceding. The defendant, in August Term, 1866, pleaded that on the day mentioned in the indictment he was in the military service of the United States, in the military district of East Tennessee, being first lieutenant of company B of the 9th Tennessee Cavalry, and bound to obey all lawful orders of his superiors, "then and there existing and being an insurrection and civil war in said military district;" and that on the 5th day of October thereafter he was ar-

raigned and put on trial at Chattanooga, before a general court-martial, for the same identical crime with which he was charged by the indictment, and was acquitted thereof; and he set forth the record and proceedings of the court-martial. To this plea the attorney-general filed a replication, denying the existence of the record, and the continuance of the war, and alleging fraud in the procurement of the trial by court-martial. The defendant demurred, and the court sustained the demurrer. The attorney-general then filed a new replication, the case was tried, and the defendant was acquitted. Writ of error being brought, the Supreme Court of the State reversed the decree of acquittal, on the ground that the defendant's plea was insufficient, and remanded the case to the Circuit Court for trial. The effect of this judgment was to overrule the defendant's plea, and to require him to plead over to the indictment.

The case was now brought here by Rankin, under the 25th section of the Judiciary Act, which gives a writ of error to this court from the highest court of the State on "*final* judgments," in certain cases, specified in the section.

Messrs. H. Maynard, and R. M. Barton, for the plaintiff in error.

No opposing counsel.

Mr. Justice BRADLEY delivered the opinion of the court.

The difficulty with the case, as brought before us, is that the judgment was not a final one in the case. This court, under the 25th section of the Judiciary Act, can only take cognizance of final judgments of the State courts. And although the court has been liberal in its construction of the statute as to what judgments are final, yet the judgment in this case cannot be deemed such by any reasonable stretch of construction. It is a rule in criminal law *in favorem vitæ*, in capital cases, that when a special plea in bar is found against the prisoner, either upon issue tried by a jury, or upon a point of law decided by the court, he shall not be concluded or

convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty.* And this is the effect of the judgment of reversal rendered by the Supreme Court of Tennessee in this case; so that in no sense can that judgment be deemed a final one. The case must go back and be tried upon its merits, and final judgment must be rendered before this court can take jurisdiction. If after that it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency.

WRIT OF ERROR DISMISSED.

EDMONDSON *v.* BLOOMSHIRE.

A clause in the will of a woman who died in 1803—"My certificates that are in the hands of my brother Ben, I desire may be given to my husband, to dispose of as he may think proper"—held not to include warrants for a large amount of bounty lands, though the words certificates and warrants, of the sort in question, were sometimes used synonymously; the same brother having had in his hands at the time of the making of the will some other instruments more properly called "certificates;" the testator having devised all the lands she possessed to her husband "during his life;" a settlement of her estate on the basis that the warrants did not pass as certificates, having been long acquiesced in by the party now complainant, and "evidence of the most satisfactory character having been introduced by the respondents, showing that the land warrant was never in the hands of the brother prior to the date of the will, or at any other time."

APPEAL from the Circuit Court for the Southern District of Ohio, in which court John Edmondson and Littleton Waddell in right of his wife Elizabeth, sister of the said John, filed a bill against Adam Bloomshire and others, to compel a conveyance of certain lands in Ohio, alleged to be in the possession of the defendants. The court below dismissed the bill, and the complainants appealed.

* 4 Blackstone's Commentaries, 338.

Statement of the case in the opinion.

Both in the court below and here several interesting and difficult questions were raised; and fully and ably argued by *Messrs. H. Stanberry and J. B. Baldwin, for the complainants*, and *Messrs. William Lawrence and J. W. Robinson, contra*:*

But the case as passed on by the court avoided a decision on these, and placed the judgment on the meaning of a peculiar and badly expressed will, and certain facts which explained it. The case, therefore, presenting nothing of interest, the arguments of counsel upon the construction of the will and evidence are suppressed.

Mr. Justice CLIFFORD stated the case and delivered the opinion of the court.

Volunteer forces for the public service in the war of the Revolution were, in many instances, furnished by the States, and all such, as well as the regular forces, were paid for their services to a large extent in continental money, which so depreciated in a short time as to become almost valueless.

Troops for that service were raised by the State of Virginia, known as the Virginia line on continental establishment, and they also were paid for their services in that currency; and in order to afford relief for the loss which the troops sustained in that way, the legislature of the State, at the November session 1781, passed an act directing the auditor of public accounts to settle and adjust the pay and accounts of the officers and soldiers of that line, so as to make their claims for pay and subsistence equal to specie, such adjustment to cover the period from the first day of January, 1777, to the last day of December, 1781; and the directions to the auditor were that he should issue printed certificates to the respective applicants for the balance found due to them in such adjustment, payable on or before the first day of January, 1785, with interest at the rate of six per centum per annum.†

Directions were also given to the auditor in the same act that he should in like manner settle and adjust the accounts

* See Appendix.

† 10 Hening's Statutes of Virginia, 462.

of all officers and soldiers of the said line who have fallen or died in the service during that period, and the provision was that their representatives should be entitled to such certificates, and all other benefits and advantages therein granted to the officers and soldiers in the line at the date of the act.*

None of these matters are the subject of controversy, and it is also alleged and admitted that William Rickman, of Charles City, Virginia, was a deputy director general in the Virginia line on continental establishment; that he served three years or more as such director, and that he thereby became entitled also to Virginia military bounty-lands.

On the seventh of August, 1778, William Rickman made and published his last will and testament, by which he gave and bequeathed to his wife, Elizabeth Rickman, all his estate, both real and personal, in fee simple, and appointed his wife, together with Benjamin Harrison, her father, and her brother, Benjamin Harrison, Jr., the executors of his will so made and published. Three years afterwards the testator died, leaving the said last will and testament unrevoked and in full force, and the same was subsequently duly proved and admitted to record.

Application in behalf of Elizabeth Rickman, as the widow and executrix of her deceased husband, was afterwards made to the auditor of public accounts to settle and adjust the pay and subsistence accounts of the testator as an officer in the Virginia line on continental establishment, and on the twenty-eighth of February, 1784, the requested adjustment was made. By that adjustment the auditor of public accounts found that there was a balance due to the deceased, or to his legal representatives, of one thousand seven hundred and twenty-two pounds nineteen shillings and two pence, and the record shows that the evidence of the indebtedness of the State to the deceased for that amount was delivered to B. Harrison on the same day the adjustment was made.

* 10 Hening's Statutes of Virginia, 468.

Statement of the case in the opinion.

Prior to that adjustment, to wit, on the twenty-ninth of November, 1783, the House of Delegates of Virginia passed two resolutions which it becomes important to notice.

1. That the petition of Elizabeth Rickman praying that the auditor of public accounts should settle and adjust the pay and accounts of her late husband was reasonable, showing satisfactorily that the adjustment was largely influenced by the legislature.

2. That Elizabeth Rickman, widow of William Rickman, be allowed such a portion of land as the rank and service of the deceased merit.

Pursuant to the second resolution the governor of the State, Benjamin Harrison, on the twelfth of January, 1784, executed a certificate that Elizabeth Rickman, widow and executrix of William Rickman, director general, is entitled to the proportion of land allowed a colonel in the continental line who has served three years, and on the following day a warrant for six thousand six hundred and sixty-six and two-thirds acres was issued to her, signed by the register of the State land office.

Five years later she intermarried with John Edmondson, and they afterwards, during the succeeding year, united in executing a deed of trust or post-nuptial agreement to her brother, Carter B. Harrison, of all her estate, real and personal, or to which she was entitled under the will of her former husband, for her separate use and advantage, her heirs, executors, and administrators, the husband stipulating therein that she might dispose of the same by her last will and testament as she should see fit to do.

On the third of May, 1790, Elizabeth Edmondson made her last will and testament, which was olographic, and on the first day of January, 1791, she died, leaving her will in full force, and on the twentieth of the same month the will was proved and admitted to record in the county where she resided at her decease.

Absolute title to the lands embraced in the warrant signed by the land register is claimed by the complainants, upon the ground that the same were devised in fee simple by Eliza-

beth Edmondson to her husband, John Edmondson, by her last will and testament, but the respondents deny that her will when properly construed contains any such devise, and insist that the will, if it made any disposition of those lands, only devised to the husband a life estate in the same, and that the fee simple title to the same, inasmuch as the testatrix died without issue, descended to her brothers and sisters, under whom they claim, as alleged in the answer.

Unless the course of descent was broken by the will of the testatrix, it is clear that her brothers and sisters became the owners of the lands embraced in that warrant, as it is conceded that she died without issue.

Afterwards, in the year 1795, the said John Edmondson married again, and the record shows that he had three children by the second wife, one of whom died before the father without issue, leaving John and Elizabeth, the latter having since intermarried with Littleton Waddell, the other complainant and appellant in the case before the court.

Before his decease, John Edmondson, the father of the two appellants, John and Elizabeth, also made a will and devised all his property to his three children, one of whom, as before stated, died during the lifetime of the father. His will bears date on the third of October, 1802, and the pleadings show that he died on the first day of December following, leaving the two children before named as his principal devisees and sole heirs-at-law. They, together with the husband of Elizabeth, claim the lands in controversy upon the ground that the same were devised to the father of John and Elizabeth by the will of his first wife.

Defences of various kinds are set up in the answer, but in the view taken of the case it is not necessary to enter into those details, as the court is of the opinion that the decision of the case must turn upon the construction of the will of Elizabeth Edmondson, deceased, it being conceded that she held the title to the lands in controversy under the warrant granted to her for the same by the State.

Proofs were introduced by both parties, but the Circuit Court was of the opinion that the complainants were not

entitled to recover, and entered a decree dismissing the bill of complaint. Whereupon the complainants appealed to this court, but the appeal was dismissed, it appearing on the face of the record that the transcript was not filed in this court during the term next succeeding the allowance of the appeal.*

Since that time a new appeal has been allowed to the complainants and they have removed the cause into this court, seeking to reverse the same decree from which the first appeal was taken. Pending the present appeal a motion to dismiss was filed by the respondents, which was heard at the same time with the merits, but the questions involved in the motion will not be decided, as the court is of the opinion that the decree of the Circuit Court dismissing the bill of complaint for the want of equity is correct.

Motions of the kind are usually determined before proceeding to examine the merits of the controversy, but the court deems it proper to adopt a different course on the present occasion for the following reasons, among others which might be mentioned: (1.) Because differences of opinion exist in the court as to the proper disposition to be made of the motion, irrespective of the fact that the case has been twice heard upon the merits. (2.) Because the respondents, when the case was here before, went to final hearing without making any objections to the regularity of the appeal.

Affirmative relief, it is true, could not be granted to the complainants without first disposing of some of the questions involved in the motion, but inasmuch as an affirmance of the decree of the Circuit Court will effect substantially the same result as a dismissal of the appeal, the court is not inclined to decide the preliminary questions.

Letters of administration on the estate of Elizabeth Edmondson were granted to John Edmondson, the husband of the deceased, as no executor was named in the will. Several bequests to the husband were made by the testatrix in

* Edmondson v. Bloomshire, 7 Wallace, 306.

Statement of the case in the opinion.

the will which need not be noticed, as they furnish no aid in the solution of the question presented for decision. Those clauses relate to certain articles of personal property which she gave to her husband forever, and to certain slaves which she gave to him "to dispose of as he may think proper." Preceding the clause disposing of the articles of personal property the will contains the following devise: "I give to my dear husband, John Edmondson, all the land I possess, *during his life*," but the will contains no residuary clause of a general nature. Enough appears to show that the testatrix owned real estate, as she devised the house and land where they lived, at the death of her husband, to one of her brothers, and to another brother she gave, at the decease of her husband, a certain other tract described in the will as having been purchased by her first husband, but the will does not in terms make any ultimate disposition of the lands devised to her husband during his life except those two parcels, and the complainants do not controvert the proposition that the lands in question, if they were devised to the husband under that clause of the will, descended at his decease to the brothers and sisters of the testatrix, as contended by the respondents. They deny, however, that the lands in controversy, or any portion of the same, were devised to him by that clause. On the contrary, they rely upon another clause in the will as the foundation of their claim, which follows the bequests before mentioned to her husband and certain other bequests of like kind to her brothers and sisters and other relatives, specifying in each of the several bequests the name of the legatee.

Having devised all the land she possessed to her husband during his life, and made those bequests, the testatrix provides as follows: "My certificates that are in the hands of my brother Ben, I desire may be given to my husband to dispose of as he may think proper." Founded on that clause in the will, the theory of the complainants is that the warrant signed by the land agent for the six thousand six hundred and sixty-six and two-thirds acres of bounty-lands was devised to their father, and that at the decease of the testa-

trix he became the owner in fee simple of the lands surveyed and located under that warrant, and that they, as the devisees in his will and his sole heirs-at-law, are the lawful owners of the lands in controversy.

Support to that theory is attempted to be drawn from the fact that the governor, before the warrant was signed, granted a certificate in which he certified that the widow and executrix of the deceased claimant was entitled to the proportion of land allowed to a colonel of the continental line who had served three years, but the decisive answer to any such attempt is that the certificate of the governor was, on the following day, deposited in the proper office as the legal foundation of the land warrant, where it has ever since remained.

Most of the introductory allegations of the bill of complaint are admitted by the respondents. They also admit that Elizabeth Rickman, before her marriage with John Edmondson, obtained the certificates for the balance due her first husband for pay and subsistence as director general in the continental line, and also for the interest due on the same, and that she also obtained the warrant for the lands in controversy, but they utterly deny that the word certificates as used in the clause of the will under which the complainants claim means or intends the warrant in question or the lands described in the pleadings.

Persons having claims to bounty lands were required at that time, by the laws of that State, to exhibit their vouchers to the executive, and if found to be correct and the claim was allowed, it was the duty of the governor to issue a certificate to that effect to the register of the land office, and the register, upon the filing of that certificate, was required to grant the warrant.*

More than six years before the testatrix made her last will and testament in which she uses the phrase "my certificates that are in the hands of my brother Ben," the cer-

* 11 Hening's Statutes of Virginia, 83; Swan's Land Laws, 118.

tificate as to the bounty lands had been surrendered to the register of the land office, and the land warrant in question had been issued in its place, and there is no evidence that the land warrant or the certificate which preceded it was ever in the hands of any one of the brothers of the testatrix.

Undoubtedly the certificate for the balance due for pay and the subsistence accounts arising from the depreciation of the currency in which the original claimant was paid and the certificates for the interest on the same did pass by that clause in the will to the husband of the testatrix, and the proofs are satisfactory that those certificates were in the hands of her brother Benjamin at the date of the will. Those certificates bear date on the twenty-eighth of February, 1784, and they were immediately delivered to the brother named in the will as having them in his hands, where they remained to the date of the will of the testatrix and to the time of her death.

Certified copies of the certificate signed by the governor as the foundation for the land warrant are exhibited in the record as given by the register of the land office, which shows that it could not have been in the hands of her brother at the date of the will, as it had been in the register's office more than six years before the will was executed. Suppose, however, that it appeared that the land warrant had been in the possession of her brother, from its date to the time when the testatrix died, still it would be difficult, if not impossible, to hold that the signification of the word certificates, as used in the will, is sufficiently comprehensive to include that instrument, as the word certificate seems to have an appropriate and direct reference to the instruments of evidence issued to the testatrix for the back pay and subsistence accounts of her former husband, as before explained.

Attempt is made in argument to show that the words certificate and warrant are sometimes used in the statutes of the State as words of equivalent import, but the examples put do not relate to the same subject, and if they did it would not be difficult to show that the words are there used

rather as conferring an alternative authority than as words of synonymous signification. Be that as it may, still it is evident that the word certificates was used by the testatrix as referring directly to the instruments in the hands of her brother, which were given in the adjustment of her claim for the balance due to her former husband to make his pay as director-general equal to what it would have been if he had been paid in specie.

Strong confirmation of that view is derived from the course pursued in the settlement of her estate and the long acquiescence of the complainants in the pretensions of the respondents and those under whom they claim. Evidence, however, of the most satisfactory character was introduced by the respondents showing that the land warrant never was in the hands of her brother prior to the date of the will, or at any other time, but it is not deemed necessary to enter into those details, as we are all of the opinion that the land warrant, if it passed to the husband by the will, passed under the devise which gave him during his life all the land which the testatrix possessed, that it did not pass to him by the other devise, and that the decree of the Circuit Court dismissing the bill of complaint is correct.

DECREE AFFIRMED.

BANK OF LEAVENWORTH *v.* HUNT, ASSIGNEE.

1. Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or the evidence respecting them is not controverted.
2. An agreement between persons insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promise its president to deliver to the bank, whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the meantime retained in their possession, is void as against their other creditors.
3. Such an agreement does not create any lien upon the property, or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the Bankrupt Act

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Any subsequent sale, made in pursuance of the agreement, does not take effect by relation at its date.

4. A mortgage of personal property, consisting of goods in a retail store, executed in Kansas to secure the payment of certain promissory notes, is void as against creditors of the mortgagors by statute, if the mortgage is not deposited in the office of the register of deeds of the county where the property is situated, or the mortgagors reside, and is void independent of the statute if the mortgagors remained in possession of the goods by the terms of the mortgage, and continued to sell the goods mortgaged with the assent of the mortgagees.

ERROR to the Circuit Court for the District of Kansas.

This was an action brought by the assignee in bankruptcy of Keller and Gladding to recover of the Second National Bank of Leavenworth the value of certain property alleged to have been transferred to it by them in fraud of the provisions of the Bankrupt Act.

On the trial evidence was introduced, on the part of the plaintiff, tending to show that the bankrupts had made a conveyance of their property to the defendants when they were insolvent, and that the defendants had reasonable grounds for believing that the bankrupts were in this condition at the time; that the transfer was not made in the ordinary course of their business; and that, on the first day of August, 1866, they executed a chattel-mortgage on portions of their property to the cashier of the bank to secure the payment of two notes, each for four thousand dollars, belonging to that institution. This chattel-mortgage provided that in case of default in the payment of the notes or interest, it should be lawful for the cashier of the bank to take possession of the property and sell the same. The mortgage was never deposited in the office of any register of deeds of any county in Kansas. The statute of Kansas in force at the time declared a mortgage of goods and chattels, not accompanied by an immediate delivery of the property and followed by an actual and continued change of possession, absolutely void as against creditors and subsequent purchasers and mortgagees in good faith, unless the mortgage or a copy thereof was forthwith deposited in the office of the register of deeds in the county where the property

was situated, or if the mortgagor was a resident of the State, then in the county of which he was a resident.*

Thereupon evidence was given on the part of the defendants, tending to show that the bankrupts, in conversations preliminary to the execution of the chattel-mortgage, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promised its president to deliver to the bank, whenever it should desire, the entire stock of goods which they might have at the time on hand; that in February, 1867, in pursuance of this agreement, they delivered a portion of their stock, amounting in value to $2542, and in July following they turned over the balance to the bank.

Evidence was also given, tending to show that the bankrupts continued to sell the goods included in the mortgage, and all other goods at their store, with the consent of the defendants, until the transfer in July, 1867, and that this was contemplated by the parties when the mortgage was made.

The defendants thereupon prayed the court to instruct the jury, that if they "believe from the evidence that the conveyance by Keller and Gladding, in July, 1867, was made in pursuance of the original agreement between them and the bank, they are to regard the sale or transfer as valid, and not [as made] in contemplation of evading the provisions of the bankrupt law." The court refused to give the instruction, and the defendants excepted. The correctness of this refusal was the question presented for consideration in this court. The plaintiff obtained judgment, and the defendants brought the case here by writ of error.

Messrs. Sherry and Helm, for the plaintiffs in error; Messrs. Stillings and Wheat, contra.

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

The question presented for our consideration arises upon the refusal of the Circuit Court to give the instruction

* Compiled Laws of Kansas of 1862, p. 723.

prayed; and it is one easily answered. It would have been error to have given the instruction, for it assumes that there was an original valid agreement between the parties that the plaintiffs should deliver to the bank the entire stock of goods when desired.

In the first place, the record does not disclose that any such agreement was established; it only discloses that the evidence introduced tended to show that, in conversations preliminary to the execution of the mortgage, the bankrupts made a promise to the president of the bank to that effect.

Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or the evidence respecting them is not controverted. The courts would otherwise encroach upon the appropriate and exclusive province of juries.

In the second place, the supposed agreement, if established, was void as against other creditors of the bankrupts. It did not create any lien upon the property, or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the Bankrupt Act. The subsequent sale, even if made in pursuance of the agreement, did not take effect by relation at its date. Transfers of personal property, situated as in this case, only take effect as against creditors from the delivery of the property to the purchaser.

The stipulation in the chattel-mortgage, providing that in case of default in the payment of the notes or interest, it should be lawful for the cashier of the bank to take possession of the property and sell the same, does not aid the defendants for two reasons, both equally conclusive. 1st; The mortgage was never deposited in the office of the register of deeds of the county where the property was situated or the mortgagors resided, and was therefore void as against creditors under the statute of Kansas. 2d; The mortgagors remained in possession of the goods notwithstanding the mortgage, and by its terms; and the testimony tended to show that they continued to sell the goods, with the assent of the defendants, until the transfer in July, 1867. The

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court could not assume the instrument to be valid in the face of this testimony, for if the facts were found by the jury which the testimony tended to establish, the mortgage was fraudulent and void as against creditors.*

In any view of the case the instruction prayed was properly refused.

JUDGMENT AFFIRMED.

MISSOURI *v.* KENTUCKY.

1. On a question of the exact ancient course of a river in a wild region of our country, maps made by early explorers being but hearsay evidence, so far as they relate to facts within the memory of witnesses—*ex. gr.* since A. D. 1800—are not to control the regularly given testimony of such persons.
2. It seems that the old maps (those *ex. gr.* prior to A. D. 1800), indicative of the physics and hydraulics of the Mississippi, are not greatly to be relied on.
3. Wolf Island, in the Mississippi River, about twenty miles below the mouth of the Ohio, is part of the State of Kentucky, and not part of the State of Missouri. This fact settled by the testimony of witnesses as to which State exercised jurisdiction; as to where the middle of the main channel of the Mississippi River had been when the boundary between the States was fixed; by the character of the soil and trees of the island, as compared with the soil and trees of Missouri and Kentucky respectively; and by the natural changes produced in the course of the current by the physics and hydraulics of the river since the time mentioned as generally and specifically shown.

THE State of Missouri brought here, in February, 1859, her original bill against the State of Kentucky, the purpose of the bill being to ascertain and establish, by a decree of this court, the boundary between the two States at a point on the Mississippi River known as Wolf Island, which is about twenty miles below the mouth of the Ohio. The State of Missouri insisted that the island was a part of her territory, while the State of Kentucky asserted the contrary. The bill alleged that both States were bounded at that point by the main channel of the river, and that the island, at the

* Griswold *v.* Sheldon, 4 Comstock, 581; Wood *v.* Lowry, 17 Wendell, 492.

time the boundaries were fixed, was and is on the Missouri side of said channel.

The answer stated that Kentucky, formed out of territory originally embraced within the State of Virginia, was admitted into the Union on the 1st day of June, 1792, and that she had always claimed her boundary on the Mississippi to the middle of the river, and Wolf Island to be within her jurisdiction and limits as derived from Virginia; a part of Hickman County, one of the counties of Kentucky, opposite to which it lay. And it denied that the island belonged to Missouri, or that the main channel was on the eastern side of it when the boundaries of the States were fixed.

An immense amount of testimony, derived from maps as ancient as the earliest well-known navigation of the river; from the journals of ancient and later travellers; from official and *quasi* official surveys, &c., was introduced by the counsel of both sides, but more especially by those of Missouri, to show where the main channel had been and was—whether on the east or on the west of the island—in 1763, where the boundary between France and England, then owners respectively of the regions now known as Missouri and Kentucky, and more particularly where it was in 1783, when by our treaty of peace with Great Britain we succeeded to the rights of that government; and also where it was in 1820, when Missouri, part of the territory acquired from France, was admitted into the Union; the middle of the main channel of the river, confessedly, having been fixed in all these cases as the boundary. The depositions of many witnesses on both sides, particularly on the defendant's, were also read, testifying as to where within the memory of man the channel in dispute had been.

The witnesses of the complainant—to give the case of Missouri more particularly—stated that from the present time back to 1830 the main channel of the river was on the east side of the island, and that from 1830 as far back as 1794, both channels were navigable. They admitted that, from 1832 to the present time, the eastern channel had been chiefly used for navigation.

Statement of the case.

The early maps and charts of the river, introduced by the State of Missouri, laid down the island as nearly in the middle of the river, but the larger portion of it west of the middle line. Amongst these were the map of Lieutenant Ross, of the British army, made in 1765, in an expedition from Fort Chartres to New Orleans; the map of Captain Philip Pittman, published in London in 1770; the map of General Collot, in 1796; Hutchins's map, in 1778; and Luke Munsell's map of Kentucky, made in 1818.

Extracts from the books of early travellers stated their passage down the river on the east side; among these books were the travels of Ashe in 1806, and of Sir Francis Baily in 1796.

The Pittsburg Navigator, in several editions from 1806 to 1818, was relied on, stating the channel to be on both sides, but best on the east side.

Reliance was had, too, on certain official or *quasi* official maps of the Federal government. An official map, made in 1821, by the United States Engineers' Department, under an act of Congress of April 14, 1820, and a United States Survey and Report, made in 1838, by the Land Department, with official computation, showed the area of the cross section of the east channel to be 31,020.33 square feet, and of the west channel to be 18,625.71, and the mean velocity of the east channel to be 3.72 feet per second, and of the west channel to be 2.79 feet, and giving the gallons discharged by the east channel per second as 115,395, and of the west channel 51,965, being less than one-half on the west side; and also the greatest depth of water on the east side as being 23 feet against 22½. General Barnard's apparently official map of 1821 was relied on as laying down the channel on the east side; as also the United States Coast Survey map, of 1864, presenting it in the same way. The island, it seemed, had been surveyed by the United States, in March, 1821, as part of Missouri; and in April, 1823, steps were taken to locate on it a New Madrid certificate for 600 arpents; and in August, 1834, a plot of the island was sent to the Register of the Land Office, at Jackson, Missouri.

The State of Missouri relied, also, a good deal on the fact,

which seemed to have been sufficiently proven, that in 1820 the sheriff of New Madrid County (the county in Missouri opposite to the island), had executed process of the Missouri courts on the island against the only settler on it, one Hunter, and who entered upon it prior to 1803; and that one of the Missouri Circuit Court judges had once—though when did not appear—resided on the island.

Evidence introduced by Missouri tended to show that the first *clear* act of jurisdiction exercised by Kentucky was not earlier than 1826; and that it was only in 1837, when her legislature passed an act for the sale of lands on the island, and her people purchased under her title so offered, that Kentucky asserted open and exclusive ownership of the island.

The State of Kentucky on its side gave proof, which was much of it in direct opposition to that presented by Missouri. It proved that land on the island was entered in the Virginia land office during the Revolutionary war; the State now known as Kentucky being then part of Virginia; and that in 1828, one of the courts of Kentucky exercised jurisdiction over the island in a matter of apprenticeship. Although it presented fewer evidences from ancient maps and books of travels than did the State of Missouri, it produced more living persons whose recollections came in support of its case. More than a score of witnesses, many of them ancient, including boatmen, navigators, and several persons who had lived from childhood close by the island, some opposite to it, and specially interested by their business to note on which side vessels sailed, all testified that while now the main channel of the river was to be regarded as on the *east* side of the island, it was undoubtedly and within their memory and knowledge not so formerly, but was on the west side; many of these witnesses going into details, and showing a positive and experimental knowledge on the subject upon which they spoke; details of a sort that could not easily be invented, and which if not invented but true, tended to give the case to Kentucky.

The geology of the island and its *sylva* were relied on by

Kentucky, and shown to be more coincident with its own soil and woods than with those of Missouri; the argument hence being that what was now an island, was originally part of the mainland of Kentucky.

The counsel for Kentucky directed evidence yet more specially, to the physical changes which the shores of the two States had undergone since the years 1763, 1783, and 1820. It was not denied by them, that now and since 1820, the river on the east side of the island had become broad, deep, and navigable; the testimony introduced by them being directed to show that this was the result of physical and hydraulic causes, working changes since the boundary had been fixed; some of the changes being the results of actual efforts of science to improve the channel, but others, immeasurably more operative, natural ones only; a continuation of those changes caused in the basin of the Mississippi, by the mighty rises to which the river is subject; estimated at such magnitude that men of science* have considered that the river poured past even at this high point of it, at the rise in March, 1858, 1,130,000 cubic feet per second; at the rise in April of that year 1,260,000, and at the rise in the following June (continuing for several days), the immense volume of 1,475,000 of cubic feet per second; inundating cities, changing courses of the stream, and in former ages leaving far to the west of the present river-course those crescent-shaped lakes, noted by Sir Charles Lyell and other geologists, plainly bends in the ancient channel.†

* See the report of Captain Humphreys and Lieutenant Abbott, of the Topographical Engineers of the United States, upon the physics and hydraulics of the Mississippi River, made by order of Congress.

† See Lyell's Second Visit to the United States, vol. ii, pp. 248, 250. By way of illustrating the immense geological changes which the basin of the Mississippi has undergone in the course of time, a passage was quoted from Lyell's Principles of Geology (10th ed., vol. i, p. 462). The author is describing a cliff near the Gulf, which he examined in 1846, and which he says had been well described by Bartram, the botanist, sixty-nine years before; "a cliff continually undermined by the stream." He says:

"At the base of it, about forty feet above the level of the gulf, is buried a forest, with the stools and roots in their natural position, and composed of such trees as

These were causes, sufficient as the counsel of the State of Kentucky argued, to account for the change in the course of the channel; and the counsel produced a map known as H. G. Black's (see it *infra*, p. 409), showing how the eastern channel had been produced by recent mighty rushings of the river against the "iron banks," above the island; and which while they were able to resist the current, threw it with a rebound to the Missouri side, but which now yielding to the tremendous stream, and being gradually washed away, let the whole force of the river come in a more direct and easy course.

The statement, in more detail, of this great body of evidence, tending only to the establishment of facts, would serve no purpose of judicial science; and may be the more properly omitted by the reporter, since, in most of the details not already given, it is minutely presented by the learned justice who gives, after stating it, the opinion of the court as a result.

It was all systematically and clearly introduced for the party whom it was supposed to aid, by *Messrs. M. Blair* and *F. A. Dick, in behalf of the State of Missouri, complainant;* and by *Messrs. G. Davis and H. Stanbery, on the other side;* the arguments which, in view of the special nature of the case, were not limited as to time, and were made by those same gentlemen, having been elaborate and able.*

now live in the swamps of the Delta and alluvial plain. Above this buried forest the bluff rises to a height of about seventy-five feet, and affords a section of beds of river sand, including trunks of trees and pieces of drift-wood, and above the sand a brown clay. From the top of the cliff the ground slopes to a height of about two hundred feet above the sea. From this section we learn that there have been great movements and oscillations of level since the Mississippi began to form an alluvial plain and to drift down timber into it, and to bury under sand and sediment ancient forests. When the trees were buried the ground was probably sinking, after which it must have been raised again, so as to allow the stream to cut through its old alluvium. The depth of this ancient fluviatile is seen to be no less than two hundred feet, without any signs of the bottom being reached."

* *Mr. Stanbery* also raised and argued fully the point of jurisdiction; the judgment in the already reported case of *Virginia* v. *West Virginia* (*supra*, 39), by which discussion on that subject would have been concluded, not having been as yet announced.

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary, for the purposes of this suit, to consider whether, on general principles, the middle of the channel of a navigable river which divides coterminous States, is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain, and England, in February, 1763, stipulated that the middle of the River Mississippi should be the boundary between the British and the French territories on the continent of North America. And this line, established by the only sovereign powers at the time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain of 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836.* And Kentucky succeeded, in 1792,† to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi River. It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner.‡

That Virginia claimed the ownership of the island as early as 1782 is very certain, for at that date the arable land on it was entered in the proper office of Virginia as vacant land lying within the territorial limits of the State, although it

* 3 Stat. at Large, 545; 5 Id. p. 50. † 1 Id. 189.

‡ Heffter, Du Droit International, p. 143, § 66; Caratheodéry, Du Droit International, 62.

seems the entry was never surveyed or carried into a grant. And that Kentucky is now, and has been for many years prior to the commencement of this suit, in the actual and exclusive possession of the island, exercising the rights of sovereignty over it, is beyond dispute. The island lies opposite to, and forms part of, Hickman County, one of the counties of the State, and the lands embraced in it were, in May, 1837, surveyed under State authority, and have since then been sold and conveyed to the purchasers by the same authority. The people residing on it have paid taxes and exercised the elective franchise according to the laws of the State. In 1851, a resident of the island was elected to represent the county in the General Assembly, and served in that capacity. And as early as 1828, a minor living there with one Samuel Scott, was bound an apprentice to him by the proper court having jurisdiction of such subjects. This possession, fully established by acts like these, has never been disturbed. If Missouri has claimed the island to be within her boundaries, she has made no attempt to subject the people living there to her laws, or to require of them the performance of any duty belonging to the citizens of a State. Nor has there been any effort on her part to occupy the island, or to exercise jurisdiction over it. If there were proof that the island, by legislation, had been included in the limits of New Madrid County, then the service of a writ in 1820, on the solitary settler there, by the sheriff of the county, would be an exercise of sovereign power on the part of the State. But in the absence of this proof, there is nothing to connect the State with the transaction, or from which an inference can be drawn that the sheriff was authorized to go on the island with his process. And for the same reason, it is hard to see how the fact, conceding it to be true, that a person occupying the position of a circuit judge of Missouri, once lived on the island (when or how long we are not informed), tends to show that the State intended to take possession of it.

These things may prove that, in the opinion of the judge and sheriff, the island belonged to Missouri, but they do not

go further and put the State in any better position than she was, if they had not occurred. And so with the locator of the New Madrid claim in 1821. He doubtless believed he had authority to locate his warrant on the island, but surely the State cannot claim that she acquired any right by this proceeding. There is, therefore, nothing in this record which shows that Kentucky has not maintained, for a long course of years, exclusive possession and jurisdiction over this territory and the people who inhabit it. It remains to be seen whether she shall remain in possession and continue to exercise this jurisdiction, or whether she shall give way to Missouri. The case is certainly not without its difficulties, but we think these difficulties can be removed by a fair examination of the testimony, and the right of the contestants properly determined.

The evidence to be considered consists of the testimony of living witnesses, the physical changes and indications at and above the island, and the maps and books produced by the complainant. In a controversy of this nature, where State pride is more or less involved, it is hardly to be expected that the witnesses would all agree in their testimony. And as this conflict does exist, it is necessary to consider the evidence somewhat in detail, in order to justify the conclusions we have reached concerning it.

There are eight witnesses called for the complainant, who testify confidently, that the main channel of the Mississippi River was always east of Wolf Island, and one of them (Swon), an experienced river-man, who navigated the river from 1821 to 1851, in all stages of water, says there are no indications that the main channel was ever on the west side. Only three of them knew the river prior to 1820, and they were engaged in the business of flat-boating, which is hardly ever undertaken in a low stage of water. There is nothing to show that any one of them ever made a personal examination of the channels and surrounding objects at this point, and there is a remarkable absence of facts to sustain their opinions. It is also noticeable, in connection with this evidence, that none of the witnesses (Hunter may be an excep-

tion) ever lived in the vicinity of the island, or remained there any length of time, and that all the knowledge any of them acquired of the state of the river was obtained by passing up or down it at different times, either on flatboats or steamboats. Notwithstanding they swear positively that the channel was always east of the island, yet Watson says it changed for about three years, and Ranney testifies that on one occasion, when the main channel was divided into three parts, the deepest water for a short time in the fall of the year was found on the west of the island, and steam boats passed on that side. But they do not prove a deficiency of water at any time in the Missouri channel, or that any boat, from that or any other cause, was ever hindered in any attempt to run it. It is undoubtedly true that the Kentucky channel, when the river was full, for many years has afforded a safe passage for boats, because at such a time, if the obstructions were not submerged they could be avoided, and navigators would take it as it was five miles the shortest. And passing the river only occasionally, and without any knowledge of where the volume of water flowed when the river was low, they would naturally conclude it was the main channel. It is equally true that now it is the main highway for the business of the river; but the point to be determined is, was it so as far back as 1763, or even 1820? If in the investigation of such an inquiry, positive certainty is not attainable, yet the evidence furnished by the defendant affords a reasonable solution of it. And, at any rate, it greatly outweighs the evidence on the other side, and in such a case the party in possession has the better right. The proof on behalf of the defendant consists of the testimony of twenty-seven witnesses. Many of them have been acquainted with the river from an early period in this century, and quite a number have spent their lives near the disputed territory, and, therefore, had better opportunities for observing the condition of the river at this point than the witnesses for the complainant, who only passed there occasionally. Nearly all of them are old men, and there is no diversity of opinion between them concerning the loca-

tion of the main channel of the Mississippi River at Wolf Island. All who testify on the subject—there are only a few who do not—agree that until a comparatively recent period it ran west of the island, and to fortify their opinions they describe the state of the respective channels at different times, and tell what was done by themselves or others about the navigation of the river. They concur in saying that in early times it was difficult for flatboats, even in the highest stage of water, to get into the Kentucky chute, owing to the current running towards the Missouri side, and that if they succeeded in doing it, the navigation was obstructed on account of the narrow and crooked condition of the stream, which was filled with tow-heads, sand-bars, drift-wood, and rack-heaps. One of the witnesses, in describing the appearance of this chute in 1804, states that it looked like lowlands, with cottonwood and cypress on it, and that there was only a narrow channel close to the island; all the other space to the Kentucky shore, now open water, was then covered with large cottonwood timber.

Other witnesses corroborate this testimony, and unite in saying that in early times, at an ordinary stage of water, it was impossible to take the Kentucky channel at all, on account of these obstructions, while the Missouri channel was wide, deep, and unobstructed. And one of them expresses the opinion that in low water, any one could have got to the island from the Kentucky shore without wetting his feet, by crossing the small streams on the drift-wood. But we are not left to conjecture on this point, for Ramsey, an old inhabitant of the country, swears that on one occasion he walked over from the Kentucky side to the island, nearly all the way on dry land, and the residue on drift-wood, and noticed while on the island, that there was plenty of water in the Missouri channel.

Can it be possible that such a stream at this time was the main channel of the Mississippi River? Although the Kentucky channel, from natural causes, had improved in 1825, still in the low water of that year it did not have a depth of over two and a half feet nor a width exceeding one hun-

dred and fifty yards, while steamboats passed through the Missouri channel without any difficulty. The witness who testifies to this state of things, at that time, had his attention especially called to the subject as he kept a woodyard on the Kentucky side opposite the island, and missed the opportunity of supplying boats that ran the Missouri channel.

And there is no one who speaks of a scarcity of water in the Missouri channel, until after Captain Shreve operated in this locality with his snag-boats, which had the effect of opening and deepening the Kentucky channel, so that it has now become the navigable stream. Judge Underwood says that in 1820 the west channel was between four and five hundred yards wider than the east one, and must have discharged nearly double the quantity of water. And one witness testifies that the east channel was formerly so narrow that two steamers could not pass in it abreast. It would seem, therefore, that the condition of this channel, as told by these witnesses, was proof enough that the main channel was west of the island; but this is not all the proof on the subject. Russell, who was appointed superintendent of river improvements in 1842, and knew the island since 1814, and spent five months there in 1819, swears that in descending the river in 1830 or 1831 he sounded the Kentucky channel, and, not finding water enough in it by two or three feet to float his boat, was compelled to go down on the Missouri side, where there was nine or ten feet of water. To the same effect is the evidence of Holton, who, in 1828, being unable to get up the east channel with a steamer drawing upwards of six feet of water, went over to the Missouri side and passed through without any trouble. And, three years later, Peebles saw three or four steamers attempt to run up the Kentucky channel, and failing to get through, back out and easily ascend the other. Christopher, who ran the river from 1824 to 1861, on one occasion could not pass the bar at the foot of the Kentucky chute with a boat drawing twelve feet of water, and was compelled to change to the other side, and got up without any difficulty; and there are other witnesses who testify to the inability of boats to

pass east of the island, and to their safe passage west of it. Indeed, the concurrent testimony of all the persons engaged in the navigation of the river is, that they could never safely go east of the island, unless in high water, and that they uniformly took the west channel in dry seasons; and the flatboatmen, in early times, even in high water, were frequently compelled to uncouple their boats in order to descend the Kentucky channel, and then were obliged to pull through by trees, on account of the narrowness of the channel. In low water they would quite often get aground and have to wait for a rise of the river to take them out. It will readily be seen that this class of men would naturally take risks in order to save five miles of navigation. Moseby, who has lived in the vicinity for forty-two years, testifies to the greater volume of water in the Missouri channel, and to boats usually taking it; and all the witnesses agree that since they knew the river the chutes around the island have undergone great changes, and that the east one is now, in depth, width, and freedom from obstructions, wholly unlike what it was formerly. In this state of proof, how can it be successfully contended that Missouri has any just claim to the island?

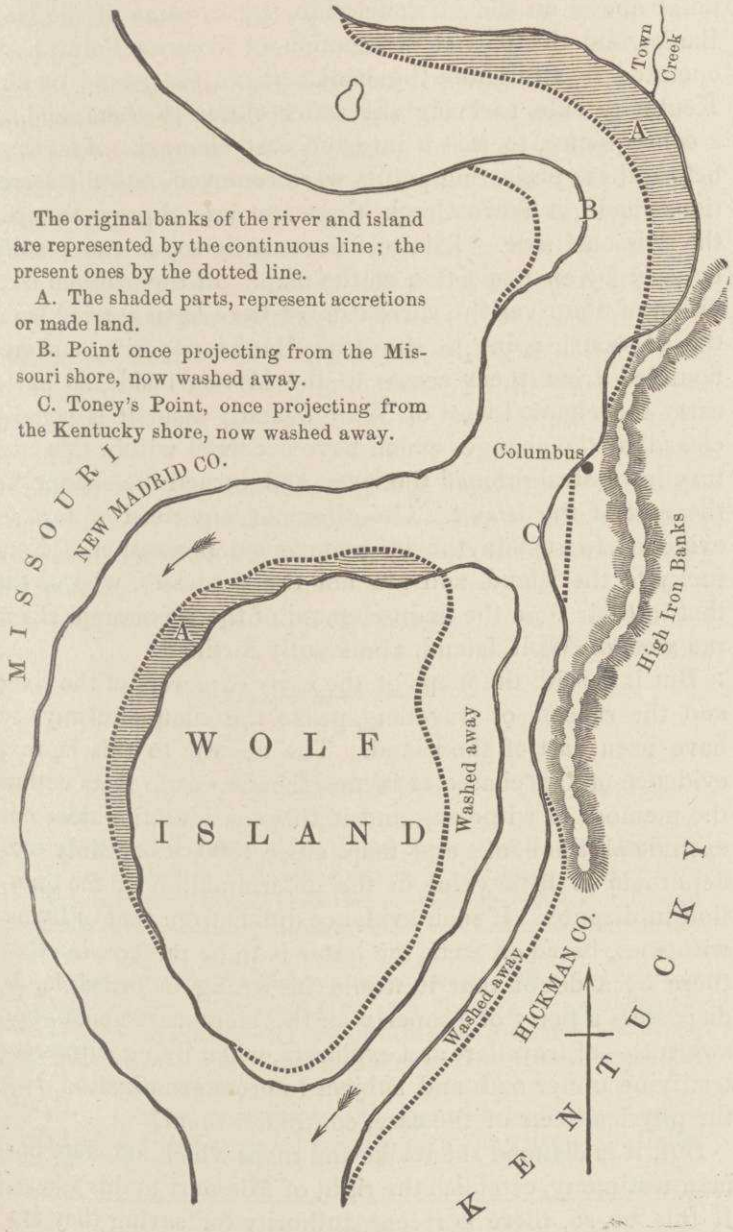
But there is additional proof growing out of certain physical facts connected with this locality which we will proceed to consider. Islands are formed in the Mississippi River by accretions produced by the deposit at a particular place of the soil and sand constantly floating in it, and by the river cutting a new channel through the mainland on one or the other of its shores. The inquiry naturally suggests itself, of which class is Wolf Island? If the latter, then the further inquiry, whether it was detached from Missouri or Kentucky. The evidence applicable to this subject tends strongly to show that the island is not the result of accretions, but was once a part of the mainland of Kentucky. Islands formed by accretions are, in river phraseology, called made land, while those produced by the other process necessarily are of primitive formation. It is easy to distinguish them on account of the difference in their soil and timber.

It has been found, by observation and experience, that primitive soil produces trees chiefly of the hard-wood varieties, while the timber growing on land of secondary formation—the effect of accretions—is principally cottonwood. Wolf Island is of large area, containing about fifteen thousand acres of land, and, with the exception of some narrow accretions on its shores, is primitive land, and has the primitive forest growing on it.

On the high land of the island there are the largest poplar, chincapin, oak, and black-jack trees growing, and primitive soil only has the constituent elements to produce such timber. But this is not all, for trees of like kind and size are found on the Kentucky side on what is called the second bottom, near the foot of the Iron Banks, which is about two feet higher than the bottom on which Columbus is located. There are no such trees on the Missouri shore. Those found there are of a different kind and much smaller growth. Besides this, the high land on the island is on the same level with the second bottom on the Kentucky side, while it is four or five feet higher than the land on the Missouri side opposite the island and above it. In this state of the case, it would seem clear that this second bottom and island were once parts of the same table of land, and, at some remote period, were separated by the formation of the east channel. In the nature of things, it is impossible to tell when this occurred, nor is it necessary to decide that question, for, by the memory of living witnesses, we are enabled to determine that the east channel, or cut-off, as it should be called, was not the main channel down to 1820.

If the testimony already noticed be not enough to prove this, there is the additional evidence furnished by the changes which the river has accomplished in the neighborhood of the island, within the recollection of many intelligent persons. These changes are important, and are shown on the map of H. G. Black (on the opposite page), which is proved to be a correct representation both of the present and original position of the island, the river, and its banks. The effect of the evidence on this subject is, that the filling

Map.


The original banks of the river and island are represented by the continuous line; the present ones by the dotted line.
A. The shaded parts, represent accretions or made land.
B. Point once projecting from the Missouri shore, now washed away.
C. Toney's Point, once projecting from the Kentucky shore, now washed away.
Town Creek
A
B
Columbus
C
MISSOURI
NEW MADRID CO.
A
WOLF ISLAND
Washed away
High Iron Banks
Washed away
HICKMAN CO.
KENTUCKY

up at the mouth of Town Creek, the washing away of the point above on the Missouri side, the abrasion of the Iron Banks, and the partial destruction of Toney's Point, have operated to straighten the banks above the island on the Kentucky side, to bring the water closer to them, and, as a consequence, to cast it into the east channel. And that, before these projecting points were removed, and the accretions made at Town Creek, the water was thrown towards the Missouri side. This was necessarily so, as can readily be seen by an inspection of the map. In the original condition of the river the current must have been carried from the Missouri point to the Iron Banks opposite, and rebounded from them across to the Missouri side, so as to carry the channel west of Wolf Island. And it is equally clear that the changes which have occurred within this century have straightened the river and turned the channel to the east of the island. Can there be any need of further evidence to sustain the long-continued possession of Kentucky to the island, and are not the witnesses, who swear that in their time the main channel of the Mississippi River ran west of Wolf Island, abundantly fortified?

But it is said, the maps of the early explorers of the river and the reports of travellers, prove the channel always to have been east of the island. The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses, based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle, to dispossess a party of property on the mere statements—not sworn to—of travellers and explorers, when living witnesses, testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them?

But, it is claimed the books and maps which antedate human testimony, establish the right of Missouri to this island. If this be so, there is recent authority for saying they are

unreliable. In 1861 Captain Humphreys and Lieutenant Abbott, of the corps of Topographical Engineers, submitted to the proper bureau of the War Department, a report based on actual surveys and investigations, upon the physics and hydraulics of the Mississippi River, which they were directed to make by Congress. In speaking on the subject of the changes in the river,* they say: "These changes have been constantly going on since the settlement of the country, but the old maps and records are so defective, that it is impossible to determine much about those which occurred prior to 1800." In the face of this report, authorized by the government, and prepared with great learning and industry, how can we allow the books and maps published prior to this century, to have any weight in the decision of this controversy?

Without pursuing the investigation further, on full consideration of all the evidence in the case, we are satisfied the State of Missouri has no just claim to the possession of Wolf Island.

It is therefore ordered that the bill be

DISMISSED.

THE MONTELLO.

1. A river is a navigable water of the United States when it forms, by itself or by its connection 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.
2. If a river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State.
3. The acts of Congress providing for the enrolment and license of vessels only apply to vessels employed upon the navigable waters of the United States.

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* Page 104.

Statement of the case.

4. Congress has not prescribed any regulations governing commerce between the States, except so far as it is conducted in vessels on the navigable waters of the United States.

APPEAL from the Circuit Court for the District of Wisconsin.

This case was heard on the libel of information, as amended, filed by the United States against the steamer Montello, and the exception to it taken by the claimants. The object of the proceeding was to recover two penalties alleged to have been forfeited to the United States; one by the neglect of the owners or captain of the vessel to procure her enrolment and license whilst she was engaged in navigating Fox River, in the State of Wisconsin, between Oshkosh and Portage City, and in transporting passengers and merchandise between those places; and the other, by their failure to put upon the boilers of the steamer an additional safety-valve prescribed by the board of supervising inspectors, and to provide a good and reliable water-gauge for the boilers.

For the first penalty claimed the libel alleged in its first article in substance, that the owners of the vessel, which was propeled in whole or part by steam, and was of twenty tons burden and upwards, on the 1st of October, 1867, transported in her, passengers and merchandise on the bays, rivers, and other navigable waters of the United States; and that, in carrying passengers, they navigated Fox River, in the State of Wisconsin, between the ports of Oshkosh and Portage City, and that prior to that period they were engaged in transporting between those places merchandise consisting of the products of Wisconsin, which were destined for use and consumption in other States of the Union and in foreign countries, and also in transporting merchandise consisting of the products of other States, brought from those States to Wisconsin, and destined to different places within her limits, without having the steamer enrolled and licensed, as required by the act of Congress of July 7th, 1838, and the amendatory act of August 30th, 1852.

For the second penalty claimed the libel alleged in its

second article that an additional safety-valve, of such dimensions and arrangement as had been prescribed by the board of supervising inspectors, had not been placed upon the boilers of the steamer as required by law, and that a good and reliable water-gauge had not been provided for the boilers.

The act of July 7th, 1838,* above referred to, 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 30, 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.

The act requires, among other things, that the supervising inspectors, appointed under its provisions, shall satisfy themselves that the safety-valves of the boilers on the steamers are of suitable dimensions, sufficient in number, well arranged and in good working order, and that there is a suitable number of gauge-cocks properly inserted, and a suitable water-

* 5 Stat. at Large, 304.

† 10 Stat. at Large, 61.

gauge and steam-gauge indicating the height of the water and the pressure of the steam,* before giving their certificate to the collector.

The exception of the claimants to the libel was, that the court had no jurisdiction of the matters contained in the articles, on the ground that they were not matters of admiralty and maritime jurisdiction, in this, that the steamer Montello was employed wholly on the inland waters of the State of Wisconsin at the time of the seizure and previously, and was not engaged in the coasting trade, or in foreign commerce, or in commerce between the States.

The District Court sustained the exception, and dismissed the libel. The Circuit Court affirmed the decision, and the United States brought the case here on appeal.

Mr. Akerman, Attorney-General, for the United States, cited the case of *The Daniel Ball.*† No one appeared for the claimants in this court.

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

The libel does not impart any information as to the character of Fox River, or its connection with other waters, and it is only from the general allegation of the libel that the vessel transported passengers and merchandise upon the navigable waters of the United States, preceding the allegation as to the transportation on Fox River, that we are justified in inferring that the libel intended to state that Fox River was a navigable water of the United States.

We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States. Since this case was presented we have examined, with some care, such geographies and histories of Wisconsin as we could obtain from the library of Congress, to ascertain, if possible, the real character of Fox River, and to render the

* 10 Stat. at Large, § 9, second head, p. 64. † 10 Wallace, 557.

fiction of the law, as to our supposed knowledge of the navigable streams in that State, a reality in this case; but from such examination we are still in doubt whether Fox River has any such connection with other waters as to form with them 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. It can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters, such a highway. If it form such a highway, the case presented is directly within the ruling made in the case of the steamer *Daniel Ball*, decided at the present term.* If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State, and the acts of Congress, to which reference is made in the libel, for the enrolment and license of vessels, have no application. Those acts only require such enrolment and license for vessels employed upon the navigable waters of the United States.

The fact that the steamer, in so far as she was employed in transporting the products of Wisconsin, which were destined for use and consumption in other States and foreign countries, and in transporting the products of other States brought to Wisconsin, and destined to different places within her limits, was engaged in commerce between the States, does not affect the question under consideration, for Congress has not prescribed any regulations governing such commerce, except so far as it is conducted in vessels on the navigable waters of the United States.

As the decree must be reversed, and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the

* 10 Wallace, 597.

precise character of Fox River as a navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading.

DECREE REVERSED, AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

MONCURE *v.* ZUNTS.

1. The provisions of the Code of Procedure of Louisiana concerning sales of real estate under execution require that the sale shall be advertised in a newspaper published in the parish where the land is situated.
2. The policy of Congress, as shown by numerous statutes, has been to adopt for the several courts in suits at common law, the processes and modes of proceeding of the State courts in which they are held.
3. The act of May 26, 1824 (4 Stat. at Large, 62), not only adopts the mode of proceedings then established in the State of Louisiana, but requires the Federal courts to conform to such changes as may be made in that State; and limits very materially the power of the Federal courts to modify or change those rules, as that power exists in the courts of other districts.
4. The seventh section of the act of Congress of March 2, 1867 (14 Stat. at Large, 466), applies only to such advertisements as may be published in behalf of the government, and are to be paid for out of the Federal treasury. It does not affect advertisements for sale of lands under judicial process in suits between individuals.
5. A sale of lands in such cases, under execution from the Federal court in Louisiana, should be set aside in a proper proceeding for that purpose, when it has not been advertised in a newspaper of the parish, and when there is a paper published in such parish.

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

Deas obtained a judgment in the court below against Moncure and others, heirs of Doyal, and, under an execution issued on this judgment, certain real estate was sold lying in the parish of Ascension, of which Zunts, the present defendant in error, became the purchaser. The laws of Louisiana authorize a proceeding by a purchaser at judicial sale somewhat in the nature of a bill of peace to quiet and con-

firm the title acquired at the sale. This proceeding is called a monition, and is instituted in the same court in which the original judgment was rendered, by a publication warning all persons interested to come forward and show cause, if any they can, why the title acquired by the sale should not be confirmed.

In response to this monition issued by Zunts, the present plaintiffs in error, Moncure, Dunlop, and others, appeared in court and opposed the confirmation on several grounds which attacked the validity of the sale for want of conformity in the marshal's proceedings to the laws of Louisiana The issues raised by this opposition were tried by a jury and several bills of exceptions were taken, which presented the points relied on by the plaintiffs in error, to reverse the judgment of the Circuit Court confirming the sale.

The most important of these related to the advertisement of the sale, and to that one this court limited its observations.

The code of procedure of Louisiana originally provided that such sales should be published in the English and French languages in a newspaper of the parish where the seizure was made. Subsequently the law was altered so as to dispense with the publication in French, unless the defendant should request it. But, from this amendment, the parish of Ascension and some other parishes were exempt. So, that there was no question but that the law of Louisiana, in regard to land sold under executory process in the parish of Ascension, required a publication in a newspaper of that parish, in both French and English, as a preliminary to the sale. In the case under consideration no publication was made in the parish of Ascension, though there was a newspaper published there in both the English and French languages, and the only notice given of the sale was an advertisement in the English language, made in May, 1868, in a certain newspaper of New Orleans, such as is spoken of hereafter.

There seemed, therefore, to be no reason to doubt, if the original judgment in this case had been rendered in a State

court of Louisiana, and the proceeding which the court was now considering had been there tried, that the sale could not have been sustained. And the question which this court was called on to decide was, whether the departure of the marshal from the requirements of the Louisiana code in making the sale under executory process of the Federal court was sufficient in this case to invalidate the sale.

The matter depended upon certain acts of Congress. Thus the act of May 26, 1824, to regulate the mode of practice in the courts of the United States for the District of Louisiana,* declared

"That the mode of proceedings in civil causes in the courts of the United States that now are, or hereafter may be, established in the State of Louisiana, shall be conformable to the laws directing the mode of practice in the District Courts of said State: *Provided*, That the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the State courts, and make by rule such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such should exist, between such State laws and the laws of the United States."

The *seventh* section of an act of March 2d, 1867,† it was contended below, however, had repealed or modified this former practice act. This act of 1867 was an act making appropriations for sundry civil expenses of the government for the year 1868. Among these expenses were the publication of the laws of Congress in newspapers of each State, the publication of advertisements of the departments, and other matters in the District of Columbia, and the laws concerning the army and navy in the United States Army and Navy Journal. The seventh section of this act authorized the clerk of the House of Representatives to name one or more newspapers published in each of the eleven States which had been in insurrection (naming them) in which the

* 4 Stat. at Large, 62.

† 14 Id. 466.

treaties and laws of the United States should be published, and in some one or more of which

"All such advertisements as may be ordered for publication in said districts *by any United States courts or judge thereof, or any officer of such courts*, or of any executive officer of the United States, shall be published, the compensation provided, and other terms of publication shall be fixed by said clerk, at a rate not exceeding two dollars per page for the publication of treaties and laws, and not exceeding one dollar per square of eight lines *for the publication of advertisements, the account for which shall be adjusted by the proper accounting officers and paid in the manner now allowed by law in like cases.*"

The law further provided that the clerk of the House should give notice to the heads of departments and each judge of the United States courts of the paper selected, and that thereafter it should be the duty of such executive officers to furnish to such selected paper only an authentic copy of the publications to be made as aforesaid.

The court below, contrary to the request of the parties opposing the confirmation of the sale, who asked for the opposite construction, charged that an advertisement of the property sold by the marshal in newspapers published in New Orleans, selected under the act of Congress just quoted, by the clerk of the House of Representatives of the United States, was a sufficient advertisement in a newspaper, under the law.

And it was recited in the bill of exceptions that it appeared from the evidence that it had been the practice of the marshal to make this kind of advertisement since that act of Congress.

Mr. P. Phillips and Mr. Conway Robinson, for the plaintiffs in error, contended:

That the legal advertisements spoken of in the act of 1867 were such as might be ordered for publication by any United States court or any judge or other officer thereof; but that the advertisement, under an execution for the sale

Argument for the defendant in error.

of property, was not made by order of the court, or by any officer thereof, but was required by *law*, and was not dependent on any authority less than the law itself. It was, therefore, not within the letter of the statute; still less was it within its spirit when it was shown that the advertisements intended were those for which the public treasury was responsible.

Mr. T. J. Durant, *contra*, argued in support of the views of the court below:

1. That the seventh section of the act of 1867 had repealed or modified the old act of 1824. It was on the very subject of court advertisements in the Federal districts. An advertisement for a marshal's sale, in a Federal district, is an advertisement ordered for publication in that district by a United States court, by the judge thereof, and by one of its officers, to wit, the marshal. It thus falls, by a singular multiplicity of descriptions, within the very words of the act. The act of 1824, requiring, as it does, uniformity with State practice, cannot stand with the act of 1867, presenting a departure from it. The adoption, in 1824, of the Louisiana mode of advertising property for sale under *fi. fa.*, did not prevent Congress from abrogating that adoption in 1867, when, in the judgment of the legislative branch of the government, a new rule for advertising judicial sales under process from the United States court in Louisiana became necessary. The Federal, and not the State law, was supreme.

2. The bill of exceptions stated that the advertisement conformed to the existing practice of the court; to that which had in fact become the rule of the court, and under this rule the marshal acted.

Reply:

The utmost duration of the practice set up can only extend from the 2d March, 1867, the date of the act, to May, 1868, when the advertisement was made. Will the court hold this pretended practice of a year sufficient to overturn the law settled from the foundation of the State government?

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

The act of Congress of May 26th, 1824, declares that "the mode of proceedings in civil cases in the courts of the United States that now are, or hereafter may be, established in the State of Louisiana, shall be conformable to the laws directing the mode of practice in the District Courts of said State," and, though there is a provision authorizing the judges of those courts to make alterations necessary to conform the practice to the organization of the Federal courts, this authority is quite limited. This statute, then, in establishing the practice of the State courts as the practice of the Federal courts, however the State laws may modify that practice, and in limiting the power of the Federal courts in that State over their own rules of practice, is a departure from the otherwise uniform action of Congress on that subject. The mode of procedure in the courts of Louisiana, conforming very nearly to those of the civil law, and both the code of procedure and the civil code of that State differing so widely from the system of common law adopted in all the other States, was the reason of this special purpose of Congress to require the Federal courts in that State to conform to the usages of the local law. This has been frequently noticed in this court.

It is said, however, that the act of 1824 has been repealed or modified by the seventh section of the act of March 2d, 1867.

The strict grammatical construction of the seventh section, relied on by the counsel of the defendant in error to show that the act of 1824 has been repealed or modified, limits its application to such advertisements and publications as must be adjusted by the proper accounting officers, and paid in the manner now allowed by law in like cases. That this means accounting officers of the Federal treasury and payments by or on behalf of the United States, we cannot doubt. Such language would hardly be used in reference to the costs of court, to be paid by private parties, in a litigation between themselves. Nor would any legislative body use the phrase "accounting officers" in reference to the clerk

or marshal in taxing the costs of advertisements in the regular course of their duties. It is a phrase well known as referring to the auditors and controllers of the treasury, who pass upon all claims against the government before they can be paid out of the public treasury. The cases then to which the section by its term applies are such publications as the Federal government is concerned in, and for which it may have to pay.

This view is confirmed by the manifest purposes of the act. These are, first to require that the clerk of the House of Representatives should select, in the States lately in insurrection, the newspapers in which such publications should be made as the United States required, instead of the heads of departments and other officers who had heretofore exercised that discretion; secondly, that he should also fix the scale of prices, within a limit prescribed by the act, which the government should be charged for such publications.

Nor is this view affected by the fact that judges of courts and other officers of the court, meaning marshals and clerks, are among those required to make publications in the papers so selected; for in the proceedings of these courts in revenue seizures, confiscations, cotton cases, forfeitures, and the like, many notices are required to be published and are published by these officers, for which the United States pays, and which, before the marshal can get the allowance for it, must be passed upon by the accounting officers of the treasury.

Whether we look, then, to the language of this seventh section, or to the manifest purpose and object of the act, we are constrained to limit its application to such publications as the Federal government may make on her own account, and for which payment is to be made out of the Federal treasury.

If the language of the section were much more favorable than it is to the construction contended for by the defendant in error, we should pause long before concluding that Congress had reversed in this instance its uniform policy of conforming the modes of proceeding in the Federal courts to those of the States, and had repealed *pro tanto* the act of 1824,

which laid down that as the law for Louisiana with an express limitation in the power of the court to modify it, and that it had invaded the rule long received as an axiom, that the descent, alienation, and transfer of real estate was governed rightfully by the law of the State wherein it lay. We are quite satisfied that Congress had no such intent in passing the act of 1867.

The effort to support the course of the marshal, by showing that he acted under a rule of the court, is hardly worth consideration. The mere circumstance that for a few months that officer, acting under the construction of the act of 1867, which we have just shown to be erroneous, had advertised only in the newspapers selected by the clerk of the House of Representatives, did not constitute a rule of the court.

We are of opinion that the sale should have been set aside for want of the advertisement in the parish where the land lay. The judgment of the Circuit Court affirming the sale is, therefore, REVERSED, and the case remanded with directions to proceed

IN CONFORMITY TO THIS OPINION.

St. Louis v. The Ferry Company.

The ferry-boats of a corporation incorporated in one State, and carrying passengers, &c., forward and back across a river to a city situated in another State, are not taxable under a law taxing boats "*within* the city," in a case where the relation of the boats to the city was simply that of contact, as one of the termini of their voyage; and the place where they were laid up when not in use, and where their pilots and engineers resided, and where the real estate of the corporation including a warehouse was situated, was on the opposite shore and in another State. This is not altered by the facts that the boats were enrolled in pursuance of our navigation acts at the city; that the ferry company had an office there; that its president, vice-president, and other principal officers lived there; that the stockholders mainly resided there, and none in the State opposite; that there the ordinary business meetings of the di-

rectors were held, and its moneys received and disbursed, and the corporate seal kept.

ERROR to the Circuit Court for the District of Missouri.

A statute of Missouri enacts that "shares of stock and all other interests held in steamboats, keel-boats, wharf-boats, and all other vessels," shall be taxable for State purposes; and by its charter the city of St. Louis has authority to tax all property *within the city*, so taxable.

In this state of statutory enactment the city authorities of St. Louis laid a tax on the value of all ferry-boats used by the Wiggins Ferry Company, in ferrying passengers and cargo on the Mississippi River, between the city of St. Louis, Missouri, and East St. Louis, in Illinois, on the opposite shore. The ferry company refused to pay the tax, on the ground that these boats were not "property *within* the city," and the question was whether they were so or not.

The case as found by the court below (to which it had been submitted under the act of March 3d, 1865),* was this:

The ferry company was incorporated by the laws of Illinois, and had its principal office in St. Louis, Missouri. There its president, vice-president, treasurer, superintendent, and other chief officers resided; there the ordinary business meetings of the directors were held, and there the seal of the corporation was kept. The company's minor officers, such as engineers and pilots on its ferry-boats, resided in Illinois, opposite the city of St. Louis, where its real estate was situated, also its warehouse and some other property. The ferry-boats, when not in actual use, were laid up by the Illinois shore, and were forbidden, by a general ordinance of the city of St. Louis regulating ferries and ferry-boats, to remain at the St. Louis wharf or landing longer than ten minutes at a time. The city exacted from the company an annual ferry license, which was paid. It permitted the company to erect landing or wharf-boats at its wharf or public landing, for the convenience and exclusive use of its

* The reader who does not recall the provisions of this act may see them *supra*, towards the bottom of page 141.

ferry-boats, for which wharf-boats the city charged the company a stipulated annual wharfage, which was also paid. The company was assessed and taxed for the value of these wharf-boats within the city limits, in addition to the ferry license and wharfage.

The stockholders of the ferry company resided mainly in St. Louis. Some, however, resided in Ohio, some in New York, and some elsewhere, but none in Illinois. The meetings of the company as a corporation for the election of directors had been generally held in Illinois, but the meetings of the directors for the election of its officers and appointment of its employees had been generally held in St. Louis, Missouri. All the principal business of the company done by its directors, superintendent, and other agents, had been transacted in St. Louis. The money collected and received by it for ferriages and other dues were kept in St. Louis, and the books of the company were kept there, and some of the disbursements of the company were there made by its treasurer. The personal property belonging to the company, assessed for taxes by the city, for which these suits were brought, consisted solely of its already mentioned ferry-boats. On these as well as on its other property it was duly assessed in Illinois, and paid taxes there. The ferry-boats were enrolled at St. Louis under the laws of the United States; that is to say, under the acts of 1789 and 1792, which require every vessel to be registered in the district to which she belongs, and declare that her home port shall be that at or near to which her owner resides.

Upon this same state of facts, the Supreme Court of Missouri, in *The City of St. Louis* v. *Wiggins Ferry Company*,* had adjudged that the company was bound to pay the tax.

The court below decided that the ferry company, being a corporation created by the State of Illinois, and the ferry-boats not being within the limits of St. Louis except as they habitually touched at its wharf for the delivery of passengers and cargo, was not taxable for its boats by the city, as prop

* 40 Missouri, 580.

erty within it. The fact that the principal business office of the company was in St. Louis, and that the ferry-boats were enrolled at the port of St. Louis, under the United States laws, did not, as the court below considered, essentially change the case. Judgment having been accordingly entered for the ferry company, the city excepted to the law as declared by the court upon the facts, and tendered its bill of exceptions, which was signed and sealed.

Mr. J. M. Krum, for the plaintiff in error:

Were these boats "within the city" of St. Louis? That is the only question in the case.

The enrolment at the port of St. Louis is not indeed conclusive as to the *situs* of the property. It may but indicate the domicile or home port of the vessels, but it is a circumstance to be considered in connection with the other facts in determining the question at issue.

What are these other facts? The managers of the boats resided in St. Louis, and there received and disbursed the earnings of the boats, keeping their office there, and the ferry company itself keeping its principal office there. These facts, taken in connection with the fact that the boats had already been enrolled at the last-named port, lead to the conclusion that the property was "within" the city of St. Louis. It is manifest that all the practical, life-giving, and fiscal operations of this corporation were performed within the city of St. Louis. There was its head and the centre of its operations.

The payment of the tax in Illinois neither proves nor tends to prove that the *situs* of the property was in that State. Nor does the payment of a ferry-license to the city of St. Louis and of a wharfage tax on the wharf-boats of the company show anything contrary to our view. These are matters foreign to the question.

The question now before this court was adjudicated in *The City of St. Louis* v. *Wiggins Ferry Company*. The facts in that case were the same as in this. That decision is a decision of the court of last resort of Missouri, construing

and giving effect to its laws in respect to property situate *within* and owned or claimed by a *resident* of the State. The refusal of the court below to conform its judgment to the decision of the Supreme Court of Missouri is good ground for reversing the judgment in this case.

Messrs. M. Blair and F. A. Dick, contra:

The boats were not "within the city."

A corporation actually and permanently resides within the State by whose law it is created; and there has the legal status of a citizen and inhabitant of such State, where only its stockholders can assemble and act as one body.*

The officers and agents of the company who actually remain with and control the boats do not reside in Missouri, "but opposite the city of St. Louis, where its real estate is situated, also its warehouse and some other property." The boats when not running are laid up at the same place; and it is contrary to the city ordinance concerning ferry-boats, when on the St. Louis side, that they remain there "longer than ten minutes at a time." The point of departure on each trip of the boats was from the port where she was laid up and at rest. To that port each boat returned, and when it so returned, and not until then, was such trip at an end. Under such a state of facts there is no room for a constructive presence in St. Louis or a constructive possession of the boats by the general or fiscal officers of the company.

The home port of a vessel, when owned by one person, is that at or near which the owner usually resides; and this is not changed by her enrolment at another port, especially when the first-named port is not a port of enrolment. This company, as we have said, being created by Illinois, resides there.†

But there are higher grounds on which to rest the unlawfulness of the tax. It is imposed upon a National vessel engaged in commerce between two of the States on a navigable

* Insurance Co. *v.* Francis, *supra*, 210.

† The Golden Gate, Newberry, 308; Hays *v.* Pacific Steamship Co., 17 Howard, 596.

river. Vessels so engaged are subject only to National taxes and regulations, and are expressly withdrawn from State taxation. A tonnage tax is simply a tax upon vessels, and belongs exclusively to the National government under the provisions giving power to Congress to collect taxes and duties and to regulate commerce with foreign nations and among the several States; and having belonged to the States before the adoption of the Constitution, was surrendered by them in the clause saying that "no State shall, without the consent of Congress, lay any duty of tonnage." [The learned counsel went into a full argument on this point.]

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiff in error instituted five suits in the St. Louis Circuit Court for the recovery of taxes alleged to be due from the ferry company to the city. Upon the petition of the company they were removed into the Circuit Court of the United States for that district. In that court, by the consent of the parties, the causes were consolidated and thereafter proceeded to trial as one case. The counsel upon both sides entered into a written stipulation waiving a jury, and the cause was submitted to the court, pursuant to the act of Congress of March 3d, 1865. The court found the facts specially, and the finding is a part of the record. Judgment was given for the defendant. The city excepted and has brought the case here for review.

The bill of exceptions was unnecessary. The facts having been specially found by the court, they are before us for examination as if they were embodied in the special verdict of a jury. The question presented for our consideration, as prescribed by the statute, is, whether they are sufficient to support the judgment. The bill of exceptions gives them no effect which they would not have had without it, and raises no question which would not have been as well presented if it had not been taken.

The controversy relates to taxes imposed by the city upon the ferry-boats of the defendants, used in conveying freight

and passengers across the Mississippi River between the city of St. Louis and the opposite Illinois shore. The company was required to pay a specific sum for a license, and a tax was imposed upon its wharf-boat, attached to the city landing. Both were duly paid. Payment of the taxes upon the ferry-boats was refused, and the several suits, consolidated into the one before us, were instituted by the city to recover the amount claimed to be due.

In the jurisprudence of the United States a corporation is regarded as in effect a citizen of the State which created it. It has no faculty to emigrate. It can exercise its franchises extra-territorially only so far as may be permitted by the policy or comity of other sovereignties. By the consent, express or implied, of the local government, it may transact there any business not *ultra vires*, and, "like a natural person, may have a special or constructive residence, so as to be charged with taxes and duties or be subjected to a special jurisdiction."* It is for the local sovereign to prescribe the terms and conditions upon which its presence by its agents and the conducting of its affairs shall be permitted.†

It has been said that the power of taxation for the purposes of the commonwealth is a part of all governmental sovereignty and is inseparable from it. It is for the legislature to decide what persons and property shall be reached by the exercise of this function and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction. When called into activity there can be no limit to the degree of its exercise except what is found in the wisdom of the law-making power and the operation of those conservative principles which lie at the foundation of all free government.‡

* Glaize *v.* South Carolina Railroad Co., 1 Strobhart, 72; Cromwell's Executors *v.* Charleston Insurance and Trust Co., 2 Richardson, 512.

† Bank of Augusta *v.* Earle, 13 Peters, 588; Lafayette Insurance Co. *v.* French, 18 Howard, 405

‡ McCulloch *v.* State of Maryland, 4 Wheaton, 428; Providence Bank *v.* Billings, 4 Peters, 563.

Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.

In the eye of the law personal property, for most purposes, has no locality. *Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam.* In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees.* But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual *situs*, and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality.† The personal property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there.‡ Whether the personal property of a resident of one State situate in another can be taxed in the former, is a question which in this case we are not called upon to decide.§

Upon looking into the enactments under which the taxes in question were assessed, it is obvious that their purpose

* Story's Conflict of Laws, § 379; Broom's Maxims, 501, 502; In re Ewin, 1 Crompton & Jervis, 156.

† International Life Assurance Company *v.* Commissioners of Taxes, 28 Barbour, 318; Hoyt *v.* The Commissioners, 23 Id. 228; Story's Conflict of Laws, 550.

‡ Finley *v.* Philadelphia, 32 Pennsylvania State, 381.

§ Wilson *v.* The Mayor of New York, 4 E. D. Smith, 678; Hoyt *v.* The Commissioners, 23 New York (Court of Appeals), 228.

was not to tax the property through the proprietor, but to tax the things themselves by reason of their being "within the city." The point for us to decide, therefore, is, whether they are covered by the legal provisions under which the taxes were imposed. If the taxing officer acted without authority the taxes were invalid, and the city is not entitled to recover in this action.

The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, section 2,* and the act of 1792, section 3,† require every vessel to be registered in the district to which she belongs, and the fourth section of the former act, and the third section of the latter, declares that her home port shall be that at or near which her owner resides. The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrolment.‡

The company has an office in Illinois. Its minor officers, such as engineers and pilots, lived in Illinois, where its real estate, including a warehouse, was situated. The company had also an office in St. Louis. Its president and vice-president and other principal officers lived in the city, and there the ordinary business meetings of the directors were held, and the corporate seal was kept. The court found that the boats, "when not in actual use, were laid up by the Illinois shore, and were forbidden, by a general ordinance of the city of St. Louis regulating ferries and ferry-boats, to remain at the St. Louis wharf or landing longer than ten minutes at a time." A tax was paid upon the boats in Illinois. Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was, in the eye of the law, a citizen of

* 1 Stat. at Large, 55. † Ib. 287.

‡ 3 Kent, 133, 170; Hill *v.* The Golden Gate, Newberry, 308; S. B. Superior, Ib. 181; Jordan *v.* Young, 37 Maine, 276.

that State, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property.* Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained.† In our opinion, the facts found are sufficient to support the judgment.

It has been insisted ably and learnedly by the counsel for the defendant in error, that the taxes in question are taxes upon the tonnage of vessels engaged in interstate commerce, and are prohibited by the Constitution of the United States. No argument as to this aspect of the case has been submitted by the counsel upon the other side. We have not found it necessary to consider the subject, and we express no opinion upon it.

JUDGMENT AFFIRMED.

UNITED STATES *v.* HOWELL.

1. The sixth section of the act of February 25th, 1862, to punish the counterfeiting of treasury notes is not void for repugnancy in its reference to uttering or passing such counterfeited notes.
2. Nor is an indictment pursuing the language of the statute bad because it describes the note passed by the prisoner as a false, forged, and counterfeit note of the United States, issued under the authority of that statute or of other statutes authorizing the issue of such notes.
3. The words "false, forged, and counterfeit," necessarily imply that the instrument so characterized is not genuine, but only purports to be, or is in the similitude of such an instrument, and this implication is according to good usage and is supported by adjudged cases.

ON a certificate of division between the judges of the Circuit Court for the District of California.

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* Hays *v.* Pacific Steamship Company, 17 Howard, 599; City of New Albany *v.* Meekin, 3 Indiana, 481.

† Railroad Company *v.* Jackson, 7 Wallace, 262.

Statement of the case.

Howell was indicted for passing counterfeit treasury notes, under the sixth section of the act of February 25th, 1862,* which provides:

"That if any person or persons shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, or shall willingly aid or assist in falsely making, forging, counterfeiting, or altering any note, bond, coupon, or other security issued under the authority of this act, or heretofore issued under acts to authorize the issue of treasury notes or bonds; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place, with intent to pass, utter, publish, or sell, or shall have or keep in possession, or conceal with intent to utter, publish or sell, *any such false, forged, counterfeited, or altered note, bond,* coupon, or other security, with intent to defraud any body corporate or politic, or any other person or persons whatsoever, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding $5000 and by imprisonment and confinement to hard labor not exceeding fifteen years, according to the aggravation of the offence."

The indictment contained two counts.

The first count charges that the defendant "feloniously did pass, utter, publish, and sell, a certain false, forged, and counterfeited United States note, *purporting* to be a United States note issued under the authority of" said act, with intent to defraud, &c., well knowing the same to be false, forged, and counterfeited.

The second charged that the defendant "feloniously did pass, utter, publish, and sell, a certain false, forged, and counterfeited treasury note, issued under the authority of" said act, with intent to defraud, &c., well knowing the same to be false, forged, and counterfeited.

Demurrer to the indictment and joinder. Afterwards, on argument, the following questions occurred:

"1. Whether the second count in the indictment, in manner and form as therein stated, is in itself repugnant.

* 12 Stat. at Large, 347.

"2. Whether the sixth section of the act is repugnant; and whether any person could, under the said act, be legally convicted of and punished for any offence whatever other than that of altering, and causing and procuring to be altered, and willingly aiding and assisting in altering a note, bond, coupon, or other security issued under authority of said act.

"3. Whether the fourth paragraph or clause of the sixth section of the act, which is in the words following, to wit:

"'Or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place, with intent to pass, utter, publish, or sell, or shall have or keep in possession, or conceal, with intent to utter, publish or sell, any such false, forged, counterfeited or altered note, bond, coupon, or other security, with intent to defraud,'

&c., is repugnant.

"4. Whether the defendant could, under the said fourth paragraph or clause, be legally convicted of and punished for uttering or passing a forged or counterfeit note purporting to be a United States or treasury note issued under authority of said act.

"5. Whether he could, under the said fourth paragraph or clause, be legally convicted of and punished for any offence whatever, other than 'passing, uttering, publishing, or selling,' &c., an 'altered note, bond, coupon, or other security,'" &c.

On each of which questions the opinions of the judges were opposed. Whereupon the disagreement was certified to this court.

Mr. D. T. Sullivan, for the prisoner:

First. The indictment is repugnant and inconsistent in itself.

How could the note be a "false, forged, and counterfeit" note if it was issued under the authority of an act of Congress? The object of issuing treasury notes is that they may be "passed, uttered, published, and sold;" and how can the defendant, Howell, be guilty of a criminal act by doing that which it was the very object of the act should be done? The use of the adjectives "false, forged, and coun-

terfeit" are inconsistent with and repugnant to the allegation that the note was issued under proper authority; nor are qualifying words of themselves, even if there be no repugnancy or inconsistency in the indictment, sufficient to make a criminal offence.

Second. The statute under which the indictment is framed, or at least so much thereof as relates to the charge of "passing, uttering, publishing, and selling" the note in question, is repugnant and void.

The United States v. *Cantrell*,* is in point. Cantrell was indicted under act of Congress of June 27th, 1798,† for "uttering, passing," &c., a ten dollar note, "purporting to be" a note "issued by order of the president," &c., of the bank. The words "purporting to be" were not in the statute, nor were there any words such as are usually found in statutes of this character; as, for instance, "in the similitude of," "in imitation of," or others pointing against the disposing and putting off of notes *which have not been issued by competent authority.* The counsel for Cantrell made the objection which we take here, that the statute was fatally defective in not containing these or similar words, and the whole court, through Marshall, C. J., adjudged the objection to the statute to be well taken, and for that reason ordered that the judgment be arrested.

Mr. B. H. Bristow, Solicitor-General, contra.

Mr. Justice MILLER delivered the opinion of the court.

The judges of the circuit have certified to this court five questions arising on the indictment. The first question is, whether the second count of the indictment is bad as being in itself repugnant, and the four other questions relate to a similar repugnancy in the statute under which the indictment is framed. As the count to which the first question refers pursues the language of the statute, all the questions resolve themselves into the single one of whether the act, so far as it relates to altering and publishing forged or coun-

* 4 Cranch, 167.

† 1 Stat. at Large, p. 573.

terfeit notes of the United States, is itself void for repugnancy.

The objection is, that if the note which the party is charged with passing was, in the language of the statute, "issued under the authority of this act, or heretofore issued under acts to authorize the issue of treasury notes or bonds," it must necessarily be a valid or genuine note, and if it was not issued under the authority of some of these acts, the passing of the note is not made an offence by the law.

There is some degree of plausibility in this hypercriticism at first blush, which, if it were sound, would make the act void for want of any meaning, a result which one of the first canons of construction teaches us to avoid if possible, and which is at war with the common sense, which assures us that the purpose of the act was to punish the making of counterfeits of the notes and bonds described in the statute. Nor is the criticism philologically just. The offence is described as the passing of false, forged, or counterfeited notes or bonds issued under the authority of the statute. We are to give due weight to all the words employed in describing the instrument, and cannot reject the words *false*, *forged*, and *counterfeited*, if it is possible to adopt any reasonable construction which will permit them to stand. This is done by mentally supplying the ellipsis which is in general use in conversation or in writing in similar cases. We speak, for instance, of "false diamonds." According to the criticism we are considering this phrase has no meaning, because if the stones spoken of *are* diamonds they cannot be false, and if they are *false* they cannot be diamonds. But any one understands the meaning to be false stones which purport to be diamonds, or false similitude of diamonds. So we speak of a bank note. Now if the paper spoken of is a forgery it is not a bank note, which means an obligation of some bank to pay money. But here also the mind supplies the ellipsis which good usage allows, and understands that what is meant is a forged paper in the similitude of a bank note, or which on its face appears to be such a note. And in a similar manner we speak of a forged will. If the argu

ment of defendant's counsel is sound there can be no such thing as a forged will, receipt, note, or bond, because if forged they are void and therefore not notes, wills, bonds, &c. In fact the phrase "void will" or "void note," is, according to this argument, a solecism, because the instrument cannot be at once the will or note of the party, and be void.

The use of the words false, forged, and counterfeit, in the statute, imply, therefore, when applied to any of the obligations of government mentioned, that it purports to be such an instrument, but is not genuine or valid. And so are the authorities. See 2 Russell on Crimes, 801; East's Pleas of the Crown, 950.

It is conceded, that if the statute had, in describing the offences, called the instrument uttered a note, *purporting* to be issued under the authority of the statute, the difficulty would have been removed. In the case of *Rex* v. *Birch and Martin*, the indictment charged them "with publishing as true, a false, forged, and counterfeited paper writing, *purporting* to be the last will of Sir Andrew Chadwick." It was objected that the indictment was bad, because "it should have been said that they forged a certain will," which was the language of the statute, and *not a paper writing* purporting to be a will. "But," says Mr. East, who, in his Pleas of the Crown,* makes a full report of the case, "a variety of precedents were found, so that the judges held it to be good." But it is apparent, from the exception taken, and from the language of East and of Russell, that the usual mode of charging the offence was to say that the prisoner had forged the will or other paper, and that either form is good.

The case of *United States* v. *Cantrell* is relied on as holding an opposite doctrine to that we have here presented. That case was submitted without argument, and the report says that the opinion of the court was that the judgment should be arrested for the reasons assigned in the record. These reasons are that the indictment was repugnant, because it

* Page 950.

charged the prisoners with having published as true "a certain false, forged, and counterfeited paper, *purporting* to be a bank bill of the United States for ten dollars, *signed* by Thomas Willing, president, and G. Simpson, cashier." And because the statute relating to the charge set forth in the indictment is inconsistent, repugnant, and void. In this statement, the words signed and purporting are italicized, and the court may have held the indictment bad because the former word was used, thus sustaining the objection made in *Rex* v. *Birch and Martin.* Or it may have held that the language of the indictment amounted to an averment, that the bill charged to be forged was signed in fact by the president and cashier of the bank, in which case it could not have been a forgery. Or it may possibly have thought that under the peculiar language of that statute, which differs materially from the one under consideration, they were bound to hold it void for repugnancy. However that may be, we do not consider the case, as it is reported, an authority for holding the statute void which we are called on to construe.

To the first and third questions, and the first branch of the second, we answer, No.

To the fourth and fifth, and the second branch of the second, we answer, YES.

INSURANCE COMPANY *v.* WEIDE.

1. On a suit on a policy of insurance against loss of a stock of groceries in process of retail sale, by fire, it is competent, in the absence of trustworthy books and of specific evidence by persons other than the plaintiffs themselves, to show by witnesses in the town where the fire occurred, engaged in the same business with the plaintiffs, and whose annual sales were as large, that grocery merchants in that city for the six years prior to the fire had not carried, or had on hand at any one time, more than one-fifth of their annual aggregate sales, and that this was the case on the day the fire occurred. In other words, to show by the general course of trade in that branch of business in the town that

Statement of the case.

the plaintiffs' loss could not have exceeded $24,000, if their sales during the year amounted to only $120,000.

2. But the witness can testify only to his personal experience on the subject. He cannot be asked what "the course of trade" was in regard to this particular business.

ERROR to the Circuit Court for the District of Minnesota; the case was thus:

In October, 1866, the Home Insurance Company insured, for the term of one year, against fire, a stock of groceries and other merchandise owned by C. & J. Weide, and which were contained in a storehouse occupied by them in the city of St. Paul. In February, 1867, the storehouse and its contents were burnt, and this suit was brought to recover for the loss of the stock of goods. At the trial the main question in issue was the extent of the loss. As most of the books were destroyed, and the defendants had introduced evidence tending to show that those which were not burned were not to be depended on, and afforded no data from which the value of the goods on hand at the date of the fire could be ascertained, or the extent of loss determined, the case rested chiefly on the testimony of the plaintiffs. They swore that their sales during the year preceding the fire were about $120,000, and that the goods on hand at the time of the fire were worth, at their cost value, $65,000.

The defendants insisted, on the basis of the sales, that the loss was greatly overstated, and, as one means of proving it, offered to show by witnesses in St. Paul, engaged in the same business with the plaintiffs, and whose annual sales were as large as theirs, that grocery merchants in that city for the previous six years had not carried, or had on hand at any one time, more than one-fifth of their annual aggregate sales, and that this was the case on the day when the fire occurred. In other words, they wished to show by the general course of trade in that branch of business in St. Paul, that the plaintiffs' loss could not have exceeded $24,000, if their sales during the year amounted to only $120,000.

The court refused to allow the evidence to go to the jury,

and the correctness of this ruling was the only point in the case which it was necessary here to consider. In the course of the trial, however, the defendant asked a witness this question:

"Supposing that the plaintiffs' sales were $120,000 for the year preceding the fire, as grocery merchants, what average amount did they carry or have on hand during such year, *according to the general course of business?*"

And on objection made to it, some discussion took place below on the correctness of that question.

Mr. E. A. Storrs, for the plaintiff in error; Mr. W. H. Peckham, with a brief of Mr. L. Allis, contra.

Mr. Justice DAVIS delivered the opinion of the court.

Although we agree with Lord Ellenborough, "that the rules of evidence must expand according to the exigencies of society,"* yet it is not necessary to introduce any innovation upon these rules in order to hold that this evidence should have been admitted. It is true there are no reported cases on the subject, but on principle its admissibility can be sustained.

It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it.† Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads them to a proper conclusion on such evi-

* Pritt *v.* Fairclough, 3 Campbell, 306.

† Hart *v.* Nev land, 3 Hawks, 122.

dence. And if they should happen to reach a wrong conclusion, the court has in its own hands the mode and measure of redress. In the nature of things, the officers of the insurance company were unable, by any direct proof, to contradict the testimony of the plaintiffs as to the value of the goods destroyed. If the loss were an honest one it was their duty to pay it, but if they had good reason to believe it to be exaggerated, it was equally their duty to refuse to pay it. As they had no direct evidence to produce bearing on the subject, they offered to prove a fact which, uncontradicted and unexplained, would lead the jury to the conclusion that the plaintiffs had overvalued the property destroyed by fire. It was neither opinion nor hearsay which they tendered to the court, nor was it a usage of trade they wanted to prove, but a matter of fact concerning the business in which the plaintiffs had been employed, which would render it extremely improbable that they had sustained the loss they claimed to have suffered. The plaintiffs testified when the fire occurred the stock in their store was worth over sixty thousand dollars, and yet their sales during the year were only double that amount. The defendants said this could not be so, because the merchants of St. Paul, engaged in a like business, and to the same extent, did not at that time, nor at any other time during the preceding six years, have on hand on the average more than one-fifth of their annual aggregate sales.

If this state of case could be proved by the united testimony of this class of merchants, it would establish a fact connected with this kind of business, to wit, the uniform relation between the stock on hand and the annual sales, from which the existence of another fact could be reasonably inferred, which is, that the business of the plaintiffs rested on the same basis and was governed by the same rule of uniformity. Indeed, so strong would be this inference, that in the absence of any attempt to explain or contradict the evidence, the jury would be justified in adopting the conclusion which it tended to prove. A presumption is an inference as to the existence of a fact not actually known, arising from its

usual connection with another which is known, and on this principle the jury should have been allowed to consider this evidence.

As this case will have to go back for a new trial, and as the point was raised in the court below, it may be proper to observe that no witness can be asked what the course of trade is in reference to this particular business. This would be either opinion or hearsay. He can only be allowed to tell his personal experience on the subject about which he is called to testify. It is only through the aggregated testimony of all the witnesses that the fact can be proved, which so connects itself with the plaintiffs' business as to require from him an answer.

JUDGMENT REVERSED, AND A VENIRE DE NOVO.

MEADER ET AL. v. NORTON.

1. Nothing more is contemplated by proceedings under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in California, than the separation of lands owned by individuals from the public domain. A decree confirming a claim to land rendered in such proceedings, even when followed by a patent of the United States, is not conclusive upon the equitable rights of third persons. They can assert such rights in a suit in equity against the patentee and parties claiming under him with notice.
2. In a suit at law a patent is conclusive evidence of title against the United States and all others claiming under the United States by a junior title. Until the patent issues the fee is in the government, but when it issues the legal title passes to the patentee. Persons therefore claiming the land against the patent cannot have relief in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power extends to cases where one man has procured the patent which belonged to another at the time the patent was issued.
3. In 1839 three sisters obtained from the governor of the Department of California a grant of land, which was approved by the Departmental Assembly, and official delivery of possession was given to them. Some years afterwards the husband of one of the sisters, named Bolcoff, suppressed or destroyed this grant and fabricated a pretended grant to himself of the land, and also certain other papers intended to prove the

Statement of the case.

genuineness of such fabricated grant. Upon these papers the sons of Bolcoff, he having died, obtained a confirmation of their claim, under said pretended grant, to the land, the land commissioners acting upon the supposition that the fabricated papers were genuine, no question as to their genuineness being raised before them; and upon such decree a patent of the United States issued to the claimants. The fabricated character of these papers being discovered, the grantee of the rights of the three sisters brought a suit in equity to have the defendants holding under the patentees declared trustees of the legal title, and to compel a transfer of that title to him: *Held*, that the suit would lie, and that upon proof of the fabricated character of the papers the complainant was entitled to a decree against all the defendants who had purchased with notice of the claim of the sisters, and had not obtained conveyances or releases from them.

4. Laches and the statute of limitations cannot prevail as defences where the relief sought is grounded on a charge of secret fraud and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.

APPEAL from the Circuit Court for the District of California.

This was a bill in equity, filed in the court below by C. E. Norton, to have the defendants, Meader and several others, declared trustees of certain real property situated in the State of California, and to obtain a decree that they convey to him the legal title held by them to the premises. The case as presented by the record was thus:

Three sisters, named respectively Maria Candida, Maria Jacinta, and Maria Los Angeles Castro, on the 13th of February, 1839, applied by petition to J. B. Alvarado, then Mexican governor of the department of California, for a grant of the land known as the Rancho El Refugio, situated in that part of California now known as the county of Santa Cruz.

This petition was immediately referred by the governor to the administrator of the adjoining mission with directions to make a report upon the same. On the 10th of March following that officer reported that the land solicited could be granted, and on the 16th of the same month the governor made a provisional concession of it to the petitioners; a concession which was subject to further action

in the premises. To guide him in such further action, the governor directed the prefect of the district to report to him upon the subject. The prefect reported that a grant in fee of the land solicited could be made to the parties, as it was vacant and was not claimed by any one. Accordingly, on the 8th of April following (1839), the governor made a formal cession of the land to the three sisters by name, referring to the previous proceedings, and declaring them owners in fee and directing that the proper grant or title papers (titulo) issue to them, and that the proceedings in the case be retained for the information and approval of the Departmental Assembly. These proceedings were numbered 131. In the order of concession of the governor, the name of one of the sisters, Maria de los Angeles, was erased, and over the erasure was written the name of José Bolcoff. This concession or grant of the governor was approved by the Departmental Assembly on the 22d of May, 1840. The approval in the records of the Assembly has in it the number, 131, and gives the date of the concession, and mentions the three sisters by name as the parties to whom the concession was made. On the 13th of June following the governor ordered a certificate of the approval to be given to the three sisters.

At this time one José Castro was prefect of the first district, within which district the land granted was situated, and he kept a record or minute of the grants of land made in his district. His book of registry is now in the archives in the custody of the Surveyor-General of the United States for California. In this registry is entered a minute that on the 8th day of April, 1839, the governor granted to the three sisters the place called El Refugio. In this registry there is also a similar minute of eight other grants, all of which are found in the archives, and each has a memorandum indorsed upon it that it has been entered in the registry. The memoranda on these eight grants and the entries in the registry correspond.

There is also in the archives an index of grants made between 1838 and 1845, by a clerk in the office of the secre-

tary of state of the department, and under his direction, which is commonly known as "Jimeno's Index." This Index gives the number of the espedientes, the names of the grantees, and the designation of the land granted. Upon the index against No. 131 is the entry of a grant of land designated as El Refugio, and the name of José Bolcoff is written over an erasure. It was admitted that originally the names of the three sisters were written there.

This was the documentary evidence which the complainant produced to show that a grant of the rancho El Refugio was issued to the three sisters, under whom he claimed by sundry mesne conveyances. Parol evidence produced by him related chiefly to the possession of the premises since the concession of the governor, and various alleged admissions and acts of the sisters. It was also in evidence that in 1839 or 1840 the possession of the land was officially delivered to the three sisters, and that in this proceeding, called a delivery of juridical possession, José Bolcoff appeared on behalf of the sisters, and represented them.

The defendants asserted title to the premises through José Bolcoff; and of some portions of the premises they also alleged a conveyance or release from the sisters.

As documentary evidence of title they produced—

First. A paper purporting to be a grant of El Refugio to José Bolcoff, by Governor Alvarado, bearing date on the 7th of April, 1841.

It was shown that there was no trace of any such document as this in the archives of the department, except what appeared over the erasure in the index of Jimeno.

Second. A certificate of Governor Alvarado, dated July 28th, 1841, stating that the grant made on the 8th of April, 1839, in favor of José Bolcoff, was approved on the 22d of May, 1841, by the Departmental Assembly, and purporting to quote the language of the proceedings of that body. The certificate concluded by stating that it was issued to the party interested for his security, in consequence of the decree of the 13th of June preceding, existing in the espediente.

It is to be noticed by the reader that the certificate states that the grant made on the 8th of April, 1839, in favor of José Bolcoff was approved on the 22d of May, 1841, while the alleged grant to Bolcoff produced bears date the 7th of April, 1841. The certificate purported further to quote the language used by the Departmental Assembly in this approval. It was shown that there was no session of the Assembly in 1841; at least, that there was no evidence in the archives of the department that there was a session in that year, and if the year was erroneously given, and the approval of May 22d, 1840, was intended, that related only to the grant to the three sisters, who were therein designated by name, and no such language as that given was found on the journals of the Assembly.

Third. A document purporting to be a record of juridical possession, given to Bolcoff, July, 1842.

This document bears the signature of the prefect of the district and two attesting witnesses. It appeared in evidence that one of the witnesses was unable to write, and that the body of the entire document was in the handwriting of Bolcoff. The other witness testified that he added his signature in 1851, when the document was presented to him by Bolcoff, with a request that he should sign it, inasmuch as he had not done so when the possession was given; that at this time the document had not the signature of the prefect or of the other witness, and Bolcoff stated that he was going to them for their signatures. Both of these witnesses testified emphatically that there never was but one juridical possession of the premises, and that this was delivered to the sisters. Bolcoff made oath before the land commission, that the document was signed by all the parties in the year 1842.

Fourth. A diseño or sketch of the tract El Refugio; and

Fifth. A patent of the United States, bearing date on the 4th of February, 1860, issued to Francisco and Juan Bolcoff upon the confirmation of the alleged grant to José Bolcoff.

In 1822 one of the sisters, Maria Candida, intermarried with José Bolcoff, and in 1839 Maria de los Angeles inter-

married with one Majors. The three sisters lived together as members of the family of Bolcoff upon the land granted, Los Angeles until her marriage, and Jacinta until 1850, when she became a nun, and had not since resided upon the premises. Since some time in 1850, Majors and his wife had occupied a portion of the tract, claiming possession under the concession to the sisters.

In 1852, Francisco Bolcoff and Juan Bolcoff, sons of José Bolcoff, presented a petition to the board of land commissioners, created under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in California, for a confirmation of the claim to El Refugio, asserted by them under the alleged grant to their father. In support of their claim they relied upon the alleged grant of Alvarado, of April 7th, 1841, his certificate of approval by the Departmental Assembly, the record of juridical possession, and the sketch, which are mentioned above, with parol evidence of possession and cultivation. *No question was raised before the board as to the genuineness of these documents, and in January*, 1855, *the claim was confirmed.* An appeal from the decision was dismissed, and on the 4th of February, 1860, a patent of the United States was issued thereon.

In 1852 Majors presented for himself and on behalf of his wife a petition to the board for a confirmation of her claim to one-third of the tract, under the cession to her and her sisters. In support of the claim they produced the petition to the governor, the reports thereon, the provisional grant of March 16th, 1839, the formal concession of April 8th, 1839, and the order of the governor of June 13th, 1840, that a certificate of the approval of the Assembly be issued to them.

The board rejected this claim, holding, in substance, that there was no evidence that any grant was issued to the sisters; that the decree of concession found in the archives was not proof of the delivery of a title to the parties interested; that until a document as evidence of the concession was issued and delivered to the grantees the favorable action of the Departmental Assembly did not establish their title, and

the concession was not completed, and the property continued part of the public domain, subject to the disposition of the authorities of the government. And the board observed that this was the view of the governor and Departmental Assembly, as he had, notwithstanding the decree of concession to the sisters, made two years afterwards, a grant of the same land to Bolcoff, which had been approved by the Assembly.

The entire decision proceeded upon the supposition that the documents offered as evidence of Bolcoff's title were genuine, and that the officers of Mexico possessed the power to re-grant lands which had been once granted, without their previous surrender by the first grantee, where the final title-papers had not been issued to the grantee, although such grant had been approved by the Departmental Assembly. The board in its opinion also spoke of a want of proof of performance of the usual conditions of cultivation and inhabitation; but this view was held upon the supposition that the residence and cultivation of Bolcoff and his wife, and that of her sisters, were under different grants. The commissioners held, in confirming his claim, that the proof showed cultivation of and residence upon the land. Subsequent to the action of the board upon these claims, the registry of the prefect was discovered, and this discovery and other circumstances led to a critical inspection and examination of the documents upon which the claim of Bolcoff was founded, and finally to the bringing of this suit.

The position taken by the complainant was this: that a former grant, a *titulo*, or some documentary evidence of title based upon the concession of April 8th, 1839, was on the same day issued to the three sisters; that this *titulo* or grant passed into the custody of Bolcoff, and was some years afterwards suppressed or destroyed by him, with the intent to defraud the sisters of the property granted to them, and to secure the title to himself; that in the execution of this intent, the documents presented to the board of commissioners, the grant purporting to be issued to him, the certificate of the approval of the Departmental Assembly, and

the record of juridical possession, were fabricated by him, or others at his request, and the erasures made in the decree of concession to the sisters, and in Jimeno's Index; and that a claim confirmed, and a legal title obtained by these means, should be controlled for the benefit of parties equitably entitled to the property.

The defendants in the court below did not deny that the decree of concession was made to the sisters, but they contended that the interest of the sisters was exchanged with Bolcoff for an interest in a tract of land of which he had obtained a grant, and that in consequence of this exchange the grant of El Refugio was issued at their request to him instead of being issued to them. The agreement was stated to have been this: that Majors and wife should relinquish to Bolcoff their interest in El Refugio, and allow him to obtain a grant therefor in his own name; and in exchange for this that Bolcoff should relinquish to Majors his interest in a ranch known as St. Augustine, of which he had obtained a grant in 1833, and allow Majors to obtain a grant for the same, he paying Bolcoff in addition the sum of four hundred dollars. And it was alleged that this agreement was made after the intermarriage of Majors and Maria de los Angeles, and immediately carried into execution; that Majors and wife took possession of St. Augustine, and that afterwards, on the 7th of April, 1841, Maria Candida went personally to the governor and stated the agreement, when the governor, at her request, issued the grant to Bolcoff alone, and that the erasures in the decree of concession and in the Index were at that time made by Jimeno, the secretary of state.

This statement of the defendants was contradicted by Majors, and was inconsistent with facts disclosed by the records. Majors obtained the ranch St. Augustine from Bolcoff by direct purchase, and the transfer to him was made before his marriage, and before the sisters had petitioned for El Refugio. The transfer to him is indorsed on the espediente of St. Augustine in the archives, and bears date on the 14th of January, 1839.

The alleged grant to Bolcoff of April 7th, 1841, made no

allusion to any purchase or exchange with the sisters, or of any abandonment of their rights. It recited that he himself had *petitioned* for El Refugio.

The court below held that the documents upon which the claim of Bolcoff was founded were all false, and were fabricated by Bolcoff, or some one at his instigation, to defraud the sisters of their property and secure the title to himself; that by the false and fabricated documents, and the suppression or destruction of the grant to the sisters, a confirmation of the claim under the alleged grant to Bolcoff was obtained, and the legal title secured to his children; when in truth the real title was in the three sisters, and should have been adjudged to them; and it held that, under these circumstances, the patentees and all persons holding under them with notice of the claim of the sisters, should be decreed to surrender the title.

Besides insisting upon the genuineness of the alleged grant to Bolcoff, and other documents produced in support of his title, the defendants relied, as a defence to this suit, upon the following grounds:

First. That the claim of the complainant was a stale claim, and barred by the statute of limitations.

Second. That the complainant had no standing in court, by reason of the non-presentation of the claim of two of the sisters to the board of land commissioners for confirmation, and the rejection, by the board, of the claim of the other sister. And,

Third. That the defendants were *bonâ fide* purchasers of some portions of the property for a valuable consideration, without notice of the claim of the sisters; and for other portions had conveyances or releases from them.

The court below held:

1st. That to claim any benefit of the statute of limitations the defendants were required to state facts sufficient to bring the case within its operation, and then to insist that by reason of those facts the remedy of the complainant was barred, and that this had not been done by them in this case.

2d. That the presentation or non-presentation by the sisters of their claim under the grant to the board of land commissioners had nothing to do with the equitable relations between them and third parties; which relations were never submitted to the board for adjudication.

3d. That whilst equity would reach the perpetrator of the fraud in this case, and parties acquiring the property under him without consideration or with notice of the rights of the real owners, it would extend its protection to purchasers in good faith for a valuable consideration without such notice.

The court below therefore directed that an interlocutory decree in favor of the complainant be entered and a reference be had to a master to report which of the defendants were *bonâ fide* purchasers, without notice of the claim of the sisters, and what parcels were so purchased, and also of what parcels the interest of the sisters or of any of them had been conveyed to the defendants, with all necessary particulars; and that upon the coming in and confirmation of his report a final decree be entered directing the defendants to transfer to the complainant their title to all parcels, and undivided interests in parcels, not thus acquired and held.

The case accordingly went to a master, and his report having been confirmed a final decree was entered, from which the defendants appealed to this court.

Messrs. W. H. Lamon and W. G. M. Davis, for the appellants; Mr. W. M. Stewart, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Claims to lands in California by virtue of any right or title derived from the former government were required to be presented to the land commissioners, and authority was vested in the commissioners to decide upon the validity of such claims and to certify their decisions, with the reasons for the same, to the district attorney for the district.

Applicants for such confirmations were required to present their claims to the commissioners when sitting as a

board, but the act of Congress made no provision for notice to any adverse claimant, and the proceedings before the commissioners were wholly ex parte unless opposed by the district attorney.

Power to review such decisions was vested in the District Court, on petition of the claimant in case of rejection, or of the district attorney in case of confirmation.*

Specific regulations were enacted as to the form of such petitions, and the provision was that the District Court should proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as might be taken by the order of the said court, and that the court on application of the party against whom judgment was rendered should grant an appeal to the Supreme Court of the United States.

On the fifth of May, 1852, a petition signed by the attorneys of Francisco Bolcoff and Juan Bolcoff was filed with the land commissioners, setting up title to the rancho El Refugio, as grantees of their father, José Bolcoff, and asking for a confirmation of their claim under the act of Congress passed to settle such private claims to lands in that State. They represented that the tract was granted to their father during Mexican rule by the governor of that department under the colonization laws ordained by the supreme government.

Pursuant to the requirements of the act of Congress they filed with their petition their documentary evidences of title, consisting of the following documents: (1.) A paper bearing date on the seventh of April, 1841, purporting to be a grant of the rancho El Refugio to José Bolcoff by Juan B. Alvarado, governor of the department at the date of the supposed grant. (2.) The certificate of Governor Alvarado, dated the twenty-eighth of July, 1841, stating that the grant made on the eighth of April, 1839, in favor of José Bolcoff, was approved on the twenty-second of May, 1841, by the Departmental Assembly. (3.) A document dated the twenty-

* 9 Stat. at Large, 633.

sixth of July, 1842, purporting to be a record of juridical possession of the tract given to the supposed grantee by the proper Mexican authorities. (4.) The diseño or sketch of the tract described in the petition addressed to the governor by the original donee.

Proof of the handwriting of the persons whose names purport to be signed to the documents was introduced by the petitioners, and as no question was made as to the authenticity of the documents they were received as genuine and treated as such in the hearing, and the commissioners entered a decree in favor of the petitioners, confirming the claim.

Both parties concede that an appeal was taken on behalf of the United States to the District Court, but it was never prosecuted to effect and was subsequently dismissed.

Patents may be issued for all claims confirmed by the commissioners where no appeal was taken, the claimant complying with the conditions specified in the thirteenth section of the act providing for the adjudication of such claims; that is, he must present to the general land office an authentic certificate of such confirmation and a plat or survey of the land duly certified and approved by the surveyor-general. Such an application was accordingly made by the confirmees to the commissioner of the general land office, and he, on the fourth of February, 1860, issued a patent in due form to the persons in whose favor the decree was entered and to whom the certificate of confirmation was granted. Title to the land is claimed by the appellants under that patent.

Attention will now be called to the evidences of title under which the appellee claims in this case. On the thirteenth of February, 1839, three orphans, daughters of Joaquin Castro, a deceased Mexican citizen, to wit, Maria Candida, Maria Jacinta, and Maria de los Angeles, presented their petition to Juan B. Alvarado, governor of California, asking for a grant of the rancho El Refugio. Reference of the petition was made to the administrator of the adjoining mission and he having reported, on the sixteenth of March,

1839, that the land could be granted, as the land was not necessary to the mission, the governor, on the same day, made a provisional grant of the same to the petitioners and referred the espediente to the prefect of the district, as was the usual course in respect to such applications. Immediate attention was given to the subject by that officer, and on the twentieth of the same month he reported to the governor that the land was vacant, and recommended that the grant should be issued to the petitioners.

Evidently the several documents constituting the complete espediente show a full compliance with all the requirements of the colonization laws, and it is quite clear that the case was so understood by the governor, as on the eighth of April, in the same year, he issued the concession in which the petitioners are declared to be the owners in fee of the land. Specific boundaries are given to the tract granted and the directions in the same document are that the espediente be reserved for the consideration of the Departmental Assembly and their due approval of the same. Due report of the proceedings was made to that tribunal, and the record shows that on the twenty-second of May, 1840, they formally approved of the grant.

Satisfactory proof was introduced that Maria Candida intermarried with José Bolcoff, and that Maria de los Angeles intermarried with Joseph L. Majors. Prior to the marriage of Maria de los Angeles, the three sisters lived together as members of the family of José Bolcoff, the husband of the elder, and Maria Jacinta continued to reside in his family on the premises until 1850, when she became a nun and entered a convent.

By the record it appears that Joseph L. Majors, on the thirtieth of April, 1852, presented a petition to the commissioners claiming title in right of his wife to one-third of the rancho El Refugio, setting up the concession made by the governor to his wife and her two sisters, and asked that the claim might be confirmed. In support of his claim he introduced the several documents referred to as tending to show that the concession to the three sisters was a valid

grant of the rancho; but the commissioners, on the thirtieth of January, 1855, rejected the claim, evidently proceeding upon the ground that the documents introduced by the other claimants were genuine.

Apart from that consideration the commissioners were doubtless much influenced by the testimony of the governor, who was examined as a witness by the successful claimants. He admitted that he granted the rancho in the first place to the three sisters, but he stated that he made the grant at the request of Maria Candida, the wife of José Bolcoff, and that he subsequently regranted the land to her husband at her request and upon her representation that an arrangement to that effect between her husband and the husband of her other married sister had been made. His statement was that he granted the new title to José Bolcoff because the parties agreed upon it, although he admitted that neither of the other two grantees ever came before him or made any such request. Subsequent investigations led to the discovery that the documents, or most of the documents, introduced in support of the claim of José Bolcoff, were forged and fraudulent, which induced the appellee, claiming title under the three sisters, to commence the present suit.

Confirmed as the claim of José Bolcoff was at the same time that the claim of the three sisters was rejected, they did not appeal nor would they have been benefited if they had, as the claim was confirmed to the other claimants and they were not parties in that litigation and could not appeal from the decree. Had all the facts and circumstances been known the unsuccessful claimant might perhaps have presented a petition to the district judge and have procured an injunction restraining the confirmees of the claim "from suing out a patent for the same until title thereto" had been "finally decided," but it is a sufficient answer to any such suggestion that the patent was issued before the alleged forgeries were discovered.

Remediless as the appellee was at law, he instituted the present suit in the Circuit Court. His theory is, as shown in the bill of complaint, that the grant was in fact made to

the three sisters, and that their names were erased and the name of the successful claimant inserted in the same, and that the commissioners were induced by false swearing, forgery, and fraud, to confirm the claim to the grantees of the party guilty of all those offences, as the means of his success and of the defeat of the claim of the three sisters, to whom the rancho really belonged.

All such charges are denied in the answer, but they are fully proved by the documents exhibited in the case and by such facts and circumstances as leave no doubt in the mind of the court that the charges are true. Even the governor admits, in his deposition taken in this case, that the espediente, including the concession, was prepared in the name of the three sisters, but he states that when the titulo was prepared the wife of José Bolcoff came before him, and that upon her representation that her sisters were to receive an interest in another rancho the title-papers were made out in the name of her husband.

Such a theory is highly improbable, but the much better answer to it is that it is clearly and satisfactorily disproved. Beyond all doubt the entire espediente, except the titulo, was in the name of the three sisters, and the formal concession which was also in their name directed that the ultimate title should be issued to them and be recorded in the proper book; and discoveries made since the patent was issued show that the grant was entered in the Toma de Razon and in Jimeno's Index.

Much weight is due to those documents as evidences of title, even when they are not introduced in the particular case before the court. They were not produced before the commissioners, and it may be doubted whether they would have benefited the case of the three sisters if they had been, as their names are erased in the entry and the name of José Bolcoff written in their place, and as no suspicion of forgery or fraud existed at that time it may be doubted whether the production of the documents would have changed the result. Conjectures in that behalf, however, are of no avail, as it now appears that all or nearly all of the title-papers intro

duced to support that title were forged and fraudulent, showing to the entire satisfaction of the court that the equity of the case was in the three sisters.

Further argument upon that topic is unnecessary as the proofs are persuasive, convincing, and decisive. Detailed reference to them is given in the opinion delivered by the Circuit Court, and to that the parties can recur if they desire to examine the documents or the statements of the witnesses as exhibited in the depositions sent up in the record.

Suppose that is so, still it is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was final and conclusive between the original claimants. Unquestionably it is a general rule that when jurisdiction is delegated to a tribunal over a subject-matter, and its exercise is confided to their discretion, the decision of the matter, in the absence of fraud, is in general valid and conclusive. Even fraud will not in every case open the judgment or decree to review where the proceeding is not a direct one, but it is not important to enter much into that field of inquiry, as the fifteenth section of the act under which the commissioners were appointed provides that the final decrees rendered by the commissioners or by the District or Supreme Court of the United States, or any patent to be issued under the act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.*

Nothing more is contemplated by the proceedings under that act than the separation of the lands which were owned by individuals from the public domain.†

Argument is not necessary to show that a patent in a suit at law is conclusive evidence of title against the United States and all others claiming under the United States by a junior title. Until the patent issues the fee is in the gov-

* 9 Stat. at Large, 634.

† United States *v.* Mc-illo, 1 Wallace, 709; Beard *v.* Federy, 3 Id. 493; United States *v.* Sanchez, Hoffman, Land Cases, 133; Martin *v.* United States, Id. 146; United States *v.* Ortega, Id. 135.

ernment, but when it issues the legal title passes to the patentee. Persons claiming to hold the land against the patent cannot have relief in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued.*

Where one party has acquired the legal right to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title.†

Objection was taken in the court below that some of the respondents were innocent purchasers, but that objection cannot have any weight at this time, as all the appellants before the court had notice of the title of the appellee, as clearly appears by the report of the master. None of those who purchased without notice are embraced in the decree.

Laches and the statute of limitations are set up in argument, but such defences cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.

DECREE AFFIRMED.

Mr. Justice FIELD did not sit in this case, nor participate in its decision.

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* Bagnell *v.* Broderick, 13 Peters, 436; Patterson *v.* Winn, 11 Wheaton 380.

† Stark *v.* Starrs, 6 Wallace, 419.

Syllabus.

GALVESTON RAILROAD *v.* COWDREY.

1. *Bonâ fide* holders of railroad bonds, executed in due form and by the proper officers, cannot be prejudiced by the fact that the mortgage given to secure the same was executed out of the State, or by virtue of a resolution of directors, at a meeting held out of the State. The company and its privies are bound thereby.
2. One who purchases railroad bonds in open market, supposing them to be valid, and having no notice to the contrary, will be deemed a *bonâ fide* holder.
3. Where the trustees of a railroad mortgage or deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders, secured by the same mortgage; or, if there be several successive mortgages, the trustees of which are dead, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all the bondholders under each mortgage.
4. In such case no injustice could be done, because any bondholder, not made a party, would have a right to intervene and contest the priority of a mortgage earlier in date than that by which his bonds are secured; or the validity of bonds held by any other bondholder.

A railroad company of Texas made four successive mortgages, in 1853, 1855, 1857, and 1859, and issued bonds under each; the road and its appendages were then sold under judgments in 1860; the purchasers operated the road until 1867, and realized large receipts therefrom. In 1857, after the making of the first three mortgages, the legislature passed a law subjecting the road and chartered rights of all railroad companies to sale for their debts, either under mortgages, deeds of trust, or judgments. *Held:*

First. That this law enured to the benefit of the three first mortgages, as well as to that made and as to the judgment recovered after its enactment, and in the order of priority due to each.

Second. That the sale under the judgment did not disturb the priority of the mortgages.

Third. That although the three first mortgages covered and conveyed the tolls, income, and profits, yet the purchasers under the judgment were not accountable for the tolls and income received by them from the road before they received notice to pay them over to the bondholders.

Fourth. That although part of the road was entirely built by the money raised on the fourth mortgage, yet that fact did not give it priority over the first three mortgages, even on that portion of the road; provided it was a part of the chartered route.

Fifth. A railroad mortgage, as against the company and its privies, although given before the road is built, attaches itself thereto as fast as it is built, and to all property covered by its terms as fast as it comes into existence as property of the company.

Sixth. The principle applicable to maritime cases, which gives priority of lien to the last creditor furnishing supplies and repairs for the conservation of the ship or voyage, does not apply to railroads. As to them the common law rule prevails, *qui prior est in tempore, potior est in jure.* Mechanics' lien laws have not been extended to railroads in Texas.

APPEALS from decrees in the Circuit Court for the Eastern District of Texas on bill and cross-bill.

The bill was filed by Cowdrey and others, citizens of New York, against the Galveston, Houston, and Henderson Railroad Company; another company of the same name (the "successor company" of the one just mentioned); the Galveston and Houston *Junction* Railroad Company; one Nichols, and fourteen other persons, all citizens of Texas (except one, who was a citizen of Massachusetts), for the foreclosure and sale of the railroad of the said Galveston, Houston, and Henderson company, with all its appurtenances, and all the property of said company, to pay in due order the several outstanding bonds issued under certain mortgages which it had made, to wit, its first, second, and third mortgages, and to call the defendants to account for the tolls, income, and profits of the said railroad and property whilst in their possession. The bill was filed on the 12th of February, 1867, on behalf, not only of the complainants, who alleged that they were large holders of the said bonds, but of all other holders thereof, who might come in and contribute to the costs and expenses of the suit.

It appeared from the pleadings and proofs that the Galveston, Houston, and Henderson Railroad Company was chartered by an act of the legislature of Texas, on the 7th of February, 1853, for the purpose of constructing and operating a railway from the city of Galveston to the city of Houston, and thence to Henderson,* with such branches as they might deem expedient; with power, amongst other things, to take lands by condemnation, and to acquire, by purchase, donation, or in payment of stock, such real estate as the directors should think desirable to aid in the con-

* See the diagram, *infra*, page 464.

struction or maintenance of said road; and to alienate or *mortgage the same for the constructing or maintaining said road;* such alienation or mortgage to be signed in the name of the president and countersigned by the treasurer; also, with power *to borrow money on their bonds or notes*, at such rates as the directors should deem expedient; and, *generally, to do and perform all such acts as might be necessary and proper for, or incident to, the fulfilment of their obligations and for the maintenance of their rights.* And it was expressly declared by the charter that all conveyances and contracts executed in writing and signed by the president and countersigned by the treasurer, or other officer duly appointed by the directors under the seal of the company and in pursuance of a vote of the directors, should be valid and binding. By virtue of supplements to the charter, and by general laws of the State of Texas, the company became entitled to grants of the public lands of the State, in virtue of which they subsequently acquired land certificates for 512,000 acres of land.

The company was duly organized under its charter and began operations for constructing its road.

On the 1st of December, 1853, the company made an issue of bonds—its first issue—consisting of fifteen hundred bonds, each for £100 sterling, payable in London, at the expiration of ten years, with interest at the rate of 6 per cent. per annum. To secure these bonds the company executed a deed of trust, or mortgage, to trustees, upon its railroad, constructed *and to be constructed*, from Galveston to Houston, and its *privileges, rights, and real estate, owned, or that should thereafter be owned*, by the company, in connection with its said railroad; and *all tolls, issues, and profits, whenever default should be made in paying the bonds, and all the franchises* of the company, and all depots, stations, and buildings, and lands, occupied *or to be occupied therefor.* The terms of the deed were that it should be held in trust for the bondholders: that so long as no default was made by the company in payment of principal or interest, the property should remain in the company's possession; *but if it should be in default for the space of three months in payment of either, and on*

request in writing by any holder of the bonds, the trustees might take actual possession of the railroad and all the property mortgaged, take the receipts thereof, and, on due notice, sell the same to pay the principal and interest due, after paying expenses of management and all costs and charges incident to the trust.

On the 1st of June, 1855, a second issue of bonds was made by the company to the amount of $750,000, payable in ten years, with interest at 10 per cent. per annum, convertible, after three years, into stock of the company, and secured by a second mortgage of similar import to the first, except that it conveyed, "in addition to what was conveyed by the first mortgage, all the lands which shall or may belong to said company by virtue of any act of the legislature of the State of Texas in connection with said road from Galveston to Houston." This mortgage contained a declaration that it was "to take the place of" the former one, which was for an equivalent sum in sterling money, and it had a clause thus:

"And the issue of the bonds referred to in this instrument can take place only by the cancelling of a like amount of the said 6 per cent. sterling bonds, so that this instrument is and shall be a first lien upon all the property donated thereon to the amount of bonds issued."

On the 8th of October, 1857, a third issue of bonds was made to the amount of $2,625,000, in $100 bonds, payable in 1879, with interest at 8 per cent. per annum; and these bonds were secured by a third mortgage to the same trustees as the last, on the same property as the second mortgage, except that it purports to cover the railroad from Galveston for the full distance of 75 miles. This mortgage declared that it was executed in part "to take the place of" the preceding one; particulars being stated.

The trustees named in the first mortgage were the Honorable William Kent, of New York, and certain London bankers. These last, however, refused to accept the trust. The trustees under the two later mortgages were Mr. Kent

of New York, already named, and Mr. C. B. Haddock, of that city or State. Both these trustees were dead at the time the bill was filed, and there were then no trustees acting under the mortgages.

All the mortgages were executed under the corporate seal, were signed by the president, and countersigned by the treasurer. They did not declare in what place they were executed, but the execution of them was proved in the city of New York, before a commissioner for Texas, it being stated in the affidavit of probate that the president and treasurer resided in that city. The evidence tended also to show that the meetings of the directors, by which the mortgages were authorized to be executed, were held in New York; where the company had an office where its fiscal arrangements chiefly originated and were accomplished.

The bill stated that these bonds were issued to raise money to construct, equip, and supply the railroad; and that the company, by the aid thereof, did complete its road from Galveston to Houston, a distance of 52 miles. It further stated that the company, after the issue thereof, took up and cancelled about £100,000 of the first issue, leaving outstanding only about £50,000, of which the complainants held £32,600, with a large amount of coupons thereon for unpaid interest; that only about $700,000 of the second issue were outstanding, besides the coupons thereon, of which the complainants held $250,000, besides a large amount of unpaid coupons; and that about $2,000,000 of the third issue were outstanding, of which the complainants held a large amount. The bill averred the entire insolvency of the original company.

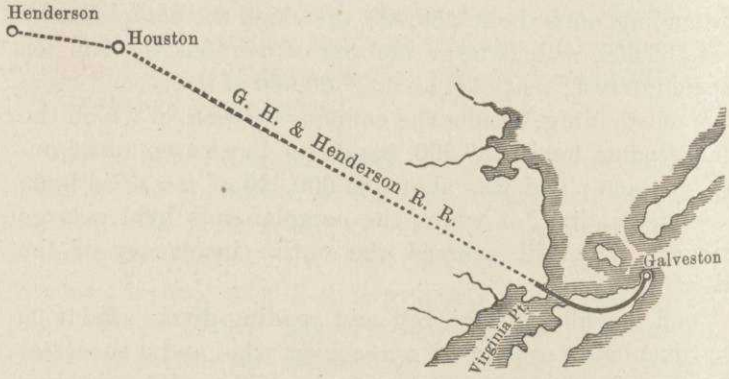
Upon the filing of the bill and reading divers affidavits, the court below appointed a receiver, who, and a successor since appointed, during the pendency of the suit, carried on the operations of the road and received all the emoluments thereof for the benefit of the parties entitled thereto.

Answers and replications being filed, testimony was taken.

During the examination the complainants produced and scheduled the bonds of the several classes held by them, to

the amounts nearly corresponding with those above alleged; the amount of the third issue so produced being $21,800, besides coupons. They were examined as to the manner in which they obtained possession thereof, and proved that they had purchased them of various parties and at various prices, from 30 to 70 per cent. on the par value.

It further appeared that on the 21st of May, 1859, the company executed to one Tucker, as trustee for Robert Pulsford, a fourth deed of trust to secure the payment of £9600 sterling, previously lent to the company by Pulsford on a number of bonds of the third issue, together with other securities, delivered to him to hold as collateral security, and £10,000 advanced at the time of the execution of the deed. This deed covered the same property which was covered by the other trust deeds. It was besides agreed, in a separate article, that Pulsford should have a special lien on a lot of railroad iron which was pledged to him, and which *was to be used for completing the track of the railroad between Galveston City and Virginia Point, a distance of about five miles;* indicated on the diagram inserted here by a heavier line than the rest of the road.



The bill did not advert to this deed; but Pulsford and his trustee, on their petition for that purpose, were permitted to intervene as defendants, and filed an answer and a cross-bill, claiming a first lien *on the portion of road laid with the aforesaid rails.* The ground on which Pulsford claimed pri-

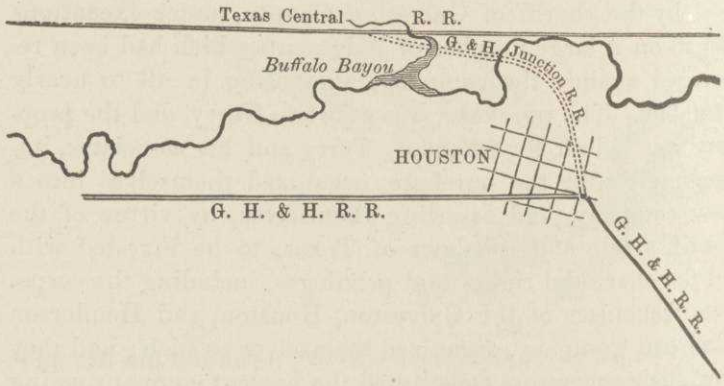
ority on that portion of the road which was laid with his iron, was that when the mortgages of the complainants were executed that part of the road was not in existence and could not have been conveyed by them, and could only be embraced in them on a principle of equitable estoppel, which was met and paralyzed when it came in conflict with a superior equity; secondly, because the company having become bankrupt and unable to finish the road, the work previously done had become worthless, and the pledge given by the mortgage was without value; and because his iron, applied to the road, saved it, and rendered it capable of being used, which it would not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, that he was entitled to priority in this case. It appeared from vouchers produced on the examination that over $30,000 had been paid to Pulsford on his claim.

It further appeared that *on the 6th of March*, 1860, the road-bed, track, franchises, chartered rights and privileges of the Galveston, Houston, and Henderson Railroad Company, and the rolling stock thereof, consisting of two locomotives, fourteen platform cars, one passenger car, &c., were sold by the sheriff of Galveston County, under executions issued on a large number of judgments which had been recovered against the company, amounting in all to nearly $120,000. The purchaser was a certain Terry, and the property was bid off for $28,000. Terry and his associates, immediately after the purchase, organized themselves into a new company, and asserting themselves, by virtue of the sheriff's sale and the laws of Texas, to be invested with all the chartered rights and privileges, including the corporate franchises of the Galveston, Houston, and Henderson Railroad Company, organized themselves as such; and they and their successors constituted the present company acting under that name, "the successor company," already mentioned. This new organization took possession of the railroad and all its works and property and began to operate it.

The last directors of the old company were interested in this purchase and continued in the new company.

It further appeared that Terry and his associates formed themselves into a voluntary company called the Real and Personal Estate Association, for the purpose of raising money to pay some of the pressing claims against the railroad company, which were regarded as assumed by the new company, and for the further purpose of procuring real estate for depots, and rolling stock machinery, and tools needed for the use of the railroad; that in this way they laid out a large sum of money, over $150,000, and leased the property thus acquired to the new railroad company. The rents reserved were stated in the answer of the defendants.

It further appeared that, in order to build a short railroad at the city of Houston, to connect the railroad of the defendants with the Texas Central Railroad, the same persons procured a charter from the legislature, on the 8th of April, 1861, by which they were incorporated as the Galveston and Houston *Junction* Railroad Company; and were, as such, authorized to construct and operate a railroad to connect the Galveston, Houston, and Henderson Railroad with the Texas Central Railroad. This road was constructed accord-



ingly, and was less than two miles in length, with a bridge over the Buffalo Bayou. (See the diagram above.)

Statement of the case.

The cost of the road was stated to have been about $51,000. The company also purchased $12,000 worth of cars from a yet different railroad company,—the Houston, Trinity, and Tyler Company. These cars were leased to the Galveston, Houston, and Henderson Company at $600 per month.

About the 1st of May, 1865, the Real and Personal Estate Association sold and transferred all its rolling stock, tools, and machinery to the Galveston and Houston *Junction* Railroad. So that, when the bill in this case was filed, the latter company asserted itself to be owner of all the rolling stock, tools, and machinery in use on the Galveston road, except the old stock that was in existence in March, 1860; the whole being rented to the Galveston Company for rents, which were charged by the complainants to be exorbitant, and intended to absorb all the earnings of the Galveston Railroad. The evidence showed clearly enough that, by means of the rents paid by the Galveston Company to the Real Estate Association for real estate, depot grounds, &c., and for rolling stock, tools, and machinery, and of similar rents paid to the Junction Company, and of the proportion of the gross receipts retained by said company, the Galveston Company received but a very small portion of the earnings of the works for its share.

It was admitted by the defendants that the stockholders of the new Galveston Railroad Company, the stockholders of the Junction Railroad Company, and the members of the Real and Personal Estate Association were identically the same persons, and that their several interests were proportionally the same in each concern. It was evident, therefore, that the bargains made with the Galveston Railroad Company were bargains made with themselves, and were what they were pleased to make them; and the design manifestly was to make them on such terms that the Galveston Railroad Company should get but a small share of the proceeds. The complainants charged that all this was a fraud; that the tolls and income of the railroad were mortgaged to them, as well as the road-bed itself, and that the individual defendants were bound to account for them.

Statement of the case.

It was admitted by the defendants that these "outside companies" were formed because they apprehended difficulty from the creditors of the old company. They did not deem it safe to purchase new property, either real estate or rolling stock, or to construct the connecting road at Houston in the name of the Galveston Railroad Company. The mortgages held by the trustees of the complainants and other claims were clouds hanging over the title of the railroad, and, therefore, they were unwilling to invest their money in the company's name or to invest it with the title to any new property acquired. They urged these circumstances in justification of their mode of proceeding, though they insisted that the rents and the division of the receipts were fair and right.

Among the defences set up, either generally or specifically, by the answer or course of the defendant's testimony, were:

1st. That the mortgages sued on were created without authority by the charter of the railroad company, or by the laws of Texas, and were illegal and void; the argument here being that though the company might have power, under the language of its charter, to mortgage such "outside" real estate as it was authorized to acquire to subserve to the main design of building its road, yet that there was obviously no express authority, nor any authority by any implication of the particular language in the corporation to mortgage its right of way, track, and franchises; and that without some such power a private railroad corporation could not mortgage these; a point, it was said, determined by numerous State courts,* and approved of in this.†

* Steiner's Appeal, 27 Pennsylvania State, 315; Susquehanna Canal Co. *v.* Bonham, 9 Watts & Sergeant, 28; Troy & Rutland Railroad Co. *v.* Kerr, 17 Barbour, 601; State *v.* Mexican Railroad, 3 Robinson's Louisiana, 513; Robins *v.* Embry, 1 Smede & Marshall's Chancery, 269; Coe *v.* Columbus Railroad Co., &c., 10 Ohio State, 372; Commonwealth *v.* Smith, 10 Allen, 455; Richardson and others *v.* Sibley, 11 Id. 65; Pierce *v.* Emery, 32 New Hampshire, 508; State *v.* Rives, 5 Iredell, 297.

† York & Maryland Railroad *v.* Winans, 17 Howard, 30; Gue *v.* Tidewater Canal, 24 Id. 257.

2d. That even if such power existed, it could only be exercised through meetings of the directors in proper places, and that all the meetings of this company, including those which authorized these mortgages, were held in the city of New York, where the company was organized; where its office records and seals were kept; where the president and treasurer resided; where probate of the mortgages to enable them to be recorded in Texas was made; all outside of the limits of Texas. The argument here being that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty; that legislative acts ought to receive a reasonable interpretation, and that it could not be presumed that a legislature authorized an act beyond the reach of its proper jurisdiction; the case of *Hiles* v. *Parrish*, in the 14th volume of the New Jersey Chancery Reports, p. 383, with other cases,* being here relied on. The case specially named says:

"It is a rule of law that a private corporation, whose charter has been granted by one State cannot hold meetings and pass votes in another State. It exists by force of the law that created it, and where that law ceases to exist and is not obligatory the corporation can have no existence. It appears that the resolutions of the board of directors which authorized the transfer of the stock in question were passed at a meeting held, not in this State, but in the city of Philadelphia. *They are therefore void.*"

3d. That the bonds sued on had not issued upon a consideration which brought them within the security of the trust-deeds; and that whatever their effect, as bonds or debts of the old company, they were not covered by the lien of those deeds; evidence on this point (not, however, clear) being given, tending (or so alleged by the defendants) to show that the bonds under the second mortgage had been issued, not to take up those under the first, but as a new and independent way of borrowing money; and the argu-

* Warren Man. Co. *v.* Ætna Ins. Co., 2 Paine, 501; Bank of Virginia *v.* Adams, 1 Parsons' Equity Cases, 534; Freeman *v.* Machias, 38 Maine 345.

ment upon an assumption of that fact, as proved, being, that if a corporation executed a mortgage on its property, on its face, to secure bonds to be issued (only by the cancelling of a like amount of previous bonds), and people bought them without seeing that such like amount had been cancelled, they could not come into equity and claim the security of the mortgage for such second bonds, though they might become bond creditors of the company.

4th. That these complainants could not maintain this bill to foreclose the three mortgages. The casual fact that each of them happened to hold bonds said to have been issued under each of the three mortgages, was not, it was argued, material. This was a suit, it was urged, by four complainants, in behalf of themselves, *and all others having a common interest with them.* But no one had a common interest with them who did not hold bonds issued under each of the three mortgages, and of the same proportionate amounts as the complainants; and there was no evidence, or any reason even to conjecture that any one did. There was no community of interest between those who held bonds under the several successive mortgages. Each incumbrancer under the second mortgage had a direct interest to show the first invalid, and to reduce the amount secured by it; and so with the third mortgage, in reference to the first and second. There could be no community of interest, and no right of representation, a matter which could exist only by reason of community of interest, where consecutive incumbrances are held by different persons, each of whom has rights adverse to all who precede him. In its foundation and structure, the bill was therefore inconsistent with fundamental principles which govern courts of equity, and it could not be maintained.

The Circuit Court made a decree, amounting in effect to a foreclosure of the three first mortgages, for the sum then found to be due in the aggregate, $5,263,039. The decree included £49,600, issued under the first mortgage, and £41,664 of unpaid coupons, and the whole $750,000 included in the second mortgage and unpaid coupons $675,000.

Statement of the case.

The decree contained this clause:

"As this decree cannot, on account of the reference hereinafter ordered to a master, be made final as to all matters in controversy, and as certain of the defendants have given notice of their intention to appeal from a final decree, when rendered, the court does not direct a sale of said mortgaged property, but will do so in said final decree; and this decree is without prejudice to the right of the defendants, or any of them, to an appeal, with supersedeas, from this decree and all matters herein, within the time appointed by law, after the final decree which may be made in this cause."

A reference to a special master (directed by the decree for the information of the court) was had, and documentary and other evidence collected. *But there was no reference ordered in this decree for taking the proof of the various bonds that might be produced.*

The evidence collected before the master was submitted to the court below, which now made a further or final decree.

By this the original decree was confirmed, so far as related to the foreclosure of all the mortgages, fixing their priorities according to date, and subjecting to their lien the whole road from Galveston to Houston, with the original rolling stock and equipments. But the decree refused any remedy by account, or an enforcement of the lien against any of the property acquired and used in connection with the road since March 6th, 1860, when, as already mentioned,* the road-bed, track, franchises, chartered rights, and rolling stock of the company were sold by the sheriff.

The cross-bill of Pulsford for a superior equity was dismissed.

The decree contained this direction:

"And to ascertain more exactly such proportion, and the amount of the several series of bonds and coupons now outstanding, it is hereby ordered that all holders of such bonds or coupons claiming a participation in the distribution of the proceeds of any sale of the property claimed to be mortgaged to

* *Supra*, p. 465.

secure them in this cause, shall present their bonds and coupons to this court (to be deposited in some National bank to be designated on such presentation, there to remain subject to further order, and to such directions as the court may make to ascertain their genuineness and to classify them), within one year from the date of this decree. And after any such sale, as hereinbefore directed, has been duly made and confirmed, and the amount of the successful bids paid as before stated, the said marshal shall execute in due form a conveyance of the property bought to the purchaser."

From this decree the "successor company" appealed to this court. The complainants, Cowdrey and the other bondholders, took a cross-appeal. Pulsford also prayed an appeal.

In this court the same grounds were taken in behalf of the "successor company" as in the court below, and were urged at length. It was urged additionally that the original decree—the decree of foreclosure—was erroneous, because there had been no reference to a master to ascertain what parties holding bonds *would* come in and make themselves parties to the *suit;* and that only the bonds held by parties so coming in, and those held by the complainants in the bill could be included in the decree of foreclosure *nisi.* All others were excluded from the benefit of the decree. And though the complainants in such a bill might have made proof at the hearing of some bonds, so as to entitle them, in the opinion of the court, to a decretal order of reference, yet that it was settled on sound reasons and by the highest authority, that the complainants themselves in such a bill, must go before the master and prove their claims.*

And it was said that it would be difficult to find a case which demanded more imperatively than did this one the application of this rule of procedure; for that plainly many of the bonds—as appeared by the prices paid for them—had been bought at prices from 30 to 70 per cent. below their par, with notice of the way in which they had been

* Owens *v.* Dickenson, Craig & Phillips, 48–56; Field *v.* Titmuss, 2 Law & Equity, 89; S. C., 1 Simons (N. S.) 218; Whitaker *v.* Wright, 2 Hare, 310.

issued; that is to say, with notice of the fact that they had been issued in violation of the provisions of the two later mortgages; a matter, however, it was urged, not regarded in the decree.

The claim of Pulsford for a superior equity was pressed anew with much learning of the Roman law and continental jurists, as well as by some authorities in other courts, including *Collins* v. *The Central Bank*, in Georgia.*

For Cowdrey and the other bondholders it was argued against the view of the court below (that the defendants being in the position of mortgagors of real estate, were not to be held accountable for the income of the road), that while it was a general rule that the mortgagor, while in possession, with the consent of the mortgagee, was not liable for rents, the rule did not apply here; for here the old company had made a specific mortgage of "the tolls, incomes, issues, and profits of said railroad, whenever the company should make default in making payment," and after default in interest for three months, had authorized the trustees to take possession, receive the rents, and apply them in payment of the interest; that it was the duty of the agents of the mortgagors to have applied the income in payment of the interest; that they had not only violated this duty, but had undertaken to set up an adverse title and to defeat the mortgagors' title. And that the general rule did not apply here, for the farther reason that trustees who were authorized to give notice and take possession were dead, and that in such case the persons who intruded themselves into the dead men's estates were bound to account for the whole of the property.

Messrs. B. R. Curtis, C. B. Gooderich, and W. P. Ballinger, for the railroad company; Messrs. Albert Pike and R. W. Johnson, for Pulsford; Messrs. Grant and W. G. Hale, for Cowdrey and others.

Mr. Justice BRADLEY delivered the opinion of the court.

The first objection made by the defendants to the decree

* 1 Kelly, 435.

is, that the mortgages under which the complainants claim are not valid for want of capacity in the railroad company to make them. It is admitted that the charter authorizes the company to mortgage certain real estate, which it was authorized to acquire for the purpose of aiding in the construction or maintenance of the road. But they insist that this power applies to outside real estate procured as ancillary to the main design of building the road, and does not apply to the right of way and track of the railroad. But we think it is general, and applies to any real estate which the company might acquire in any way. This construction is aided by the other powers conferred by the charter, as that of borrowing money on bond or note, and of doing all acts necessary and proper for or incident to the fulfilment of their obligations. And it is expressly declared that all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under seal of the company, and in pursuance of a vote of the directors, shall be valid and binding. If it were necessary to look into the charter for express power to borrow money and mortgage its property to secure the payment thereof, we think the power is found therein.

But the defendants contend that if the power to mortgage mere real and personal estate be conceded, still there is no power to mortgage, or in any way to assign the railroad as such, or the franchise of operating it and taking tolls, or any other franchise, much less that of exercising corporate powers; and hence the decree is erroneous in authorizing a sale of these rights and franchises under the mortgages.

Without examining how far the operative effect of a mortgage executed by a railroad company upon its road, works, and franchises may extend, *per se*, without statutory aid, it is sufficient to say that, in our opinion, the legislature of Texas has validated the mortgages, and given them the effect which, by their terms, they were intended to have. By the act of December 19, 1857,* section 4912, it is expressly provided that

* Paschal's Digest, art. 4912.

"The road-bed, track, franchise, and chartered rights and privileges of any railroad company in this State shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the same, but . . . shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, *deed of trust, or any other power*, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter, or by virtue of the general laws of this State; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company."

The following section, 4913, enacts that

"Whenever a sale of the road-bed, track, franchise, and chartered rights and privileges of any railroad company is made by virtue of any deed of trust or power, the same shall be made at the time and place mentioned in the deed of trust or power, and in accordance with the provisions of the same, as to notice and in other respects; and if the same be not specified, such sale shall be made as hereinafter provided for sales under execution or order of sale."

The following section, 4914, gives the like effect to sales under execution issued upon a judgment. Indeed, it is by virtue of the latter section that the defendants claim to be the present owners of the road and its franchises. This law is not prospective, but general in its operation. It is a remedial law for the benefit of creditors, and should be liberally construed. It should especially be applied to a case in which, by the very terms of the trust-deed, all the franchises and rights of the company are expressly embraced therein. It cannot be claimed, as is done by the defendants, that a sale under one mortgage or judgment, by virtue of this law, nullifies and destroys all prior mortgages. Such a doctrine would work the greatest injustice, and would open

the door to the grossest frauds. A sale under a junior security must be subordinate to one that is prior and paramount. Successive sales of the same franchises can no more be deemed incompatible than successive sales of the same property; and we all know that a sale of land under a judgment does not, in the slightest manner, affect a prior mortgage. A subsequent sale of the same land may be made by virtue of the latter.

It is next objected that the mortgages were not properly executed, because the meetings of the directors by which the mortgages were authorized to be executed were held in the city of New York. It is not denied that the mortgages were executed in good faith under the corporate seal, and signed by the president and countersigned by the treasurer of the company, and duly recorded in the proper offices of registry in the State of Texas. Supposing the complainants to be *bonâ fide* holders of the bonds held by them, the question raised by this objection amounts to this: Can a corporation repudiate a mortgage, given to secure its bonds held by *bonâ fide* holders, on the ground that its directors authorized its execution by a resolution passed outside of the limits of the State, the mortgage being, in other respects, executed and recorded in due form of law? Can it take all the benefit of the transaction, get off its bonds on the business community, and then repudiate its mortgage for such a cause? We have not been referred to any case like this. It would seem, at first blush, to be a very hard rule, if such a rule exists. No doubt it may be true, in many cases, that the extra territorial acts of directors would be held void, as in the case cited from the 14th New Jersey Chancery Reports, 383, where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts

and transact business in another territory, and may sue and be sued therein. It may hold land in another territory so long as the local authorities do not object. And we see no reason why it should not be estopped by the action of its directors in another territory, when that action is the basis of negotiations by which third parties have *bonâ fide* parted with their money and the company has received the benefits of the transaction. A contrary doctrine would authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities. Must a person, purchasing railroad bonds in Wall Street or Walnut Street, first send to Illinois, California, or Texas, to see whether the meeting of the directors which authorized the mortgage given to secure the bonds was held in a proper place? Whoever may, under supposable circumstances, raise an objection of this kind, it ought not to lie in the mouth of the company to raise it. And, if the company are estopped, then those who purchase the property of the company at an execution sale must be estopped. It has frequently been held that such a purchaser takes only the right, title, and interest which the debtor had, subject to the equities which existed against the property in his hands when the judgment was recovered.

But it is objected that the complainants are not *bonâ fide* holders of the bonds in their possession; that many of the bonds were issued improvidently, and against stipulations contained in the mortgages, to the effect that they should only be issued to retire the previous issue of bonds. If this were true with regard to some of the bonds, it is not pretended to be true with regard to all of them; and the question, what particular bonds were wrongfully issued, if a material question, is properly examinable in the master's office, where all bonds are to be presented and passed upon, if not already done. And the decree will stand only for the benefit of such bonds as appear to be entitled to its benefit; and this benefit will not be confined to the complainants' bonds, but will be extended to all bonds that may be presented by other holders. But it does not appear, so far as we have

been able to scrutinize the evidence, that the complainants are not *bonâ fide* holders of their bonds. They have been examined, and have produced their bonds, and have told how they procured them, namely, by purchase, and what they gave for them; and they allege that they purchased them in good faith in the open market, supposing them to be valid obligations of the company, and being told that they were. If such is the fact, and no proof to the contrary occurs to us, we do not see why the complainants must not be held to be *bonâ fide* holders for value of the said bonds.

The next objection we shall notice is, that the complainants have no right to sue for themselves and in behalf of the several classes of bondholders under the different mortgages, because the interests of these classes are antagonistic to each other. They are no more antagonistic to each other than the several bondholders of the same class are. It is the interest of each bondholder to have as few prior claims to his, and as few participants with him as possible. Every co-bondholder is, in one sense, an antagonist. But the objection is entirely without foundation. The complainants do, in fact, hold bonds of the three different classes, and they have a perfect right to state that fact in their bill, and to pray relief suitable to the fact, and no possible harm or inconvenience can arise in their suing in behalf of themselves and all other bondholders in each class according to their several priorities. If any class of bondholders wish to contest the precedency of a prior mortgage, they have a perfect right to intervene in the suit and file a cross-bill setting up the matter of objection. All bondholders, including the complainants themselves, have to establish their claims in the case before it is finally closed, and before a distribution of the assets can be made. And any bondholder proving his claim may contest the claim of any other bondholder. It has even been held that a mortgagee may sue on behalf of himself and all other creditors, notwithstanding he claims a right to prior satisfaction out of the mortgaged property.*

* See Story's Equity Pleading, §§ 101, 158.

And Judge Story says that, on principle, it is not easy to see why it might not be sufficient, in a suit by incumbrancers, to file the bill on behalf of all the creditors and incumbrancers; thus making them all, in a sense, parties to the extent of asserting their own rights, or of enabling them to contest the matter before a master. He says that this seems to be the true doctrine inculcated by the more recent authorities.* But the case before us is much stronger than this. The complainants *must* set out their own claims under the different mortgages, and it would be impossible to make all the bondholders of either class parties, for they could not be discovered; and the rights of all are protected by the opportunity given to all to contest the claim of any. We consider the bill as properly conceived, and the objection as untenable.

In connection with this objection it is proper to notice an objection to the original decree, that it undertook to declare and find the amount of bonds outstanding and due under each mortgage before the bonds had been regularly produced and proved. That decree, of course, is not to be regarded as final and conclusive on this point. The remarks of Vice-Chancellor Wigram, in *Whitaker* v. *Wright*,† are germane to this subject: "With respect to the form of a decree in a creditor's suit," says he, "the court does not treat the decree as conclusive of the debt. It is clear that it is not so treated for all purposes, for any other creditor may challenge the debt, and it is equally clear that in practice the executor himself is allowed to impeach it. If, in a case where the plaintiff sues in behalf of himself and all other creditors, and the defendants, who represent the estate, do not admit assets, it is objected at the hearing that the debt is not well proved, the court tries the question only whether there is sufficient proof upon which to found a decree; and however clearly the debt may be proved in the cause, the decree decides nothing more than that the debt is sufficiently proved to entitle the plaintiff to go into the master's office,

* See Story's Equity Pleading, § 158; Equity Jurisprudence § 549.
† 2 Hare, 310.

and a new case may be made in the master's office, and new evidence may be there tendered."* In this case, it is true, no reference to a master was made in the first decree for taking the proof of the various bonds that might be produced; but the final decree directed that to ascertain the proportion and amount of the several series of bonds and coupons outstanding, all holders thereof claiming participation in the distribution of proceeds of any sale of the property should present their bonds and coupons to the court, to be deposited in some bank to be designated, there to remain subject to further order, and to such directions as the court may make to ascertain their genuineness, and to classify them. This has not yet been done, all proceedings being stayed by the appeal. But the action of the court, as far as it has gone, is substantially correct. It only remains to complete the proceeding in accordance with the proper practice applicable to the case.

On the part of Robert Pulsford it is objected that the decree does not give him a priority on that portion of the road which was laid with his iron. He contends that he is entitled to this, first, because when the mortgages of the complainants were executed it was not in existence, and could not have been conveyed thereby, and can only be embraced therein on a principle of equitable estoppel, which is rebutted when it comes in conflict with a superior equity; secondly, because his capital applied to the road conserved it, and rendered it capable of being operated, which it would not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, he is entitled to priority. The counsel for Pulsford has furnished us with a very ingenious and learned argument on these points; but we cannot yield to their force.

As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first, second, and third deeds of trust,

* See Story's Equity Jurisprudence, § 549, note.

or mortgages, given by the Galveston Railroad Company to the trustees, estops the company, and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust-deeds could safely be given thereon. The practice of the country and its necessities are in coincidence with the rule. The precise case arose in New Jersey thirty years ago. The Morris Canal Company mortgaged its canal, appurtenances, and chartered rights to secure a loan. When the mortgage was given, one section of the canal, that between Newark and Jersey City, although authorized, was not constructed. It was constructed afterwards. Two other mortgages were given upon that part of the canal, one of which was held by the State of Indiana. A bill of foreclosure was filed on the first mortgage, and after argument by very able counsel, Chancellor Pennington held that the first mortgage took priority. The objection was raised that the company did not own any of the land on which the contested portion was constructed when the mortgage was given. "Can it be possible," said he, "that if on the line of the route at any place it should turn out that a deed was obtained for a piece of land since the execution of the mortgage, that such part of the canal is not embraced within it?"* Mr. Pulsford, as holder of the fourth mortgage, is

* 3 Green's Chancery, 402.

an assignee of the railroad company, claiming under it, with full notice of the other mortgages. He is in privity with the company, and is bound by the estoppel.

As to the other point, giving priority to the last creditor for aiding to conserve the thing, all that is necessary to say is that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason. We do not understand that it is a part of the general law of Texas. By an act of the Congress of Texas, passed 20th January, 1840, the common law was made the rule of decision, where not inconsistent with the Constitution and acts of Congress. By the common law it is an inflexible rule, that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them. In certain States a lien is created by statute in favor of mechanics, called the mechanics' lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation in saying that Pulsford's claim to priority cannot be maintained.

Some other minor points have been made by the defendants which it is not necessary for us to examine in detail. Our conclusion is that the decree, so far as it is in favor of the complainants, must be affirmed.

The complainants have also appealed from the decree because it fails to award them the tolls, income, and profits of the railroad during the time it was operated by the present defendants, and to make the defendants accountable therefor. The complainants claim that nearly all the rolling stock and property, including the junction railroad, claimed

by the defendants as their property, were really produced by the earnings of the railroad fraudulently appropriated to themselves by the defendants. This claim raises the question whether a mortgage of the tolls and income makes the mortgagor or his assignees accountable therefor before demand made by the mortgagee. In this case it does not appear that the complainants or their trustees made any demand for the tolls and income until they filed the present bill. The bill itself does not contain any allegation of such a demand. Now what is the language of the deeds of trust? They convey, it is true, with the other premises, the tolls, income, issues, and profits, whenever the company shall be in default of payment; but a subsequent clause provides that in case the company shall at any time for the space of three months be in default in respect to the payment of either interest or principal of said bonds when due and demanded, on request in writing of any of the holders of the bonds, the trustees shall take possession of the railroad and other property, and through the agency of the persons they may appoint, shall collect and receive the tolls, incomes, and profits of the railroad and mortgaged property for the purpose of the security before declared, and may sell the road upon giving due notice, &c. It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practicably carried into effect. At all events until a regular demand were made for the payment of the tolls and income we do not think, under the language of the deed, that the defendants were bound to account therefor. If this be so, it matters not what bargains the defendants made between themselves as to the disposition of said tolls and income.

We are, therefore, of opinion that this part of the decree ought also to be affirmed. The result is that the entire decree of the Circuit Court is

AFFIRMED.

FORSYTH *v.* WOODS.

1. *Semble*, that a debt incurred by the members of a partnership individually, even in a matter where the firm is to profit, will not, in case of bankruptcy of the firm, let the person to whom the debt was incurred come for a dividend upon the assets of the firm as distinguished from the assets of the individual partners.
2. The acceptance of letters of administration being a trust—(granted because of the confidence reposed in the grantee)—a loss sustained by a surety in the administration bond, who has entered into the suretyship under a representation from a firm of which the administrator was a member, that they intended to take into the possession of the partnership all the assets of the intestate, to make the administration a matter of partnership business, and to share as partners the gains and losses resulting from the administration, so that in signing the bond he would become the surety of the firm and not of the individual partner, cannot be recovered by the surety from the firm. Such a transaction is against the policy of the law.

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

Woods, assignee in bankruptcy of the firm of E. P. Tesson & Co. (which was composed of E. P. & E. M. Tesson) sued Forsyth *in assumpsit* to recover from him a balance in account.

Forsyth pleaded a special plea in bar. The plea averred a joint request made by the *individuals* who composed the firm of E. P. Tesson & Co. to him, soliciting him to become a surety of *one* of those individuals in an administration bond. It also averred a joint representation made to him by them, that they intended to make the administration a matter of partnership business, to take into the possession of the partnership all the assets of the intestate, and to share as partners the gains and losses resulting from the administration, so that in signing the bond he would in effect become the surety of the firm, and not merely a surety of the partner to whom the grant of letters of administration might be made. The plea further averred that, moved by the joint request, and relying upon the joint representations aforesaid, he did become a surety in the administration bond, and that

afterwards (the partnership having taken possession of all the assets of the deceased intestate, and having become bankrupt), he was compelled to pay to the legal representatives and next of kin of such intestate a large sum of money, in consequence of the default of the administrator. It still further averred, that under similar circumstances, after like request and representations, the defendant became a surety in an administration bond of the other partner, to whom administration of another estate was committed by the probate court, and that he was compelled to pay money for that administrator's default. The plaintiff demurred generally, and the court below sustained the demurrer. The defendant, Forsyth, now brought the case here. Whether the facts pleaded showed a legal liability of the partnership, as such, to repay what the defendant had been compelled to pay in consequence of his suretyship, was the question presented by the record. If they did, the defendant had a set-off to the plaintiff's demand; if they did not, the demurrer to the plea was rightly sustained.

The Bankrupt Act, whose provisions were a good deal discussed in the argument, provides that "the net proceeds of the joint stock shall be appropriated to pay the creditors of the partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors." The joint stock does not go to pay the separate creditors, except when there is a balance of such stock after payment of the joint debtors.

Messrs. T. T. Gantt, J. M. Carlisle, and J. D. McPherson, for the plaintiff in error, argued:

That the defendant having assumed a liability for and at the express request of the bankrupts, and the defendant having had to pay money in discharge of this liability, the money so paid was in contemplation of law paid for them, and at their request.

That the liability of the firm had occurred before bankruptcy, viz., at the time when the defendant became surety for the partner.

That the payment made by the defendant could be, and ought to be, properly set off in this action.

Mr. S. S. Boyd, contra.

Mr. Justice STRONG delivered the opinion of the court.

If it be conceded that such a joint request as is pleaded, followed by an assumption of obligation and a consequent payment of money in pursuance of it, raised an implied promise on the part of those who joined in the request to reimburse the defendant, it is, perhaps, still not clear that it was a partnership promise, creating a debt of the partnership, and therefore entitled to priority in bankruptcy over private debts of the partners. It is not pleaded that the firm of E. P. Tesson & Co. requested the defendant to assume the obligation he took, though it is averred that the persons who constituted the firm made that request, and it is not certain that a promise by a partnership and a promise by the individual partners collectively have the same effect. If a firm be composed of two persons, associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively, in the first instance, for the payment of its debts may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract.

But the substantial fault of the plea in this case is, that, at best, it sets up an illegal contract, which the law will not

enforce. The promise, if any, of the firm was to indemnify the defendant for doing an act planned and intended to enable his principal in the administration bond to commit a gross breach of trust. The arrangement was entered into in order that the partnership might obtain the possession of all the effects, goods, chattels, rights, and credits which had belonged to the intestate decedent, and which were assets that the administrator only had the right to hold. It was also a part of it that the administration should be conducted by the firm and not by the person to whom the probate court committed it. To this arrangement the defendant became a party, and he signed the bond in view of it, and in order that it might be carried out. This appears from the plea. It needs no argument to show that the transaction was against the policy of the law and plainly illegal.

Letters of administration are a trust. They are granted by the probate court or ordinary because of confidence reposed in the grantee. They require him to take exclusive charge of the personal property of his intestate and to bring to its administration his own personal attention and judgment. He has no right to allow others to control it or to share in its administration. If he does, he exposes it to unnecessary hazards and subjects it to the disposition of persons in whom the officer of the law has reposed no confidence. To permit a mercantile or a banking firm, of which the administrator is a partner, to take the assets of the decedent's estate into its possession and to share in the disposition of them is to invite what the plea shows happened in this case, misappropriation and loss. It is a gross breach of trust, a violation of legal duty. It must be, therefore, that any contract which has for its object such a faithless abandonment of the duties of an administrator cannot be enforced in a court of law.

It is not to be said that the implied promise of the partners or the firm was only collateral to the illegal arrangement. It was a part of it. The signing of the bond and the promise to indemnify were both not only in view of a contemplated transfer of the administrator's duties to the

partnership, but they were means avowedly selected for that end.

It follows that the plea set up no debt to the defendant due from the bankrupt firm which is recoverable at law and which can be made available as a set-off. The demurrer was therefore correctly sustained.

JUDGMENT AFFIRMED.

EUREKA COMPANY *v.* BAILEY COMPANY.

1. A contract in writing may be binding on a corporation though a private seal of one of its officers was used instead of the corporate seal, and though no record may be found authorizing the officer to make the contract, if other evidence proves that he had such authority, or that the company ratified his act afterwards.
2. A patent from the government cannot be impeached for fraud in procuring its issue in any other mode than by a direct proceeding to set it aside. But it may be shown in a suit on a reissued patent that it covers matter not part of the original invention.
3. When parties have, after long negotiation, with full opportunities for knowing what they are doing, entered into contracts for the use of inventions covered by rival patents, and no fraud or imposition is alleged, the case of a party sued in such a contract must be very clear, who denies the validity of the patent for which he has agreed to pay a royalty.
4. And when such a party has furnished under the contract a model of the machines which he proposes to make, on which he agrees to pay a royalty, he cannot deny that such machine contains matter covered by the patent, unless he alleges and proves circumstances which would set aside the contract for fraud, mistake, or surprise.

APPEAL from the Circuit Court for the District of Massachusetts; the case being thus:

The Bailey Company was the owner of a reissued patent for an improved washing and wringing machine, the original of which had been issued to John Allender. There had been several surrenders and reissues of this patent, the last of which was on the 22d July, 1865. The Eureka Company being engaged in the manufacture of clothes-wringing machines under other patents, one S. B. Rindge, its treasurer,

professing to act as its agent, entered into two written indentures with the Bailey Company, through its general agent, for the privilege of using their patent.

The execution of the agreements was in the following form:

"In witness whereof the said party of the first part have caused its seal to be hereunto affixed, and this instrument to be signed by S. A. Bailey, its general agent, thereto duly authorized; and the said party of the second part has affixed its seal and caused these presents to be signed by S. P. Rindge, its treasurer, thereunto duly authorized, this day and year first hereinabove written.

"Bailey Washing and Wringing Machine Co.,
"S. A. BAILEY, [SEAL.]
"General Agent.
"Eureka Clothes Wringing Machine Co.,
"By S. B. RINDGE, [SEAL.]
"Treasurer."

The seals above set were not corporate seals, but mere private seals.

The first of the agreements licensed the Eureka Company to use the patent of the Bailey Company during the existence of the patent, and of any renewal thereof, for which the Eureka Company was to pay a royalty of fifty cents for every machine manufactured by it in which the patent should be used. To secure the performance of this, and to prevent any misunderstanding, the Eureka Company furnished a sample of the machines, and agreed that its books should, at all times, be open to the examination of complainants, and that it would make monthly reports and payments; and it covenanted that it would not, directly or indirectly, infringe the reissued patent of the Bailey Company, or violate the conditions of their agreement.

The second agreement was made to arrange the prices at which the machines made by the parties should be sold, so as to prevent injurious competition.

Statement of the case.

The Eureka Company made a report and payment for one month after the agreement; but would make no more. Thereupon the Bailey Company filed a bill in the court below. The bill set out the covenants. It charged that they were the result of protracted negotiation, in which the original patent, the reissues, and the character of the invention were well considered, and that they were a fair adjustment of the interests of the parties. It then alleged that in the first month five hundred machines were made under the contract and paid for by defendant, but that it continued to make and sell the machines, and refused to account or to pay for them. It then prayed a discovery of the number made, and for an account and decree for the sum due, and for an injunction against the use of the patent until the sum found due should be paid.

The answer of the Eureka Company, which was somewhat vague in its allegation, denied that it had ever executed, or caused to be executed, or ever authorized any one in its name or behalf, to execute the indentures; asserted that ever since its organization the company had a corporate seal, duly adopted and established (an impression of which it affixed in the margin), and that it had never employed any other, or authorized any agent to use or employ any other; it denied the infringement, asserted that the reissued patent was obtained by fraud; that it was a device to cover matter not invented or claimed by Allender, and denied that the machines made by the defendants had anything in them covered by the patent of the complainant.

Replication was put in, and testimony taken. The complainant did not produce any minute from the books of the corporation, directing Rindge to make the covenant which he had undertaken to make. But Rindge's relations and action as agent to the company, and the report and payment for one month, were sufficiently proved.

The machine which the Eureka Company was making was before the court; the purpose of its exhibition being to show that it was not covered by the original patent to Allen-

der; but the patent was not in the record, nor were any of the reissues except the last.

The court below rendered a decree according to the prayer of the bill, and the Eureka Company brought this appeal.

Mr. J. B. Robb, for the appellant; Mr. C. L. Woodbury, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. We are satisfied that the agreements set up in the bill are the valid contracts of the defendant. Though the plaintiff was unable to produce any resolution or order in writing by the trustees or board of directors of the defendant corporation, and though the seal used was the private seal of one of its officers, instead of the corporate seal, neither of these is essential to the validity of the contract. We entertain no doubt that Rindge, the agent and one of the directors and treasurer of the Eureka Company, was authorized to execute the agreement, and if any doubt existed on that point, the report and payment for five hundred machines, the first month's use of the patent under that agreement, would remove the doubt. If it did not, it would very clearly amount to a ratification.

2. The defendant company furnished a sample of the machine they were making. That machine is before us. We do not understand that it is seriously contended that this machine does not contain some part of the invention covered by the reissue of the Allender patent. The effort of defendant is to show that it is not covered by the original patent to Allender. This latter point will be noticed presently. After making the agreement in this case, an agreement made on due deliberation, the defendant being engaged in the business of making the machines before it took the license, an agreement manifestly intended to adjust conflicting rights, and after furnishing one of the machines as a sample of what it proposed to do under that agreement, and after having made and sold five hundred of them, there arises a very strong presumption that the denial that any-

thing in those machines is covered by plaintiff's patent is made to support an unwillingness to pay the royalty which it had agreed to pay. And we are not at all satisfied that, in equity, it can be permitted to set up this defence, while it makes no attempt by cross-bill, or even in the answer, to show that the agreements were obtained by fraud, surprise, or imposition.

But if this could be permitted, the testimony does not repel the presumption arising from the making of that contract and the defendant's action under it, that the machines made by it do contain matter covered by the reissued patent of plaintiff.

3. If the defendant means, by the very vague answer to the bill, to set up and to rely on a fraud by which the commissioner was misled and deceived and induced to reissue the patent, and that the plaintiff or its assignors were the guilty parties, that question cannot be raised in this collateral proceeding, and can only be considered in some direct suit to impeach and set aside the patent.*

But if it is meant merely to say that, in point of fact, the reissue embraces matter which was no part of Allender's original invention, then there is no evidence in the record by which we can determine that question, for neither the original patent to Allender, or any part of it, or any of the reissues of that patent, except the last, which is the one claimed to be wrongfully reissued, is in the record.

4. Some attempt is made to assail the novelty of Allender's invention, but as no notice was given of any such attempt, or of the witnesses or other evidence by which that charge was to be supported, it cannot be considered in this case.

On the whole case we concur with the Circuit Court, and its

JUDGMENT IS AFFIRMED.

* Rubber Company *v.* Goodyear, 9 Wallace, 788.

Statement of the case.

STEWART *v.* KAHN.

1. In writs of error under the 25th section of the Judiciary Act of 1789, which gives jurisdiction to this court to review no error but such as appears on the face of the record, &c.—where the writ is to the Supreme Court of Louisiana, the code of which State enacts that—"When the defendant alleges on his part new facts, these shall be considered as denied by the plaintiff: therefore neither replication nor rejoinder shall be allowed," a question was *held* to appear sufficiently on the face of the record when the petition for review in the Supreme Court of the State set out that the question was raised in the court below and decided against, and when the Supreme Court on the question being thus before it decided the case in the same way.
2. The act of June 11th, 1864, "in relation to the limitation of actions in certain cases," is not prospective alone in its operation. Under it, the time which elapsed while a plaintiff could not prosecute his suit by reason of the rebellion, whether before or after the passage of the act, is to be deducted from the operation of any State statute of limitations.
3. The act applies to cases in the courts of the States as well as to those in the Federal courts.
4. Thus construed it is constitutional.

ERROR to the Supreme Court of Louisiana; the case being thus:

On the 10th August, 1860, Bloom, Kahn & Co., of which firm one Levy was a member, all parties being resident traders in New Orleans, gave their promissory note to A. T. Stewart & Co., resident traders of New York, payable March 13th, 1861. Payment was refused on demand at maturity. Very soon after this, that is to say, in April, 1861, the late rebellion broke out, and from the 15th of that month, when its existence was announced by proclamation from President Lincoln, until some time after, May 4th, 1862, at which date the government troops took possession of New Orleans,* the ordinary course of judicial proceedings was so interrupted by resistance to the laws of the United States, that none of the defendants could have been served with process if suit had been brought on the note against them.

On the 11th of June, 1864, Congress passed this act, en-

* See The Circassian, 2 Wallace, 141.

titled "An act in relation to the limitation of actions in certain cases:"

"That whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or arrest of such person—

"Or whenever, after such action, civil or criminal, shall have accrued, such person cannot by reason of such resistance of the laws, or such interruption of judicial proceedings, be served with process for the commencement of the action—

"The time during which such person shall be beyond the reach of judicial process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

On the 16th April, 1866, the Federal courts being now re-established in New Orleans, Stewart & Co. sued Bloom, Kahn & Co. on the note. These set up what is called in Louisiana "the prescription of five years;" equivalent to that which is elsewhere known as a statute of limitation, barring an action after five years. No replication to this plea was put in. The Code of Practice in Louisiana bars replications generally. This code enacts that

"When the defendant in his answer alleges on his part new facts, these shall be considered as denied by the plaintiff; therefore neither replication nor rejoinder shall be admitted;"

And by the settled practice of the State what was embraced in the defendants' answer was open to every "objection of law and fact the same as if specially pleaded." The plaintiffs therefore were to be considered as denying the validity of the State statute of prescription which the defendants had set up in their plea, and as declaring that in virtue of the act of Congress above quoted it was suspended by the rebellion.

The court in which the suit was brought gave judgment

for the defendants. The plaintiffs then filed a petition in the Supreme Court of Louisiana for a rehearing of the case, and, among other things represented in the petition, that in the court below

"They mainly relied upon the act of Congress entitled 'An act in relation to the limitation of actions in certain cases,' approved June 11th, 1864, as a complete answer to the plea of prescription set up by the defendants."

The petition for rehearing also declared that the plaintiffs had filed a written brief in the said District Court, which the rules of that court required them to file, setting out the said act of 1864. This petition was inserted in the record.

The Supreme Court of Louisiana affirmed the judgment in the court below, in these words:

"This is an action upon a promissory note. The defendants pleaded the prescription of five years. The note fell due on the 13th of March, 1861, and the citations were served on the 18th day of April, 1866. More than five years having elapsed after the maturity of the note before the citations were served on the defendants, the plea of prescription must be sustained. It is therefore ordered, adjudged, and decreed, that the judgment of the lower court be affirmed, and that the appellant pay the costs of the appeal."

The plaintiffs now brought the case here.

Prior to the 5th of February, 1867, there was but one enactment on the subject of bringing judgments from the Supreme Courts of States to this court, the well-known 25th section of the Judiciary Act of 1789.* On the day first above mentioned, however, Congress passed another act on the subject;† following, in most respects, the language of the old act, though changing it in some places and leaving out one whole clause in the old act. The important parts of the two acts are here set out in parallel lines; words in the act of 1789 omitted in the act of 1867 being inclosed in

* 1 Stat. at Large, 85. † 14 Ib. 385.

brackets, and words variant in the two enactments being put in italics:

Judiciary Act of 1789.

"SEC. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court [of law or equity] of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity, or 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, treaties or laws of the United States, and the decision is in favor of such their validity, *or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held* under the United States, and the decision is against the title, right, privilege or *exemption* specially set up or claimed by either party, under such [clause of the said] Constitution, treaty, statute, or commission, may be re-examined and reversed, or affirmed in the Supreme Court of the United States upon a writ of error, . . . in the same manner and under the same regulations, and the writ shall have the same effect as if the

Judiciary Act of 1867.

"SEC. 2. *And be it further enacted*, That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or 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, treaties, or laws of the United States, and the decision is in favor of such their validity, *or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised* under the United States, and the decision is against the title, right, privilege, or *immunity* specially set up or claimed by either party under such Constitution, treaty, statute, commission [or authority], may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error . . . in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree

judgment or decree complained of had been rendered or passed in a *Circuit Court.* [But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the beforementioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."]

complained of had been rendered or passed in a *court of the United States.*"

The case being now in this court, two questions were made:

1. Of jurisdiction in this court.
2. Assuming jurisdiction to exist, the correctness of the judgment below.

Mr. E. T. Merrick, for the dismissal, and in support of the ruling below:

It is *said* in the brief of the opposing counsel, that in the Supreme Court below the plaintiffs set up and insisted upon the act of Congress of 1864, as a bar to the prescription. We remember no such fact. The matter must be decided by the record. Certainly there is nothing of record to show that any question respecting the statute of limitations of the United States of June 11th, 1864, was raised or relied upon before the Supreme Court of Louisiana, as a ground of recovery.* Although the act of 1867 is broader than the act of 1789, it must be construed with it; and thus construed there is nothing which contemplates a writ of error for any other matter or thing than that which appears on the face of the record It was not the intention of Congress by the new act to create any new method of trying cases in error.

* Medberry et al. *v.* The State of Ohio, 24 Howard, 413.

A petition to the Supreme Court stating that a particular statute was relied on in the inferior court, does not prove that it was so relied on; still less does it prove that it was relied on in the court above.

Moreover, if the writ is to have the same effect under the act of 1867, "as if the judgment or decree complained of had been rendered or passed in a court of the United States," it will not benefit the plaintiffs in error, because if this case had been tried in the Circuit Court of the United States, in the absence of bills of exception, there is nothing on which to base an examination of the question; much less to reverse the judgment of the lower court.

On the merits: The act of Congress of 1864, in relation to the limitation of certain actions, was meant to bind the courts of the United States alone. This is to be inferred, because as will be conceded, there is no grant of power in the Constitution of the United States to Congress, to prescribe rules of property or practice for the government of the courts of the several States, and because as to matters not intrusted to the government of the United States, the State courts are considered as courts of another sovereignty.* As Congress cannot create the State courts, as it cannot establish the ordinary rules of property, obligations, and contracts, nor in general, denounce penalties for crimes and offences, in the several States, it cannot prescribe rules of proceeding for such State courts.

On the other hand, there is no inhibition in the Constitution of the United States upon the individual States to pass statutes of limitation even where such statutes of limitation bar the judgments of sister States.†

The act suspended the statutes of limitation, in the cases given, both as to crimes and civil actions. This shows that Congress was legislating for the courts and officers of the United States, over which it has jurisdiction; for certainly a State could not bring a writ of error to this court, to re-

* Ableman *v.* Booth, 21 Howard, 516.

† McElmoyle *v.* Cohen, 13 Peters, 328.

verse a judgment of its own courts, which should hold that a criminal offence was barred by the statute of limitation, notwithstanding the impossibility of arresting the offender, for the cause assigned in the statute?

If our view of the purpose of Congress is not correct, then we deny the power of Congress to pass such an act. If Louisiana was a State of this Union (and this court has not failed to consider it as such, as is shown by the numerous writs of error which it has allowed to the State court, and considered), Congress could not constitutionally repeal or suspend State laws, or any subject-matter reserved to the States.

Mr. S. M. Johnson, contra:

Under the peculiar practice of Louisiana, it is next to impossible to raise in the pleadings constitutional or legal questions. The plaintiffs had a right to urge any denial whatever to the plea of prescription of the defendants, the same as if it had been set up in replication. The statute of prescription must be pleaded, because the law itself makes it optional to invoke it or not; but the question whether such statute is in force or has been suspended, or whether it exists at all or not, may be raised by the plaintiff, without spreading upon the record his grounds of objection.

The defendants pleaded a law of that State, and it was clearly the duty of the court to decide upon the validity of that law. They did decide that it was valid, when confessedly it was not valid. That was their error, and it was an error which deprived us of essential rights, the enforcement of which we had invoked in the courts of Louisiana, and which we are here to insist upon.

Perhaps, therefore, even under the Judiciary Act of 1789, and even if there were no petition in the record showing that the matter turned on the act of 1864, this court might have jurisdiction.

But the petition which is made part of the record does show specifically "the before-mentioned question of the validity or construction" of a statute of the United States; to

Recapitulation of the case in the opinion.

wit, the said statute of 1864. We are thus brought directly within the language even of the act of 1789:

"Where is drawn in question the *validity* of a statute of any State, &c., ... on the ground of their being repugnant to the laws of the United States, and the decision is in favor of such their validity."

But this proceeding in error is instituted under the act of 1867, which is in addition to and amendatory of the act of 1789. The act of 1867 makes a material change in the law of 1789. All that part of the last-named act which required that the matters involved in the case must have been discussed and decided upon in the lower court, and *must appear of record*, is omitted in the act of 1867. The requirement, that questions raised shall appear of record under the act of 1789, was intentionally omitted from the act of 1867, to meet the contingency of a case like this, where the State judges manifestly intended to defeat an appeal to this court by refusal to notice the questions raised in the pleadings.

As to the merits, the case is completely settled by *Hanger* v. *Abbott*,* itself acted upon and in effect affirmed by *The Protector*.†

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Louisiana. The record discloses the following case: On the 16th of April, 1866, the plaintiffs in error, citizens and residents of the State of New York, brought suit against the defendants in error in the fourth District Court of New Orleans, upon a promissory note made at New York on the 10th day of August, 1860, by the defendants, under their firm name of Bloom, Kahn & Co., to the plaintiffs, by their firm name of A. T. Stewart & Co., for the sum of $3226.24, payable at the office of A. Levy & Co., in the city of New Orleans, with the current rate of exchange on New York,

* 6 Wallace, 532. † 9 Id. 687

Recapitulation of the case in the opinion.

seven months from date. The plaintiffs, by their petition, claimed also to recover a few dollars for the balance of an account. The note was duly protested at maturity for non-payment. On the 28th of the same month of April the defendant, Levy, filed his answer, wherein he alleged that he knew nothing of the correctness of the note, or account, and demanded full proof. He also pleaded the statutory prescription of that State of five years as a bar to the action. The other defendants, Bloom, Kahn & Adler, answered subsequently. They denied all the allegations of the petition, and also set up the defence of prescription.

A statute of the State provides, that when "new facts" are alleged in the answer, "neither replication nor rejoinder shall be admitted." The facts are "considered as denied by the plaintiff."*

Kahn was examined upon interrogatories, and answered that the defendants' firm was constituted as alleged in the plaintiffs' petition, and that their place of business at the date of the note was Clinton, Louisiana. Another witness testified that he had known the defendant, Levy, since the year 1854 or 1855; that Levy had resided in New Orleans since that time, and was there during the period of the rebellion. At the trial the plaintiffs submitted this testimony, and the note and protest, to the court. It does not appear that any evidence was offered touching the account. The court gave judgment for the defendants. Upon what ground it was given is not disclosed in the record.

The plaintiffs appealed to the Supreme Court of the State. In that court they insisted that the act of Congress of June 11, 1864, entitled "An act in relation to the limitation of actions in certain cases," interrupted the running of the prescription, and entitled them to recover. The Supreme Court affirmed the judgment of the District Court. The record shows they held that "more than five years having elapsed after the maturity of the note before the citations were served

* Code, Art. 329.

on the defendants, the plea of prescription must be sustained." It is clear that the judgment was given solely upon this ground. The case would have been more satisfactorily presented if a bill of exceptions had been taken at the proper time, and the material facts in that way placed upon the record. But enough is shown to develop clearly the action of the Supreme Court of the State, and the point we are called upon to review. There is no controversy as to the facts. Under the circumstances, a refusal on our part to exercise the jurisdiction invoked would involve a sacrifice of substance to form and unwarrantably defeat the ends of justice.

Our attention has been called to the second section of the act of Congress of February 5, 1867, amending the Judiciary Act of 1789.* That section is to a great extent a transcript of the 25th section of the prior act. There are several alterations of phraseology which are not material. A change of language in a revised statute will not change the law from what it was before, unless it be apparent that such was the intention of the legislature.† But at the close of the second section there is a substantial addition and omission. The addition in no wise concerns this case, and need not be remarked upon. The omission is of these words in the 25th section of the original act: "But no other error shall be regarded as a ground of reversal in any such case, as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."‡

It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled.§

* 14 Stat. at Large, 385.

† Theriat *v.* Hart, 2 Hill, 381, note; Douglass *v.* Howland, 24 Wendell, 47.

‡ 1 Stat. at Large, 85.

§ Ellis *v.* Paige et al., 1 Pickering, 43; Nickols *v.* Squire, 5 Id. 168; Bartlet *v.* King's Executors, 12 Massachusetts, 537.

Whether the 25th section of the original act is superseded by the second section of the amendatory act is a point not necessary in this case to be determined; for, conceding the negative, the question before us is within the omitted category, is presented by the record, and is the only one we are called upon to consider. It is alike within the section in question of the original and of the amendatory act. In either view there is no jurisdictional difficulty.

In *Hanger* v. *Abbott*,* this court held that the time during which the courts in the States lately in rebellion were closed to the citizens of the loyal States is, in suits since brought, to be deducted from the time prescribed by the statutes of limitations of those States respectively, although the statutes themselves contain no such exception, and this independently of the act of Congress of 1864. In the case of *The Protector*,† the same rule was applied to the acts of Congress of 1798 and 1803, fixing the time within which appeals shall be taken from the inferior Federal tribunals to this court. The case before us was decided prior to the decision of this court in *Hanger* v. *Abbott*, with which it is in direct conflict. But apart from the act of 1864, it would present no ground of Federal jurisdiction. *Hanger* v. *Abbott* came into this court under the 22d section of the Judiciary Act of 1789, or if that section is superseded, under the second section of the amendatory act of 1867. Its determination, therefore, depends necessarily upon the construction and effect to be given to the act of 1864.

The note upon which the suit is founded matured upon the 13th of March, 1861. The prescription of five years expired on the 13th of March, 1866. This action was commenced on the 16th of April, 1866, one month and three days after the period of limitation had elapsed.

The act of 1864 consists of a single section containing two distinct clauses. The first relates to cases where the cause of action accrued subsequent to the passage of the act. The second to cases where the cause of action accrued before its

* 6 Wallace, 532. † Id. 687.

passage. The case before us belongs to the latter class. The first clause of the statute may, therefore, be laid out of view. The second enacts that "whenever, after such action —civil or criminal—such have accrued, and such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

A severe and literal construction of the language employed might conduct us to the conclusion, as has been insisted in another case before us,* that this clause was intended to be made wholly prospective as to the period to be deducted, and that it has no application where the action was barred at the time of its passage. Such, we are satisfied, was not the intention of Congress. A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitutes the law.† The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal States having causes of action against parties in the rebel States if the prescription had matured when the statute took effect, although the occlusion of the courts there to such parties might have been complete from the beginning of the war down to that time. The same remarks would apply to crimes of every grade if the offenders were called to account under like circumstances. It is not to be supposed that Congress intended such results. There is no prohibition in the Constitution against retrospective legislation of this character. We are of the opinion that the meaning of the statute is, that the time which elapsed while the

* See *infra*, 511, United States *v.* Wiley, the case immediately succeeding.—REP.

† United States *v.* Freeman, 3 Howard, 565; Same *v.* Babbit, 1 Black, 61; Slater *v.* Cave, 3 Ohio State, 80.

plaintiff could not prosecute his suit, by reason of the rebellion, whether before or after the passage of the act, is to be deducted. Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law-makers were governed — lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction — we cannot doubt the soundness of the conclusion at which we have arrived.

On the 15th of April, 1861, President Lincoln issued his proclamation announcing the existence of the rebellion, and calling for volunteers to the number of 75,000 to suppress it. On the 19th of the same month he issued a further proclamation, announcing the blockade of Louisiana and other States in rebellion. By a proclamation of the 16th of August, 1861, he declared that the States named in it, Louisiana being one of them, were in a state of insurrection against the United States, and forbade all commercial intercourse between them and the other States of the Union. This proclamation was authorized by the 5th section of the act of July 13, 1861. The authority of the United States was excluded from the entire State of Louisiana from the date of the first proclamation down to the month of May, 1862, when the city of New Orleans and a small strip of adjacent territory lying along the Mississippi River below that city was reclaimed from the dominion of the rebels by the military forces of the United States. Even then no court there, State or Federal, was open to the plaintiffs. Levy was there, but the other defendants were elsewhere in the State whither the arms of the United States had not penetrated. But, without pursuing the subject further, here was a period of more than a year to be deducted, according to the act of Congress, from the time necessary, under the State law, to create a bar, and this defeated the prescription relied upon by the defendants.

But it has been insisted that the act of 1864 was intended to be administered only in the Federal courts, and that it

has no application to cases pending in the courts of the States.

The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. All those who could not sue in the courts of the United States, including the loyal men who were driven out by the insurrection and returned after it ceased, and those of the same class who remained at home during the war, would be deprived of its benefits. The judicial anomaly would be presented of one rule of property in the Federal courts, and another and a different one in the courts of the State, and debts could be recovered in the former which would be barred in the latter. This would be contrary to the uniform spirit of the National jurisprudence from the adoption of the Judiciary Act of 1789 down to the present time.

The act thus construed, it is argued, is unwarranted by the Constitution of the United States, and therefore void.

The Constitution gives to Congress the power to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The President is the commander-in-chief of the army and navy, and of the militia of the several States, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority. It only applies coercively the principle of law of nations, which ought to work the same results in the courts of all the rebellious States without the intervention of this enactment.* It promotes justice and honesty, and has nothing penal or in the nature of confiscation in its character. It would be a strange result if those in rebellion, by protracting the conflict, could thus rid themselves of their debts, and Congress, which had the power to wage war and suppress the insurrection, had no power to remedy such an evil, which is one of its consequences. What is clearly implied in a written instrument, is as effectual as what is expressed.† The war power and the treaty-making power, each carries with it authority to acquire territory.‡ Louisiana, Florida, and Alaska were acquired under the latter, and California under both. The act is within the canons of construction laid down by Chief Justice Marshall.§

This objection to the statute is untenable.

The judgment of the Supreme Court of the State is REVERSED. The cause will be remanded to that court, with directions to overrule the plea of prescription, and to proceed in the case

IN CONFORMITY TO LAW.

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* Hanger *v.* Abbott, 6 Wallace, 532.

† United States *v.* Babbit, 1 Black, 61.

‡ American Insurance Company *v.* Canter, 1 Peters, 511.

§ McCulloch *v.* Maryland, 4 Wheaton, 316.

UNITED STATES v. WILEY.

1. The effect of the rebellion was to suspend the running of statutes of limitations during its continuance, as well in regard to the claims of the government against its own citizens resident in the rebellious States as to the claims by citizens of the loyal States against that same class of persons. The doctrine of *Hanger v. Abbott* (6 Wallace, 532), and *The Protector* (9 Id. 687), which was applied to the latter case, affirmed and applied to the former.
2. This general rule was not changed by the act of Congress of June 11th, 1864 (13 Stat. at Large, 123), relative to the limitation of certain actions. On the contrary, that statute requires all the time to be deducted during which the suit could not be prosecuted by reason of resistance to the laws or interruption of judicial proceedings, whether such time was before or after its passage. *Stewart* v. *Kahn* (*supra*, 493), affirmed.

ERROR to the Circuit Court for the District of Virginia; the suit below being one by the *United States* against J. F. Wiley, former marshal of the Eastern District of the State just named, upon his official bond. The case was this:

A statute of April 10th, 1806,* "relating to bonds given by marshals," enacts by its second section, that it shall be lawful in case of a breach of condition, "for any person, persons, or body politic thereby injured, to institute a suit." A fourth section enacts:

"That *all* suits on marshals' bonds . . . shall be commenced and prosecuted *within six years* after the right of action shall have accrued, saving nevertheless the rights of infants, *feme coverts*, and persons *non compos mentis*, so that they sue within three years after their disabilities are removed."

In 1861 the Southern rebellion broke out. The present cause of action arose in the previous year.

Four years or more afterwards, that is to say, on the 11th of June, 1864,† Congress passed an act enacting:

"That whenever, during the existence of the present rebellion, any action, civil or criminal, *shall accrue* against any per-

* 2 Stat. at Large, 374. † 13 Ib. 123.

son, who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of said action—

"Or the arrest of such person; or whenever, after such action *shall have accrued*, such person *cannot*, by reason of such resistance to the execution of the laws of the United States, or such interruption of the ordinary course of judicial proceedings, *be arrested, or served with process* for the commencement of the action—

"The time during which such person *shall so be* beyond the reach of legal process, shall not be deemed or taken as any part of the time limited by law for the commencement of the action."

On the 15th of February, 1869, about nine years after the cause of action arose, this suit was brought. The defendant pleaded the statute of April 10th, 1806. A general replication was put in, with leave to offer in evidence all matters which might have been replied specially. It was agreed of record, "that, from the 24th day of May, 1861, to the 24th day of May, 1865, the defendants were actual residents of the State of Virginia, and that, during the whole of that period, by reason of resistance to the execution of the laws of the United States and the interruption of the ordinary course of judicial proceedings in the State of Virginia, the defendants could not be served with process for the commencement of this action."

The court below gave judgment for the marshal, and the United States brought the case here.

Mr. Akerman, Attorney-General, Mr. Bristow, Solicitor-General, and Mr. Hill, Assistant Attorney-General, for the United States, contended, 1st, that the act of the 10th April, 1806, was meant to limit suits brought by individuals on the marshal's bond, and that the limitation of six years prescribed in it did not touch the rights of the government; against which it was a general principle that limitations did not run.

2d. That however this might be, the case was covered by

Hanger v. *Abbott*,* and *The Protector*,† to the effect that the time during which the courts in the lately rebellious States were closed to the opposing belligerents, was to be excluded from the computation of time fixed by the statute of limitations within which suits must be brought; that there was no reason, if the statute of limitations ran against the United States at all, why this exclusion should not be made in respect of suits brought by them as well as suits brought by their citizens.

Mr. Tazewell Taylor, contra:

The language of the act of April 10th, 1806, is general. No exception is made in favor of the government. The government could have repealed it if it had desired to. Its not doing so is evidence of its purpose to be bound by it.

Does the simple fact of war alter the case? *Hanger* v. *Abbott*, and *The Protector*, only rule that war suspended the statutes running against citizens' claims by one citizen on another. *They* had no right to sue during war. The act of the government had made it criminal for them to do so. But the case with the United States was different. There was never a suspension for a moment, of the right of the United States to sue; no act of the government which was intended to prevent it from commencing an action. Moreover, if the cases just above referred to are open for any reconsideration, it is worthy of remark that it is a well-settled rule of construction in England, that the courts will not ingraft exceptions upon a general statute of limitations, merely because they stand upon as strong grounds of reason, or upon the same grounds as the exceptions, which may have been introduced into it; or because it may be thought unjust or unreasonable, that the statute should not contain them. We cite "the great case," as it is called by Sir William Grant, of *Stowel* v. *Lord Zouche*, in Plowden, pp. 353, 369; and *Beckford* v. *Wade*,‡ the latter case decided upon great consideration, and after a review of the leading authorities, by Sir W. Grant, one of the most emi-

* 6 Wallace, 532. † 9 Id. 687. ‡ 17 Vesey, 88.

nent judges, and one of the ablest and soundest reasoners, that ever sat in the English Court of Chancery. Though the case of *Beckford* v. *Wade* is a different case from the one now before the court, yet in that case the master of the rolls inquires at considerable length into the reasonableness of the rule to which we have referred, and reviews some of the most respectable and weighty authorities by which it is established. His opinion seems to be in favor of the rule, and he refers to the cases of *Lord Buckinghamshire* v. *Drury*,* and *Stowel* v. *Lord Zouche*, to show that infants and married women would have been bound by general statutes of limitations, unless they had been expressly excepted out of them. He further states, that absent defendants had the benefit of the statute of limitations, until a statute was passed in the reign of Queen Anne to prevent them from taking advantage of it. Surely there could not be in any case stronger reasons for excepting it from the statute, than in the case of a plaintiff who could not sue, because the debtor had absconded or chose to be out of the realm. Yet all attempts to introduce such an exception *had failed*, until the legislature was obliged to interfere. He refers also to the cases of *Hall* v. *Wybourn*,† and *Aubry* v. *Fortescue*,‡ with apparent approval; in which the opinion had been expressed, that even if the courts were shut up in time of war, *so that no original could be served*, the statute of limitations would continue to run, and certainly no cases can stand upon stronger grounds than some of the cases mentioned above, in which the courts constantly refused to make any exception.

Does the act of June 11, 1864, alter the case? That act has two branches, and in both its operation is prospective. With respect to those actions, which in the language of the act "shall accrue," this is palpably clear. It is clear, also, that in relation to actions, which *shall have accrued*, it is prospective to this extent, that although it applies to past transactions, that is to say, to causes of action which had accrued before its passage, still, even in those cases, it de-

* Wilmot, 177. † 2 Salkeld, 420. ‡ 10 Modern, 206.

ducts from the time which may have elapsed since the cause of action arose, only so much of the time of the rebellion, or of the period when process could not be served, as elapsed *after* the passage of the act. This appears from the use of the phrases, "cannot be," and "shall so be." The act does not use the words, "*cannot have been*," but "cannot *be*." It does not say, "shall *so have been*," but who "shall *so be*" beyond the reach of legal process. Both these expressions are prospective, and can only mean, that if, *after the passage of the act*, any person cannot be arrested, then the time, *after the passage of the act*, during which process is obstructed, shall be deducted, in computing the time within which the action may be, or might have been, brought.

Congress has, therefore, said, that *so much* of the time of the rebellion as elapsed after the passage of the act aforesaid shall not be computed in applying the act of limitations. This is equivalent to saying that the residue of the term of the war shall be computed.

What we ask the court to do is, to consider the plain language of an act of Congress, and to carry out the intent of the law, as gathered from that language. We insist, therefore, that, even if the act of limitations of 1806 ought, in the absence of all other legislation on the subject, to have been construed in the same way that the statute of Arkansas was by the court in *Hanger* v. *Abbott*, still, the act of June 11th, 1864, has changed the law.

Mr. Justice STRONG delivered the opinion of the court.

Whether the act of April 10th, 1806, which prescribes a limitation to suits upon marshals' bonds, is applicable to suits brought by the United States, is a question which we do not propose now to answer, for, if it is, we are still of the opinion that the defendants' plea of the statute was an insufficient bar.

The cause of action arose in 1860, and the present suit was brought on the 15th of February, 1869. But it is stipulated between the parties that from the 24th day of May, 1861, to the 24th day of May, 1865, the defendants were

actual residents of the State of Virginia, and that during the whole of that period, by reason of resistance to the execution of the laws of the United States, and the interruption of the ordinary course of judicial proceedings in said State of Virginia, the defendants could not be served with process for the commencement of the action. We know, judicially, that during the four years in which the process could not be served there existed a state of war, and that the inability to effect service was caused by that. The question, therefore, is whether the time during which the war existed, and during which it was impossible to serve process for commencement of suit, is to be deducted from the time which elapsed between 1860 and February 15th, 1869.

In *Hanger* v. *Abbott* it was decided that the effect of the war was to suspend the running of statutes of limitation during its continuance, in suits between the inhabitants of the loyal States and the inhabitants of those in rebellion. The same doctrine was repeated in substance in *The Protector*. It would answer no good purpose to go behind the decisions and review the reasons upon which they are founded. We are still of opinion that they rest upon sound principle. But it is said those decisions only rule that the war suspended the statutes' running against claims by one citizen upon another, and that they do not relate to claims of the government against its own citizens resident in rebellious States. This may be conceded, but the same reasons which justify the application of the rule to one class of cases require its application to the other. True, the *right* of a citizen to sue during the continuance of the war was suspended, while the *right* of the government remained unimpaired. But it is the loss of the ability to sue rather than the loss of the right that stops the running of the statute. The inability may arise from a suspension of right, or from the closing of the courts, but whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded

claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have. It is quite obvious that this is the case, as well where the government is the creditor as where the creditor is a citizen of the government, and if, therefore, the running of the statute is suspended in favor of the citizen, with equal reason must it be in favor of the government. There is also great force in the thought suggested by the observations made in *Hanger* v. *Abbott*, that "unless the rule be so, the citizens of a State may escape the payment of their debts to the government by entering into an insurrection and rebellion, if they are able to close the courts and successfully resist the laws until the bar of the statute shall have become complete. Such a doctrine is too unreasonable to be for an instant admitted."

It has been argued, however, on behalf of the defendants in error, that if the general rule be as above stated, it was changed by the act of Congress of June 11th, 1864. The operation of the statute, it is said, is to direct that the time *after the passage of the act* during which process might be hindered shall be deducted in computing the time within which the action should have been brought, and hence that an implication arises that the time antecedent to its passage shall not be deducted. Such is not our understanding of the enactment. It is, doubtless, prospective as furnishing a rule for the action of courts, but it did not abrogate the common law. Even were it admitted that the time required to be deducted is only that which was after the passage of the act, there is no necessary implication that the time antecedent to its passage should be taken as a part of the period limited by law for the commencement of actions. The act of March 2d, 1867,* authorized appeals and writs of error

* 14 Stat. at Large, 545.

from and to courts in judicial districts when the regular sessions of the courts had been suspended by insurrection or rebellion, if brought or sued out within one year from the passage of the act. This act might with more reason be claimed as raising an implication that such appeals or writs of error cannot be allowed after the expiration of a year from its passage. Yet in *The Protector* it was held that an appeal was in time though not taken until July 28th, 1869, more than eight years after the final decree in the Circuit Court, and more than two years after the enactment of 1867, and this because the four years of the war were to be deducted. In other words, the statute being affirmative only, raised no implication of an intent to repeal a former statute or alter the common law to which it was not repugnant.

The purpose of the act of 1864 was manifestly remedial, to preserve and restore rights and remedies suspended by the war. Hence it is entitled to a liberal construction in favor of those whose rights and remedies were in fact suspended. The mischief it sought to remove would be but half remedied were it construed as contended for by the plaintiffs in error. It is not, therefore, to be admitted that the intention of Congress was to prescribe a deduction only of the time which might elapse after the passage of the act, during which it might be impossible to serve process. On the contrary, we are of opinion that the statute requires all the time to be deducted during which the suit could not be prosecuted by reason of resistance to the laws, or interruption of judicial proceedings, whether such time was before or after its passage. Such we have decided to be its meaning at the present term, in *Stewart* v. *Kahn*,* and it is unnecessary to repeat the reasons given for the decision.

These observations are sufficient to show that in our opinion there was error in entering a judgment for the defendants.

JUDGMENT REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

* *Supra*, 493, the case immediately preceding.

Syllabus.

SEYMOUR *v.* OSBORNE.

1. The invention of William H. Seymour and of Palmer & Williams, explained and defined.
2. The grant of letters patent by the commissioner of patents when lawfully exercised, is *primâ facie* evidence that the patentee is the first inventor of that which is described and claimed in them.
3. The settled practice in equity is to require a respondent to give notice in his answer of the names and residence of those persons whom he intends to prove to have possessed a prior knowledge of the invention, and where the same had been used.
4. Recitals in letters patent in the absence of fraud are conclusive evidence that the necessary oaths were taken before the patent was granted.
5. Where an invention does not embrace an entire machine, the part should be specified and pointed out, as *ex. gr.* the coulter of the plough, or the divider or sweep rake of a reaping machine, *so* that another party may construct the plough or reaping machine, provided he does not use the part specified.
6. Neither reissued nor extended patents can be abrogated by an infringer in a suit against him for infringement, upon the ground that the letters patent were procured by fraud in prosecuting the application for the same before the commissioner.
7. The act of the commissioner in accepting a surrender and granting a reissue is final and conclusive, and not re-examinable in a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, or that there is such a repugnancy between the old and the new patent that it must be held as matter of *legal construction* that the new patent is not for the same invention as that embraced and secured in the original patent.
8. Interpolations in a reissued patent of new features or ingredients or devices, which were neither described, suggested, nor substantially indicated in the original specifications, drawings, or patent office model, are not allowed.
9. Parol testimony as to the scope of an original invention, is not allowable on an application for a reissue as the basis of interpolation of new matter.
10. The identity of invention in the original and reissued patent in such suits, is a question of comparison of the two instruments to be made by the court, aided or not by the testimony of experts, as it may or may not appear that one or both may contain technical terms requiring the assistance of such persons in defining them.
11. To raise such a question, the defendant in a patent suit must introduce the original patent.
12. A claim which might otherwise be held to be bad as covering a function or result, when containing the words "substantially as described," must

be construed in connection with the specification and be limited thereby; and when so construed it may be held to be valid. The claims in this case, when so construed, were so held.

13. Changes in the construction and operation of an old machine, so as to adapt it to a new and valuable use which the old machine had not, are patentable, and may consist either in a material modification of old devices, or in a new and useful combination of the several parts of the old machine.

14. Utility, in the sense of the patent law, does not require such general utility as to supersede all other inventions that can accomplish the same object.

15. Crude and imperfect experiments do not confer a right to a patent. He is the first inventor who first perfects and adapts an invention to use.

16. Desertion of an alleged prior invention, consisting of a machine never patented, may be proved by showing that the inventor, after constructing it, broke it up or laid it aside, as something requiring more thought and experiment; provided it appears that those acts were done without any definite intention of resuming his experiments.

17. Under the act of Congress allowing reissues in divisions, it may require the use of several reissues to constitute a complete machine, and on a proceeding for infringement these may be introduced in one bill.

18. A description in a prior publication, in order to defeat a patent, must *contain* and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms, as to enable any person skilled in the art or science to which it appertains, to make, construct, and practice the invention patented. It must be an account of a complete and operative invention, capable of being put into practical operation.

19. The extent to which either the inventor of a device or of an entire machine, or of a mere combination, can invoke the aid of the doctrine of equivalents, is the same, except that a combination is not infringed unless by a machine containing all the material ingredients patented, or proper substitutes for one or more of such ingredients, *well known to be such* at the time when the patent was granted.

20. A question of infringement is best determined by the court, by a comparison of a defendant's machines with mechanism described in patent, and of their modes of operation.

21. The use of one post and a supporting frame attached thereto in a reaping machine, is an obvious equivalent for the two posts specifically mentioned in the patent of Palmer and Williams.

APPEAL from the Circuit Court for the Northern District of New York.

The suit below was on a bill by W. H. Seymour and D. S. Morgan, for the infringement by Osborne of five patents owned by them, for improvement in reaping machinery.

Statement of the case.

Two of these patents covered the inventions of Seymour —one (No. 72) relating to the shape or construction of the grain platforms, and its special location in reference to the cutting apparatus—the other (No. 1683) involving the gathering-reel as an additional element to the combination just named.*

The other three patents in controversy were granted to secure inventions made by Palmer and Williams, assignors of the complainants. Two of the latter patents (No. 1682 and No. 4) were for the employment of a discharging sweep-rake in connection with the peculiarly shaped platform, which was conceded to have been the invention of Seymour.†

The third patent of Palmer and Williams (No. 10,459) was for the means of sustaining the reel or grain-gathering device, consisting of a prolonged axle and two supporting posts, placed at one end of the reel only, leaving the other end free.‡

The court below was of the opinion that the proofs of the complainants did not show any infringement, and so dismissed the bill. From this decree the complainants took this appeal.

The leading parts or features of a reaping machine are three in number.

First. The part which gathers or presses the standing

* Seymour's patent was granted July 8th, 1851, and this patent was reissued July 10th, 1860, in decisions 1003, 1004, 1005. Reissue No. 1005 was again surrendered and reissued May 7th, 1861, numbered reissue 72, which was in this suit. Reissue No. 1003 was also surrendered and reissued May 3d, 1864, as reissue No. 1683, which was also in this suit.

† Palmer and Williams obtained original patent dated July 1st, 1851. This was surrendered April 10th, 1855, which was again surrendered January 1st, 1861, and reissues 4 and 5 granted. Reissue 5 was surrendered May 31st, 1864, and reissue 1682 granted in lieu thereof. Reissues 4 and 1682 are concerned in this suit.

‡ Palmer and Williams obtained a separate patent for reel-support, January 24th, 1854, numbered 10,459, which patent is in this suit.

grain to the cutting apparatus, and this has been called a reel. (Fig. 1.)

Second. The cutting apparatus which severs the stalk;

FIG. 1.

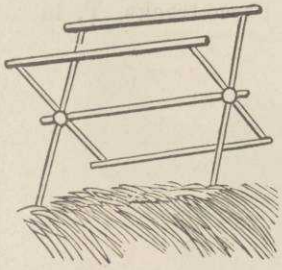
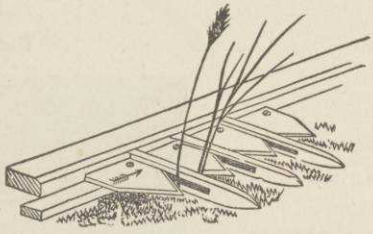


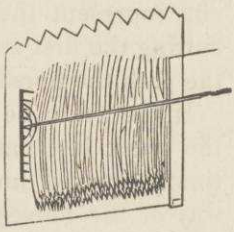
FIG. 2.



which cutting apparatus usually consisted of a vibrating scalloped sickle, sliding through a series of fingers or guards. (Fig. 2.)

Third. A platform on which the grain is received, after it has been severed from the stalk. (Fig. 3.) In connection with the platform there is also to be noticed, its shape, and the arrangements for removing the grain therefrom, and depositing it on the ground in gavels or bundles ready for the binder. The latter arrangement usually consisted, in practice, prior to the patents in controversy, of a hand-rake and device for supporting the body of the raker on the machine, as shown in Figure 5, further on.

FIG. 3.



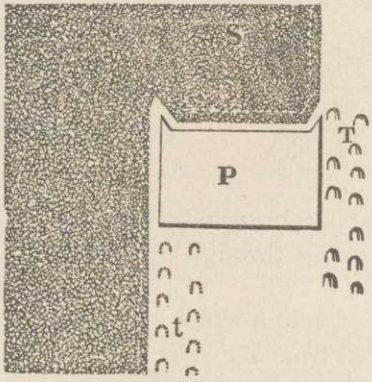
These several parts in the machine were necessarily so arranged with reference to each other as to co-operate in producing the desired result, viz., that of cutting the grain and depositing it on the ground in bundles, adapted to being readily bound into sheaves.

The reaping machine, when doing its work, passes around the field, the horses being attached in front, and to one side of it, and if, while cutting the first swath, the grain was to

pass directly back and fall on the ground in the rear of the sickle, as the horses came around with the machine to cut the second swath, they would walk over and trample upon this grain which had been just cut.

Thus, if S represents the standing grain and P the platform, and if the distinctly-marked horse-tracks, T, in the

FIG. 4.



cut, represent the path just passed over by the horses, in cutting the first swath, then the dotted horse-tracks, t, show the path the horses will pass over on their next round.

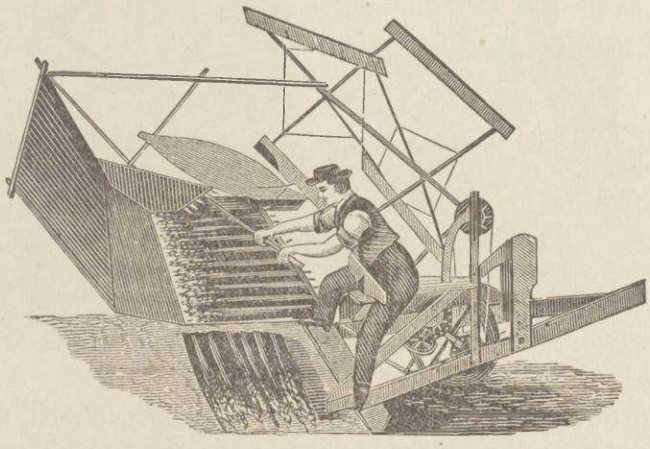
If the grain be thrown from the platform so as to fall on the track just passed over by the horses (*i. e.*, on the distinctly-marked horse-tracks T), it will then be out of the way of the horses on their next round. If, however, the grain be discharged directly backwards, immediately behind the sickle, it will be in the way of the horses on their second round, and, in that case, binders must be employed to follow the machine and bind the grain into sheaves and lay it to one side, before the horses come around with the machine to cut the succeeding swath.

It is evident that the proper place to discharge the grain is in the path just passed over by the horses; and behind the horses, because it will then be out of the way of the horses on their next round.

Perhaps the most usual mode of discharging grain prac-

ticed prior to the patent in controversy here, is shown in the accompanying sketch.

FIG. 5.



The plate represents the arrangements for discharging the grain, and also the relative position of cutter, reel and platform, as well as that of the gavel or sheaf deposited on the ground. The raker is supported upon that machine by a seat or stand which sustains the lower part of his body, leaving the upper part of his body free, to enable him to operate the hand-rake with his arms. From this position he reaches the cut grain on the platform back of the reel, and by a sweep of his arms delivers it on the ground, either diagonally or more or less at right angles to the track in the path passed over by the horses.

This mode of delivering the grain, however, was fatiguing to the raker, and frequently the grain was deposited in a straggling manner upon the ground, and more or less obliquely to the track or path of the machine.

Obed Hussey, one of the earliest inventors of reaping machines, constructed his machines without a reel, and with a square platform, and discharged the grain when cut immediately in the rear of the platform, as shown in the drawing, Figure 6.

FIG. 6.

Obed Hussey's Machine.

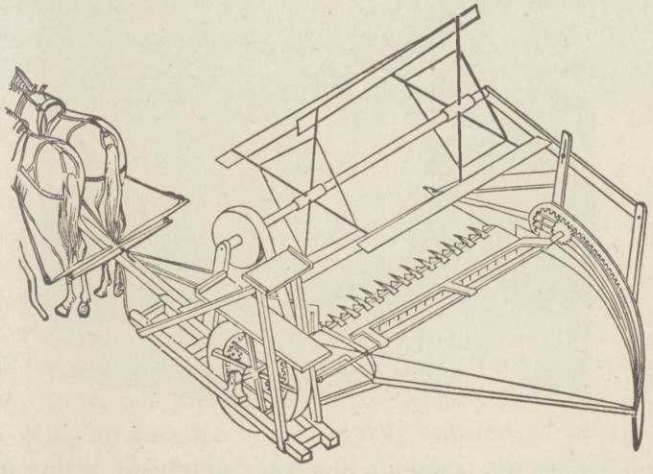
In this machine, the grain was discharged directly into the path to be passed over by the horses in their next round, and had therefore to be gathered up immediately as fast as cut. Some machines were also constructed by Hussey with a straight guideboard on the platform, which was adjustable within certain limits, and which, to a certain extent, caused the cut grain to be pressed to one side sufficiently for a single horse or tandem team to pass on the next round without trampling on the cut grain. Hussey also made machines with two platforms—one platform attached to the rear of the other—and employed two men, one to rake the grain back, and the other to discharge it to one side. He likewise made a reaping machine with a square platform, to the rear of which was bolted an angular addition, giving to the whole where the addition was attached an angular form. This machine was made in 1848, and after being made, it was removed in the latter part of the summer of 1848, from Hussey's shop in Baltimore, of which place he was at the time a resident, to the railroad depot, and (as the witnesses understood) to be shipped for trial, but they did *not know* where it was to go, or whether, in fact, it was ever so shipped or tried. Some time in 1849, or later, this machine reap-

peared at the shop of Hussey, and had the appearance of having been used some little. On its return to the shop it was set aside, and nothing more was done to it, or with it until it was looked up in connection with this suit.

An important question arose upon this state of facts as to whether that last machine, even if conceded to be the same in principle with that of the complainants, amounted in view of law to an anticipation of their invention.

The invention of Seymour consisted in constructing the platform upon which was received the grain in the shape of a quadrant or sector of a circle, and placing it just behind the cutting apparatus, and in such relation to the main frame that the cut grain could be swept around on the arc of a circle, and dropped on to the ground behind the horses, so as to be so far removed from the standing grain as to leave room for the horses and frame to pass between the standing grain and the gavels, thereby obviating the necessity of taking up the cut grain as fast as cut, and at the same time doing the work more perfectly. It is here shown.

FIG. 7.



Seymour's Machine.

Such being Seymour's invention, he obtained an original patent dated July 8, 1851, and by successive reissues and

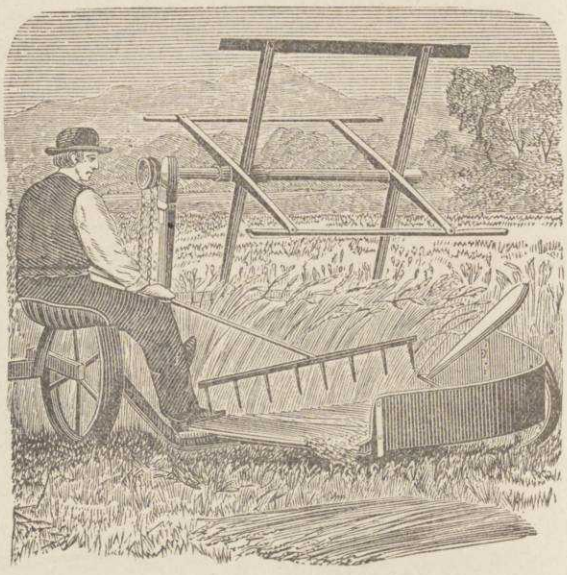
divers divisions thereon, among other things, two claims were allowed to him, one in reissue No. 72, as follows, viz.:

"*A quadrant-shaped platform, arranged relatively to the cutting apparatus substantially as herein described, for the purpose set forth.*"

The other claim allowed to him was in reissue No. 1683, on the basis of the same original patent, as follows, viz.:

"*The combination in a harvesting machine of the cutting apparatus (to sever the stalks) with a reel, and with a quadrant-shaped platform located in the rear of the cutting apparatus, these three members being and operating as set forth.*"

FIG. 8.



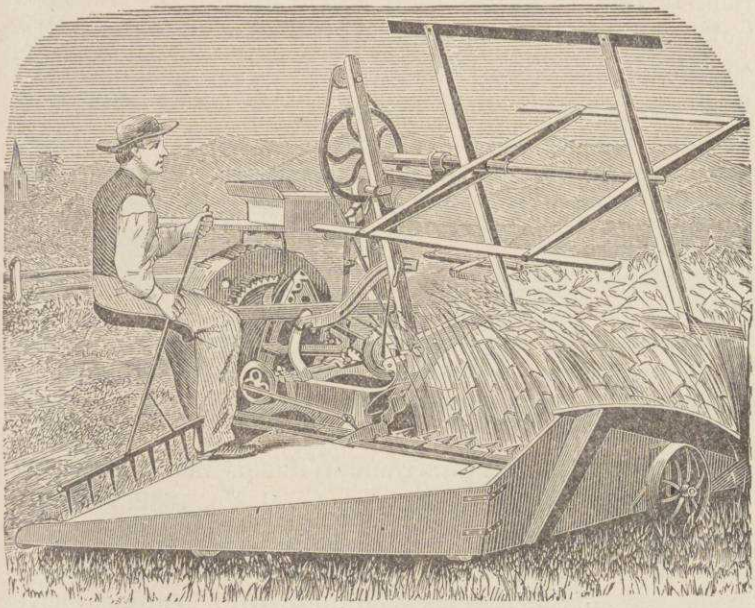
In Figure 8 is shown a quadrant platform cutting apparatus, and the operation of discharging the grain by hand-by sweeping it in the arc of a circle. The relative position of the parts also to the reel is shown, the discharging hand-

Statement of the case.

rake striking the cut grain immediately after it is deposited by the reel on the platform.

The complainants alleged that the defendants infringed these two claims by the use of a machine such as is shown in the following sketch.

FIG. 9.



The Defendant's Hand-raker.

This machine was used with a hand-rake. The defendants contended that the complainants' claim was for a quadrant-shaped platform only, and that their own platform was composed of two straight side pieces placed together at an angle.

The court below decided that although this form of the platform made it *in effect* a quadrant-shaped platform; yet that in view of Hussey's, and of Nelson Platt's platform, the complainants were only legally entitled to hold under their claim the *precise shape* of platform invented and described by Seymour, and that as so limited, it had not been infringed by the defendants, and that the doctrine of equivalents could not be invoked in such a case on behalf of plain-

tiff's patent, relying on *Burr* v. *Duryee*. The position thus assumed by the court below was pressed upon this court by the counsel of the defendants, the now appellees.

The machine of Hussey last above referred to, with the angular piece bolted to the platform, was urged as having been a full and complete anticipation of Seymour's invention.

The complainants, or now appellants, on the other hand, contended that Seymour's invention of the quadrant platform was complete in or before the harvest of 1849; that Hussey's machine, with the angular rear piece, had no reel, and was therefore no answer to reissue No. 1683, which had a reel as part of its claim; and that as to reissue No. 72, Hussey was *not proved* to have anticipated Seymour as an inventor, and that his platform was, in point of law, an abandoned or incomplete experiment.

A machine of one Burral was set up in the answer but not in the argument. Irrespective of plain want of identity it was proved to be posterior in date. It need not be described.

The inventions of Palmer and Williams involved in this suit are embraced in reissue No. 4 and No. 1682, and pertain to the employment of an automatic sweep-rake in combination with the quadrant platform, which as a separate device was conceded as between these two inventors to have been the invention of Seymour.

The annexed description and Figure 10 (p. 527) is taken from Palmer and Williams's patent; and the claim concerned in this case under reissued patent No. 4 was as follows:

"*Discharging the cut grain from a quadrant-shaped platform, on which it falls as it is cut, by means of an automatic sweep-rake, sweeping over the same substantially as described.*"

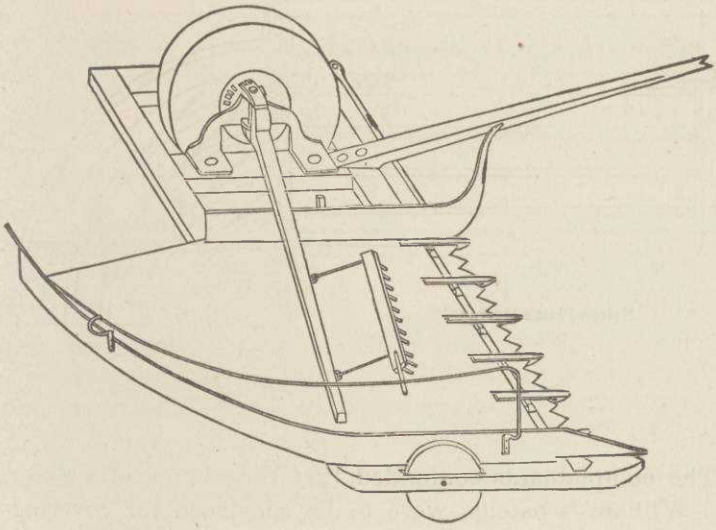
The defendants contended that this was a claim for a function or result, and as such was bad in law, and that the patent was, therefore, void.

* 1 Wallace, 531.

Statement of the case.

The defendants also contended that there was no novelty in the invention, and that Palmer and Williams had been anticipated by Nelson Platt's patent, and although Palmer and Williams's machine differed from Platt's, yet there was no invention in the change from Nelson Platt's rake to the complainants'; that all that Palmer and Williams had in fact done was to take Platt's automatic sweep-rake and put it upon Seymour's quadrant-shaped platform; and that doing this was not invention, but merely the exercise of ordinary mechanical skill.

FIG. 10.



Palmer and Williams's Machine.

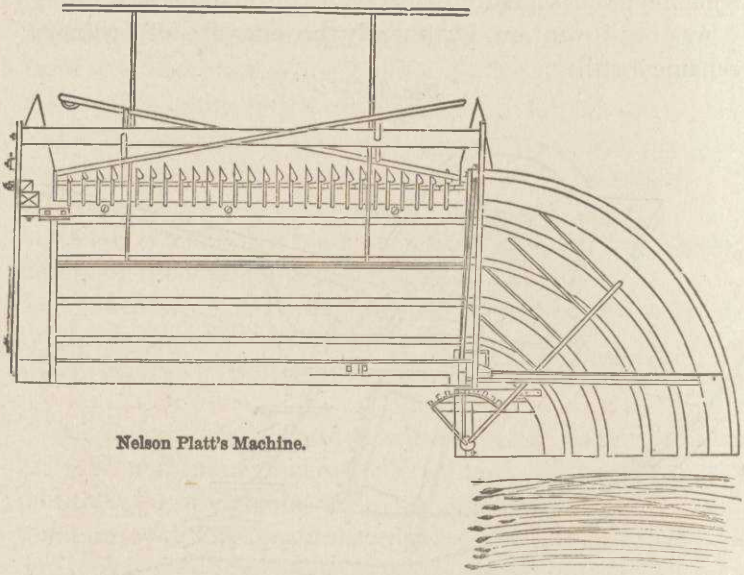
This latter view was adopted by the Circuit Court.

Nelson Platt's patent was granted June 12th, 1849, for a self-raking reaper, which is shown in Figure 11, on page 528.

In this machine the platform was propelled from the rear, and the grain, after being cut, was deposited on a rectangular platform, and was then raked across the rectangular platform, by one set of rakes acting from below, on to a second quadrant-shaped platform. The grain was then discharged from that second quadrant-shaped platform by a

vibrating rake, which swept across it in the arc of a circle, on to the ground, the heads of grain lying towards the machine. The defendants did not insist that this was identical in construction with the complainants' invention, but that the skill of the mechanic only was required to change it to their invention. The court below adopted this view.

FIG. 11.



Nelson Platt's Machine.

The complainants contended that the claims of Palmer and Williams's patents were to be construed for covering substantially the "*means*" *described* for discharging the grain "*as specified*"—that "*this means*" was a combination of mechanism. The elements of the combination are a *quadrant-shaped platform*, a *cutting apparatus*, and an *automatic sweep-rake*, and that these elements must sustain to each other, to constitute the thing patented, the following relations:

First. The quadrant-shaped platform must be directly behind the cutting apparatus.

Second. The automatic sweep-rake must traverse the platform so as to sweep the grain from where it falls, as cut, round to the place of its destiny upon the ground.

Third. To accomplish this, the rake must have a certain relation to the cutting apparatus, to the platform, and to the material which has been laid upon the platform.

The complainants further contended, that while, upon the one hand, the claim was for an entirely different invention from Platt's, yet that one form of the defendants' machine known as their Automatic Sweep-Rake Machine, was a clear infringement.

The defendants' automatic sweep-rake machine, alleged to infringe, is here shown.

FIG. 12.

Defendant's Self-raking Machine.

The automatic rake in that machine swept over the platform from the cutter to the place of delivery. It was used with a platform of the same shape as referred to above in connection with the defendants' hand-raking machine. The automatic rake swept the cut grain from where it fell on the platform to the point of delivery.

The peculiar mechanism or gearing by which the sweep-rake in the defendants' machine was made to traverse their platform was admitted by the complainants to be different from that in their patent.

Upon the latter difference, the Circuit Court decided that defendants' automatic rake did not infringe the claims now in question, thereby limiting this claim of the complainants to the specific driving mechanism or machinery for gearing and actuating the sweep-rake in its movement.

The claim of the complainants' patent reissue No. 1682, was in the following words:

"*The combination of the cutting apparatus of a harvesting machine with a quadrant-shaped platform arranged in the rear thereof, and a sweep-rake operated by mechanism in such manner that its teeth are caused to sweep over the platform in curves when acting on the grain, these parts being and operating substantially as hereinbefore set forth.*"

And it was contended by the complainants to be a claim to a combination consisting of

1. A cutting apparatus.

2. A quadrant-shaped platform combined with and placed behind the cutting apparatus.

3. An automatic sweep-rake connected with the frame by a pivot and operated by cog-wheels, so as to sweep over the platform while moving the grain towards the delivery side of the platform.

The complainants insisted that the difference between this claim and that of reissue No. 4 was in this:

That the combination claimed in this patent, No. 1682, appertained exclusively to the operation of cutting the grain, receiving it upon and removing it from the platform. It did not (unless incidentally) include the means of carrying the rake back to seize a new gavel. The claim of No. 4 included also the means of carrying the rake back to get a new gavel after delivering the former one.

The defendants insisted that this patent was void, as being identical with the claim of reissue No. 4, and as also being obnoxious to the objections urged against reissue No. 4.

Patent No. 10,459, granted to Palmer and Williams, was also alleged to have been infringed.

Statement of the case.

This patent merely related to the mode of supporting the reel. When a reel is supported at each end by a post or bearer, the post or bearer which is on that side or end of the reel which runs into the standing grain encounters obstructions, and these collect upon and impede the rotation of the reel. To avoid this, Palmer and Williams devised the mode of supporting the reel wholly on that side of the machine which did not run into the standing grain, and no support was provided at the other end of the reel. The claim for this invention was in these words:

"*The method of hanging the reel so as to dispense with any post or reel-bearer next to the standing grain, as herein described, thereby preventing the grain from getting caught and being held fast between the divider and a reel supporter.*"

The defendants' machine had but one post. The reel axle, however, was prolonged, and it was supported wholly on that side or end of the reel and by means of two bearings attached to that post. This mode of support is shown *supra*, in Figure 9, and was argued by the complainants' counsel to be substantially the same as that claimed in reissue 10,459.

The only alleged prior invention set up in the proofs against this particular patent was what is called the Ogle Machine. The only evidence of this machine was contained in the "Mechanics' Magazine," published in London in 1825.

A copy of the description and drawing from this book was put in evidence by the appellees.

An expert of the defendant testified as to this publication:

"I do not understand that it has any reel support at the grain side of the machine, it being represented as having two reel supports at the stubble side of the machine."

But the expert did not say positively that the reel had not any support on the grain side of the machine, but that he did not so understand it; and gave his reasons why he did

not so understand it, which was because there were *two supports* on the stubble side; or, in other words, because there were two reel supports on the stubble side he inferred that there was none on the grain side.

On the other hand, the complainants contended that the presence of two reel bearings on the stubble side of the machine was not conclusive evidence of the absence of a bearing also on the grain side, because there might have been two on the stubble side to better support the shaft toward the centre and keep it from sagging, as well as one on the grain side, and that for such purpose they might obviously be useful.

The experts of the complainants testified that these drawings, taken with the printed part of the description in the "Magazine," did not show what is described in this patent of the complainants and specified in the claim in controversy, and that they did not suggest the idea of this invention.

The counsel of the complainants insisted that the description in the first publication, to be available, must be such as to enable the public to practice the invention.*

In addition to the points above, as to novelty and infringement, other grounds of objection were taken by the defendants to the validity of these reissued patents, among them, these:

That Palmer and Williams never made oath to the application on which the reissued patent was granted, and therefore the reissue was void:

That the patentees did not specify and point out in their specifications and claims the parts which they claim as their respective inventions:

That the commissioner of patents had no jurisdiction to receive the surrender of the originals or grant the reissued patents thereon, because no evidence was produced before him to show that the originals were "inoperative and invalid:"

* Citing Curtis on Patents, § 378; Betts *v.* Menzies, Hall *v.* Evans, 6 Law Times, N. S. 90.

That the reissued letters patent were void because they were not granted for the same invention as the original patents.

Messrs. Gifford and Stoughton, for the appellants, the complainants below. Mr. D. Wright, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Controversies respecting the infringement of letters patent possess, in many cases, a degree of importance much beyond the profits or damages claimed for the alleged unlawful use of the invention, as the pleadings usually put in issue, in one form or another, the validity of the letters patent alleged to be infringed, and frequently involve, directly or indirectly, the same inquiry in regard to the letters patent set up in defence as superseding the patent on which the suit is founded. Such being the state of the pleadings, the result, whatever it may be, whether for the party suing or for the party defending, must oftentimes determine rights of property of much greater value than the amount of the profits or damages claimed for the alleged infringement of the letters patent.

Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.

Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as con-

templated by the Constitution and sanctioned by the laws of Congress.

Five several letters patent were owned by the complainants when the present suit was commenced, and they allege in the bill of complaint that the respondents have infringed their exclusive rights as secured to them in each and every one of those letters patent. Four of the letters patent are reissued letters patent, and are numbered and described as follows: (1.) Reissued letters patent No. 4, dated January 1, 1861, for a new and useful improvement in harvesters, being one of a second reissue in two separate patents, on amended specifications, as more fully explained in the pleadings and the patents annexed to the printed record. (2.) Reissued letters patent No. 1682, dated May 31, 1864; also for a new and useful improvement in harvesters, being the second reissue from the before-mentioned reissue when the invention was divided into two parts. They both purport to be founded upon the original patent granted to Aaron Palmer and Stephen G. Williams, dated July 1, 1851, which was for a new and useful improvement in harvesters, and the reissued patents were fully extended for seven years from the expiration of the original term.

(3.) Reissued letters patent No. 72, dated May 7, 1861, being a reissue of one of three parts of a prior reissue of the original patent, dated July 8, 1851, which was granted to William H. Seymour for a new and useful improvement in reaping machines. (4.) Reissued letters patent No. 1683, dated May 31, 1864, being a reissue of another of the three parts of the prior reissue of that patent, as more fully explained in the pleadings; the charge being that the respondents have infringed the first claim. (5.) Superadded to those several charges against the respondents is the further one that they have also infringed certain original letters patent owned by the complainants, dated January 24, 1854, which secures to them, as assignees of Palmer and Williams, certain other new and useful improvements in grain harvesters besides those embodied in the several reissued letters patent to which reference has been made.

Opinion of the court.

Founded upon those several letters patent, the bill of complaint, which is drawn in the usual form, alleges that the respondents have unlawfully made, and used and vended to others to be used, the respective inventions therein described, and the complainants pray for an account and for an injunction. Service was made upon the respondents, and they appeared and filed an answer, setting up several defences to each of the patents described in the bill of complaint. Responsive to the answer the complainants filed the general replication, and the cause being at issue they put in evidence the five several letters patent on which the suit is founded, the respondents consenting that copies of the same, and of the respective certificates of extension mentioned in the pleadings, might be substituted in the record in the place of the originals as introduced in evidence.

Other proofs were introduced and the parties were fully heard, but the Circuit Court was of the opinion that the proofs introduced by the complainants were not sufficient to show any infringement of their rights, and accordingly entered a decree for the respondents, dismissing the bill of complaint. Dissatisfied with that conclusion the complainants appealed to this court and now seek to reverse that decree.

Separate defences having been set up in the answer to each of the five letters patent, it will be necessary to a clear understanding of the controversy and to prevent any misunderstanding as to the views of the court, to describe somewhat more fully the nature of the several inventions and the objects which they were designed to accomplish.

I. Explained in general terms, the invention secured in the first-mentioned reissued patent, numbered four, consists in arranging an automatic sweep-rake in a harvesting machine in such relation to a quadrant-shaped platform, upon which the cut grain falls as it is cut, that it shall vibrate over the same at suitable intervals to discharge the cut grain in gavels upon the ground.

Specific description is given, in the first place, of the frame of the machine, which, as represented, is composed

of three longitudinal beams and two transverse beams securely fastened to each other at their points of intersection. Next follows a reference to the driving wheel, which, as represented, is placed between the outer longitudinal beam and the central beam, having its bearings on arched supports or brackets rising from each of the beams composing the frame. Guard fingers through which a sickle vibrates are secured upon the front edge of a platform shaped like a quadrant or sector of a circle, of which the arm or lever that carries the rake-head forms the radius, and the fulcrum-pin on which the arm or lever vibrates constitutes the centre, the whole operating so that the grain is swept round, on an arc of a circle, and discharged in gavels upon the ground behind the driving wheel.

Minute details of all the other elements of the machine are also given in the subsequent parts of the specifications, and of their modes of operation, and the specification concludes with the claim which, in substance, is discharging the cut grain from a quadrant-shaped platform on which it falls as it is cut, by means of an automatic sweep-rake vibrating over the same, substantially as described, which must be understood as referring back to the description contained in the body of the specification.

II. Two combinations are mentioned in the specification of the reissued letters patent No. 1682, but it is only necessary to refer to the first, as it is not alleged that the respondents have infringed the second claim. Described separately the ingredients of the first claim are as follows: (1.) The cutting apparatus to sever the standing stalks of grain. (2.) The quadrant-shaped platform arranged behind the cutting apparatus to receive the severed stalks of grain as they fall. (3.) The sweep-rake and the described mechanism to operate the same in such manner that the teeth shall move in circular curves over the platform when they are acting on the grain.

Reference must also be made to the other two reissued letters patent embraced in the pleadings. Both have respect to an improvement made in reaping machines, and they

were both granted to secure material parts of an original invention once before surrendered and reissued because the letters patent were defective and inoperative. Before the term of the original patent expired the patents were extended for the further term of seven years.

III. Number seventy-two consists in constructing the platform of a reaping machine, upon which the cut grain falls as it is cut, in the shape of a quadrant, or of a sector of a circle, placed just behind the cutting apparatus, and in such relation to the main frame that the grain, whether raked off by hand or by machinery located behind the cutting apparatus, can be swept around on the arc of a circle and be dropped, heads foremost, on the ground far enough from the standing grain to leave room for the team and machine to pass between the gavels and the standing grain without the necessity of taking up the gavels before the machine comes round to cut the next swath.

IV. They also acquired title to the invention secured in the remaining reissued letters patent mentioned in the bill of complaint, to wit, number 1683; but it will be sufficient to refer to the first claim of the same, as the second is not the subject of controversy in this suit.

As described in the specification the ingredients of the first claim are the cutting apparatus to sever the stalks, the reel to incline the heads of the stalks towards the cutting apparatus, and the quadrant-shaped platform, located in the rear of the cutting apparatus, to receive the cut stalks as they fall before the operation of the sweep-rake begins.

Designed as the improvements were to accomplish the same object as the other two improvements previously described, the patentees or owners of the several letters patent elected to compromise rather than litigate, and the result was that the entire interest became ultimately vested in the appellants.

V. Patented improvements in the method of transferring motion from the driving wheel of a reaping machine to the rake on the platform of the machine, and in the method of hanging the reel so as to dispense with any post on the side

of the machine next the grain, were also acquired by the appellants as a part of the same arrangement, and they charge in the bill of complaint that the second claim of the original letters patent, embodying that improvement, is also infringed by the respondents.

Power to grant letters patent is conferred by law upon the Commissioner of Patents, and when that power has been lawfully exercised, and a patent has been duly granted, it is of itself *primâ facie* evidence that the patentee is the original and first inventor of that which is therein described, and secured to him as his invention.*

Persons seeking redress for the unlawful use of letters patent, in which they have an interest, are obliged to allege and prove that they, or those under whom they claim, are the original and first inventors of the improvement embodied in the letters patent on which the suit is founded, and that the same have been infringed by the party against whom the suit is brought.

Undoubtedly the burden to establish both of those allegations is, in the first place, upon the party instituting the suit, as they lie at the foundation of every such claim, but the law is well settled that the letters patent in question, where they are introduced in evidence in support of the claim, if they are in due form, afford a *primâ facie* presumption that the first-named allegation is true, and the rule is equally well settled that that presumption, in the absence of satisfactory proof to the contrary, is sufficient to entitle the party instituting the suit to recover for the alleged violation of the exclusive rights secured to him in the letters patent.

Availing themselves of that rule of law the complainants in this case introduced the five several letters patent on which the suit is founded, and they contend, and well contend, that their effect as evidence is to cast the burden of proof upon the respondents to show that the respective patentees are not the original and first inventors of the im-

* White et al. *v.* Allen et al., 2 Clifford, 228.

provements embodied in the several letters patent, as they have alleged in their answer.

Parties defendants, sued as infringers, are not allowed in an action at law to set up the defence of a previous invention, knowledge, or use of the thing patented, unless they have given notice of such a defence thirty days before the trial, and have stated in the notice "the names and places of residence of those whom they intend to prove to have possessed a prior knowledge of the thing, and where the same had been used;" and the settled practice in equity is to require the respondent, as a condition precedent to such defence, to give the complainant substantially the same information in his answer.*

Notices of the kind were given by the respondents in this case, but it will be more convenient to examine certain special defences set up in the answer before entering upon that inquiry, as the decree must be affirmed, in any event, if any one of those defences is well founded, whether the issues of novelty and of infringement are determined in favor of the complainants or respondents.

All of the special defences apply to the original patent, as well as to those which have been reissued, except such as are founded upon the acts or omissions of the commissioner in granting the reissues, which of course are not applicable to the former. They are eight in number, as exhibited in the answer, the respondents alleging in each that the letters patent are void and of no effect for the reasons therein set forth; and they will be briefly examined in the order in which they are pleaded.

1. That the letters patent are void and of no effect because the patentees did not make oath, before the patents were granted, that they did verily believe that they were the original and first inventors of the improvements for which the letters patent were solicited.

Congress possesses the power to pass laws to secure to inventors, for limited times, the exclusive right to their in-

* Agawam Co. v Jordan, 7 Wallace, 596; Teese v. Huntingdon, 23 Howard, 10.

ventions, and Congress, in pursuance of that article of the Constitution, has conferred the power to grant letters patent for that purpose upon the Commissioner of Patents. Persons who have made an invention, and who desire to obtain an exclusive property therein, may make application in writing to the Commissioner of Patents, and the provision is that the commissioner, on due proceedings had, may grant a patent for the said invention.

Inventors of machines are required, before they receive a patent, to deliver a written description of their inventions, and of the manner and process of making, constructing, and using the same, in such "full, clear, and exact terms" as to enable any person skilled in the art or science to make, construct, and use the same, and fully to explain the principle by which the invention may be distinguished from others of like kind; and they are also required to specify and point out the part, improvement, or combination which they claim as their invention.

Doubtless these several requirements may be regarded as conditions precedent to the right of the commissioner to grant the application, as they must appear on the face of the letters patent, and are always open to legal construction as to their sufficiency.

Drawings are also required in certain cases, and where the invention is such that it may be represented by a model, the applicant for a patent is required to furnish a model of the same; and the further requirement is that he shall make oath or affirmation that he does verily believe that he is the original and first inventor of the improvement for which he solicits a patent, and that he does not know that the same was ever before known or used.

Importance, it is conceded, must be attached to the latter requirement, but it is certain that the oath or affirmation may be taken elsewhere than before the commissioner, as the same section provides that it "may be made before any person authorized by law to administer oaths."*

* 5 Stat. at Large, 119.

Extended examination of the question, however, is unnecessary, as every one of the letters patent on which the suit is founded contains the recital that the required oath was taken before the same was granted, and the court is of the opinion that those recitals, in the absence of fraud, are conclusive evidence that the necessary oaths were taken by the applicants before the letters patent were granted.

2. That the letters patent are void and of no effect because the patentees did not specify and point out in their specifications and claims the parts, improvements, or combinations which they claim as their respective inventions.

Grant the theory of fact assumed in the proposition and the conclusion would follow, but the whole theory of the proposition as applied to the present case is founded in error.

Inventions secured by letters patent sometimes, though rarely, embrace an entire machine, and in such cases it is sufficient if it appear that the claim is coextensive with the invention. Other inventions embrace only one or more parts of a machine, as the coulter of a plough, or the divider or sweep-rake of a reaping machine; and in such cases the part or parts claimed must be specified and pointed out so that constructors, other inventors, and the public may know how to make the invention, and what is withdrawn from general use.

Patented inventions are also made which embrace both a new ingredient and a combination of old ingredients embodied in the same machine. Even more particularity of description is required in such a case, as the property of the patentee consists, not only in the new ingredient, but also in the new combination, and it is essential that his invention shall be so fully described that others may not be led into mistake, as no other person can lawfully make, use, or vend a machine containing such new ingredient or such new combination. They may make, use, or vend the machine without the patented improvements, if it is capable of such use, but they cannot use either of those improvements without making themselves liable as infringers.

Improvements in machines protected by letters patent may also be mentioned, of a much more numerous class, where all the ingredients of the invention are old, and where the invention consists entirely in a new combination of the old ingredients, whereby a new and useful result is obtained, and many of them are of great utility and value, and are just as much entitled to protection as those of any other class.*

Such a combination is sufficiently described if the ingredients of which it is composed are named, their mode of operation given, and the new and useful result to be accomplished pointed out, so that those skilled in the art and the public may know the extent and nature of the claim, and what the parts are which co-operate to produce the described new and useful result. Tested by these rules, it is clear that the objection under consideration cannot prevail in respect to any one of the several letters patent on which the suit is founded.

3. That the reissued letters patent are void and of no effect, because the Commissioner of Patents never obtained jurisdiction to receive the surrender of the originals, nor to grant the reissues, as no evidence was produced before him to show that the originals were inoperative or invalid for any reason or cause whatsoever.

Whenever any patent is inoperative or invalid, by reason of a defective or insufficient description or specification, if the error arose by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it is lawful for the commissioner, upon the surrender to him of such patent, and of the payment to him of a certain duty, to cause a new patent to be issued to the inventor *for the same invention* for the residue of the term then unexpired, in accordance with the patentee's corrected description and specification.†

Whether adjudged to be valid or invalid, it is clear that

* Union Sugar Refinery *v.* Matthiessen, 2 Fisher's Patent Cases, 605.

† 5 Stat. at Large, 122.

the several reissued letters patent are all in due form, and that they contain all the usual recitals asserting a compliance with the requirements specified in the patent act, and it is equally certain that the respondents did not introduce any proofs to establish the theory of fact assumed in the answer.

Authority to accept the surrender of original patents in certain cases, and to grant new patents to the inventor, was conferred upon the commissioner by the act of the 3d of July, 1832, and in a case arising under that act it was held by this court, more than thirty years ago, that where an act was to be done or a patent granted, upon proofs to be laid before a public officer, upon which he was to decide, the fact that such public officer had done the act or granted the patent was *primâ facie* evidence that the proofs had been regularly made, and that they were satisfactory, even though the patent did not contain any recitals that the prerequisites to the grant had been fulfilled; and such continued to be the rule until the question came up again for consideration under the existing patent act, when it was held by this court that the fact of the granting of the reissued patent closed all inquiry into the existence of inadvertence, accident, or mistake, and left open only the question of fraud for the jury.*

Since that time it has been definitively settled that neither reissued nor extended patents can be abrogated by an infringer, in a suit against him for infringement, upon the ground that the letters patent were procured by fraud in prosecuting the application for the same before the commissioner.†

Where the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy be-

* Railroad *v.* Stimpson, 14 Peters, 458; Stimpson *v.* Railroad, 4 Howard, 384; 4 Stat. at Large, 559.

† Rubber Company *v.* Goodyear, 9 Wallace, 797; S. C., 2 Clifford, 375.

tween the old and the new patent that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent.*

4. That the reissued letters patent are void and of no effect because they were not granted for the same invention as that embodied in the original letters patent, nor for any invention made by the patentees before the original letters patent were granted.

Reissued letters patent must, by the express words of the section authorizing the same, be *for the same invention*, and consequently where it appears on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as that state of facts shows that the commissioner, in granting the new patent, exceeded his jurisdiction. Power is unquestionably conferred upon the commissioner to allow the specification to be amended if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to redescribe his invention and to include in the description and claims of the patent not only what was well described before but whatever else was suggested or substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected. Interpolations of new features, ingredients, or devices, which were neither described, suggested, nor indicated in the original patent, or patent office model, are not allowed, as it is clear that the commissioner has no jurisdiction to grant a reissue unless it be for the same invention as that embodied in the original letters patent, which necessarily excludes the right on such an application to open the case to new parol testimony and a new hearing as to the nature and extent of the improvement, except in certain special cases, as provided in

* Battin *v.* Taggert, 17 Howard, 83; O'Reilly *v.* Morse, 15 Id. 111, 112; Sickles *v.* Evans et al., 2 Clifford, 222; Allen *v.* Blunt, 3 Story, 744.

a recent enactment not applicable to the case before the court.*

Corrections may be made in the description, specification, or claim where the patentee has claimed as new more than he had a right to claim, or where the description, specification, or claim is defective or insufficient, but he cannot under such an application make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings, or patent office model.

Prior to the decision of this court that a person sued as an infringer cannot abrogate a reissued or extended patent by showing that the commissioner had been induced to grant it by fraudulent representations, it had sometimes been supposed that every such new patent was open to that defence and that the question was one of fact dependent upon evidence, but since it has been determined that such a party cannot be heard to make such a defence to the charge of infringement, it has come to be regarded as the better opinion that all matters of fact involved in the hearing of an application to reissue a patent, and in granting it, are conclusively settled by the decision of the commissioner granting the application. Matters of construction arising upon the face of the instrument are still open, but all matters of fact connected with the surrender and reissue are closed in such a suit by the decision of the commissioner in granting the reissued patent.†

Letters patent reissued for an invention substantially different from that embodied in the original patent are void and of no effect, as no jurisdiction to grant such a patent is conferred by any act of Congress upon the commissioner, and he possesses no power in that behalf except what the acts of Congress confer. Whether a reissued patent is for the same invention as that embodied in the original patent

* 16 Stat. at Large, 206; Cahart et al. *v.* Austin, 2 Clifford, 536; Curtis on Patents (3d ed.), 276; Woodworth *v.* Stone, 3 Story, 753.

† Rubber Co. *v.* Goodyear, 9 Wallace, 796; Stimpson *v.* Railroad, 4 Howard, 404; Railroad *v.* Stimpson, 14 Peters, 458.

or for a different one is a question for the court in an equity suit to be determined as a matter of construction, on a comparison of the two instruments, aided or not by the testimony of expert witnesses, as it may or may not appear that one or both may contain technical terms or terms of art requiring such assistance in ascertaining the true meaning of the language employed.*

Where the specification and claim, both in the original and reissued patents, are expressed in ordinary language, without employing any technical terms or terms of art, the question whether the reissued patent is for the same invention as that described in the original patent or for a different one is purely a question of construction, but where both or either contain technical terms or terms of art the court may hear the testimony of scientific witnesses to aid the court in coming to a correct conclusion. Cases doubtless arise where the language of the specification and claim, both of the surrendered and reissued patents, is so interspersed with technical terms and terms of art that the testimony of scientific witnesses is indispensable to a correct understanding of its meaning. Both parties in such a case would have a right to examine such witnesses, and it would undoubtedly be error in the court to reject the testimony, but the case before the court is not of a character to render it expedient to pursue the inquiry.†

Apply the rule to the present case, that the question is one of construction, and it is clear that the defence under consideration is not open to the respondents, as they did not introduce in evidence the original letters patent from which the reissued patents were derived.

Persons owning reissued letters patent, and seeking redress from those who have invaded their exclusive rights, are not obliged to introduce in evidence the surrendered patent, and, if the old patent is not introduced by the party sued, he cannot have the benefit of such a defence.

* Sickles *v.* Evans et al., 2 Clifford, 203.

† Bischoff *v.* Wethered, 9 Wallace, 814; Betts *v.* Menzies, 4 Best & Smith, Q. B. 939.

5. That the several letters patent are void and of no effect because the claims therein patented are for an effect, and not for any particular machinery.

Founded, as the defence is, upon an obvious misconstruction of the claims of the several patents, it does not seem to require much explanation. Omit the words "substantially as described," or "substantially as set forth," and the question presented would be a very different one, but inasmuch as those words, or words of equivalent import, are employed in each of the claims, the defence is without merit. Where the claim immediately follows the description of the invention it may be construed in connection with the explanations contained in the specifications, and where it contains words referring back to the specifications, it cannot properly be construed in any other way.*

6. That the several reissued letters patent are void and of no effect because the claims therein made are too broad and embrace that of which the patentees were not the original and first inventors prior to the granting of the original letters patent.

Properly understood the defence is substantially the same as that set up in the fourth defence, and it must be overruled for the same reasons, which need not be repeated.

7. That the several letters patent are void and of no effect because what is claimed therein as new was in public use, with the consent and allowance of the original patentees, more than two years before they applied for the several patents.

Such a defence set up in a case where the complainants file the general replication is of no avail unless sustained by proof, and the respondents did not introduce any proofs to sustain it, which is all that need be said upon the subject.

8. That the combination claimed in each of the several letters patent is a combination of old parts, the combining of which involved no invention, but merely the skill of an intelligent mechanic or other person skilled in the manufacture and use of harvesting machines.

* Curt's on Patents (3d ed.), secs. 225-227.

Reduced to a proposition the defence, as set up in the answer, is that the several improvements were old and not patentable on that account, as no improvements were made which required invention. Specific objection is made under this head to each of the four reissued letters patent, but the grounds of the several objections are substantially the same, so that the several propositions may be considered together.

New and useful machines are the proper subjects of an application for a patent, and so, by the express words of the act of Congress, are new and useful improvements on any machine. All of the patents embraced in the suit fall under the second clause of the provision, and are of the fourth class of patents before described, that is, they consist of a new combination of old elements whereby a new and useful result is obtained.

Particular changes may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not been, and could not be, applied without those changes, and, under those circumstances, if the machine, as changed and modified, produces a new and useful result, it may be patented, and the patent will be upheld under existing laws.*

Such a change in an old machine may consist merely of a new and useful combination of the several parts of which the old machine is composed, or it may consist of a material alteration or modification of one or more of the several devices which entered into its construction, and whether it be the one or the other, if the change of construction and operation actually adapts the machine to a new and valuable use not known before, and it actually produces a new and useful result, then a patent may be granted for the same, and it will be upheld as a patentable improvement.†

Improvements for which a patent may be granted must

* Bray *v.* Hartshorn, 1 Clifford, 541; Losh *v.* Hague, 1 Webster's Patent Cases, 207; Hindmarsh on Patents, 95; Phillips *v.* Page, 24 Howard, 166; Norman on Patents, 25.

† Park *v.* Little, 3 Washington Circuit Court, 196.

be new and useful, within the meaning of the patent law, or the patent will be void, but the requirement of the patent act in that respect is satisfied if the combination is new and the machine is capable of being beneficially used for the purpose for which it was designed, as the law does not require that it should be of such general utility as to supersede all other inventions in practice to accomplish the same object.*

Unsuccessful in those defences the respondents in the next place attack the respective inventions as destitute of originality, and allege that the patentees were not the original and first inventors of the several improvements supposed to be secured in the letters patent. Separate defences of the kind are set up in the answer to each of the letters patent, but the nature and character of the objections are such that the whole series may properly be considered together.

Prior notice in the answer is required in such a case as a condition precedent to the right to introduce proofs to support such a defence, and it is certainly proper that the respondent should be allowed to comply with that requirement, but it is an abuse of the privilege to give such notices without some reason to suppose that such a defence can successfully be made, and that the proofs, if required, can be obtained, as it exposes the complainant to unnecessary expense and trouble in preparing his case for trial. Where no proofs were introduced in support of the answer no mention will be made of the notices, as a notice without proof to support it is of no avail.

Out of all the alleged prior inventions set up in the answer, only four were made the subject of proof to any substantial extent. Two of these are the inventions of Obed Hussey and of Thomas D. Burral, of the combination of the quadrant-shaped platform located behind the cutting apparatus. Those patents were introduced as tending more particularly

* Lowell *v.* Lewis, 1 Mason, 182; Bedford *v.* Hunt, Id. 302; Many *v.* Jagger, 1 Blatchford, 372; Barrett *v.* Hall, 1 Mason, 447.

to supersede the reissued patent number seventy-two, before described.

Strong doubts are entertained whether any of the patents given in evidence by the respondents as superseding the particular patent of the complainants, involved in this issue, are of a character to have that effect, even if the inventions which they purport to secure were of prior date, but it is not absolutely necessary to decide that point, except as to one of the exhibits, as the court is of the opinion that none of the others antedate the invention secured in that patent. Conclusions are all that will be useful on this branch of the case, especially as the question is one of fact dependent upon the proofs, which are somewhat conflicting, and where a full analysis of the evidence would hardly be practicable, as it would extend the opinion to an unreasonable length.

Proofs entirely satisfactory to the court are exhibited by the complainants showing that their invention, as described in the patent in question, was perfected early in the summer of 1849, as a material part of a harvesting machine, and that the same was reduced to practice as an operative machine during the harvesting season of that year.

Hussey, from 1839 or earlier to the time of his death, in the summer of 1860, was much engaged in the manufacture of reaping machines of various kinds. Most of his machines, however, were constructed without any reel and with square platforms, so as to drop the cut grain at the rear of the platform, differing so widely from the patented machine of the complainants as to require no argument to show that they afford no support to the present defence. Other machines were constructed by him with a straight guide-board on the platform, which was adjustable within certain limits, and the apparatus was doubtless capable, to a limited extent, of causing the cut grain to be moved sufficiently out of the path of the machine to give room for a single team.

Evidence to show that the invention of the complainants is embodied in those machines is entirely wanting, and it is quite clear that if any such had been introduced it could not have been credited, as the differences between them are too

palpable and material to be overcome by parol evidence. Machines were also made by him with two platforms, or with a platform in two parts, the one being attached to the rear of the other, but it required two men to do the work which, with the complainants' machine, is easily and much better accomplished by one, which is certainly all the explanation which need be given of those machines in the present case.

Apart from these he also made one experimental machine, with a square platform, to which was bolted an angular addition, giving the whole, when the addition was attached, an angular form. Examined when the addition is bolted to the main platform, irrespective of the other ingredients of the combination, it approaches much nearer to the invention of the complainants than any of the other exhibits introduced in evidence by the respondents. Conceding all that, still it would not be difficult to show that the two are substantially different in several respects; but it is unnecessary to enter that field of inquiry, as the proofs are entirely satisfactory to the court, that the machine, as constructed, was merely an experiment, and that it was never reduced to practice as an operative machine. Undoubtedly it was built in the autumn of 1848, subsequent to the close of the harvest season; but the respondents' testimony shows that it was not used for cutting grain during that harvesting season.

Some obscurity surrounds its early history, nor is it of much importance that it should be better known. It appears that it was sent to the railroad depot to be transported to some other place for trial; but there is no positive evidence that it was ever forwarded or used, or that it was capable of any beneficial use. Where it was transported, if at all, from the depot, does not appear; but it does appear that it was returned the next year to the shop of the maker, and that it was set against the wall by the side of the street, in front of the shop, where it remained for some time; that it was then removed to the new shop of the maker, where it remained until it was taken to pieces and broken up by his order, and never restored till long subsequent to the complainants' patent.

Original and first inventors are entitled to the benefit of their inventions if they reduce the same to practice, and seasonably comply with the requirements of the patent law in procuring letters patent for the protection of their exclusive rights. Crude and imperfect experiments are not sufficient to confer a right to a patent; but in order to constitute an invention, the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form.

Desertion of an invention consisting of a machine, never patented, may be proved by showing that the inventor, after he had constructed it, and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments, and of restoring the machine with a view to apply for letters patent.*

He is the first inventor in the sense of the patent law, and entitled to a patent for his invention, who first perfected and adapted the same to use, and it is well settled that until the invention is so perfected and adapted to use it is not patentable under the patent laws.†

Argument is hardly necessary to show that nothing else introduced in evidence by the respondents as having been constructed by that inventor is of a character to interfere, in any substantial respect, with the novelty of the invention held by the complainants, as the weight of the evidence plainly tends to disprove the allegations of the answer, and the inferences to be drawn from a comparison of the exhibits would establish the opposite theory even if the other proofs were less decisive to that effect.

Prior invention by Thomas D. Burrall is the next defence set up by the respondents to the particular patent under consideration. They attempt to show that he constructed a

* Johnson *v.* Root, 2 Clifford, 123; Gayler *v.* Wilder et al., 10 Howard, 498; Parkhurst *v.* Kinsman, 1 Blatchford, 494; White et al. *v.* Allen et al., 2 Clifford, 230.

† Washburn *v.* Gould, 3 Story, 122; Cahoon *v.* Ring, 1 Clifford, 612.

harvesting machine having a square platform, to which he attached an apron, quadrant formed, which would deliver the cut grain, heads foremost, at the side of the machine and out of the way of the team in cutting the next swath.

Concede the fact that the machine, together with the circular apron, was constructed by the person named as alleged, and that the machine in that form antedates the invention held by the complainants, still the court is of the opinion that it is not of a character to defeat the complainants' patent, as it had no reel, was not a self-raker in any view of the case, and consisted beyond doubt of a substantially different combination. Compared with that, the invention described in the complainants' patent is both new and useful, and is plainly sufficient to support a patent as a new arrangement.

Suppose it to be otherwise, still the conclusion as to this defence must be the same, as the court is unhesitatingly of the opinion from the proofs that the supposed inventor did not construct the circular apron, and attach the same to the square platform, and use the two in conjunction until after the complainants' invention was perfected and reduced to practice as an operative machine.

Evidence was also introduced by the respondents respecting the invention of Nelson Platt, but extended discussion upon that topic is unnecessary, as it is hardly contended by the respondents that the machine contains a quadrant-shaped platform with, and immediately behind, the cutting apparatus, and in such relation to the main frame as that described in the specification of the complainants' patent. They appear to shrink from that proposition, which is the only one involved in this defence, and seek shelter under another, of a very different character, which is that the difference between the two is so very slight that it required no invention to pass from the former to the latter, which is a matter appertaining to another head of the defence that has previously been fully considered and the point distinctly overruled.

Properly understood, that machine does not contain a combination of the quadrant-shaped platform with the cutting apparatus in any practical sense. On the contrary, it

has a square platform combined with the cutting apparatus, and the quadrant-shaped platform is combined with the square platform; nor does it contain any quadrant-shaped platform to receive the grain as it falls, but the ingredients of the invention, as well as the combination, are different from those in the complainants' machine, and the mode of operation is also different, which is all that need be said in response to that defence.

Substantially the same defences were also set up to the other reissued letters patent, to the extent that those patents were put in issue in the pleadings, but it will not be necessary to restate the objections to their originality nor to present any response to the same, as to do so would only be to repeat what has been said in respect to the one more particularly assailed in argument.

Attempt is also made to show that the original letters patent described in the bill of complaint are also invalid, because the patentees are not the original and first inventors of the improvements therein secured. Whether they were or were not the original and first inventors of the improvement in the first claim is a matter of no importance in this case, as the pleadings do not put that claim in issue. They only put in issue the second claim, which embodies the described method of hanging the reel so as to dispense with any post or reel-bearer next to the standing grain, to prevent the grain from getting caught between the divider and the reel-supporter, and the only evidence introduced of prior invention is what is contained in an article published in London, in the Mechanics' Magazine. Expert witnesses were examined in respect to it by both sides. One examined by the respondents testified that he did not understand that it had any reel-support on the grain side of the machine, which in that respect is like the machine of the complainants, but three expert witnesses examined by the complainants testify that neither the description nor the drawings of the same, as exhibited in that magazine, show anything which is embodied in the complainants' patent, and the court is of the same opinion.

Opinion of the court.

Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defence, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defence, must be an account of a complete and operative invention capable of being put into practical operation.*

None of these defences, however, were sustained in the court below, but the circuit judges were of the opinion that the proofs failed to show that the respondents had infringed the letters patent of the complainants.

Actual inventors of a combination of two or more ingredients in a machine, secured by letters patent in due form, are entitled, even though the ingredients are old, if the combination produces a new and useful result, to treat every one as an infringer who makes and uses or vends the machine to others to be used without their authority or license.†

They cannot suppress subsequent improvements which are substantially different, whether the new improvements consist in a new combination of the same ingredients, or of the substitution of some newly-discovered ingredient, or of some old one, performing some new function not known at

* Webster's Patent Cases, 719; Curtis on Patents (3d ed.), § 278, a; Hill v. Evans, 6 Law Times, N. S. 90; Betts v. Menzies, 4 Best & Smith, Q. B 999.

† Pitts v. Whitman, 2 Story, 619; Ames v. Howard, 1 Sumner, 487

the date of the letters patent, as a proper substitute for the ingredient withdrawn from the combination constituting their invention. Mere formal alterations in a combination in letters patent, however, are no defence to the charge of infringement, and the withdrawal of one ingredient from the same and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination if the ingredient substituted performs substantially the same function as the one withdrawn.

Patentees, therefore, are entitled in all cases to invoke to some extent the doctrine of equivalents, but they are never entitled to do so in any case to suppress all other substantial improvements, and the rule which disallows such pretensions, if properly understood and limited, is as applicable to the inventor of a device, or even of an entire machine, as to the inventor of a mere combination, except that the inventor of the latter cannot treat any one as an infringer whose machine does not contain all of the material ingredients of the prior combination, as in that state of the case the subsequent invention is regarded as substantially different from the former one, unless the latter machine employs as a substitute for the ingredient left out to perform the same function some other ingredient which was well known as a proper substitute for the same when the former invention was patented.*

Bonâ fide inventors of a combination are as much entitled to suppress every other combination of the same ingredients to produce the same result, not substantially different from what they have invented and caused to be patented, as any other class of inventors. All alike have the right to suppress every colorable invasion of that which is secured to them by their letters patent, and it is a mistake to suppose that this court ever intended to lay down any different rule of decision. Guided by these rules the remaining question for the determination of the court is whether the respond-

* Prouty *v.* Ruggles, 16 Peters, 341; Johnson *v.* Root, 2 Clifford, 123.

ents have infringed the several patents described in the bill of complaint.

Infringement is alleged by the complainants, and the burden is upon them to prove the allegation, as it imputes a wrongful act to the respondents. All controversy as to the character of the machines made and sold by the respondents is closed by their admission set forth in the record. Exhibit six, it is conceded by the respondents, is an accurate representation of the machines which they made and sold, and the complainants accept the admission as correct. Absolute certainty, therefore, attends that inquiry, and there is very little, if any, more difficulty in ascertaining the construction of the patented machines made and furnished to the public by the complainants, so that the only substantial inquiry is whether the machines made and sold by the respondents infringe the patented machines of the complainants, as the latter embody all the inventions of the complainants, except the claims pointed out as not infringed, and the proofs satisfy the court that the exhibits are constructed in accordance with the mechanism described in the several letters patent.

Properly construed the reissued patent number four is the combination of a quadrant-shaped platform located behind the cutting apparatus of the harvester so as to receive the grain as it falls after it is cut, with an automatic sweep-rake so constructed as to sweep over the platform in circular curves, and to move forward and backward, or towards and from the cutting apparatus, so as to seize upon the grain as it falls, after being cut, sweeping it over the platform in circular curves and delivering it upon the ground behind the machine with its stalks at right angles, or nearly so, with the line of progression of the machine, and to return by a forward movement towards the cutting apparatus to the original position when the first operation commenced.

Number 1682 is divided into two parts, the first of which may be used without the second, and it is not charged that the second part has been infringed by the respondents. Briefly described it consists of a combination of the cutting apparatus of a harvester with a quadrant-shaped platform

arranged in the rear thereof, and with a sweep-rake operated by mechanism in such a manner that its teeth are caused to sweep over the platform in curves when acting on the grain and to discharge the stalks crosswise to the direction of the swath and out of the way of the team on the return of the machine.

Two combinations are also contained in the reissued patent 1683, but the respondents are not charged with infringing the second, so that it is only necessary in this connection to refer to the first and describe its operation. It consists of a combination of the cutting apparatus with a reel and with a quadrant-shaped platform located in the rear of the cutting apparatus, operating as follows: The cutting apparatus severing the grain, the reel bearing the grain against the cutting apparatus and insuring its delivery upon the quadrant-shaped platform in the rear thereof, and the quadrant-shaped platform receiving the grain from the cutting apparatus and reel, and supporting it in such a manner that it can be moved from the cutting apparatus, heads foremost, swept round in a curve and discharged upon the ground crosswise to the direction of the swath and out of the track of the horses when the machine comes round to cut the next swath.

Patent numbered seventy-two is also an arrangement of the quadrant-shaped platform immediately behind the cutting apparatus of a reaping machine, so that the platform will receive the grain as it falls from the cutting apparatus, and will support it in such a manner that it may be swept round in a curvilinear path and discharged, heads foremost, upon the ground at the side of the platform out of the path of the horses when they return.

Reference will only be made to the second part of the original patent embraced in the suit, as it is not charged that the respondents have infringed the other claim. Separated from the second claim the first consists in a mode of hanging the reel in a reaping machine so as to dispense with any post or reel-bearer on the side next to the standing grain, without any projection of the reel-shaft or bearing

therefor on that side of the machine, so that the reel overhangs the bearings on the one side and is without support on the other side.

Prior to the act of Congress allowing several patents to be issued for distinct and separate parts of the thing patented, it is not probable that a bill of complaint joining five several patents in the same charge of infringement would have escaped objection from the respondent, but it will be noticed that all the claims appertain to the same general subject, and that it requires all of the inventions in question to constitute a complete self-raking harvester or reaping machine, and that they are all embodied in the machines which the complainants make and furnish to the public. Viewed in that light the court is of the opinion that the objection, if it had been made, could not have been sustained.*

Where the invention or inventions are embodied in a machine the question of infringement is best determined by a comparison of the machine made by the respondent with the mechanism described in the complainant's patent or patents, where more than one is embraced in the same suit.†

Comparisons of the kind have been carefully made by the court, aided by the evidence of the expert witnesses, as exhibited in the record, and the court is of the opinion that the several inventions of the complainants, excepting the claims pointed out as not infringed, are embodied in the machines made and sold by the respondents. Two of the expert witnesses testify to that effect without qualification, and the reasons which they assign for that conclusion are, in the opinion of the court, decisive of the question. Some attempt was made in the cross-examination of those witnesses to elicit an answer that the sweep-rake employed by the respondents operated differently from the corresponding device of the complainants in the several reissued patents, but the attempt was wholly unsuccessful, and called forth explanations which confirm the conclusion that the two devices have substantially the same operation.

* 5 Stat. at Large, 192. † Blanchard *v.* Putnam, 8 Wallace, 426.

Special reference is made in the opinion of the district judge to the means employed by the respondents in supporting the reel, as showing that the machines which they have made and sold do not infringe the second claim of the original patent. His view is that their machines do not infringe that claim because they do not employ but one reel-post instead of two, as shown in the complainants' patent, but it is so obvious that the one post with the frame attached to the upper end is substantially the same thing that it is not deemed necessary to pursue the argument.

For these reasons we are all of the opinion that the complainants are entitled to a decree that their several patents are valid, and for an account and for a perpetual injunction, except as to such, if any, as have expired.

DECREE REVERSED with costs, and the cause remanded for further proceedings

IN CONFORMITY TO THE OPINION OF THE COURT.

HALLIDAY v. HAMILTON.

A. in St. Louis having a standing agreement with B. & Co., in New Orleans, to ship produce to them, drawing against the shipments—the balance of any draft on one shipment not discharged by its proceeds, to be paid from the proceeds of any other shipment—bought of C., residing at Cairo, on the Mississippi, a hundred miles and more below St. Louis, a specific number of sacks of corn, then lying at a landing on the river somewhat above Cairo, though much below St. Louis, and received an order for its delivery. He did not pay for it, though the transaction was impliedly one for cash. A. delivered his order to the agents of a steamer at St. Louis, then about to go down the river to New Orleans. These gave to him a regular bill of lading, agreeing to deliver the specified number of sacks of corn to B. & Co., in New Orleans. On the same day A. drew his bill of exchange on B. & Co., in New Orleans, telling them to charge the draft to the account of this specific shipment; and attaching to his bill of exchange, the bill of lading thus received, sold the draft in the market. Being forwarded, it was paid at maturity by B. & Co., in New Orleans; they having had no notice of any difficulty. They were at the time in advance to A. on account of other shipments. The steamer set off on her voyage, and stopping at

Statement of the case.

the place where the sacks of corn were, took them on board. Proceeding further on her voyage she came to Cairo, C.'s residence. C. having learned that A. had failed, had not paid for the corn and was insolvent, issued an attachment, and on the arrival of the steamer seized the corn and took it off the boat. On suit brought by B. & Co., for damages, *held* that after the boat took the corn on board a transfer of the property to B. & Co. was effected, and that C. had made himself liable for his act of seizure and asportation.

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

In 1867 Sherwood, Karns & Co., commission merchants of St. Louis, had a standing agreement with Hamilton & Dunnica, of New Orleans, to ship produce to them, and to draw drafts on the shipments, which they were to accept and pay. In case the proceeds of any shipment left a balance due to Hamilton & Dunnica, they were to apply the surplus of any other shipment in payment of it. At this time Cole Brothers were the correspondents in St. Louis of Hamilton & Dunnica, and were advertised to make advances on shipments made to them, and often during the season of 1867 made advances upon shipments to this house by Sherwood, Karns & Co. In this condition of things the transaction occurred which was the subject of this controversy.

On the 31st of August, 1867, Sherwood, Karns & Co. purchased of Halliday Brothers, of Cairo, Illinois, through their agent (one Booth) in St. Louis, 1250 sacks of corn, lying at Price's Landing on the Mississippi River, a hundred and fifty miles, more or less, below St. Louis, and a short distance above Cairo, and obtained an order for the delivery of the corn. This order they handed over to the agent of the steamboat Bee, then at her wharf in St. Louis, who issued a regular bill of lading to deliver the corn to Hamilton & Dunnica at New Orleans. On the same day Sherwood, Karns & Co. drew their bill of exchange for $2500 on Hamilton & Dunnica, and in it told them to charge the same to account of this specific shipment. At this time there was a large balance due Hamilton & Dunnica on account of previous shipments of produce. This bill of exchange was

taken to Cole Brothers for discount, and sold, indorsed, and delivered to them with the bill of lading attached, by Sherwood, Karns & Co., to whom they paid the proceeds. Shortly after this Cole Brothers deposited the bill of exchange thus accompanied by the bill of lading with a banking house in St. Louis, who sent them forward, and Hamilton & Dunnica accepted the bill of exchange, without notice of any difficulty in the matter, and paid it at maturity. In a day or two after the bill of lading was issued and transferred to Cole Brothers, the steamboat Bee proceeded on her voyage to New Orleans as far as Price's Landing, and, *having obtained the corn*, stopped at Cairo, arriving there September 5th. On the day, however, before she got there, Booth, the agent at St. Louis of Halliday Brothers, telegraphing to them that Sherwood, Karns & Co. had failed, had not paid for the corn, and had no effects in St. Louis, directed them "to stop the delivery of the corn." Thereupon Halliday Brothers got an attachment, and upon the arrival of the steamer at Cairo, the corn was levied on and taken from the possession of the boat by virtue of the same. Halliday Brothers stated to their agent, Booth, his impression was, that "they attached the corn." These attachment proceedings resulted in the sale of the corn, and the payment of the net proceeds by the marshal to Halliday Brothers. Hamilton & Dunnica hereupon brought trespass against Halliday Brothers. The court below charged generally in favor of the plaintiffs; and refusing to charge as the defendant asked it to do, that the defendants were not liable in this action unless they directed the officer to seize the corn, or personally interfered with or took control of it. The jury found for the plaintiff $3436. Judgment accordingly.

Messrs. Albert Pike and R. W. Johnson, for the plaintiffs in error, contended that:

1. That the case was wanting in the essential characteristics of the factors' lien without possession; that there was no previous express agreement to ship the identical cargo in

question; no distinct pledge of the proceeds of *that* cargo to the payment of actual advances; no actual advances made in pursuance of such agreement by actual payment or acceptance of draft before the rights of third parties attached. That the case did not show that Hamilton & Dunnica knew of the existence of this corn, or bill of lading, or draft, but only that one party had been in the habit of shipping, and the other in the habit of paying on consignment.

2. That at all events, Hamilton & Dunnica as against the attaching creditors could have no lien beyond their actual advances on the particular consignment; and that the equitable interest of Sherwood, Karns & Co., in the surplus, was open to attachment.

3. That a bill of lading for corn as shipped at St. Louis on one day, could not give the right of property in corn shipped at a place one hundred and fifty miles distant, on another day. The corn had not been received by the transportation company at all, when the bill was given.

4. That the court had erred in refusing the instruction above mentioned as asked for, viz.: that what the attachment called upon the marshal to seize was, of course, the corn of Sherwood, Karns & Co., and not any property of Hamilton & Dunnica; and as for any notification of the marshal's trespass, if a trespass had been made, the case showed no ratification with a knowledge that any had been committed.

Mr. G. P. Strong, contra.

Mr. Justice DAVIS delivered the opinion of the court.

There is no difficulty, on principle and authority, in determining the rights of the parties to this controversy. On the conceded facts of this case there can be no question that the legal title to the 1250 sacks of corn passed to Hamilton & Dunnica before the levy of the attachment by Halliday Brothers, and if so, the judgment of the Circuit Court must be affirmed.

It is not necessary to discuss the general doctrine relat-

ing to the lien of a factor, because it has no application here. If this were the case of a mere agreement to ship produce in satisfaction of antecedent advances, which will not in general give the factor or consignee a lien upon it for his general balance until he obtains actual possession of it, the attachment would hold the property. But the agreement in question is of a different character, and rests on a different legal principle. It appropriates specifically 1250 bags of corn to Hamilton & Dunnica, with an intention that they shall sell it to pay the draft drawn against it, and, if there is any surplus remaining after this is done, to apply it in liquidation of the advances previously made for Sherwood, Karns & Co. And this appropriation did not rest in intention merely, for it was executed, so far as the parties in St. Louis could execute it, by the transmission of the bill of lading to Hamilton & Dunnica. As soon as the corn was deposited with the common carrier, who was the bailee for the purpose, the title to it and right of property in it was changed and vested in Hamilton & Dunnica, to whom it was to be delivered. This is the effect of all the cases on the subject.* A contrary rule would defeat the object which the parties to the agreement intended to accomplish by it, and would seriously embarrass commercial men in their dealings with each other, for it can be readily seen that the mode of transfer adopted in this case is necessary for the purposes of commerce. If Hamilton & Dunnica had purchased the corn outright, they could not have got a better legal title to it than they acquired under the admitted facts of this suit. The legal title to the property passed to them to carry out certain designated purposes, and they had the right to the undisturbed possession of it until those purposes were effected.

* Haille *v.* Smith, 1 Bosanquet & Puller, 563; Desha et al. *v.* Pope, 6 Alabama, 690; Gibson *v.* Stevens, 8 Howard, 384; Grove *v.* Gilmor, Ib. 429; Bryans *v.* Nix, 4 Meeson & Welsby, 775; Anderson *v.* Clark, 2 Bingham, 20; Holbrook *v.* Wight, 24 Wendell, 169; Grosvenor *v.* Phillips, 2 Hill, 147; Sumner *v.* Hamlet, 12 Pickering, 76; Nesmith et al. *v.* The Dyeing and Bleaching Company, 1 Curtis, 130; Valle *v.* Cerre, 36 Missouri, 575.

It may be said that Sherwood, Karns & Co. had an equitable interest in any surplus that might remain of the proceeds of the corn after the claims of Hamilton & Dunnica were satisfied, and that this equitable interest was liable to attachment by the laws of Illinois. "But that liability," says Chief Justice Taney, in *Gibson* v. *Stevens*,* "will not authorize the attaching creditor to take the property out of the hands of the legal owner before his claims upon it are discharged." Besides, it is clear from the evidence that the proceeds from the corn fell far short of liquidating the indebtedness due Hamilton & Dunnica from Sherwood, Karns & Co.

It is argued that the bill of lading did not effect the transfer of the property, because when it was executed the corn had not been received by the transportation company. But it became operative as soon as the corn was in the custody of the boat, and the legal relations of Hamilton & Dunnica to the property were fixed from that time, and it is unnecessary to consider what would have been the rights of third persons if the attachment proceedings had preceded, instead of being subsequent to, the delivery of the corn.

It is urged that the Circuit Court should have instructed the jury, as it was asked to do, that Halliday Brothers were not liable in this action, unless they directed the officer to seize the corn, or personally interfered with or took control of it. But the refusal to give this instruction worked no harm to the plaintiffs in error, for the court could have well told the jury that the evidence was conclusive on these points against them. Indeed, so conclusive is it that there is no room to doubt that they took out the attachment to seize this very corn, and directed the officer to delay the boat for that purpose. On the 4th of September, Booth, their agent in St. Louis, having ascertained that Sherwood, Karns & Co. had failed, and did not own any property there to attach, and being unable to get the money for the corn, sent a telegram to the Hallidays to stop its delivery. This they doubt-

* 8 Howard, 384.

less found they could not do; but on the same day they applied for the writ of attachment, which was issued and served on the following day. No other persons in Cairo could have known of the shipment of the corn, or Sherwood, Karns & Company's connection with it, and it is idle to suppose the marshal would have made the levy without the special instructions of the plaintiffs in the suit. Besides, it was their interest to keep their proceedings as secret as possible, for fear the officers of the boat might get knowledge of them and avoid landing at Cairo. But this is not all, for they told Booth that they attached the corn, and the marshal paid them the net proceeds of the sale of it. Surely nothing more is necessary to show that the levy and sale were at their instance, and there is no evidence at all to the contrary.

These views dispose of the case, and the judgment is accordingly

AFFIRMED.

STEINBACH *v.* STEWART ET AL.

1. A decree of the District Court of the United States confirming a claim to land under a Mexican grant in California contained a proviso that the confirmation to the claimant should be without prejudice to the rights of the legal representatives of the original grantee, or whoever might be entitled to the land under him, and should enure to the benefit of any person, or persons, who might own or be entitled to the land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent, or otherwise. On appeal to the Supreme Court the decree, so far as it confirmed the original grant, was affirmed: *Held*, that this language of the Supreme Court did not annul the proviso to the decree, but left it in full force; and that the decree accordingly gave to parties holding under the original grantee or the confirmee the same benefits which it gave to them in the perfection of their title.
2. In August, 1846, the confirmee, V., executed an instrument, and delivered it to one H., wherein he uses these words, after certifying that he had purchased the tract of land designated of the original grantee:

   "I grant and transfer all the right which I have in the land mentioned to H., who shall make such use thereof as may be most convenient to him;"

   Held, that the instrument, construed by the Mexican law in force in Cali-

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fornia at the time of its execution, was a conveyance of all V.'s title, and not a mere license to H. to occupy the land.

3. In a deed of land from H. to D., the premises were described as "one mile square of land, English measure, containing six hundred and forty acres, situated, lying, and being in the district of Sonoma, and being part and parcel of all that certain tract of land called Agua Caliente, formerly taken up by Lazaro Peña, by a grant from the government." When this deed was offered in evidence it was shown that the grantee, D., at the time of his purchase from his grantor, H., took possession of the tract thus conveyed, and occupied it, and that all the subsequent grantees under him, of whom there were several, at the date of their respective conveyances took possession of the same tract and remained in the open and notorious possession of the same until they parted with their respective interests; *Held*, that the deed, accompanied by this evidence of identification and occupation of the land, was properly admitted.

4. The statements of a grantor of land, made after he has conveyed the land to others, are inadmissible to invalidate his deed.

ERROR to the Circuit Court for the District of California.

This was an action of ejectment for a tract of land situated in the State of California. Issues having been joined the case was called on for trial before a jury, and evidence was introduced by the respective parties. After all the evidence on both sides was concluded, the attorneys of the parties who had appeared in the action stipulated that the jury should be discharged, and that the issues be tried and determined by the court. The jury were accordingly discharged, and the facts established were substantially as follows: On the 14th day of October, 1839, one Lazaro Peña presented a petition to the commandant general of the department of California for a grant of land situated in the present county of Sonoma, in that State, known by the name of Agua Caliente, of which land Peña had been years previously in the possession; and the commandant gave to him a provisional concession of the land until he should petition the government for the proper title. Afterwards, on the 13th day of October, 1840, Peña obtained a grant of the land from Alvarado, then governor of the department of California, and on the 8th day of October, 1845, this grant was approved by the Departmental Assembly. Pending the

proceedings to obtain the grant the petitioner, Peña, sold and conveyed all his interest in the land to one M. G. Vallejo. Subsequently, March 2d, 1853, Vallejo presented a petition to the board of land commissioners, created under the act of March 3d, 1851, for a confirmation of his claim under the grant. By the board his claim was rejected; but afterwards, on appeal, the District Court of the United States for the Northern District of California confirmed his claim. The decree of confirmation was entered on the 13th July, 1859, and was accompanied by the following proviso:

"Provided, that this confirmation of the above land to the said M. G. Vallejo shall be without prejudice to the rights of the legal representatives of Lazaro Peña, the original grantee, or whoever may be entitled to said lands under him; and said confirmation to said Vallejo shall enure to the benefit of any person or persons who may own or be entitled to said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent, or otherwise."

Afterwards, on appeal to the Supreme Court of the United States, this decree was affirmed *in so far as it confirmed the original grant.* The tract thus confirmed embraced the premises in controversy.

On the 17th of January, 1863, Vallejo, for the consideration of $3000, sold and conveyed his interest in the entire tract to the plaintiff Steinbach, and the deed was duly recorded under the laws of California in the recorder's office of the county. On the 5th of February, 1864, Vallejo executed for the like consideration a second deed of the same premises, which was also duly recorded in the same office.

Four of the defendants, namely, G. W. Whitman, Martha C. Watriss, C. V. Stewart, and J. B. Warfield, claimed each a portion of these premises under Vallejo, through an instrument executed by him to one Andres Hoeppener, on the 12th of August, 1846. The original was in Spanish, and was indorsed on the espediente of Peña. The following is a correct translation of the document:

"The undersigned certifies that he legitimately and formally

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purchased from the citizen Lazaro Peña the tract of land of the 'Agua Caliente,' to which the preceding approval of the Departmental Assembly of Alta California has reference. I grant and transfer all the right which I have in the land mentioned to Don Andres Hoeppener, who shall make such use thereof as may be most convenient to him. And for the necessary purposes and uses I give this, at Sonoma, this 12th day of August, 1846.

"M. G. VALLEJO.

"Witness:

"A. A. HENDERSON,
"J. P. LEESE."

It was at the time admitted that Peña had previously executed a deed of the tract to Vallejo, bearing date December 4th, 1839, and that at the time the deed from Vallejo to Hoeppener was executed Hoeppener received full possession of the premises from Vallejo, and continued thereafter in the possession until the land was sold by him.

The counsel for plaintiff objected to the reception of this document in evidence, on the ground that the same did not convey any estate from Vallejo to Hoeppener, but was a mere license to occupy, which terminated and was extinguished when Hoeppener asserted title to or attempted to convey the lands; which objection was overruled by the court and the evidence admitted, to which ruling an exception was duly taken.

The counsel for the defendants then, on the part of the defendant, Whitman, offered in evidence a deed from Hoeppener to Carlos Glein, dated December 1st, 1847, together with various mesne conveyances, by which the title acquired by said Glein had passed to and vested in said Whitman. In the deed from Hoeppener to Glein the land intended to be conveyed is described as follows:

"All that certain tract and parcel of land containing three hundred acres, more or less, being a portion of the rancho named Agua Caliente, as transferred to the said Andres Hoeppener by M. G. Vallejo; the said three hundred acres being more particularly bounded and described as follows, to wit: On the west side by Sonoma Creek, on the east side by the Napa

Hills, on the north by Yeltan's farm, and on the south by the land of Ernest Rufus."

The defendants' counsel then proved, on the part of the defendant Whitman, that Glein, at the time of his purchase from Hoeppener, took possession of the tract thus conveyed (and which is the same tract held and possessed by Whitman), and that said Glein, together with all his successive grantees, including Whitman, at the date of their respective conveyances, paid a valuable consideration therefor, and took possession of the tract, and remained in the open and notorious possession of the same until they parted with their interests therein; but that Whitman had never parted with his interest therein; and that, at the date of the conveyance from Vallejo to Steinbach of his interest in the Agua Caliente rancho, he (Whitman) was in the open and notorious possession of the tract, claiming to own the same.

The plaintiff's counsel objected to the admission of this deed in evidence, because it did not import to convey the title to any particular tract of land; that it created no legal estate, and was therefore incompetent evidence to prove any issue made in this action, and was irrelevant and immaterial.

The court overruled the objection and admitted the evidence; to which ruling of the court exception was duly taken.

The counsel for the defendants then, on behalf of the defendant Watriss, offered a deed from Hoeppener to J. J. Dopken, dated November 14th, 1846, together with various mesne conveyances, by which the title acquired by the said Dopken had passed to and vested in the said Watriss. In the deed from Hoeppener to Dopken the land intended to be conveyed is described as follows:

"One mile square of land, English measure, containing 640 acres, situated, lying, and being in the district of Sonoma, and being part and parcel of all that certain tract of land called Agua Caliente, formerly taken up by Lazaro Peña, by a grant from the government and lately purchased from the said Lazaro Peña by M. G. Vallejo, and granted by the said M. G. Vallejo

unto the aforesaid Andrew Hoeppener, together with all and singular the advantages, profits, privileges, and appurtenances whatsoever, right, title, and interest of the said Hoeppener, of, in, and to the same, belonging or in any way pertaining."

The defendants' counsel then proved, on the part of the defendant Martha C. Watriss, that Dopken, at the time of his purchase from Hoeppener, took possession of the tract thus conveyed (and which is the same tract held and possessed by the said Martha and described in her answer), and that Dopken, together with all his successive grantees, including the said Martha, at the date of their respective conveyances, took possession of said tract and remained in the open and notorious possession of the same until they parted with their interests therein, but that Martha had never parted with her interest therein; and that, at the date of the conveyances from M. G. Vallejo to Steinbach of his interest in the Agua Caliente rancho, the said Martha was in the open and notorious possession of the tract, claiming to own the same.

To the admission of which deed the counsel for the plaintiff objected that the said deed, by reason of the indefiniteness of the said description, was insufficient to convey title or to create any legal estate; and that it was therefore irrelevant, immaterial, and inadmissible; which objection the court overruled and admitted the deed in evidence, *in connection with the testimony as to the occupation of the particular premises*, to which ruling an exception was duly taken.

After the defendants had closed their testimony, the plaintiff's counsel offered to prove, by statements made by Hoeppener in 1848, that Hoeppener and Vallejo agreed that Hoeppener should teach Vallejo's family music, for which Vallejo was to convey him the rancho; that in the meanwhile Hoeppener was to occupy it; that neither Hoeppener nor Vallejo intended or considered the said instrument as a conveyance, or more than a license to occupy; that Hoeppener did not perform his agreement, but, after part performance, abandoned it, and admitted that he had no claim to the land. All which took place in the year 1847–1848.

The court refused to receive any testimony as to statements of Hoeppener subsequent to the date of his conveyances to others, and excluded the testimony; to which ruling of the court an exception was duly taken.

The plaintiff also proved that he paid to Vallejo for the two deeds received from him, as above mentioned, a valuable consideration at the time, and that he made the purchase of the land and received the deeds without knowledge or notice actual or constructive of any other conveyances of the premises or of any interest therein by Vallejo, except as given by the actual, open, and notorious possession and occupation of the defendants, G. W. Whitman, Martha C. Watriss, J. B. Warfield, and C. V. Stewart, as above stated.

He also proved that previous to the year 1857 Hoeppener, above mentioned, died intestate and without issue, leaving a widow, Anna Hoeppener, who was his sole heir; that on the 17th of May, 1858, the said Anna, by a deed executed and delivered, for a valuable consideration sold and conveyed to J. L. Green the tract of land known as Agua Caliente, and which deed was recordrd on the 10th of July, 1863, in the proper recorder's office; and that Green, on the 2d day of January, 1864, by a deed duly executed and delivered, for a valuable consideration sold and conveyed the same property to the plaintiff, and that the deed was also properly recorded on the 22d day of October, 1864.

The court gave judgment in favor of the four defendants above named, for the land which they severally had purchased and occupied, and in favor of the plaintiff against all the other defendants, except those against whom the action had been dismissed. From this judgment the case was brought here on writ of error sued out by the plaintiff.

Mr. J. Wilson, for the plaintiff in error; Messrs. E. O. Wheeler and C. T. Botts, contra.

Mr. Justice STRONG delivered the opinion of the court.

The record exhibits five assignments of error, all founded upon exceptions taken in the court below to the admission

or rejection of evidence. Of these the first is, in substance, that the court permitted the defendants to give in evidence what it is contended constituted at most only an equitable right, and what was, therefore, no defence against the legal title asserted by the plaintiff. The exception cannot be understood without a brief examination of the titles under which each of the parties claimed the lands in controversy.

The title of the plaintiff had its origin in a provisional concession made by the Mexican government to Lazaro Peña on the 14th day of October, 1839. Peña was then in possession of the land, and the concession was made to him with the reservation that he should petition for the usual title from the political government. On the 13th day of October, 1840, he obtained a grant in the usual form from Don Juan B. Alvarado, then governor of the department of California, for the land then known by the name of "Agua Caliente," embracing the land now in dispute, and on the 8th of October, 1845, the grant was approved by the Departmental Assembly. Before it was made, however, though after the provisional concession, Peña conveyed all his interest in the land to Mariano G. Vallejo. In 1853 Vallejo instituted proceedings, under the act of Congress of March 3d, 1851, for a confirmation of the land to him, and it was confirmed by the District Court in 1859. The decree of confirmation contained the following proviso: "Provided that this confirmation of the above land to the said M. G. Vallejo shall be without prejudice to the rights of the legal representatives of Lazaro Peña, the original grantee, or whoever may be entitled to said lands under him; and said confirmation to said Vallejo shall enure to the benefit of any person, or persons, who may own or be entitled to the said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent, or otherwise." The record of the confirmation was subsequently brought into this court by appeal, and here it was adjudged that the decree of the District Court, in so far as it confirmed the original grant, be affirmed. It was under this decree of confirmation that the plaintiff claimed, both through

a deed of Anna Hoeppener, sole heir of Andres Hoeppener, an alleged grantee of Vallejo, dated December 21st, 1858, and secondly, by a deed dated January 17th, 1863, from Vallejo himself.

The defendants asserted ownership of the parcels of the rancho "Agua Caliente," now in controversy, under an alleged grant made by Vallejo to Andres Hoeppener, dated August 12th, 1846, about ten months after the grant to Peña had been approved by the Departmental Assembly.

It thus appears that both parties claimed under Peña and Vallejo, and a brief examination will show that the nature of their titles was the same. If that of the plaintiff was a legal estate (which it is not necessary to this case to decide), that of the defendants was equally so. That the right of Vallejo on the 12th of August, 1846, when he conveyed the property to Hoeppener, was not perfect, must be conceded. His claim had not been confirmed, and he had no patent. He had nothing but the Mexican espediente. Of course the right which he conveyed was also imperfect. But when afterwards the District Court confirmed the land to him, the confirmation enured to the benefit of his prior grantee. It was not the acquisition of a new title, but the establishment of his original right. And this was expressly decreed by the proviso already quoted. By that it was adjudged that the confirmation should enure to the benefit of any person or persons who owned, or were entitled to the land by any title in law or in equity, derived from the original grantee by deed, devise, descent, or otherwise. If, therefore, Hoeppener or his grantees held any such title, it was confirmed to them as truly as if he or they had been petitioners for such confirmation. Now, it is in virtue of this decree of the District Court that the plaintiff claims. He has no standing without it. Asserting his rights through it, the law will not permit him to repudiate any part of its provisions.

It is argued, however, that the proviso to the decree of confirmation was annulled by the action of this court. To this we do not assent. The judgment upon the appeal was that the original grant to Lazaro Peña was a good and valid

grant, and that the decree of the District Court, in so far as it confirmed the original grant, be itself affirmed. This was no reversal of any portion of the decree of the District Court. On the contrary it left that decree in full force to all its extent. And by relation it was carried back to the inception of the title confirmed. It is a well-settled rule that where several acts concur to make a complete conveyance the original act is preferred, and all others relate to it.* Mr. Cruise, in his work on Real Property,† says, "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." The proviso was, therefore, nothing more than a declaration of what would have been the legal effect of the decree without it. If, therefore, as is insisted by the plaintiff, the confirmation vested in Vallejo the legal title, it at the same time vested a legal estate in the grantees of Vallejo, or Peña, who held portions of the land under conveyances from the confirmees.

The second exception taken in the court below is, that the court received in evidence an instrument of writing, dated August 12th, 1846, claimed by the defendants to be a grant of the land by Vallejo to Andres Hoeppener, and this is the basis of the second assignment of error. The bill of exceptions shows that the execution of the instrument was duly proved, that it was indorsed upon the espediente to Peña, that at the time when the deed was made Hoeppener received full possession of the land from Vallejo, and that he continued thereafter in such possession until the land was sold by him. It is argued that the deed was only a license to occupy, and not a grant of the land, hence that it was revocable at will, conferring a mere tenancy-at-will and not a legal estate. Certainly it is a very informal instrument, and were the rules of the common law to be applied to it there would be difficulty in maintaining that it was a grant of the fee.

* Viner's Abridgment, 290; Relation. † Vol. 5, pp. 210–11.

It is to be noted, however, that its character and effect are to be determined by Mexican law. It was made before California had been ceded to the United States. In inquiring what was the intention and effect of the instrument we are not, then, to be guided by the rules of the common law or by the British statute of uses. That it was more than a license to occupy is plain. Its language is, "I grant and transfer (*cedo y transparo*) all the right which I have in the land mentioned, to Don Andres Hoeppener, who shall make" (or have) "such use thereof as may be convenient to him." These are not words of mere license. They describe the subject of the grant, not as a possessory right, but as "all the right" of the grantor "in the land." Full effect cannot be given to all the words of the instrument unless it is held to be a conveyance of all Vallejo's title. If the intent had been to transmit less, why describe the subject as all right in the land? It is argued that the words following the operative words of transmission to Hoeppener, viz.: "who shall make such use thereof as may be most convenient to him," indicate that no more than a license to occupy was intended. They do not appear to us to warrant any such inference. They, or other words of like import, are common in Mexican grants which have been held to be conveyances of the entire estate of the grantors.* In the latter case the effect of such clauses is considerably discussed. Instead of being words of limitation or restriction, they seem rather intended to confer the largest dominion. And in our law they have been held to enlarge into a fee, a devise which, without them, would have been only a life estate.

If there were any doubts respecting the deed, whether it was intended as a grant or a license, they would be dispelled by noticing the construction manifestly given to it by the parties. This is an aid that may always be called in when the meaning of a contract is ambiguous.† There was no

* *Vide* Hayes *v.* Bona, 7 California, 154; Havens *v.* Dale, 18 Id. 362; and Mulford *v.* Le Franc, 26 Id. 88.

† French *v.* Carhart, 1 Comstock, 102, and cases therein cited; United States *v.* Appleton, 1 Sumner, 502–3.

necessity for reducing to writing a mere license. Yet this contract was in the form of a conveyance, reduced to writing, and indorsed upon the espediente. There was no necessity of livery of seizin if the deed was a mere license, yet Hoeppener was actually put into possession of the land by the grantor, and he or his grantees retained the possession unchallenged, so far as it appears, from August 12th, 1846, until this suit was brought. Vallejo never claimed any right until 1863, when he made a grant to the plaintiff, not of the land, but of "all his right, title, and interest" in it. In addition to all this the plaintiff recognized a possible right in Anna Hoeppener, the heir of Andres Hoeppener, by taking a deed from her grantee, to whom she had conveyed her "right, title, and estate" in the tract of land, in the year 1858. These facts tend strongly to show that the parties understood Vallejo's deed as conveying to Hoeppener absolute ownership of the land described in it.

It is insisted, however, that even if the intent was to convey the land, instead of mere license to occupy it, the instrument was ineffectual, because informal. It is said that it did not contain all the requisites of a valid Mexican grant. It is doubtful whether this point was made in the court below. It does not distinctly appear in the bill of exceptions that it was urged as an objection to the admission of the deed. The objection appears rather to have been that Hoeppener obtained by the deed a mere license, which terminated when he asserted title to the land, or attempted to convey it. Such was the reason stated for the objection in the bill tendered by the plaintiff. But assuming that it is presented for our consideration, we are of opinion the deed contains all that was necessary to constitute an operative grant. That it was executed and delivered, and that, in pursuance of it, Hoeppener was put into possession by the grantor, are facts that are not controverted. This is all that, under the civil law, is necessary to transfer titles. Livery of seizin is the controlling fact. Admitting that, under the Mexican law, a contract in writing was necessary to a private conveyance, it is nevertheless true that the form of the instrument was not

material. Any form would answer that manifested an intent to convey. Here were words of grant (*cedo y transparo*). The word *cedo* (I grant) is the ordinary word used in Mexican conveyance to pass title to lands.* Though the earlier cases in California asserted that the consideration or price of the grant must be mentioned in the written contract, or, at least, that it must be mentioned a price was paid, the later cases have asserted a different doctrine.† It is quite clear that in no case could mention of a price ever have been deemed necessary when there was no price—when the transaction was a gift. In such a case a writing without mention of any consideration, coupled with livery of seizin, or delivery of possession, would consummate the transfer. It would answer no good purpose to review the authorities upon this subject. Suffice it to say, that in view of the language of the instrument, of the facts that Vallejo put Hoeppener into possession under it, and that the grantee and his successors in the title remained in unchallenged possession for more than seventeen years before this suit was brought, we are constrained to hold that it amounted to a conveyance of all right to the lands which Vallejo had.

The third assignment of error is founded upon the third exception taken in the court below. It is, in substance, that the court received in evidence a deed from Hoeppener to Carlos Glein, dated December 1, 1847. It was offered with sundry other conveyances, by which the title conveyed to Glein became vested in Whitman, one of the defendants in error. In the deed from Hoeppener, thus received, the subject of the grant was described as follows: "All that certain tract and parcel of land, containing three hundred acres, more or less, being a portion of the rancho named 'Agua Caliente,' as transferred to the said Andres Hoeppener by M. G. Vallejo, the said three hundred acres being more particularly bounded and described as follows, to wit: On the west side by Sonoma Creek, on the east side by the Napa Hills, on the north by

* Mulford *v.* Le Franc, 26 California, 108.

† Havens *v.* Dale, 18 California, 366; Merle *v.* Mathews, 26 Id. 455.

Yeltan's farm, and on the south by land of Ernest Rufus." In connection with the offer of this deed it was proved that Glein, the grantee, at the time of his purchase, took possession of the tract thus conveyed (the same now held by Whitman), and paid a valuable consideration for it; and that all the succeeding grantees, including Whitman, paid valuable considerations for their grants at the times of their several purchases, and took possession of the land, remaining in open and notorious possession while their interests continued, Whitman still retaining his. It was also proved that when Steinbach, the plaintiff, acquired his title to the Agua Caliente rancho, Whitman was in the open and notorious possession of the tract, claiming to own the same.

To the admission of this deed from Hoeppener to Glein the plaintiff objected, for two reasons assigned at the time. The first of these was, that the deed did not import to convey the title to any particular tract of land; and the second was, that it created no legal estate, and that it was therefore incompetent evidence for any issue made in the action. Neither of these reasons is, in our opinion, well founded. The first rests upon a mistake of fact. We are unable to perceive that there was insufficient certainty in the description of the land granted. It was identified by giving natural boundaries for both its east and west sides, and by calls for adjoining proprietors upon the north and the south. This was enough. In regard to the second reason, we remark that the entire deed is not before us. It is not found in the record, and there is nothing, therefore, to show that it did not convey all the estate which Hoeppener had acquired by the deed to him from Vallejo. If it did not, it was incumbent upon the plaintiff in error to show the fact by exhibiting to us the deed itself. We infer, from the course of the argument, that the objection was intended only to reassert that Hoeppener's title was a mere equity. The worthlessness of that assertion has already been sufficiently considered.

The fourth exception is quite similar to the third. It is that the court received in evidence, against the objection of the plaintiff, a deed, dated November 14, 1846, from Andres

Hoeppener to J. J. Dopken, whose title subsequently passed to Martha C. Watriss, another of the defendants. The deed was for six hundred and forty acres, part of the rancho "Agua Caliente" granted to Peña, confirmed to Vallejo, and conveyed by him, as above mentioned, to Hoeppener. Standing by itself, the deed is indefinite in its description of the land intended to be granted, and an insufficient designation of the subject of the grant. But it was not offered or received alone. It was made, as will be perceived, while the country was under Mexican rule, and its offer was attended by proof of what amounted to livery of seizin—an actual putting of the grantee into possession under it, and a maintenance of that possession from 1846 until 1864, when this suit was brought. It had been admitted, when the deed was received in evidence, that Vallejo had put Hoeppener into possession of the entire rancho, and that Hoeppener continued in possession until he sold to Dopken, when he retired, and allowed his grantee to take possession of the tract sold. This was a parol identification followed by long possession unchallenged. Considering the looseness of Mexican grants at that time, and the acquiescence for so many years of the grantor and all claiming under him, we cannot say that the deed, in connection with this other evidence, was erroneously admitted.

The only remaining assignment of error is, that the court refused to allow the plaintiff to give evidence in rebuttal to prove that, even if the deed shown by the defendants from Hoeppener did make out an equity in his grantees, Hoeppener failed to perform the conditions upon which Vallejo's grant was made to him, upon which the equity rested, and, therefore, that the equity expired.

A few words will dispose of this. If the assignment correctly represented what was the ruling of the court, it would be a sufficient answer to it, that the deed from Vallejo to Hoeppener was unconditional, and, therefore, that his title, and that of his grantees, was not dependent upon the performance or non-performance of conditions. But the court made no such refusal as that of which the plaintiff com-

plains. What the court did rule was, that Hoeppener's statements, made after he had conveyed the land to others, could not be admitted to invalidate his deeds. Surely such a ruling requires no vindication.

Finding no error in the record, the judgment is

AFFIRMED.

LUDLOW *v.* RAMSEY.

1. In a collateral proceeding, to set aside a sale made under a judgment of another court, it must be shown that such court had no jurisdiction of the case. It is not enough to show mere errors and irregularity.

   Hence it is not enough to set aside, in a collateral proceeding, a sale made under the attachment laws of Tennessee, that the affidavit on which the attachment issued did not state, as the code of Tennessee directs that such affidavits should do, that the claim to secure which the attachment process was prayed was "a just claim;" it stating such facts, however, as made the justice of the claim inferable almost as of necessity.

2. The doctrine of *Dean* v. *Nelson* (10 Wallace, 158), that judicial proceedings on a mortgage carried on within the Union lines, against a person driven, by way of retaliation for outrages committed by others, outside of those lines and prohibited from returning within them, does not apply to a person who went and remained voluntarily in rebellion. Such a person cannot complain of legal proceedings regularly prosecuted against him as an absentee.

3. A party had attached, in a State court, the property of a person who had left his home and engaged in the rebellion. Afterwards, on information by the government filed in a District Court of the United States, for confiscation of the property under an act of Congress, the attaching creditor intervened, as the act allowed him to do, to protect his prior right and secure his claim from the proceeds of the forfeited property when sold. The proceedings in confiscation having been terminated by a pardon to the person whose property had been proceeded against, the proceedings in attachment in the State court went on, and a purchaser of the property under them was put into possession by a writ of possession from the State court. *Held*, that whether such writ was issued by the State court in contempt of the Federal one or not was a question which could not be passed upon by a Federal court in a suit by the original owner of the property to set aside as void a sale made under the proceedings in attachment, and that such proceedings could not be

deprived of their legal validity by the ineffectual attempt at confiscation supervening upon them.

APPEAL from 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," enacts that a plaintiff after action for any cause has been brought may, when the sum claimed exceeds $50, on giving bond, &c., sue out an attachment at law or in equity against the property of a defendant in the following cases:

"Where he is about to remove or has removed himself from the State.

"Where he absconds or is absconding or concealing himself or property."

The code continues:

"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.*"

Subsequent sections provide for notice of the attachment by publication, declaring that the attachment and publication are in lieu of personal service.

With these provisions of the code in force, Mrs. Cynthia S. White, having a suit pending against one Ramsey, applied, September 18th, 1863, to the State Chancery Court at Knoxville, Tennessee, for an attachment against a portion of the said Ramsey's property. The affidavit filed was thus:

"Your orator, Cynthia S. White, a citizen of Knox County, respectfully represents unto your honor that she holds a bond on J. G. Ramsey, dated July 17th, 1860, payable six months after date, with lawful interest from date, for $300, a copy of which note is hereunto appended, the original of which shall be produced in the final hearing of this cause. Your orator shows that the said Ramsey has left this State, or so conceals himself that the ordinary process of law cannot be served upon him.

Statement of the case.

He was the owner *of a considerable estate, both real and personal, in Knox County.* The premises considered, your orator prays that the said J. G. Ramsey be made a party defendant to this bill; that process of subpœna and attachment issue, and *that a sufficient amount of said estate be attached* to satisfy your orator's demand. She prays for publication, and, on the final hearing, she prays for the sale of said property, and for an account, if necessary."

A copy of a note, such as was described in the affidavit, was annexed to it, but as the reader will have observed, nothing is said in the affidavit as to the justness of the debt to secure which the attachment was prayed for.

Having given the requisite bond an attachment was issued, and a house and lot in Knoxville, belonging to Ramsey, was duly attached, as appeared by the sheriff's return to the writ, no personal property being found. At the January rules, 1864, order of publication was made in the Knoxville Whig, a newspaper published in Knoxville, to notify the defendant to appear on the first Monday of April, 1864, and make defence, or that judgment would be taken *pro confesso* against him. In October Term a decree was rendered for the amount of the debt, and directing the master to sell the property attached. The master duly advertised it for sale, and bid it off, January 3d, 1865, to one Vail for $5100. The sale was reported to, and confirmed by, the court, and a writ of possession was issued, but was opposed by persons occupying the premises. Subsequent proceedings, however, were taken, which finally resulted in putting Ludlow into possession, he having purchased the property of Vail.

Ramsey now filed a bill (subsequently amended) in the court below against Ludlow, to set aside the sale thus judicially made of the house and lot, and to recover the rents and profits. His allegation was that the property was sold for $5100, a sum which was not more than half its value, to pay a claim of $332; that he had another house just beside the one sold of less value than it, and two farms not far off, a limited number of acres of which might have been sold; all of which the sheriff certainly knew of; that he himself

knew nothing of the institution of the suit until long after the sale was made, and the decree confirmed.

He alleged further, that the proceedings by which the property was sold were null and void. Referring to the publication in the newspaper at Knoxville, giving him notice to appear and defend the original suit, or that judgment would be taken *pro confesso* against him, his bill alleged that he left Knoxville shortly before the Federal troops arrived; that at the time when the attachment was sued out, and when the publication was made, he was in no situation to see or know of the same; that Tennessee was held by Federal troops, and he in the country held by the Confederate troops; and that no newspapers that were published within the Federal lines were allowed to be sent into the Confederate lines; that there were no mail facilities between them, and the only communication was by a flag of truce; that a great civil war was raging between the Confederate government and the United States, and martial law existed in the State of Tennessee, and civil courts were only held by the will of military commanders. In his amended bill he alleged that when the attachment was issued, and the proceedings had, he was known to be one of the enemy of the party governing by arms the locality of the court, and that it was known that he could not have notice of the suit, could not appear at the court, and could have no communication with others at the place of the court, &c.

The bill further set forth that in September, 1864, the United States seized the property in question as forfeited, and in October of the same year filed an information against it; that Mrs. White had asked and obtained leave to intervene, and did intervene in December, 1864, prior to the date of the sale under the attachment, and it charged that by filing the said intervention in the District Court, Mrs. White had virtually abandoned her attachment suit in the Chancery Court, and that she relied upon having her debt made in the District Court, as provided by the act of Congress which authorized the seizure; and that these proceedings in the District Court gave the United States a prior lien upon the

Argument in support of the absentee's title.

property, the same as if it had been seized by the United States prior to the issue of the attachment bill in the Chancery Court, and that the Chancery Court had no authority to proceed with the sale of the said property, and have the sale confirmed after the said proceedings had been commenced in the District Court of the United States.

As respected the facts it seemed that the property was estimated variously from $6000 to $10,000; that the complainant had another house and lot close by of less value, and a farm; that he had been engaged in rebellion against the United States, and on that account had left Knoxville, the place of his residence; and though no record of the proceeding in the District Court for forfeiture was produced, it was yet admitted by the defendant that the mere facts of seizure, information, and intervention alleged, were correctly alleged, but it appeared also that Ramsey produced to the District Court a pardon from the President for his complicity in the rebellion, and that the proceedings being thus ended, the purchaser under the attachment obtained possession of the property under a writ of possession issued from the Chancery Court of the State.

The court below held that, "for want of a sufficient affidavit," the attachment issued at the suit of White was insufficient; that the Chancery Court of the State acquired no jurisdiction; and that all the proceedings therein "were null and void," and that as they had no other effect than to throw a "cloud" upon Ramsey's title, the removal of it the court regarded as ground for jurisdiction and relief, and granted the relief prayed for. Ludlow accordingly brought the case here.

Messrs. Lander and Moore, in support of the decree:

The case is one of such extreme hardship that the court will scan with eagle eyes the regularity of the proceedings by which the title set up is sought to be maintained. A valuable lot in Knoxville, worth more than thirty times the amount of the debt due to White, was levied on when there were other pieces of property not a stone's throw from it far

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less valuable; yet abundantly sufficient to pay the debt, notoriously known to be the property of the appellee. Yet this valuable piece of property was levied on and sacrificed. Now we say:

1. The affidavit upon which the attachment was obtained, does not meet, in form or in substance, the requirements of the law as expounded in numerous cases.* The language of McKinney, J., in one of them, *Thompson* v. *Carper*,† has been often cited, and seems conclusive of the case.

2. Ramsey obtained his pardon from the President of the United States, and whatever may have been his sympathies with the rebellion, he has a legal right to allege the fact of the existence at the time of a public war, and that being within the lines of the rebel authorities, he had no possible opportunity to defend the suit against him, nor to obtain any information of the existence of such a proceeding.

This court has recognized the war of the rebellion to have been a public war, and the fact that Ramsey before the Federal army took possession of the country around Knoxville had resided there and voluntarily left it and gone to another State, although it might have some weight in determining his status in a proceeding by the government against him, cannot avail Ludlow in a suit of this kind.

The law has been settled with respect to parties situated as these parties were during the war. In *Dean* v. *Nelson*,‡ the court say that "the defendants were within the Confederate lines, and that it was unlawful for them to cross those lines." Two of the defendants there had indeed been expelled from the Union lines, and could not return, so that an attempt may be made to distinguish that case from this, but as the report in that case states, "the other had never left the Confederate lines." As to him, *Dean* v. *Nelson* cannot be distinguished from this case; and even as to the other two, why had they been expelled? only in retaliation on

* Woodfolk *v.* Whitworth, 5 Caldwell, 561; Thompson *v.* Carper, 11 Humphrey, 542; Morris *v.* Davis, 4 Sneed, 453; Smith *v.* Foster, 3 Caldwell, 140; Haynes *v.* Gates, 2 Head, 598.

† 11 Humphrey, 542.

‡ 10 Wallace, 158.

rebels. They were as faulty as the one who remained all the time in the rebel lines. Yet of all three the court say in *Dean* v. *Nelson:*

"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."

3. Prior to the sale under the attachment Mrs. White intervened in the proceedings for confiscation, and by virtue of the provisions of the act of Congress had the privilege of asserting any right that she had. Now when the proceedings in the District Court were quashed, Ramsey, who had been pardoned, and all whose guilt had been wiped away, became possessed of his property. The State court had no power to vacate the order thus restoring his estate to him, and in giving it to Ludlow in virtue of the sale under the attachment, it acted in contempt of the Federal judiciary.

Messrs. Maynard and Nelson, contra, for the appellant.

Mr. Justice BRADLEY delivered the opinion of the court.

As the bill in this case is a collateral proceeding to set aside the sale, mere errors and irregularities in the original proceeding will not suffice. It must be shown that the court had no jurisdiction. We had occasion, recently, in the case of *Cooper* v. *Reynolds*,* which came from the same district as this case, and also arose upon an attachment, to examine this question, and it is unnecessary to repeat what was then said. The question is, did the court acquire jurisdiction of the case? It is not denied that it has general jurisdiction of attachments in such cases. The code expressly says, that any person may sue out an attachment in the Chancery Court, upon debts or demands of a purely legal nature, except causes of action founded on torts, whenever the amount in controversy is sufficient to give the court jurisdiction.† Fifty dollars gives the court jurisdiction, and the amount here is over $300. The judge below, in his decree, relies on the want of a suf-

* 10 Wallace, 308

† § 3461.

ficient affidavit. We have compared the affidavit with the requirements of the statute, in the light of the cases cited by the appellee's counsel, and we see in it no defect which should make the proceedings null and void. True, it does not say that the debt is a *just* claim; but it states the amount of the debt, and that it is on the defendant's note or bond, a copy of which is appended, showing that it was made under the defendant's seal, and contained a promise to pay to the complainant or order three hundred dollars, six months after date, for value received, with interest from date. This is a particularity beyond the requirement of the statute, and more than compensates for the omission of the statement that it was a just claim. The dictum of Judge McKinney, in 11th Humphrey, 545, so often quoted, that "it should be stated in the affidavit, and alleged in the attachment, that a suit has been commenced 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 stated is just," relates to an ancillary attachment in a suit brought for an unliquidated demand, and is suggested by him as a sufficient affidavit in such cases, in which it is impossible for the plaintiff to swear (as he can do in debt) to the precise amount due. In this case the complainant not only swears to the amount due, but exhibits a copy of the defendant's bond or note, under seal, in effect admitting the debt and promising to pay it. We cannot believe that the courts of Tennessee would hold such an affidavit defective even, much less so absolutely void as to vitiate all the subsequent proceedings.

The writ of attachment appears to be in due form and to have been regularly served on the property; so that the court became fully possessed of jurisdiction over the case. Our attention has not been called to any other defect in the proceedings that amounts to anything more than a mere irregularity, unless the points next to be considered should be regarded as doing so.

First. It is averred by Ramsey in his bill in the present suit that at the time when the attachment was sued out, and

when the publication was made in the newspaper at Knoxville notifying him to appear and defend the original suit, or that judgment would be taken *pro confesso* against him, he was in no situation to see or know of such publication, and he makes various allegations in confirmation of that statement, that he was in the country held by Confederate troops, &c.*

On these allegations the question arises, Why was the complainant in the country held by Confederate troops? Why could he not return to Knoxville? Why could he not have communication with that place? It was his place of residence. He says that he left Knoxville a short time before the Federal troops arrived. Why did he leave? Was he forced to leave, and was his return forbidden? Could he not have returned at any moment by submitting to the authority of the United States? Was not his absence a voluntary one? The order of publication was made at the January rules, 1864. President Lincoln's proclamation of amnesty was issued on the 8th of December previous, offering pardon and amnesty to all persons who would take the oath of allegiance. Then what obstacle existed to prevent the complainant's return? The causes alleged were certainly insufficient.

This case differs from that of *Dean* v. *Nelson*, decided at the present term. In that case Nelson and his wife were driven out of Memphis by a military order and were not permitted to return, and the proceedings to foreclose their property took place during their enforced absence. The other defendant, May, was only nominally interested, and had always been within the Confederate lines. But if, as in this case, a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted. That would be carrying the privilege of *contra non valentem*

* See *supra*, p. 584.—REP.

to an unreasonable extent. We think it cannot be set up in this case.

In the next place, it is alleged that the jurisdiction of the Chancery Court was displaced by proceedings to confiscate the property in the District Court of the United States, and a seizure made for that purpose, by order of the district attorney, on the 21st of September, 1864. No record or transcript of the alleged proceedings in the District Court was given in evidence in this suit; at least, none appears in the record before us. It is conceded that no confiscation took place. Ludlow, the respondent below, the appellant here, admits that proceedings were commenced by information filed October 10th, 1864; but states and shows that Cynthia S. White intervened to protect her interest and insist on her prior levy, made almost a year before the seizure in behalf of the United States; that Ramsey pleaded the President's pardon, and thus obtained a release of his property and an end of the confiscation proceedings; and that a writ of possession was afterwards awarded by the Chancery Court on the application of Ludlow, and possession was delivered to him accordingly in execution of the decree of said court. It is said that these proceedings were in contempt of the District Court. Though that be so, the matter is not before us, and we cannot adjudicate upon it. If the United States authorities had the right to seize the property, and take it out of the hands of the law, as a preliminary step to proceedings for confiscation, it would nevertheless seem to be the right of the Chancery Court to reassume possession when the confiscation proceedings failed and came to an end. And though the writ of possession awarded by that court may have been irregularly issued (which it is not necessary for us to decide), Ludlow, the purchaser of the chancery title, was in fact put in possession, and as between him and Ramsey, he has the better title. An ineffectual attempt at confiscation, supervening upon the chancery proceedings, cannot deprive those proceedings of legal validity.

DECREE REVERSED.

Statement of the case.

REED *v.* UNITED STATES.

1. An order by the United States to the owners of a vessel, during the rebellion, to get her ready, under pain of impressment, to transport a cargo to a particular place and back, under which order, though the owners protested against going, they got ready the vessel, and sailed with their own officers and crew. *Held*, not to make the government owners for the voyage; but to leave the possession with the general owners under a contract for per diem compensation from the commencement of the voyage until the same was broken up, including also so many days in addition as would have been spent, if no disaster had occurred, in completing the return trip.
2. A voyage was held to have been "completely broken up" by a vessel's being blown aground on the Missouri, in July, 1865 (the owners having then made their protest to *cover* insurance), she having been swept off and totally destroyed by an ice freshet in the river nine months afterwards. And this so held, although her engineer, a mate, and three watchmen were left to take care of her, and a military guard sent to protect her, until a rise should occur in the river; and though just before the boat was destroyed by the flood and ice, her owners, and the government, in whose employ she was, dispatched a pilot and crew to where the boat was aground, to get the boat afloat upon the rise of the river, and to bring her to her home port.
3. The government not having been owner for the voyage, the expenses of the pilot and crew just named were not chargeable against the United States, though both were sent by the owners of the vessel, after consultation with the quartermaster of the United States at the port, and for the purpose of protecting the interests of the government as well as the interests of themselves.

APPEAL and cross appeal from the Court of Claims, in the claim of Reed and others; the case, as found by the said court, being this:

"The claimants were, on the 1st of June, 1865, owners of the steamer Belle Peoria. She was then lying at her wharf in St. Louis. The said owners were applied to by the United States quartermaster, at St. Louis, to take a cargo of military supplies to Fort Berthold, on the Missouri River, about 1700 miles from St. Louis. They declined on account of the lateness of the season. They were then ordered by the quartermaster to prepare for the trip, and informed that in case

of refusal the boat would be impressed. They protested, but, under the orders, got the boat in readiness, put on the cargo, and left St. Louis on the 3d of June, 1865. The boat arrived at Fort Berthold on the 22d of July, 1865, discharged her cargo, and started on her return trip on the 24th of the same month. She proceeded until the 26th, when a high wind sprung up, and she, in attempting to land, was blown aground. All efforts to get her off proved unavailing. After making all the effort that was deemed advisable, and finding it impossible to get her off *until a rise should occur in the river*, the officers and crew left her, leaving several persons in charge. The crew left her on the 31st of July, 1865, leaving on board one engineer, one mate, and three watchmen, who were *to take care of the boat.* These remained until the 30th September. The officer in command at Fort Rice also detailed and sent a military guard *to protect the boat.* The facts being communicated to the owners at St. Louis, *they made their protest in order to cover the insurance.* The boat remained aground until about the 15th of April, 1866, when *by an ice freshet* in the Missouri River *she was swept off and totally destroyed.*

The quartermaster at St. Louis, when he seized the boat, fixed her per diem compensation at $272. She was paid at this rate until the 10th day of August, 1865, being the time when information arrived at St. Louis that she was aground, and the captain and part of the crew returned. She was also paid, from the 10th of August to the 30th of September, at the rate of $101 per day. This was while the engineer, mate, and watchmen remained on board. From the 30th of September until the 30th of November, 1865, vouchers were issued to the claimants at the rate of $80 per day, which have not been paid. No vouchers were issued after that date. On the 3d of April, 1866, the claimants dispatched a pilot and crew up the Missouri River from St. Louis to where the boat was aground, *to get her afloat upon the rise of the river, and to bring her down to St. Louis.* These persons arrived at where the boat had been aground, about the 18th day of April, 1866, and after the boat had been de-

stroyed by the flood and ice. These persons were sent, after consultation with the quartermaster at St. Louis, and for the purpose of protecting the interests of the United States, as well as those of the claimants. The just and necessary expense incurred in these efforts to save the boat amounted to $2500.

After the destruction of the boat, the claimants applied to the third auditor, under the provisions of the act of 1849, and its supplements, for the payment of her value. These acts provide:*

"That any person . . who shall lose . . or have destroyed by unavoidable accident any . . steamboat . . *while such property was in the service* (of the United States), shall be allowed and paid the value thereof, at the time he entered the service. *Provided*, it shall appear that such destruction was without any fault or negligence on the part of the owner of the property, and while it *was actually employed in the service of the United States.*"

The claim was allowed and her value, as of the time of her taking, June 1st, 1865, fixed at $30,000, and which amount was paid to the claimants. The accounting officers rejected the claim for the per diem compensation from September 30th, 1865, until April 15th, 1866, when the boat perished, including the vouchers until November 30th, 1865. The accounting officers also rejected a claim for $5401.41, alleged to have been expended in efforts to save the steamboat.

This suit was brought to recover the amount of these vouchers, and the per diem compensation of the boat from November 30th, 1865, to April 15th, 1866, and also the expenditure made in efforts to save the boat, making together the sum of $21,161.41.

The court decided that the claimants were not entitled to recover the amount of the vouchers up to the 30th of No-

* Acts of March 3, 1849, and March 3, 1863; 9 Stat. at Large, 415; 12 Id. 743, § 5.

vember, 1865, nor for the per diem compensation of the boat from November 30th, 1865, till the 15th of April, 1866, but were entitled to recover the $2500, in efforts expended to save the boat.

From this decision both parties appealed. The claimants, because they did not have compensation for the use and detention of the boat from the 30th September, 1865, when engineer, mate, and watchmen left the boat, until the 15th of April, when she was "swept off and totally destroyed." The United States appealed, because they were charged with this $2500 expenses.

Mr. William Lawrence, of Ohio, for the claimants:

I. *As to the appeal by the claimants:* The facts as found show that the implied contract was, to pay for a round trip, which means all the time necessary to make it, or *until it became impossible.*

From September 30th, 1865, when the engineer, mate, and watchman left the boat, until she was destroyed by an ice freshet, April 15th, 1866, she was guarded by a government military guard detailed by the officer in command at Fort Rice. The object of this was, to return the boat to St. Louis the next spring. The boat was blown aground July 26th, 1865. Such officers and crew as were not necessary to guard the boat, left her, because there was no hope of getting the boat off until the next spring, and it was desirable to save expense. Up to this time, from June 1st, the government paid the full per diem compensation of $272, fixed by the quartermaster. Why pay for this *part* of the return voyage if it was not agreed that all should be paid for and no matter how long it might require, as long as any voyage was possible?

From August 10th to September 30th, during which time one engineer, one mate, and three watchmen of the crew remained aboard, and the boat aground, payment was made at the rate of $101 per day. Here was a reduction in the per diem—a modification of the original contract—because more of the crew were discharged. Why was a reduced per

diem paid? Still, because the agreement, to pay until the boat returned to St. Louis in the spring, or the voyage was abandoned as impracticable, continued.

From September 30th to November 30th, 1865, quartermaster's vouchers were issued to the plaintiffs, at the rate of $80 per day. The quartermaster was the officer charged with the duty of providing transportation, and his vouchers prove that his contract was a continuing one till the return of the boat; a matter then contemplated as certain to take place in the spring. That arrangement could not be terminated except by mutual consent, and it never was terminated until the boat was destroyed.

The boat was destroyed and the voyage rendered impossible April 15th, 1866, and not before. The right of the owners to recover the value of the boat from the government, depended by the statutes applicable to the case (those of March 3d, 1849, and March 3d, 1863), on the fact that it was then "actually employed in the service of the United States." Under these acts the third auditor allowed the claim of $30,000 for the value of the boat as of the time of her taking, June 1st, 1865, and the claim was paid by the government. This allowance and payment necessarily found the fact that the boat was actually employed in the service of the United States on the 15th April, 1866, and the government is now estopped from controverting that fact. If the boat was in the actual service that day it had been in like service during all the previous time, and the facts show it was in such service under contract for pay.

When the captain and most of the crew, abandoning all hope of bringing the steamer to St. Louis during the current season, left her to lie aground till the next spring, there was no purpose to abandon the return voyage, but the purpose was to resume it as soon as the rise of the river made it practicable. All this was with the sanction of the government, and the boat left in charge of government officers and soldiers, to the end that the return trip might be completed next spring. The facts determined by the Court of

Claims show that it "was impossible to get her (the boat) off until a rise should occur in the river."

The justice of this claim is clear. The court takes judicial notice of climate and rivers. The court know that the plaintiff's boat could have navigated the rivers south of St. Louis, and it is presumed would have earned freight from September 30th, 1865, to April 15th, 1866. The plaintiffs, when applied to by the quartermaster, on June 1st, to go from St. Louis, 1700 miles up the Missouri River, to Fort Berthold, "declined on account of the lateness of the season." They knew that the treacherous sands of the Missouri, and hazardous gales and receding waters, would probably, as they did, leave them aground for the winter, and deprive them of safer trade, and pay which required no quartermaster's vouchers, no auditor's adjustment, no Court of Claims, no lawyer's fees, and none of this almost endless delay. And having been deprived of the winter's trade in milder waters, and of speedier pay, why should they not now be paid, as the Constitution requires, "just compensation" for all the time their boat was detained by reason of what the government officers did? They only ask that compensation which they could have earned elsewhere, for compensation for time during which the government has admitted their boat was "actually employed in the service of the United States." Why should they not have it?

The grounding was not the proximate, nor even remote cause which destroyed her. The facts found by the Court of Claims are that the boat, on her return trip, was blown aground July 26th, 1865, and that—

"The boat remained aground *until about the 15th of April*, 1866, *when, by an ice freshet* in the Missouri River, *she was swept off* and totally destroyed."

The ice freshet, then, was the proximate, and really the only cause of the loss. The grounding was a peril, but it did not continue, for the boat was "swept off" from her grounding peril, and a totally different peril finally, and after

the termination of the grounding, destroyed her. They may have been successive or cumulative perils, but the grounding was in no sense a continuing peril, which finally destroyed the boat. If the claimants had sued the United States and averred a destruction of the boat only by the grounding, the evidence would not have sustained the allegation. The government has already decided that the boat was in the actual service of the United States on the 15th April, 1866, and there could be no constructive actual loss before that.

It is text in the law of insurance that grounding is not a constructive total loss. Parsons says:

"So stranding, which means the being cast on shore, may or may not be an actual total loss. The mere fact that she (the boat) rests on land or rock, and at low tide is high and dry there, does not, of itself, constitute this total loss; for the next high tide may lift her from the bottom, and if it cannot do this without assistance, it may be practically possible to use means to draw her off."*

In *Patrick* v. *Commercial Insurance Company*,† Kent, C. J., says:

"It is well understood that stranding is not *ipso facto* a total loss."

So in *Peele* v. *Suffolk Insurance Company*,‡ Parker, C. J., said:

"The mere stranding, however perilous, is not of itself a total loss, for the vessel may be relieved, and the damages may be small."

The finding does not show the destruction of the boat by the grounding; nor any facts which would justify an abandonment as for total loss. The date and fact of the liability of the United States is only fixed by the proximate cause of the loss—the ice freshet of April 15th, 1866. This is the

* 2 Marine Insurance, 72. † 11 Johnston, 9. ‡ 7 Pickering, 254.

reasonable rule as against insurers on a policy, and is certainly so as to the United States, under the act of March 3d, 1849.*

Suppose, in this case, the contract had provided that in no event should the boat be continued in service longer than April 1st, 1866, by the very terms of the law the United States could not have been held liable for the destruction of the boat on the 15th of April, because the boat was not then destroyed. There was then no liability for the boat fixed until April 15th, and if not the liability for services continued to that time.

Although there was a protest made to *cover* the insurance, there was no abandonment of the voyage when the vessel ran aground, nor till the boat was finally lost. *When* the protest was made does not definitely appear, but it was made "in order to cover the insurance," not against the United States, but under a supposed or real policy of insurance. The boat was blown aground July 26th. Then, as the facts show—

"All efforts to get her off proved unavailing, and finding it impossible to get her off *until a rise should occur in the river*, the crew left her on the 31st July, 1865, leaving on board one engineer, one mate, and three watchmen *to take care of the boat.*"

The engineer, watchmen, and mate remained on board until September 30th. The United States officer in command at Fort Rice detailed and sent a military guard to protect the boat, and they remained until her destruction. The officers left her with the *assent of the government*, as an economic measure to save the useless expense of a crew. Then the case shows that—

"On the 3d of April, 1866, the claimants dispatched a crew up the Missouri River, from St. Louis, to where the boat was aground, to get her afloat upon the rise of the river, and *to bring her down to St. Louis.*"

* 2 Parsons, Marine Insurance, 108 n.; De Blois *v.* Ocean Insurance Co., 16 Pickering, 303.

"Down to St. Louis" for whom? Of course for these plaintiffs. Here is the highest evidence that there never was any intention to abandon the boat. Neither the United States nor any insurance company ever took or held the boat as theirs; never accepted any abandonment, and never were asked to do so. No protest or notice was ever served on the United States, nor in fact on any insurance company; nor was any demand made on the United States for pay for the value of the boat until after she was destroyed. But the protest, as affecting rights under a policy of insurance, against an insurance company, was at most only precautionary; and a mere precautionary measure, never perfected or pursued, cannot establish any right under a policy, much less under another contract.

The boat was in the service of the government, under a contract for a return trip. If the ice freshet had not destroyed the boat, it would have been completed. The crew was sent up the Missouri River in the spring of 1866, for the purpose of completing it. All parties treated the contract as subsisting up to that time. If it had been completed no question would have been raised against the right to pay for the use of the boat during the whole time.

II. *As to the cross-appeal by the United States;* the claim for time, services, and expenses of the crew sent to recover and return the boat in April, 1866.

The boat was in the custody and under the control of the government when she went aground, July 26, 1865.

On the 31st July, 1865, the crew left the boat in care of a military guard, with the approval of the military officers, to save expense, intending, however, "to get her off" when "a rise should occur in the river," in the spring.

The crew was sent out in April, 1866, "after consultation with the quartermaster at St. Louis, and for the purpose of protecting the interests of the United States as well as those of the claimants;" that is, the crew was sent up to return with the boat to St. Louis.

The boat was "actually employed in the service of the

United States," April 15, 1866, and the destruction of the boat "was without any fault or negligence on the part of the owners." The case so comes within the statute.

As to the services and expenses of the crew, here are all the elements of an implied if not an express contract by the government to pay for them. They were rendered and incurred at the instance and request of the proper military officer, or with his sanction, and this was in pursuance of the pre-existing arrangement made when the crew left the boat, July 31, 1865, and the original purpose of the voyage. If the crew had succeeded in returning the boat to plaintiffs at St. Louis, could any question have been made as to the liability of the United States to pay? The services of the crew were only suspended during the winter; they had not abandoned the service.

Mr. Akerman, Attorney-General, and Mr. Talbot, Assistant Attorney-General, contra.

Mr. Justice CLIFFORD delivered the opinion of the court, both in the appeal by Reed and the cross appeal by the United States.

I. IN THE APPEAL.

Affreightment contracts are of two kinds, and they differ from each other very widely in their nature as well as in their terms and legal effect.

Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not a demise of the

vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership.*

Unless the ship herself is let to hire, and the owner parts with the possession, command, and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command, and navigation of the ship, is the agent of the general owner and the mariners are regarded as in his employment and he is responsible for their conduct.†

Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts.‡

On the first day of June, 1865, the assistant quartermaster of the United States, stationed at St. Louis, applied to the plaintiffs, as the owners of the steamboat Belle Peoria, to transport a cargo of military supplies from that port to Fort Berthold, but the owners of the steamboat declined on account of the lateness of the season. He then ordered them to prepare for the trip, and informed them that in case of refusal the steamboat would be impressed. They protested, but under the orders given got the boat in readiness, put the cargo on board, and on the 3d of June, 1865, left St. Louis for the place of destination where the steamboat ar-

* Donahoe *v.* Kettell, 1 Clifford, 137; The Volunteer, 1 Sumner, 551; The Spartan, Ware, 153; Gracie *v.* Palmer, 8 Wheaton, 605; Clarkson *v.* Edes, 4 Cowan, 470; Taggard *v.* Loring, 16 Massachusetts, 336; Christie *v.* Lewis, 2 Broderip & Bingham, 410.

† Putnam *v.* Wood, 3 Massachusetts, 481.

‡ Sherman *v.* Fream, 30 Barbour, 478; Reeve *v.* Davis, 1 Adolphus & Ellis, 312; Frazer *v.* Marsh, 13 East, 238; Marcardier *v.* Chesapeake Insurance Co., 8 Cranch, 39; 1 Parsons on Shipping, 278; Campbell *v.* Perkins, 4 Selden, 430.

rived on the 22d of July following, when she discharged her cargo and on the 24th of the same month started down the river on her return trip. She proceeded for two days in safety, when a high wind "sprung up," and in attempting to land she was blown ashore and grounded. All efforts to get her off proved unavailing, and believing it impossible to do so until a rise should occur in the river, the master, most of the other officers, and crew decided to return, leaving on board the mate, one engineer, and three watchmen to take care of the boat, aided by a military guard detailed and sent from Fort Rice by the officer in command at that post. Information that the steamboat was aground reached the owners at St. Louis on the 10th of August, 1865, but she remained aground until the 15th of April of the next year, when she was swept off by an ice-freshet in the river and totally destroyed. When the assistant quartermaster ordered the owners to prepare for the trip he fixed the per diem compensation of the boat at $272, which appears to have been satisfactory to the owners, as they were paid at that rate to the time they received information of the disaster, and they have presented no claim for any greater allowance for that period of time. They were also paid at the rate of $101 per day from the said 10th of August to the 30th of September in the same year, covering the period, as stated in the finding, that the mate, engineer, and the three watchmen remained on board after the master and the rest of the officers and crew returned. Vouchers were also issued to the plaintiffs at the rate of $80 per day from the 30th of September of the same year to the 30th of November following, but those vouchers have never been paid or recognized, and the plaintiffs sued the United States for the amount of those vouchers and for compensation for the use of the steamboat at the same rate from the time the last voucher was issued to the time when the steamboat was swept off from the place where she was grounded by the ice-freshet in the river and totally destroyed.

Although the plaintiffs objected to the order of the quartermaster at the time it was given, still it is quite evident

that they ultimately consented to perform the service as matter of contract, and that they were content to receive the per diem compensation fixed by the assistant quartermaster at the time he gave the order. Abundant confirmation of that view is found, if any be needed, in the fact that they voluntarily accepted the prescribed per diem compensation from the commencement of the trip to the 10th of August following, when they received information of the disaster, which was at the time when the master and all the steamboat's company, except the mate, one engineer, and three watchmen, returned to the port of departure, and that the plaintiffs make no claim for any additional compensation during that period. Compulsion is not set up by the plaintiffs, and, if it was, the theory could not be supported, as the jurisdiction of the Court of Claims does not extend to torts. They have also been paid for the value of the steamboat, and also a per diem compensation of $101 per day from the 10th of August to the 30th of September, which is the date when the mate, engineer, and the three watchmen also left the steamboat and returned to St. Louis. No additional compensation is claimed for that period, but they claim for the amount of the vouchers issued at the rate of $80 per day for the two months next succeeding that period, and at the same rate from the end of that period to the 15th of April in the following year, when the steamboat was swept off by the ice-freshet and was totally destroyed.

Judgment was rendered for the claimants for certain moneys, not involved in this appeal, which were expended by them in efforts to save the steamboat, but the petition, so far as respects the per diem compensation, was dismissed, and the claimants appealed to this court.

Throughout the litigation the plaintiffs have prosecuted their claim as a matter of contract, and it is quite clear that it could have no other foundation in the court where the suit was brought, and of course it must depend upon the proper application of the principles of commercial law to the facts of the case as found by the Court of Claims.

By the terms of the contract, they were to carry the cargo

of military supplies from the port of St. Louis up the Missouri River to Fort Berthold for $272 per day during the voyage, including the return trip as well as the trip to the place of destination, in full compensation for the entire services. By necessary implication the plaintiffs were to victual and man the steamboat and keep her in a seaworthy condition, and in contemplation of law they retained the possession, control, and navigation of the steamboat, as the master was one of their own selection and the crew were in their own employment, and they were responsible for their conduct. Steamers require fuel as a means of creating motive power, and it is quite obvious that it was the duty of the plaintiffs to supply the steamboat with fuel for that purpose as well as provisions for the officers and crew, and that the master was their agent and not the agent of the charterers. Well-founded doubts cannot be entertained upon that subject, and if those conclusions of fact are correct then it follows as a conclusion of law that the plaintiffs, as the general owners of the steamboat, were also the owners for the voyage, and that the true relation of the United States to the adventure was that of a charterer for hire and shipper of the cargo.*

Through the assistant quartermaster at St. Louis the United States put the cargo on board the steamboat, at a fixed per diem compensation during the round trip, for transporting the military supplies constituting the cargo to the place of destination, the steamboat having the right to take a return cargo from other shippers or to return in ballast, at the election of her owners. She performed the trip up the river and delivered the cargo in good condition and started on the return trip, the United States, as the charterers, having no further interest in the voyage except that the steamboat should return to the port of departure without delay. All sea risks were unquestionably upon the owners of the steamboat, as they were the owners for the voyage as well as the owners in fact, and the record shows that they must have so understood their own rights, as the statement

* Saville *v.* Campion, 2 Barnewall & Alderson, 510.

in the record is that when they received information of the disaster "they made their protest in order to cover the insurance."

Suggestion may be made that the act of the United States in paying for the value of the steamboat after she was swept off by the ice-freshet and destroyed is inconsistent with the theory that they were merely the charterers for hire, and that the plaintiffs were the owners for the voyage as well as the owners in fact, but the adjudication of the third auditor cannot change the rights of the parties in respect to any matters not within his jurisdiction.* Whether that adjudication was correct or incorrect is not a question in this case, and it is only referred to as showing that it cannot have any weight in the decision of the case before the court.

Freight, it is said, cannot be earned unless the voyage is performed and the cargo is delivered; but the voyage in this case, so far as respects the cargo, was performed and the cargo was duly delivered to the consignees, and to that extent the freight was earned; but the plaintiffs were entitled, under the contract, to the same per diem compensation during the return trip in case it was performed without unnecessary delay, and it may be that the United States could not have claimed any deduction from the agreed compensation if the interruption in the voyage had been only a temporary one, and the master, when the cause of interruption had been removed or overcome, had proceeded with the steamboat to the return port.

Whatever repairs became necessary in consequence of the disaster would have been a charge to the steamboat or her owners, but it may be that the plaintiffs would have been entitled to the agreed compensation for the days spent in executing the repairs as well as for the days actually spent in the return trip, but it is not necessary to decide those questions in this case, and the court does not express any decided opinion upon the subject.†

* 9 Stat. at Large, 415.

† Abbott on Shipping, 43; Hawkins v. Twizell, 5 Ellis & Blackburn, 883; Havelock v. Geddes, 10 East, 555.

But the interruption in the voyage was not merely a temporary one in any proper sense of the term. On the contrary the voyage was completely broken up, as fully appears from the fact that the master and all the crew ultimately abandoned the steamboat, leaving her where she was stranded, and that she remained there until the 15th of April of the next year, when she was swept off by the ice freshet and became a total loss. Broken up, as the voyage was, by the perils of navigation, no doubt is entertained that the plaintiffs were entitled to the agreed per diem compensation to that time, and to such further allowance at the same rate and for such additional time as it would have required for the steamboat to have completed the return trip. They had performed the whole of the stipulated service for the United States and had delivered the cargo to the assignees, and were proceeding on the return trip in good faith, when the voyage was broken up by causes beyond their control and without any fault on their part or on the part of the master or crew.

Unless a carrier assumes the risk of *all contingencies*, he is not liable because he fails to perform what is rendered impossible by the perils of the sea. Such events as are known as the accidents of major force, or fortuitous events, or the acts of God, always constitute an implied condition in every such engagement.* Neither party is at liberty to abandon the contract without the consent of the other, or *without legal cause*, and such cause must not be one procured or occasioned by the fault of the party who relies upon it.†

Different views have been expressed by different courts as to the effect of a temporary interruption of a voyage upon the rights of the owner of the ship and the shipper or charterer; but the rule seems to be well settled, that when the voyage is broken up by a sea peril, that neither the shipper nor the charterer is in general liable to the ship-owner beyond the time when the peril occurred; but that rule is more particularly applicable in cases where the transportation of

* The Eliza, Davies's Admiralty, 318.

† Clark *v.* Insurance Co., 2 Pickering, 108.

the cargo is not complete, and it cannot be applied at all to the case before the court without considerable qualification.*

Reasonably construed, the contract gives the plaintiffs the agreed per diem compensation from the commencement of the voyage until the same was broken up, including also so many days in addition as would have been spent, if no disaster had occurred, in completing the return trip. Apply that rule to the case, and it is clear that the judgment of the court below must be affirmed, as the United States, upon the most liberal computation, have paid more than the contract would entitle the plaintiffs to demand. Payment was made to the time when the mate, engineer, and three watchmen returned home, and the plaintiffs have no right to claim anything more.

JUDGMENT AFFIRMED.

II. IN THE CROSS APPEAL.

Supplies for the military service were transported by the appellees from St. Louis up the Missouri River to Fort Berthold, as more fully explained by the court in the case just decided. They were the owners of the steamboat Belle Peoria, and it appears by the findings in the court below that the assistant quartermaster at that station, on the 1st day of June, 1865, applied to them to take such a cargo and transport it to that place. Objections were made by the owners of the steamboat, as explained in the preceding case; but they put the cargo on board, and on the 3d of the same month started on the upward trip, and it appears that they made the trip in safety, delivered the cargo to the consignees, and without any unnecessary delay started on the return trip. Two days after they started on the return trip the steamboat encountered a high wind, and while those in charge of her were endeavoring to land she was blown aground and became fast. All efforts to get her off proving

* Palmer v. Lorillard, 16 Johnson, 352.

unavailing, the officers and crew, except the mate, one engineer, and three watchmen, left her and returned to the port of departure. By the findings, it appears that the mate, one engineer, and three watchmen remained on board to the 30th of September of the same year, when they also left the steamer and returned.

Claim was made by the present appellees, in the case just decided, for compensation for the service performed in addition to what they had received; but it is unnecessary to enter into any of those details, except to say that the boat remained aground until the 15th of April of the following year, when she was swept off by an ice freshet, and was totally destroyed. Before that occurred, however, the owners of the steamboat dispatched a pilot and crew up the river to the place where the steamboat was aground, to get her afloat and bring her down the river, but the steamboat had been swept off and destroyed three days before they arrived at the place of the disaster. Expenses of course were incurred for the wages of the pilot and crew, and for provisions and transportation, and the court below found that those expenses amounted to the sum of $2500, and for that sum the Court of Claims rendered judgment for the appellees, and the United States appealed to this court.

Apart from what appears in the opinion delivered in the other appeal, the only facts found by the court below in support of the claim are what is exhibited in the following statement: "These persons, meaning the pilot and crew, were sent, after consultation with the quartermaster at St. Louis, and for the purpose of protecting the interests of the United States as well as those of the claimants."

Unless the United States, in contemplation of law, were the owners of the steamboat for the voyage, they had no property interests in the stranded steamboat, as the cargo had, two days before the disaster occurred, been safely discharged at the place of destination and duly delivered to the consignees. They were not owners for the voyage, as the court has just decided, so that if the statement is founded

on that theory it is error, and entitled to no weight; and if not founded on that theory, it does not appear to rest on any substantial foundation, as the court has decided in the other appeal that the appellees, as the general owners and owners for the voyage, assumed all risks from sea perils for the entire trip.

Temporary delays, if any had occurred, might have increased the per diem compensation which the United States had agreed to pay; but the voyage had been broken up and frustrated more than six months before the pilot and crew were sent to the place of the disaster for the purpose of getting the steamboat afloat. Suppose, however, that it could be admitted that the United States had some property interests in the steamboat, still the admission would not benefit the appellees, as it is perfectly clear that the assistant quartermaster had no authority to bind the United States in any such arrangement. He did not attempt to make any contract, and nothing of the kind can be inferred from the finding of the court, even if it be competent for this court to make inferences to support the judgment, which is not admitted. All that is found is that the owners of the steamboat consulted with the quartermaster before they dispatched the pilot and crew to the scene of the disaster, which falls very far short of evidence to prove a contract, even if the quartermaster had been invested with authority for any such purpose. Viewed in any light, the record does not show any legal foundation for the judgment.

JUDGMENT REVERSED, AND THE CAUSE REMANDED WITH DIRECTIONS TO DISMISS THE PETITION.

DUNPHY *v.* KLEINSMITH AND DUER.

1. A complaint which is in form and substance such a complaint as is made in "a creditor's bill," is a case of equitable jurisdiction, and one requiring equitable relief as distinguished from legal.
2. In a Territory of the United States where the systems of common law and chancery are found as separate systems, chancery can alone give relief on such a bill.
3. If a case presented by a creditor's bill is tried like a common law case, that is to say by a jury, and a decree is entered on the verdict as a mere conclusion of law upon the facts found, and not as the result of the chancellor's own judgment, though of his judgment aided by the finding, it is error.
4. A decree on a creditor's bill, which makes the defendant who has cooperated with the debtor responsible for damages which the creditor has suffered in consequence of the conveyance sought to be avoided, is erroneous. On such a proceeding he is liable but to account. If damages are sought against him they should be sought by a proceeding at law.

APPEAL from the Supreme Court of the Territory of Montana.

The case was that of a creditor's bill filed by Kleinsmith, one appellee, against E. M. Dunphy, the appellant, and one Benajah Morse, surviving partner of Elkanah Morse, on behalf of himself and all other judgment creditors, to obtain satisfaction of a judgment recovered by Kleinsmith on the 12th of March, 1868, for $16,957. The bill alleged that an execution issued on the judgment was returned wholly unsatisfied, and that no part of the judgment had been paid. It then charged that on the 31st of October, 1867, Morse and his brother Elkanah (then living) executed to Dunphy a mortgage to secure the payment of $30,000 in one year from date, covering property to the amount of $70,000, including a ranch in the county of Gallatin, containing 640 acres of land, with two-thirds of the crops and all the stock thereon, embracing 225 head of cattle, and all the goods in their store at Gallatin, together with the lot and storehouse and all the book accounts and evidences of debt of E. & B. Morse. The bill stated that at the time of executing this mortgage the Morses were largely indebted to different persons, and

charged that it was made to hinder, delay, and defraud the creditors of the firm, and was not accompanied by change of possession; but that the Morses continued in possession for several months, selling and disposing of the goods for their own benefit. It further charged that the Morses did not owe Dunphy any such amount as $30,000; did not, in fact, owe him more than $6000 or $7000, the balance being fictitious; and that both Dunphy and the Morses had acknowledged as much to different persons. The bill further charged that, by means of this fraudulent mortgage and fictitious debt, Dunphy had prevented the plaintiff and other judgment creditors of E. & B. Morse from collecting their just demands; that Dunphy had claimed title to the property under the mortgage, and had forbidden the sheriff to levy upon it, and that consequently the sheriff had refused to do so, and that Morse and Dunphy were engaged in disposing of the property, and that Dunphy had already got more than $30,000 therefrom. The bill prayed that the mortgage might be declared fraudulent and void; that a receiver should be appointed to hold the property, and that if what was left should not be sufficient to satisfy the complainant and other judgment creditors, Dunphy might be made personally liable for the deficiency. By an amended bill the complainant alleged that, on the 3d of January, 1868, Morse executed to Dunphy an assignment of all the property embraced in the mortgage, and authorized him to sell and dispose of it with due regard to his own interests and the interests of the creditors of E. & B. Morse; but that, notwithstanding the assignment, Morse still continued in possession and control of the property for several months, and to sell the same and collect the proceeds thereof; and that the assignment was fraudulent and void.

To this bill Dunphy filed an answer, insisting on the *bona fides* of his debt, and setting forth that it consisted of $12,500 for a stock of goods sold to the Morses, and $10,000 for money lent to them at the date of the mortgage, the balance being for interest to accrue during the year the mortgage had to run, namely, one per cent. a month on the former

sum, and five per cent. a month on the latter, which was allowed by the laws of the Territory. The appellee, Duer, recovered a judgment against Morse on the same day that Kleinsmith's was entered, failed to obtain satisfaction, and filed a petition to intervene as a co-complainant in the suit, and was admitted to intervene accordingly. The cause was put at issue and came on for trial in March, 1869.

It appeared that by an act of the Territorial legislature of Montana, passed in December, 1867, it was declared:

"SEC. 1. That there shall be in this Territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs."

And,

"SEC. 155. That an issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as provided in this act."

By another act, passed in January, 1869, it was provided:

"That in all civil cases, if three-fourths of the jurors agree upon a verdict, it shall stand and have the same force and effect as if agreed upon by the whole of the jurors."

The cause was tried in pursuance of these provisions of the Territorial law. In order to present distinct issues for trial the court framed a series of questions (twenty-two in number), and submitted them to the jury: as

"1*st*. Did E. & B. Morse retain possession and control and continue to dispose of the property mortgaged after the execution of their mortgage to E. M. Dunphy on the 31st day of October, 1867?

"2*d*. State whether B. Morse, after the 3d day of January, 1868, continued to remain in possession of the property assigned to Dunphy, and also to exercise control over it, and to sell and dispose of it?

"4*th*. Did E. & B. Morse owe E. M. Dunphy $30,000 at the time of the execution of their mortgage to him on the 31st day of October 1867?

Statement of the case.

"*9th.* Did the mortgage to Dunphy prevent the collection of the judgments of Kleinsmith and Duer?

"17*th.* Was the mortgage to Dunphy executed and accepted for the purpose of covering up the property of E. & B. Morse, and delaying or preventing the collection of demands found against them or either of them?" &c., &c.

To all these questions nine of the jury returned answers adverse to Dunphy and favorable to the complainants, and three dissented.

This verdict was rendered on the 25th of March, and accepted by the court, and on the 3d of April a decree was made, which, after reciting the principal findings of the jury, proceeded as follows:

"It is therefore ordered, adjudged, and decreed that the said mortgage from E. & B. Morse to E. M. Dunphy for $30,000 be set aside as fraudulent and void, and of no effect, and that the said plaintiffs recover of the said E. M. Dunphy the sum of $35,737, the amount of plaintiffs' judgments, interest, and costs, together with the costs of this action, taxed at $7149; that the said judgments be credited by the money in the possession of the receiver in the above cause, and that plaintiffs have execution against the said Dunphy for the residue of said judgment after such credit has been entered."

This judgment was rendered in the District Court for the third judicial district of the Territory. It was taken to the Supreme Court and affirmed. An appeal was then taken to this court.

The principal question presented by this case was whether these proceedings, conducted in the manner stated, could be sustained.

By the organic act constituting the Territory of Montana, passed by Congress May 26th, 1864, section 6, the legislative power of the Territory was declared to extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of that act. By the 9th section provision was made for establishing various courts of the Territory, namely, a Supreme Court, District

Courts, Probate Courts, and justices of the peace; and it was enacted that the Supreme and District Courts, respectively, should possess chancery as well as common-law jurisdiction. By the 13th section it was declared that the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the Territory as elsewhere in the United States.

These were the only provisions of the organic law which were referred to in the argument.

Mr. Lyman Trumbull, for the appellant; Messrs. F. A. Dick, J. O. Broadhead, and A. M. Woolfolk, contra.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court, as follows:

From the provisions of the organic law, which have been referred to in the argument, it is apparent that the Territorial legislature has no power to pass any law in contravention of the Constitution of the United States, or which shall deprive the Supreme and District Courts of the Territory of chancery as well as common-law jurisdiction.

This case was clearly a case of chancery jurisdiction, and one necessarily requiring equitable, as distinguished from legal, relief. The property, according to the charge of the complainant, had been put beyond the reach of the ordinary process of the law. It had been disposed of by the assistance and through the co-operation of Dunphy in such a manner that the judgment creditors could not find it to satisfy their claims, or, if found, it was held by Dunphy under cover of an assignment, which, *primâ facie*, gave him the legal title. This is what is charged by the judgment creditors. They further charge that this was a fraudulent contrivance to hinder and delay them in the recovery of their debts. In a country or territory where the systems of common law and chancery both substantially prevail, it is perfectly clear that chancery only could give adequate relief in such a case. And, then, the case was instituted and the pleadings were framed strictly in accordance with this view. The bill is strictly a bill in chancery praying for equitable relief.

Now, it is perfectly obvious that, with the exception of the verdict being rendered by nine jurors, the trial was altogether conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at common law. This was clearly an error. The case, being a chancery case, and being instituted as such, should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury. Here the judgment is pronounced as the mere conclusion of law upon the facts found by the jury.

Again: In an equitable proceeding of this kind, a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must be a decree for an account. He must be called to account for just what property has come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified; and, as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law.

No account of the kind, or in the manner indicated, seems to have been taken at all. The suit was tried like an action for damages, and the jury were left to say, in brief, whether

or not the complainants could have made their money on execution had it not been for the mortgage and assignment to the defendant. The jury answered that they could, and the defendant was made personally liable for the whole amount.

Without attempting to decide whether the Territorial legislature had or had not the power to legalize a verdict rendered by three-fourths of a jury, we think the proceedings were erroneous, and the decree must be REVERSED and the cause remanded for further proceedings

IN CONFORMITY WITH THIS OPINION.

THE CHEROKEE TOBACCO.

1. The 107th section of the Internal Revenue Act of July 20, 1868, which enacts that "the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not," applies to and is in force in the Indian Territory embraced within the Western District of Arkansas, and occupied by the Cherokee nation of Indians, notwithstanding the 10th article of the prior treaty of 1866, between the United States and that nation, by which it was agreed that "every Cherokee Indian and freed person residing in the Cherokee nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."
2. An act of Congress may supersede a prior treaty.

ERROR to the District Court for the Western District of Arkansas; the case involving, first, the question of the intention of Congress, and, second, assuming the intention to exist, the question of its power, to tax certain tobacco in the territory of the Cherokee nation, in the face of a prior treaty between that nation and the United States, that such tobacco should be exempt from taxation.

The case was elaborately argued orally or on briefs, by *Messrs E. C. Boudinot, A. Pike, R. W. Johnson, and B. F.*

Statement of the case in the opinion.

Butler, for the claimants; and by Mr. Akerman, Attorney-General, and Mr. Bristow, Solicitor-General, for the United States.

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

This is a writ of error to the District Court of the Western District of Arkansas. The case, so far as it is necessary to state it, lies within a narrow compass.

The proceeding was instituted by the defendants in error to procure the condemnation and forfeiture of the tobacco in question, and of the other property described in the libel of information, for alleged violations, which are fully set forth, of the revenue laws of the United States. Elias C. Boudinot, for himself and his copartner, Stand Wattie, interposed, and by his answer submitted, among others, the followng allegations: That the firm were the sole owners of the property described in the libel; that the property was found and seized in the Cherokee nation, outside of any revenue collection district of the United States; that the manufacturing of the tobacco was carried on in the Cherokee nation, and that the manufactured tobacco, raw material, and other property, were never within any collection district, nor subject to the taxes mentioned in the libel, nor were the owners bound to comply with the requirements of the revenue laws of Congress; that the revenue laws were complied with as to all tobacco sold or offered for sale outside of said Indian country, if any such there were; that the claimants are Cherokee Indians by blood, and residents of the Cherokee nation, and they deny that the property had become forfeited as alleged in the libel.

At the trial, the claimants moved the court to instruct the jury that the act of Congress, entitled "An Act imposing taxes on distilled spirits, and for other purposes," approved July 20th, 1868, is not in force in any part of the Indian territory embraced in the Western District of Arkansas; that the 10th article of the treaty of 1866, between the Cherokee nation and the United States, was in full force with reference to the territory of the Cherokee nation; that the

67th section of the act of 1868 requires stamps to be sold only to manufacturers of tobacco in the respective collection districts, and that it gave the claimants no legal right to buy such stamps to place on their tobacco in the Cherokee nation, and that they are not responsible for not having done so. The court refused to give these instructions. The jury found for the United States, and judgment was entered accordingly. The claimants excepted to the refusal of the court to give the instructions asked for, and have brought the case here for review.

The only question argued in this court, and upon which our decision must depend, is the effect to be given respectively to the 107th section of the act of 1868,* and the 10th article of the treaty of 1866, between the United States and the Cherokee nation of Indians.

They are as follows:

"*Section* 107. That the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not."

"*Article* 10*th*. Every Cherokee Indian and freed person residing in the Cherokee nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."

On behalf of the claimants it is contended that the 107th section was not intended to apply, and does not apply, to the country of the Cherokees, and that the immunities secured by the treaty are in full force there. The United States insist that the section applies with the same effect to the territory in question as to any State or other territory of the United States, and that to the extent of the provisions of the section the treaty is annulled.

* 15 Stat. at Large, 167.

Opinion of the court.

Considering the narrowness of the questions to be decided, a remarkable wealth of learning and ability have been expended in their discussion. The views of counsel in this court have rarely been more elaborately presented. Nevertheless, the case seems to us not difficult to be determined, and to require no very extended line of remarks to vindicate the soundness of the conclusions at which we have arrived.

In *The Cherokee Nation* v. *Georgia*,* Chief Justice Marshall, delivering the opinion of this court, said: "The Indian territory is admitted to compose a part of the United States. In all our geographical treatises, histories, and laws it is so considered." In *The United States* v. *Rogers*,† Chief Justice Taney, also speaking for the court, held this language: "It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States Congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian." Both these propositions are so well settled in our jurisprudence that it would be a waste of time to discuss them or to refer to further authorities in their support. There is a long and unbroken current of legislation and adjudications, in accordance with them, and we are aware of nothing in conflict with either. The subject, in its historical aspect, was fully examined in *Johnson* v. *McIntosh*.‡ In the 11th section of the act of the 24th of June, 1812, it was provided "that it shall be lawful for any person or persons to whom letters testamentary or of administration shall have been or may hereafter be granted by the proper authority in any of the United States or the *territories thereof* to maintain any suit," &c. In *Mackey* v. *Coxe*,§ it was held that the Cherokee country was a territory of the United States, within the meaning of this act. The 107th

* 5 Peters, 17.
† 4 Howard, 572.
‡ 8 Wheaton, 574.
§ 18 Howard, 103.

section of the act of 1868 extends the revenue laws only as to liquors and tobacco over the country in question. Nowhere would frauds to an enormous extent as to these articles be more likely to be perpetrated if this provision were withdrawn. Crowds, it is believed, would be lured thither by the prospect of illicit gain. This consideration doubtless had great weight with those by whom the law was framed. The language of the section is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed. There being no ambiguity, there is no room for construction. It would be out of place.* The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it.† Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure but cannot enlighten. It never strengthens the pre-existing conviction.

But conceding these views to be correct, it is insisted that the section cannot apply to the Cherokee nation because it is in conflict with the treaty. Undoubtedly one or the other must yield. The repugnancy is clear and they cannot stand together.

The second section of the fourth article of the Constitution of the United States declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land."

It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that in-

* United States *v.* Wiltberger, 5 Wheaton, 95.

† Mirehouse *v.* Rennel, 1 Clark & Finelly, 527; Wolff *v.* Koppel, 2 Denio, 372.

strument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress,* and an act of Congress may supersede a prior treaty.† In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

Does the section thus construed deserve the severe strictures which have been applied to it? As before remarked, it extends the revenue laws over the Indian territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt. As regards those articles only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians? The frauds that might otherwise be perpetrated there by others, under the guise of Indian names and simulated Indian ownership, is also a consideration not to be overlooked.

We are glad to know that there is no ground for any im-

* Foster & Elam *v.* Neilson, 2 Peters, 314.

† Taylor *v.* Morton, 2 Curtis, 454; The Clinton Bridge, 1 Walworth, 155

putation upon the integrity or good faith of the claimants who prosecuted this writ of error. In a case not free from doubt and difficulty they acted under a misapprehension of their legal rights.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY (with whom concurred Mr. Justice DAVIS), dissenting.

I dissent from the opinion of the court just read. In my judgment it was not the intention of Congress to extend the internal revenue law to the Indian territory. That territory is an exempt jurisdiction. Whilst the United States has not relinquished its power to make such regulations as it may deem necessary in relation to that territory, and whilst Congress has occasionally passed laws affecting it, yet by repeated treaties the government has in effect stipulated that in all ordinary cases the Indian populations shall be autonomies, invested with the power to make and execute all laws for their domestic government. Such being the case, all laws of a general character passed by Congress will be considered as not applying to the Indian territory, unless expressly mentioned. An express law creating certain special rights and privileges is held never to be repealed by implication by any subsequent law couched in general terms, nor by any express repeal of all laws inconsistent with such general law, unless the language be such as clearly to indicate the intention of the legislature to effect such repeal. Thus it was held by the Supreme Court of New Jersey in *The State* v. *Brannin*,* that whilst the provisions of a city charter, it being a municipal corporation, may be repealed or altered by the legislature at will, yet a general statute repealing all acts contrary to its provisions will not be held to repeal a clause in the charter of such a municipal corporation upon the same subject-matter and inconsistent therewith. The same point is decided in numerous other cases. For example, when a railroad charter, subject to repeal,

* 3 Zabriskie, 484.

exempted the company from all taxation except a certain percentage on the cost of its works, it was held that this exemption was not repealed by a subsequent general tax law, enacting that all corporations should be taxed for the full amount of their property as other persons are taxed, and repealing all laws inconsistent therewith. But where the repealing clause in the general law repealed all laws inconsistent therewith, whether general or *local* and *special*, it was held that it did repeal the special exemption.* In every case the intent of the legislature is to be sought, and in the case of such special and local exemptions the general rule for ascertaining whether the legislature does or does not intend to repeal or affect them, is to inquire whether they are expressly named; if not expressly named, then whether the language used is such, nevertheless, as *clearly to indicate* the legislative intent to repeal or affect them.

In the case before the court, I hold that there is nothing to indicate such a legislative intent. The language used is nothing but general language, imposing a general system of requirements and penalties on the whole country. Had it been the intent of Congress to include the Indian territory, it would have been very easy to say so. Not having said so, I hold that the presumption is that Congress did not intend to include it.

The case before us is, besides, a peculiar one. The exempt jurisdiction here depends on a solemn treaty entered into between the United States government and the Cherokee nation, in which the good faith of the government is involved, and not on a mere municipal law. It is conceded that the law in question cannot be extended to the Indian territory without an implied abrogation of the treaty *pro tanto*. And the opinion of the court goes upon the principle that Congress has the power to supersede the provisions of a treaty. In such a case there are peculiar reasons for applying with great strictness the rule that the exempt jurisdiction must be expressly mentioned in order to be affected.

* The State *v.* Minton, Ib. 529.

This view is strengthened by the fact that there is territory within the exterior bounds of the United States to which the language of the 107th section of the recent act can apply, without applying it to the Indian territory, to wit, the territory of Alaska. And it does not appear by the record that there are not other districts within the general territory of the United States which are in like predicament.

The judgment, according to these views, ought to be reversed.

The CHIEF JUSTICE, and NELSON and FIELD, JJ., did not hear the argument.

BANK v. CARROLLTON RAILROAD.

1. A party coming into the right of a partner, whether by purchase from such partner (no matter how broad the language of the conveyance may be) or as his personal representative, or under an execution or commission of bankruptcy, comes into nothing more than an interest in the partnership, which cannot be tangible, made available, or be delivered but under an account between the partnership and the partner.
2. Where a complainant's right is thus only an equity to share in the surplus, if any, of the firm property after settlement of the partnership accounts, the proper bill is a bill for such a settlement. Such bill will not lie unless all the partners are made parties defendant.
3. Although in general a bill in chancery will not be dismissed for want of proper parties, the rule resting as it does upon the supposition that the fault may be remedied, and the necessary parties supplied, does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. Hence in a case where if all the partners were made parties to the bill, the court in which the bill was filed would, from the character of its jurisdiction (which was confined to persons resident within particular districts, which one of the partners here was not), be without any jurisdiction of the controversy, the bill must be dismissed.
4. A bill for a settlement of partnership accounts which, without charging fraudulent confederacy, shows that it is filed not against all the original partners, but against one of them (yet remaining in the administration of the firm concerns), and persons who have succeeded to the rights

Statement of the case.

(not to the obligations), of one or more of the others, presents not only a want of indispensable parties but a misjoinder of the defendants—a misjoinder apparent upon the face of the bill. It must be dismissed.

APPEAL from the Circuit Court for the District of Louisiana.

The Fourth National Bank of New York filed a bill in December, 1867, in the court below against the New Orleans and Carrollton Railroad Company, Beauregard, Hernandez, Binder, and Bonneval. The court dismissed the bill and this case was an appeal by the bank. The case was thus:

The railroad company just mentioned was a corporation in Louisiana, which had made a railroad from New Orleans to Carrollton. On the 12th April, 1866, this corporation made a lease to the defendant, Beauregard, of the road, for twenty-five years, from the 16th of that month, at a rent of $20,000 a year, under covenants to make large improvements and changes in its condition and operation. The lease contained this provision:

"The said lessee (Beauregard) shall not have the right of transferring this lease or of underletting the premises leased without the consent of the directors of the said railroad company."

A certain May and one Graham signed the lease as sureties for Beauregard, the lessee. Immediately after the execution of this lease, that is to say, on the 18th April, Beauregard, May, and Graham entered into an agreement for the equipment of the road for their common advantage. Beauregard was to have charge and direction of the road, appointing his own assistants; to have for himself an annual salary of $5000. All was to be in his name, but for the common benefit. The arrangement was to continue for twenty-five years. The whole amount of the money necessary to carry out the enterprise was to be furnished by May and Graham—$20,000 by each immediately after the lease was obtained, and $20,000 by each every month after, for

four months, and then $10,000 each, per month, for five months. The money advanced, with 8 per cent. interest, was to be repaid from the annual net profits and the remainder of the profits was to be divided between the partners; all losses being borne equally. Books were to be kept showing the moneys received and expended, and the purchases made on account of the copartnership, and monthly statements of the amounts received and expended were to be furnished by Beauregard to May and Graham. On the 8th May, 1867, Graham, in consideration of one dollar, assigned all his estate, right, and title to the lease which he derived from the partnership articles, and all his right and interest in any property and effects of the partnership, and all debts due to him by the said partnership or any partner, to the complainant, and it was in virtue of this assignment that the bill was filed. It will be observed that neither May nor Graham, the partners, were parties to the bill. The purpose of the bill, which did not charge any fraudulent confederacy, was to enforce the transfer made by Graham. The bill charged that the defendants had taken possession of the lease and partnership, and would not recognize the partnership or the interest of the plaintiff; that they claim under the copartner, May, and claim independently of the plaintiff. In point of fact, they claimed two-thirds of the partnership, in virtue of an assignment from May, made on the 14th and 16th of May, 1867, and denied that when Graham assigned to the bank he had any interest to assign; asserting that he was but a trustee for May. The prayer of the bill was that the defendants might be ordered to recognize the interest of the complainant, the bank, in the copartnership and in the business carried on under the lease, and to pay them the capital advanced by Graham and his share of profits.

Issue being joined and evidence being taken, the question as to the true interest of Graham in the partnership, whether indeed he had any as against May, and how far he had a right to make the assignment which he did, to the bank, were matters to which testimony was largely directed.

Argument for the appellant.

The court below dismissed the bill, with leave to the complainant to bring a suit against Beauregard, *Graham*, and May, for a settlement of whatever partnership existed between them prior to the transfer of May, on the 14th and 16th of May, 1867.

Graham at the time when the lease was made was a resident of New Orleans, but in 1866 removed to New York, and was a citizen of that place when the bill was filed in 1867.

Mr. P. Phillips, *for the bank*, *appellant*, recapitulating the evidence, contended that on it the *bona fides* of the assignment by Graham to the complainant on the 8th May, 1867, could not be successfully impeached; that Graham having thus assigned his interest to the complainant, and May *his* interest to Hernandez, Binder, and Bonneval, the bill was well filed against the latter and Beauregard, one of the original partners, to have an account of the profits of the concern under the prayer for general relief; that as the assignment by Graham to the complainant was absolute, Graham was not a necessary party; this, especially, as to have made him a defendant (being a citizen of the same State with the complainant) would have ousted the jurisdiction; that the decree dismissing the bill with leave to institute a suit against Beauregard, May, and Graham for a settlement of whatever partnership existed between them prior to the transfer by May, on the 14th and 16th May, 1867, was palpably erroneous, as it was through May that Bonneval, Binder, and Hernandez had come into the possession and control of the partnership effects; that the real defendants were thus protected from a suit and parties who had divested themselves of all possession and interest were to be substituted as defendants; this in an equity proceeding which deals always with those who have the real interest.

But admitting that May and Graham were necessary parties, Mr. Phillips contended that their absence did not deprive the court of jurisdiction over the cause; that the objection could only be urged against granting the relief

sought without bringing them in, and that this did not warrant an absolute dismissal of the bill as to those properly before the court; that in such a case an amendment of the bill would be ordered. And that, if necessary to maintain the jurisdiction, Graham might have been made a coplaintiff.*

Messrs. J. A. and D. Campbell, contra.

Mr. Justice STRONG delivered the opinion of the court.

The effect of Graham's assignment to the complainant was undoubtedly to dissolve the partnership which had existed between Beauregard, May, and himself, but it did not make his assignee a tenant in common with the other two partners in the property of the firm. It seems to be assumed on behalf of the complainant, that in succeeding to Graham's rights, the bank acquired an ownership of the effects of the firm jointly with Beauregard and May, and that, as Graham had been an equal partner with them, his assignee of course became the owner of one undivided third of the railroad lease and other property of the firm. But this assumption is based upon a misapprehension of the effect of the assignment. It has repeatedly been determined, both in the British and American courts, that the property or effects of a partnership belong to the firm and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners; consequently that no greater interest can be derived from a voluntary sale of his interest by one partner, or by a sale of it under execution.† In *Taylor* v. *Fields*,‡ it was said that "a party coming into the right of a partner" (in any mode, either by purchase from such partner, or as a personal representa-

* Harrison *v.* Rowan, 4 Washington's Circuit Court, 202; Carneal *v.* Banks, 10 Wheaton, 181; Milligan *v.* Milledge, 3 Cranch, 220.

† West *v.* Skip, 1 Vesey, 239; Nicoll *v.* Mumford, 4 Johnson's Chancery, 522; Doner *v.* Stauffer, 1 Pennsylvania, 198.

‡ 4 Vesey, Jr., 396.

tive, or under an execution, or commission of bankruptcy, "comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts."

When, therefore, the bank obtained from Graham the assignment, which is the foundation of its claim in this suit, it obtained thereby no ownership of the lease made by the railroad company to Beauregard, and which he agreed to hold for the benefit of the firm, nor did it obtain any aliquot part of it, or of any of the effects of the firm. The utmost extent of its acquisition was an interest in the surplus, if any, which might remain after all debts of the firm should be paid, and after the liabilities of Graham to his copartners, as such, should be discharged. It was not in the power of Graham, by retiring from the firm in violation of the articles of copartnership, either to introduce another partner or to deprive the partners who remained of their right to have all the partnership property held for partnership purposes. Incident to the right of the bank to share in the surplus was a right to enforce a settlement of the partnership accounts in order to ascertain whether there was any surplus. It is true the words of the assignment were very broad. It purported to transfer all the estate, right, title, and interest in the lease made by the New Orleans and Carrollton Railroad Company to Beauregard, to which the assignor might be entitled by virtue of the articles of copartnership, and also all his right and interest in any property and effects of the partnership, and all debts due to him from the partnership or any member thereof. But no matter what its language, it is clear no more could pass under it than the right of the assignor; and if, as we have said, that was not a right to the specific articles of property belonging to the firm, the bank obtained no such right. We are not now speaking of the fact that, under his contract with the railroad company, Beauregard had no right to transfer the lease either to the partnership or its members. The case does not require us

to consider that inability. It is sufficient that the complainant's right was only an equity to share in the surplus, if any, of the firm property after settlement of the partnership accounts, and that this is a bill for such a settlement. Manifestly, then, it is incurably defective, because neither Graham nor May are made parties defendant. It is too plain for discussion that to such a bill all the members of the firm are indispensable parties, for they are all directly affected by any decree that can be made. How utterly impossible it is to ascertain what the equity of the complainant is, with the present state of the record, will appear more distinctly, if the provisions of the articles of copartnership be considered. When it was formed, Beauregard had obtained from the New Orleans and Carrollton Railroad Company a lease of its railroad, with all its rolling stock, and with its corporate privileges, for the term of twenty-five years. Though the sole lessee, and prohibited by his contract from assigning or underletting, it was nevertheless agreed between him and his copartners that the lease should be for their common benefit; that May and Graham should each advance one hundred and fifty thousand dollars to carry on the enterprise of running the road, and that Beauregard should take charge of, manage, and direct the undertaking for the mutual advantage of the parties, at a fixed annual salary, selecting and appointing his own assistants. It was agreed that the money advanced, with eight per cent. interest, should be repaid from the annual profits of the enterprise, and that the remainder of the net profits should be equally divided between the partners, and that all losses should be equally borne by them. The contract evidently contemplated that the property of the firm and the management of its affairs should be in the hands of Beauregard. Books were to be kept showing not only all money received and expended, but also all purchases made on account of the copartnership, and monthly statements of amounts received and expended were required to be furnished by Beauregard to May and Graham. It was also agreed that the partnership should continue twenty-five years from the date

of the lease, which was April 12th, 1866. Now, it is quite possible that, on settlement of the accounts, Graham may be found indebted to the firm, or to his copartners, and that the court would be required thus to decree. How can such a decree be made when he is no party to the record? Or it might appear that May is a large debtor to the firm. How can any decree be made against him? How can any decree be made that will not prejudice one or the other of these partners? And yet, whether the bank complainant has any interest or not—whether it acquired anything under Graham's assignment, can be determined only by a final and conclusive settlement of the partnership accounts between all the partners, two of whom are not parties to this suit.

It is argued, however, on behalf of the appellant, that even if May and Graham were necessary parties, the bill should not have been dismissed, but that the complainant should have been allowed to bring in new parties by a supplemental bill. It is, doubtless, the general rule that a bill in chancery will not be dismissed for want of proper parties; but the rule is not universally true. It rests upon the supposition that the fault may be remedied, and the necessary parties supplied. When this is impossible, and whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed. Nothing is to be gained by retaining it, when it is certain that the complainant can never be entitled to a decree in his favor.* In the present case, we have seen that no decree for an account can be made, until all the partners are made parties. But if both May and Graham had been made parties defendant, the Circuit Court would have had no jurisdiction of the case. It is said Graham might have been made a co-plaintiff. Perhaps he might, and had application been made in due season for such an amendment of the bill, it might have been the duty of the Circuit Court to grant it. But no such application was made. The complainants chose to stand upon their case as they presented it. Possibly they never would have

* Note 5, § 541, Story's Equity Pleadings; Shields *v.* Barrow, 17 Howard, 130.

sought to bring in the necessary parties. The defendants could not bring them in. New parties cannot be brought into a cause by a cross-bill,* and had the bill not been dismissed, it must have been left at the option of the complainants whether the case should ever be brought to a final decree. Under these circumstances, there was no reason for retaining the bill.

It is insisted, however, that the court erred in dismissing the bill, reserving only a right to sue Beauregard, May, and Graham, for a settlement of the partnership between them prior to the 14th and 16th of May, 1867. Yet if the right acquired by Graham's assignment was, as the authorities show, not an ownership of the specific effects of the partnership, but only a right to share in the surplus remaining after the settlement of the partnership accounts and the payment of all its debts, as well as the just claims of the several partners, it is clear there can be in the complainant no equity against the railroad company, or against Hernandez, Binder, or Bonneval, who have succeeded to May's rights (not his obligations), if they have not to Graham's. No fraudulent confederacy is charged in the bill. At most, according to the complainant's own showing, they are purchasers of property that belonged to the firm. There was, therefore, not only a want of indispensable parties, a want which cannot be supplied without ousting the jurisdiction of the court, but a misjoinder of the defendants, a misjoinder apparent upon the face of the bill. Hence the decree of the Circuit Court was correct.

AFFIRMED.

UNITED STATES *v.* LYNDE.

1. Under the treaty of cession of Louisiana, made with France, April 30th, 1803, the United States Government always claimed to the Perdido River on the east, although the Spanish authorities kept possession of, and claimed sovereignty over, the territory between that river and the

* Shields *v.* Barrow, *supra.*

Statement of the case.

Mississippi (except the island of New Orleans) until 1810, when the United States took forcible possession of it.

2. Spain, in ceding the Floridas to the United States, by the treaty of February 22, 1819, only ceded so much thereof *as belonged to her*, and hence did not cede the above territory, lying between the Mississippi and Perdido Rivers.
3. The stipulation in the eighth section of the treaty of 1819, to confirm all Spanish grants of land in the ceded territory, did not embrace grants made in the above territory after Spain ceded Louisiana to France by the treaty of St. Ildefonso, in 1801; for after that it did not belong to Spain.
4. The act of March 26th, 1804, organizing territorial governments for Louisiana, expressly declared void all grants made in the territory above referred to, after the treaty of St. Ildefonso.
5. The foregoing points have been established by a long series of decisions in this court.
6. But by the act of June 22d, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," the grants made by the Spanish government in the disputed territory whilst in possession thereof, and claiming sovereignty over it, were confirmed.
7. Such a grant, for 32,025 arpents, made by the Spanish intendant Morales, on the 12th day of July, 1806, to John Lynde, the ancestor of the appellees, although rejected and declared void under previous conditions of the laws, was held to be confirmed and validated by the act of 1860.

APPEAL from the District Court of the United States for the District of Louisiana.

The heirs of John Lynde filed a petition in the court below, the object of the suit having been to obtain the recognition and confirmation, as against the United States, of a claim for 32,025 arpents of land in Louisiana, under the provisions of an act of Congress, entitled, "An act for the final adjustment of Private Land Claims in the States of Florida, Louisiana, and Missouri, and for other purposes." Approved June 22, 1860.*

The petitioners claimed title under a grant by Juan Ventura Morales, Spanish intendant of West Florida, to John Lynde, their ancestor, on the 12th day of July, 1806, in pursuance of an application made by Lynde on the 26th day of September, 1803, and regular surveys thereon. The lands

* 12 Stat. at Large, 85.

were situated east of the river Mississippi, and south of the 31st parallel of latitude, in a direction nearly north of Baton Rouge, and were a part of the disputed territory, which, after the cession of Louisiana to the United States in 1803, was claimed by them as part of Louisiana, and by Spain as a part of West Florida. The cause of this contention between the claimants under the Spanish grant and the United States, originated in the various treaties of cession which had been made respecting these territories.

The court below decided in favor of the claim, and the United States brought the case here. It was submitted on briefs of *Mr. Akerman, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, and of Mr. Louis Janin, contra, for the claimant.*

Mr. Justice BRADLEY stated the history and nature of the title on both sides, and delivered the opinion of the court.

Louisiana, as possessed by the French prior to 1763, embraced not only the entire territory west of the Mississippi, but also extended east of that river, along the Gulf of Mexico, as far as the Perdido, the present boundary between Alabama and Florida. By the treaties of 1763 France ceded the latter portion, lying east of the Mississippi, except the city and island of New Orleans, to Great Britain, and the residue to Spain. Subsequently (in 1783), Spain acquired the part ceded to Great Britain, and thus became possessed of the entire territory on our western and southern borders. On the 1st of October, 1800, a secret treaty was made at St. Ildefonso, between Spain and Bonaparte, then First Consul, by which Spain agreed, on certain conditions to be performed, to retrocede to the French republic "the colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and *such as it ought to be after the treaties subsequently entered into between Spain and other states.*"

The ambiguity of this last expression was the cause of the subsequent misunderstanding between Spain and the United States. Did it mean that Spain was to retrocede to France

all the territory which the latter had formerly possessed under the name of Louisiana, or only so much as remained after the separation of West Florida therefrom, and the cession thereof to Great Britain? The United States contended the former, Spain the latter.

The importance of this question arose from the fact that the cession of Louisiana by Bonaparte to the United States included in precise terms what had been retroceded by Spain to France. The treaty of April 30, 1803, after reciting the exact language of the treaty of St. Ildefonso, describing the colony or province of Louisiana as above stated, ceded "the *said* territory, with all its rights and appurtenances, as fully and in the same manner as they had been acquired by the French republic in virtue of the above-mentioned treaty with his Catholic Majesty."

In accordance with her construction of the treaty of St. Ildefonso, Spain refused to surrender the possession of the territory east of the Mississippi and Iberville Rivers which she had acquired from Great Britain, and which the English had named West Florida, and she retained possession of it and exercised full sovereignty over it for many years afterwards.

Notwithstanding this refusal of Spain to deliver up West Florida, the United States, through the executive and legislative departments of the government, always claimed that it was covered by the two treaties of cession, and insisted that it rightfully belonged to them, though no demonstrations were made to dispossess the Spanish authorities until 1810, when President Madison issued a proclamation directing that possession should be taken, but at the same time declared that the right thereto should remain, as it had continued, a subject for amicable negotiation with the Spanish government. Possession was taken by the United States accordingly.

During the period that Spain remained in possession, her authorities continued to grant lands, not only in small parcels to actual settlers, under her colonization laws, but in large tracts to speculators and favorites.

From 1803 to 1806, inclusive, the Spanish intendant, Morales, made many such grants (of which the grant in question was one), and which have ever since been the subject of much litigation and dispute, never being recognized as valid by our authorities, unless so recognized by the act of 1860, hereafter referred to.

Immediately after acquiring possession of Louisiana, in 1803, Congress passed an act to organize temporary governments in the newly acquired domain. This act, which was passed on the 26th day of March, 1804, created two territories—one, embracing all that part of the ceded country lying south of Mississippi Territory, east of the Mississippi River, and south of the 33d parallel of latitude west of that river, to be called the Territory of Orleans; the other, embracing all the residue of the ceded country, namely, that portion lying west of the river Mississippi and north of the 33d parallel, to be called the District of Louisiana. By the 14th section of this act all grants of land within the ceded territories, the title whereof was, at the date of the treaty of St. Ildefonso (October 1, 1800), in the crown, government, or nation of Spain, *were declared void*, except *bonâ fide* grants made to actual settlers prior to December 20, 1803, not to exceed one mile square to each settler, and the usual proportion for his wife and family.

According to the views of our government this act extended to West Florida (so called) as well as to Louisiana, and as a part thereof. President Madison, in 1810, in the proclamation referred to,* commences with these words:

"Whereas the territory south of the Mississippi Territory and eastward of the river Mississippi, and extending to the river Perdido, of which possession was not delivered to the United States in pursuance of the treaty concluded at Paris on the 30th of April, 1803, has at all times, as is well known, been considered and claimed by them as being within the colony of Louisiana conveyed by the said treaty, in the same extent that it had in the hands of Spain, and that it had when France originally possessed it," &c.

* 11 Stat. at Large, 761.

He then states that the United States had forborne to take possession, not from any distrust of their title, but from motives of conciliation towards Spain, and shows why it was inexpedient to delay taking possession any longer, and concludes by directing Governor Claiborne, "governor of the Orleans territory, of which the said territory is to be taken as part, to take possession of the same, and to exercise over it the authorities and functions legally appertaining to his office."

By the act of 25th April, 1812, after possession of West Florida had been assumed by our government, commissioners were appointed to investigate all the titles and claims to lands in that territory, and the claim now before us was laid before the proper commissioner and rejected on the ground that the territory was a part of Louisiana ceded to the United States in 1803, and that the authority of Spain over the same had ceased by the treaty of St. Ildefonso of October 1, 1800. Other claims belonging to the same category met with a like fate. A list of these claims, rejected by the commissioner for the district between the Mississippi and Pearl Rivers, may be found in the American State Papers.* The commissioner reports, that in his opinion these claims ought not to be confirmed: 1st, because the government of the United States claims an absolute property in the territory; 2d, because the Spanish government evidently distrusted its own right to make these grants, as they were made in a manner entirely different from the usages and customs always before observed in granting lands. It was not the custom of Spain to make sale and gain of her public lands, but to grant them to actual settlers. Nevertheless, the commissioner suggests whether the United States government, by permitting Spain to remain in possession of the country, and thus to impose upon persons purchasing lands in good faith, was not morally bound by considerations of equity and policy to make these purchasers some compensation.

* Title Public Lands, vol. vi, p. 501.

These events happened prior to the treaty between Spain and the United States, entered into February 22, 1819, by which his Catholic Majesty ceded to the latter all the territories *belonging to him*, situated to the eastward of the Mississippi, known by the name of East and West Florida.

By the 8th article of that treaty it is stipulated as follows:

"All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities *in the said territories ceded* by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."

When this treaty came before the courts it was held that it furnished no aid to the disputed claims, since it only guaranteed grants made by the King of Spain in the territory ceded by that treaty; and the territory ceded only embraced such territory as *belonged* to the King of Spain; and as the United States held that the disputed territory did not belong to him, no grants made by him therein were confirmed by the treaty.

In 1829 the case of *Foster and Elam* v. *Neilson* came before this court on a claim for 40,000 arpents of land under one of the grants of Morales, precisely like the claim now before the court. The case is reported in 2 Peters,* and contains, in the arguments of counsel and the opinion of the court, a complete history of the controversy. Chief Justice Marshall ably reviews the argument of our government in favor of its claim under the treaties of St. Ildefonso and of April 30th, 1803. He admits that the former is susceptible of a twofold construction; but he concludes, and that was the judgment of the court, that the judicial department is bound by the construction adopted by its own government. He says:†

"If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests

* Page 253. † Page 309.

against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that the construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect the pronounced will of the legislature."

The Chief Justice then turns to the question whether the treaty of 1819 had effected any change in the position of these grants before the courts. After quoting the eighth article of the treaty, which stipulates that "all the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said *territories ceded*, &c., should be ratified and confirmed," he inquires what territories were *ceded;* and observes that the cession did not embrace *all* territories situated to the eastward of the Mississippi, but all the territories *which belonged to him* (the King of Spain) thus situated. If, according to the position assumed by our government, the United States had already acquired a full title to West Florida, as far to the eastward as the Perdido River, then Spain had no title, and ceded nothing therein; and, by consequence, the stipulation in the eighth article of the treaty in favor of grants made by his Catholic Majesty "in the territories ceded" would not apply to the grant then before the court. Another difficulty in the case, as viewed by the court, was in the form of the stipulation. It was, that all grants "*shall be* ratified and confirmed," not "are ratified and confirmed;" a form of expression which the court held required the intermediate action of the legislature confirmatory of the grants before the courts could act upon them. For these reasons the court decided against the claim.

In the subsequent case of Arredondo,* on an examination of the Spanish side of the treaty, the court held that the last

* 6 Peters, 691.

point made in *Foster* v. *Neilson*, was untenable; and that the treaty *was* a present confirmation of the grants referred to in it;* and the same was decided in *United States* v. *Percheman*.† But this did not affect the question at issue. The main objection still remained.

Meantime attempts were made in Congress to secure the recognition of these Spanish grants, but without success. In February, 1832, a resolution was passed by the House of Representatives, calling on the Secretary of State for his opinion of the justice and validity of the claims arising upon those grants, and of the expediency of providing by law for their final adjustment. Mr. Edward Livingston, the then Secretary of State, who had been counsel for the claimants, made a lengthy and able report,‡ stating the history of the grants and the questions arising thereon, and strongly urging their justice and the expediency of providing for their settlement. He contended that this was called for in the exercise of good faith towards the Spanish government, which, whatever views we might have entertained with regard to our own title, had always considered us pledged by the treaty of 1819 to recognize and validate her grants, and had expressed very decided complaints at our failure to do so.

Mr. Wickliffe, from the Committee on Public Lands in the House, to whom the secretary's communication was referred, made a report combating its conclusions with great energy:

"Are we to be told" (says the report),§ "at this time of day, that our title to the territory between the Mississippi and Perdido was not valid until the treaty of 1819, and that by that treaty we *purchased* that part of Louisiana by the name of 'all the territories which belong to him (his Catholic Majesty), situated to the eastward of the Mississippi, known by the name of East and West Florida?' What was East and West Florida in 1819? Did it include any part of the territory between the

* 6 Peters, 737–743. † 7 Id. 51.

‡ See it, American Archives, Public Lands, vol. vi, p. 495.

§ Ib. Public Lands, vol. vi, pp. 507–8.

Mississippi and the Perdido? Had not the United States, under and by virtue of the treaty between France and Spain, and between the United States and France, long prior to 1819, taken possession of the same by expelling the Spanish power therefrom? And who doubted, in 1819, her right both of jurisdiction and soil? And who, till now, ever supposed that the United States, by the treaty of 1819, imposed upon herself the obligation to confirm these grants made by Spain in violation of her solemn treaty stipulations? . . . The committee will not do the then administration so much injustice as to suppose they would negotiate a treaty with Spain for the avowed purpose of the acquisition of East and West Florida, in terms designed to conceal the important fact from the Congress of the United States that by said treaty they were bound to confirm claims to near 600,000 acres of land which had, by an act of solemn legislation, been declared null and void, and which originated in a violation of the treaty of St. Ildefonso and of that with France in 1803."

This extract serves to show the temper with which these claims were viewed at that day by many of our leading statesmen. Of course, no advance was made in their favor on this occasion.

The next case in this court in which grants of land between the Mississippi and Perdido Rivers came in question was *Garcia* v. *Lee*, in 1838.* The court, in that case, reaffirmed *Foster* v. *Neilson*, and held that, as this territory did not belong to Spain after the treaty of St. Ildefonso, but belonged to the United States, according to its construction of the treaty, the Spanish grants therein made after 1800 were invalid, and were not confirmed by the eighth article of the treaty of 1819. Chief Justice Taney, delivering the opinion of the court,† said:

"Indeed, when it is once admitted that the boundary line, according to the American construction of the treaty, is to be treated as the true one in the courts of the United States, it would seem to follow, as a necessary consequence, that the

* 12 Peters, 511

† Page 521.

grant now before the court, which was made by the Spanish authorities within the limits of the territory which then belonged to the United States, must be null and void, unless it has been confirmed by the United States by treaty or otherwise. It is obvious that one nation cannot grant away the territory of another."

Again:

"In the case before us the grant is invalid from an intrinsic defect in the title of Spain. It is true she still claimed the country, and refused to deliver it to the United States. But her conduct was, in this respect, a violation of the rights of the United States and of the obligation of treaties."

The court relied on the act of 1804 as giving notice of the determination of the United States to claim the territory and to ignore any grants made therein, except to actual settlers.

In this state of the decisions it was in vain for claimants under these grants to think of resorting longer to the courts of the United States. They, accordingly, again applied to Congress, and on June 17, 1844, procured a law by which the act of May 26, 1824, relating to land titles in Missouri, was extended to Louisiana and Arkansas and the district between the Mississippi and Perdido Rivers, and the District Courts were invested with jurisdiction over land claims originating with either French, Spanish, or British authorities.* This act authorized any person claiming land by virtue of any French or Spanish grant, concession, warrant, or order of survey legally made or issued before the 10th of March, 1804, which was protected or secured by the treaty with France of April 30, 1803, and which might have been perfected into a complete title had not the sovereignty been changed, to present a petition to the District Court stating the case, and have the claim adjudicated upon and settled according to the law of nations, the stipulations of any treaty, the acts of Congress, and the laws of the former gov-

* 5 Stat. at Large, 676.

ernment, subject to an appeal to the Supreme Court of the United States. A number of suits for lands in the disputed district were soon after commenced in the District Court; amongst others, one by the heirs of John Lynde for the tract in question in this case. But the claimants were still unsuccessful in this court.

The first case reported is that of *United States* v. *Reynes*.* It was a case precisely like the one now before the court, and was rejected on the ground that the act of May 26, 1824, related to inchoate and incomplete titles, and was intended to give a means of completing them. The court reaffirmed *Foster* v. *Neilson*, and held that Spain could not make any valid grant in the disputed territory after the treaty of St. Ildefonso, and that the act of March 26, 1804, which had never been repealed, had pronounced all such grants void. The court adhered to the same views in *United States* v. *D'Auterive*,† *United States* v. *Philadelphia and New Orleans*,‡ *Montault* v. *United States*,§ *United States* v. *Castant*,‖ and a number of other cases in the same term, including the case now before the court. These cases were decided in 1852.

In view of this long course of decisions, all to the same purport, it must be considered as judicially settled in this court that Louisiana, as ceded to the United States in 1803, embraced the territory between the Mississippi and Perdido Rivers, and that our government had a perfect legal right, whatever may have been its moral or honorary obligations, to ignore all grants made by the Spanish authorities after the treaty of St. Ildefonso went into effect. It must also be regarded as judicially settled that the treaty of 1819 confirmed grants of land made in the Floridas, east of the Perdido, but not those made to the west of that river, unless made to actual settlers or made before the treaty of St. Ildefonso went into effect. If the political departments of the government felt bound, from considerations of honor and

* 9 Howard, 127. † 10 Howard, 609. ‡ 11 Id. 609.
§ 12 Id. 47. ‖ Ib. 437.

good faith, or from motives of conciliation and policy, to give effect to any other grants, it was for them to do so.

This is what the claimants insist has been done.

But that the government of the United States has always continued to insist upon its own construction of the treaties, whenever they are referred to as matter of right or historic derivation of title, is manifest, among other things, from the act admitting Florida into the Union as a State, passed so late as March 3, 1845, by which the boundaries are fixed as follows:

"Said State of Florida shall embrace the territories of East and West Florida, which, by the treaty of amity, settlement, and limits between the United States and Spain, on the 22d day of February, 1819, were ceded to the United States."*

It is well known that Florida, as thus limited, extended only to the Perdido River, all the territory west of which had long previously been assigned to the States of Louisiana, Mississippi, and Alabama, which were respectively admitted into the Union, with their present boundaries, in 1812, 1817, and 1819.

It is evident, therefore, that the case of the claimants, if it can stand at all, must stand on the voluntary bounty of our government, exerted through its legislative department. And the question in this case is, whether that bounty has, in fact, been exerted.

After the unsuccessful attempt made in the courts, as last referred to, under the Missouri act of 1824, the subject was again brought to the attention of Congress in May, 1858. Mr. Benjamin, who had been counsel for the claimants in the last cases, made a report to the Senate as chairman of the Committee on Private Land Claims, and submitted a bill for the relief of the claimants. This report contained a very full history of the treaties and litigation, giving a favorable view of the Spanish side of the question. Suffice it to say, in consequence of this report, Congress passed the act of June 22, 1860, entitled "An act for the final adjustment of private

* 5 Stat. at Large, 743.

land claims in the States of Florida, Louisiana, and Missouri, and for other purposes." This act provides that any person claiming lands in Florida, Louisiana, or Missouri, by virtue of grant, concession, or warrant of survey emanating from any foreign government prior to the cession of the territory to the United States, *or during the period when any such government claimed sovereignty, or had the actual possession of the district or territory in which the lands claimed are situated*, shall be authorized to make application for the *confirmation of his title* in the manner pointed out in the act, which appoints commissioners to hear and determine the applications, and to make report to the commissioner of the land office. This officer, if he approves, is to report the same to Congress for its action and final decision thereon; and it is provided that if the lands, or any of them, have been sold by the government, or cannot be surveyed and located, the claimant, if his title be confirmed, shall have the right to enter a quantity equal in extent to the lands thus sold, upon any of the public lands of the United States, subject to private entry at one dollar and twenty-five cents per acre.

By the eleventh section it is provided, that where the lands claimed have not been in possession of and cultivated by the claimant for the period of twenty years, and where the lands are claimed by complete grant or concession, &c., made prior to the cession of the territory to the United States, *or where such title was created and perfected during the period while the foreign government from which it emanated claimed sovereignty over or had the actual possession of such territory*, the claimant may, at his option, instead of submitting his claim to the commissioners, proceed, by petition, in the proper District Court of the United States, subject to appeal to the Supreme Court, whose decision is to be final; and if the claim be sustained, a patent is thereupon to issue for so much of the lands claimed as remained unsold, and for so much as may have been sold the claimant is to have the right to enter an equal quantity upon the public lands, as before stated.

That the object of this act was to confirm the grants in question seems hardly to admit of a doubt. It is true, that

in prescribing the powers and duties of the special commissioners and the courts to whose decision the applications were to be referred, it is provided that they shall decide thereon according to *equity and justice.** But it can hardly be contended, especially in view of what has already been said, that Congress meant by this language to authorize the said commissioners and courts to review the entire subject, and to decide what our government ought to have done with regard to these grants. It could not have been the intention to throw the whole discussion open, from the treaty of St. Ildefonso down to the present time, and to confer upon the tribunals named in the act the power which properly belonged to the political department of the government, and to impose upon them the duty of declaring what the policy of the government should be; or to leave it to their, perhaps varying, judgments what was the true intent and meaning of the original treaties. That could not have been the design of Congress. The act authorizes the claimants to present their claims for *confirmation;* and although it does not, in so many words, say that grants made by foreign governments, while in possession of the territory and claiming sovereignty over it, if complete, regular, and fair, shall be sustained; yet that is the unavoidable inference to be derived from its language, and from the events and course of decisions out of which it arose. And although it does not expressly repeal that part of the act of March 26th, 1804, which declared void all grants of land within the ceded territories made after the date of the treaty of St. Ildefonso; yet its provisions, in order to have any effect at all, must be regarded as irreconcilable with that clause of the act of 1804, and, consequently, as repealing it by implication.

We cannot avoid the conclusion, therefore, that the act of June 22d, 1860, was intended to validate all grants which were made by the Spanish government to *bonâ fide* grantees of lands in the disputed territory whilst the government remained in possession of the territory and claimed sover-

* See §§ 2 and 11.

eignty over it, subject, of course, to the express exceptions of the treaty of 1819, and the supplementary declaration of the King of Spain finally annexed thereto.

What range of discretion was intended to be conferred upon the special commissioners and the courts by authorizing them to decide according to the principles of equity and justice, is, perhaps, not entirely clear. The probable meaning is, that these principles are to be applied to each particular case. If it should appear that a grant was obtained by fraud, or was affected by any other special vice, it would be the duty of the tribunals to reject it. Or, if it should appear that a claim was honest and meritorious, but defective in point of form or completeness, it might be the duty of the tribunals to sustain it as an equitable, if not a strictly legal title.

This view of the subject relieves us from the ungracious task of construing treaties, and reviewing the conduct and policy of the government. Congress, by the act of 1860, has declared its own policy, and has left us simply the office of judicially carrying out its enactments in individual cases as they come before us. Congress has laid down the general rule by placing the grants in question on a platform of equality with grants made by our own government, and has left to the tribunals the duty of examining the merits of particular applications.

An examination of the case before us shows that the grant to John Lynde was made in due form and after regular surveys; and that the consideration was duly paid to the Spanish government. Nothing has been developed in the case which goes to assail the *bonâ fides* of the transaction, unless it be the fact of obtaining the grant from Morales (who was Lynde's father-in-law) after the treaty of cession, and when it was known that the United States claimed the territory. But as this can be said of all these grants, and was one of the considerations that must have been patent to the mind of Congress when it enacted the law of 1860, we must presume that it was waived by that body, and has ceased to be a valid ground of objection.

DECREE AFFIRMED.

Statement of the case.

Mr. Justice CLIFFORD dissented from the decree, upon the ground that the act of Congress in question did not confirm any claim previously adjudged void by the Federal courts in pursuance of a prior act of Congress conferring jurisdiction to hear and determine the controversy.

UNITED STATES v. WRIGHT.

Under the 5th section of the act of March 3, 1863 (12 Stat. at Large, 702), which declares that "whenever by reason of the presence of a military or naval force near any post-office, unusual business accrues thereat, the Postmaster-General is hereby required to make a special order allowing proportionately reasonable compensation to the postmaster, and for clerical services," the Postmaster-General is the sole judge to determine not only whether the exigencies in the case provided for by the act have arisen, but also, in case that he decides that they have, to determine the manner and extent of the allowance to be made. It is not competent for a court or jury to revise his decision.

ERROR to the Circuit Court for the Middle District of Tennessee.

This was an action by the United States against a principal and his sureties on a postmaster's bond. At the trial, the defendants claimed, by way of set-off, under the 5th section of the act of March 3, 1863,* certain credits which were proved to have been presented by the postmaster to the department and disallowed. The section mentioned provides:

"That whenever, by reason of the presence of a military or naval force near any post-office, unusual business accrues thereat, the Postmaster-General is hereby required to make a special order allowing proportionately reasonable compensation to the postmaster, and for clerical services, during the period of such extraordinary business."

Testimony was admitted as to the presence of United States military forces near the office of the postmaster during

* 12 Stat. at Large, 702.

the term to which his claim related, and the court charged the jury that "if they were satisfied that, owing to the presence of such forces near said office, during said time, an increased amount of business had been occasioned, it would be proper for them to inquire as to what clerical assistance, if any, was rendered necessary thereby, and to allow said postmaster as a credit the fair compensation for such necessary clerical assistance."

The question was, the correctness of this charge. It depended, of course, upon the construction to be given to the 5th section above quoted of the act of March 3, 1863.

It is necessary to state that by the 9th section of the act of July 5, 1836,* which prescribes the general duties of the Postmaster-General, that officer is, among other things, required

"To control, according to law, . . . the allowances to postmasters, the expenses of post-offices, and other expenses incident to the service of the department; to regulate and direct the payment of the said allowances and expenses for which appropriations have been made," &c.

Mr. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States. No opposing counsel.

Mr. Justice DAVIS delivered the opinion of the court.

The instruction given by the learned judge who tried the case was clearly erroneous, for it referred to the jury a matter which, under the law, rested wholly in the discretion of the Postmaster-General. The act of March 3, 1863, which embraces the section upon whose construction the disposition of the case depended, effected great changes in the administration of the post-office department, but it did not take from the Postmaster-General the right to control and regulate the allowances to postmasters and the expenses of their offices, which was conferred by the 9th section of the act of July 5, 1836. Indeed, it would seem that the general

* 5 Stat. at Large, 81.

power granted by that section was sufficient to meet the exigencies provided for by the fifth section of the act of March 3, 1863, but be this as it may, the latter section did nothing more than to require the Postmaster-General, in case the business of a particular post-office was considerably increased, on account of the location of the national forces in its vicinity, to compensate the postmaster for the extra labor performed and the additional expenses incurred.

The section did not go further and prescribe rules to govern the action of the Postmaster-General, nor did it seek to interfere with the judicial discretion of that officer. Congress constituted him the sole judge to determine not only whether the exigencies in the case had arisen, but if they had, the manner and extent of the allowance, and it is not competent for court or jury to revise his decision, nor is it re-examinable anywhere else, as there is no provision in the law to that effect. It may be safely laid down as a general rule, says Story, Judge, "that where a particular authority is confided to a public officer to be exercised by him in his discretion, upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts."*

JUDGMENT REVERSED, AND A VENIRE DE NOVO AWARDED.

MANN v. ROCK ISLAND BANK.

In this case the court expresses its dissatisfaction with appeals being made whose only effect is to throw upon *it* the burden of making minute investigations and analyses of evidence in controversies where the case turned in every point upon simple questions of fact, and where there is not a doubtful question of law involved in the entire record. And, declaring its conviction that the time of this court, due to other parties

* Allen *v.* Blunt, 3 Story, 745.

and to more important interests, should not be consumed in writing and delivering opinions which, if they attempted to go into examination of the facts to justify the decision of the court, would be equally tedious and useless, confines itself to announcing its judgment of affirmance without the exhibition through its delivered opinion of the mental processes and arguments by which it has reached its conclusion.

APPEAL from the Circuit Court for Wisconsin.

The Rock Island Bank filed a bill in chancery in the Circuit Court below against one Mann and his wife, setting forth in a full and minute way its history of certain irregular transactions by Mann, as agent and cashier of the bank, which he had been, at one time, though he had ceased to be so several years previous to the filing of the bill. The bill charged that Mann had defrauded the bank of $20,000, and that the money itself, or the property in which it had been invested, had been converted into certain real estate, the legal title of which then stood in the name of his wife, and it prayed for a decree against Mann for the $20,000, with interest, and against him and his wife, that the real estate might be subjected to the payment of the debt.

The defendants answered with similar fulness and minuteness, and issue was joined; the questions *involved being questions of pure fact without any question of law whatever.* Much testimony was taken, and a decree rendered that Mann was liable for the money, and that the real estate should be sold to pay it. This decree was carried into effect by a sale of the property, and about four years after the defendants prayed an appeal to this court. The case was accordingly brought here: the transcript of the record filling a volume of not far from two hundred closely-printed pages.

Mr. Thomas Wilson, for the appellant.

No counsel appeared for the bank; which apparently considered the appeal as made without hopes of reversal.

Mr. Justice MILLER delivered the opinion of the court.

As no counsel appeared in this court for the Rock Island Bank, we have been compelled to make a minute and care-

ful analysis of the whole record. It turns in every point upon simple questions of fact. There is not a doubtful question of law involved in the entire record. That this court should be compelled to undergo the labor of finding the truth in such a mass of testimony, a duty much more appropriate to a master, or to some other tribunal than this, and which in common-law cases is peculiarly the province of the jury, is itself a hindrance and obstruction to public justice by the delay which it interposes to the hearing of other cases. We do not feel that this burden should be further increased, and the time of this court, due to other parties and to more important interests, be consumed in writing and delivering opinions which, if they attempt to go into examination of the facts to justify the decision of the court, will be equally tedious and useless.

[The learned justice, without going, in the opinion delivered, into analysis or argument, then stated in a general form, and by way of result, the history of Mann's transactions while cashier and agent of the bank, as the court considered that the same appeared on the evidence; adding that it seemed pretty clear to this court that a certain $20,000 of which Mann had defrauded the bank did become real estate, which was now held in the name of his wife, and announcing in conclusion that as the decree of the court below was founded upon that same view of the case, it was affirmed.]

DECREE ACCORDINGLY.

HENDERSON'S TOBACCO.

1. Although a former statute is impliedly repealed by a subsequent one plainly repugnant to it, or so far as the later statute's making new provisions is plainly intended for a substitute for the earlier one, yet a repeal is not to be implied where the powers or directions under the later acts are such as may well subsist together with those under the earlier.
2. *Held*, on an application of this principle, that the act of July 20, 1868,

Statement of the case.

imposing taxes on distilled spirits and tobacco, did not repeal the proviso to the 25th section of the Internal Revenue Act of March 2, 1867, which limits to twenty days the time for commencing proceedings to enforce forfeitures.

3. But the proviso has no application to any other forfeitures than such as are provided for in it.

IN error to the Circuit Court for the District of Iowa.

This was an information under the act of July 20, 1868,* entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," to enforce a forfeiture, under the revenue laws, of certain caddies of tobacco which had been seized on the 17th of August, 1869, and which were claimed by Henderson & Co. The information contained three counts. The first was, in substance, that since the first day of January, 1868, to wit, from January 1, 1868, to August 17, 1869, the claimants, being the owners of a tobacco factory, with its furniture, manufactured, prepared, and placed in caddies, manufactured leaf tobacco, and sold and removed the same without placing on the caddies the proper revenue stamps, and without having paid the special tax required by law; but that they did place on the caddies of tobacco so manufactured and so sold and removed, half stamps, that is to say, revenue stamps cut in two parts, each part of said stamps being used on separate caddies, and each half stamp so covered by a whole stamp as to make the half stamp so used resemble and be taken for a whole stamp. The second count was for substantially the same offence. The third was for making false and fraudulent entries of the amount of tobacco sold by them annually, and false and fraudulent entries of the quantity manufactured by them, and false and fraudulent reports of their annual sales, in violation of their duty under the law.

The claimants pleaded to this information that it was not filed until more than twenty days after the caddies had been seized by the collector for the alleged violations of law. To the plea there was a demurrer, which was overruled by the

* 15 Stat. at Large, 156, §§ 69 and 70.

court and the information was dismissed. The record was, therefore, supposed to present the question whether proceedings to enforce a forfeiture for such violations of the revenue laws as were charged in the information must be commenced within twenty days from the time of the collector's seizure, and this was the only point argued. The claimants, in support of an affirmative answer to this question, relied upon the proviso to the 25th section of the act of Congress of March 2, 1867,* entitled "An act to amend existing laws relating to internal revenue, and for other purposes." This 25th section enacted that the owner, agent, or superintendent of any still, boiler, or other vessel used in the distillation of spirits, who should neglect or refuse to make true and exact entry and report of the same, or to do, or cause to be done, any of the things by law required to be done concerning distilled spirits, shall, in addition to other fines and penalties by law provided, forfeit for every such neglect or refusal all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in making the same, and all materials fit for use in distillation found on the premises. It also authorized the collector to seize such spirits, vessels, and materials, and hold them until a decision thereon according to law. Then followed this proviso:

"*Provided*, that proceedings to enforce said forfeiture shall be commenced by such collector *within twenty days* after the seizure thereof; and the proceedings to enforce said forfeiture of said property shall be in the nature of a proceeding *in rem* in the Circuit or District Court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction."

The 9th section of the same act enacted that "all proceedings relating to forfeiture and sale of distilled spirits shall apply to tobacco, snuff, and segars."

In answer to this it was contended, on behalf of the United

* 14 Stat. at Large, 483.

States, that the proviso relied upon by the claimants was repealed by the act of July 20, 1868. It was admitted that the act of 1868 contained no words expressly repealing either the act of 1867 or that of 1864, to which the one of 1867 was a supplement; but the argument was that it covered the ground of the preceding statute, and that no limitation was contained in the latter statute with regard to the time in which the proceeding of forfeiture shall be commenced.

There was no doubt that the latter act did change numerous provisions of the former act, and in so far cover its ground. In the sections under which this information was filed there were provisions for the punishment of persons manufacturing tobacco or snuff in violation of the internal revenue laws not in the former acts, and which did not make reference to the proceedings for the punishment of the illegal manufacture of distilled spirits.

The act of 1868 repealed in terms* "all acts and *parts of acts in*consistent" with its own provisions; enacting, however,

"That all the provisions of said act shall be in force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining, continuing, and enforcing liens, fines, penalties, and forfeitures, incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved; and all suits and prosecutions for acts already done in violation of any former act or acts of Congress relating to the subjects embraced in this act may be commenced or proceeded with in like manner as if this act had not been passed."

This section, it was considered by the government, indicated the broad extent to which the former revenue acts had been revised by the act of 1868, so that Congress considered that penalties under them would be lost without such a saving clause.

* § 105.

There was, however, nothing in the act of 1868 regulating or defining in any way the manner of proceeding in cases of forfeiture, and unless *certain* of the provisions of the previous acts were to be regarded as still in force, there was left apparently no guide, nor statute now in force, in important parts of the revenue practice. These were set forth in different sections among the first fifty-two of the act of 1864; amended by acts of 1866 and 1867. So section 3d of the act of 1867 provided certain rules under which district attorneys were to report certain things to the Commissioner of Internal Revenue. Section 4th placed under the control of the commissioner real estate acquired by the United States under the revenue laws. Section 7th authorized the commissioner to appoint detectives, &c., while section 8th provided a penalty for failure to pay tax when due. No provisions were made on the subject of these sections in the late act.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States; Messrs. McCrary, Miller, and McCrary, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is contended, on behalf of the United States, that the proviso relied upon by the claimants was repealed by the act of July 20, 1868.

If this is so, it was a repeal by implication only. That act contains no words expressly repealing either the act of 1867 or that of 1864, to which the one of 1867 was a supplement. On the contrary, the repealing clause, which it does contain, indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject-matter. The 105th section enacts, "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." This is an express limitation of the extent to which it was intended former acts should cease to be operative, namely, only so far as they are inconsistent with the new act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more

extensive repeal. Statutes are, indeed, sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the old law. In the *United States* v. *Tynen*,* it was said by Mr. Justice Field, that "when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, *so far* as the provisions of the subsequent statute are repugnant to it, or *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed.†

If now, in the light of these principles, the act of July 20, 1868, be examined and compared with the acts of 1864 and 1867 (the latter being an amendment of the former), there will be found in it nothing inconsistent with the authority given by the amended act of 1867 to the collector to seize and hold property subject to forfeiture, or with the proviso that directs the mode of procedure to enforce forfeitures, designates the courts in which proceedings may be instituted, and limits the time within which they may be com-

* *Supra*, 92.

† Dwarris on Statutes, 674, *et seq.*; Goldson *v.* Buck, 15 East, 877.

menced. It cannot be said that all the powers and limitations mentioned in the proviso may not subsist in entire consistency with everything prescribed in the act of 1868. Undoubtedly, that act was intended to be a revision of former acts relative to spirits and tobacco. And in some particulars it made changes. It introduced new provisions respecting the mode of paying the tax on spirits and tobacco, and it prescribed some new penalties for new offences, but it made no provision respecting the mode of enforcing penalties and forfeitures. It cannot, therefore, have been intended as a complete substitute for all former acts relative to its subject. There are many provisions of the acts of 1864 and 1867 which it left untouched and unsupplied. Indeed, the first fifty-two sections of the act of 1864, amended as they were by the acts of 1866 and 1867, without which the revenue laws cannot be executed, are not attempted to be supplied. There is, therefore, no reason for holding that any other provisions of the acts of 1864 and 1867 have been repealed than such as are plainly inconsistent with the provisions of the act of 1868. There is nothing in this latter act repugnant to the proviso upon which the claimants rely.

But the proviso of the 25th section of the act of 1867, which limits to twenty days the time for commencing proceedings to enforce forfeitures, has no application to any other forfeitures than such as are provided for in that section. Those are, as we have seen, forfeitures for neglect or refusal to make certain true and exact entries and reports, and forfeitures for neglect or refusal to do any of the things by law required to be done concerning distilled spirits (or tobacco). They are forfeitures for acts of omission or neglect. To proceedings to enforce them, the limitation was applied. It was made applicable to no other. The proviso speaks of proceedings to enforce *said* forfeiture, and plainly contemplates no seizure or forfeiture for any different offence than those previously mentioned in the section. This information is founded upon no such neglect or refusal. The forfeiture claimed is for affirmative acts of the claimants; for active offences first made grounds of forfeiture by the

act of 1868. Each count charges positive fraud—the first and second, fraudulent use of stamps, unknown under the act of 1867; and the third count charges fraudulent entries and fraudulent reports. It may well be that a distinction was intended to be made. Passive violations of law, mere neglect, may have been regarded less culpable than active transgression. All the causes of forfeiture enumerated in the sixty-ninth section of the act of 1868, upon which all the counts in the information are based, are of the latter character. We cannot hold, therefore, that the limitation of the proviso to the 25th section of the act of 1867, which the claimants have pleaded, is any protection to them. It follows that the judgment of the Circuit Court dismissing the information must be reversed.

The judgment of the Circuit Court is

REVERSED, AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS.

COOK *v.* BURNLEY.

1. The title of Juan Cano, a colonist in the empressario grant of Martin De Leon, and to whom the commissioner of that colony conveyed a league of land April 11, 1835, was a good title. The case of *White* v. *Burnley* (20 Howard, 235), thus deciding, affirmed.
2. A suit pending in a State court between parties not the same as in a suit here cannot be pleaded in abatement in the Federal courts; nor can a suit pending be pleaded in abatement after a plea to the merits; nor where it is insufficient in law.
3. In the case of a deposition taken *de bene esse* under the 30th section of the Judiciary Act, the omission of the magistrate to certify that he reduced the testimony to writing himself, or that it was done by the witness in his presence, is fatal to the deposition.
4. On a question of limitations and possession, a statement by a witness in a deposition taken *de bene esse* and without notice, that "he knew that the defendant and his tenants had continued possession" from a date specified, held to have been properly excluded, as being testimony to a matter of law and fact mixed; the witness having already testified to the fact of the defendant's possession and of that of his tenants, naming them, and of the time they held possession, and when they left the premises

5. By the laws of Texas a junior locator of a warrant is not entitled to claim as an innocent purchaser; where, as far back as 1838, a map of the names of colonists, claimants, and grantees of head-right leagues, was deposited in the general land office of that republic, and where such junior locator had actual notice of the prior grant.
6. Refusals to grant a motion to change the venue or to postpone a trial are not subjects for a writ of error.

ERROR to the District Court for the Eastern District of Texas, in a suit brought by Burnley and Porter against Cook, Eller, Elam, and several others. The case was thus:

Along the coast of Texas, small tide-water bayous, or inlets, extend from the Gulf of Mexico, and from larger bays or inlets like that of Matagorda, into the land. They frequently connect with each other, and with the gulf or bays, by other and similar channels. Being surrounded in many states of the tide, and sometimes in all, by a thread of water, they may, in one sense, be called "islands;" but lying as they nearly all do within the regular profile of the coast, and entitled to an insular name only by some depression in the original soil, which has invited the ebb and flow of the water in that direction, they can hardly be regarded as coming within the meaning of "islands" in that sense which has in most of our States made islands a sort of soil excepted by their governments from ordinary grants of soil; or in any sense which would exclude them from a grant of land on the coast generally.* In this state of the physical form of the coast, Burnley and Porter brought suit against Cook and others to recover a league of land situate on the western shore of Matagorda Bay, near the mouth of the river Lavaca, in Calhoun County, Texas. The parcel in immediate controversy lay north and adjoining Powderhorn Bayou, and comprised one hundred and seventy-nine acres. A part of the defendant's defence was based on the assumption that a portion of what the plaintiffs claimed was an island.

* The reader will see a more full account of this configuration of the Gulf Coast, with an illustrative diagram, in *Cavazos* v. *Trevino*, 6 Wallace, 775, 778; where one of the islands was likened to Long Island.

Statement of the case.

Having pleaded the general issue and the statute of limitations, and it being agreed by writing that under the general issue the defendant might prove every fact which he could under a special plea, the defendants put in, without verification by affidavit, a plea in abatement, alleging the pendency of a suit commenced in a State court of Texas, by Burnley and one *Jones* as plaintiffs, against the present defendant, Cook, and others; not all of them, however, the same persons as the defendants here. The suit in the State court, as the plea represented, set forth title to the same league of land as was now sued for; the laying out of a town site thereon, the location thereon by Cook of a land certificate for three hundred and twenty acres, the commencement of a rival town enterprise, acts of trespass and waste, and it prayed an injunction, which was obtained; also damages $10,000, and general relief. The court below struck out this plea in abatement on the ground, 1st, that it was filed after answer to the merits; 2d, that it was not verified by affidavit; 3d, that it was not sufficient in law.

The case being called for trial, the defendant, Cook, applied for a continuance, on the ground of the absence of a witness; he having previously obtained one continuance on affidavit, and having agreed to a peremptory order of trial. The application was overruled.

After this he moved for a change of venue, supported by an affidavit setting forth certain statements with reference to himself, in a publication alleged to have been made by the judge of the court below; his belief that the judge had prejudged his cause; and that he could not obtain a fair and impartial trial. This motion was made under the act of March 3, 1821, providing that "in all suits and actions in any District Court of the United States in which it shall appear that the judge of such court is in any way concerned in interest or has been of counsel for either party, or is so related or connected with either party as to render it improper for him, *in his opinion*, to sit on the trial of such suit or action, it shall be his duty, on application of either party, to cause the fact to be entered on the records of the court,"

and also an order certifying the case for trial, &c.* The court overruled this motion.

The case then proceeded to trial. The title of the plaintiffs was based on the colonization laws of Mexico, under which Martin De Leon established a colony in Texas with power to grant titles. This title came more immediately from Juan Cano, a colonist in this empressario grant, and under a conveyance from the commissioner of De Leon, April 11th, 1835. Under this same settlement of De Leon grants similar to the present one had been made adjoining this one to one Benito Morales, and on a suit by this same plaintiff, Burnley, and one Jones, against the same Cook who was the principal defendant here; which suit came finally before this court in the case of *White et al.* v. *Burnley*,† several years ago. The land, in this present grant to Cano, was described as situated *on* the western bank of the Mother Lake (*Laguna Madre*) of Matagorda, commencing at a stake that stands upon the deep brake of *said* lake, and after being carried by courses and distances around three sides, to a point where a stake was driven in the deep brake of the *said* lagoon, for the fourth and last landmark, . . . followed the bends of the lagoon to the place of beginning. It was represented as containing forty-six millions of square varas. Appended to this grant was a plot or diagram.

The plaintiffs then made title from Cano to one L. Manso, and by deed, dated in Louisiana, April 6th, 1836, from Manso to one Grayson. At the time when this last deed was made, Texas, then an independent republic and not yet a State of the American Union, was at war with Mexico. Manso had been long resident at one time in Mexico, but whether ever a citizen of it was not so clear. He was a native of Spain, and at the time of this grant was temporarily resident in Louisiana, having been expelled from Mexico under some laws driving away Spaniards, and was purposing to go to Texas when its war with Mexico should be ended.

The defendants objected to the reading of the grant from

* 3 Stat. at Large, 643.

† 20 Howard, 235.

Statement of the case.

De Leon to Cano, because the title had not been recorded in the county where the land was situate, and neither recorded nor deposited in the general land office of Texas. The ground of the objection apparently was, that the legislature of Texas had by statute enacted, on the 20th of December, 1836, that any person owning lands should, within twelve months, have his titles proved in open court, and recorded in the county where the land lies; and that no deed should affect the rights of third parties unless proven and recorded. And that on the 14th of December, 1837, it was further enacted that it should be the duty of every person having titles to deposit them in the general land office within sixty days.

It was shown, however, by the testimony of one Edward Linn, who had been surveyor of the Victoria district (where these lands lay), from 1838 to 1840 and from 1847 to 1854, when examined, that he had made a connected map of a survey in that district and deposited it in the general land office in 1838, and that the head-right lease of Cano, whom he knew, and knew to be a colonist in the colony of Martin De Leon, along with head-right leases of other colonists, including Manso, already named, and one Benito Morales, with all the lands titled by the commissioner who had made this grant, were laid down on this map, and that Cook, when he made his location on the head-right leases, knew of these "colonial titles."

To the reading of the deed from Manso to Grayson the defendants also objected, because at the time of making it Manso was an alien enemy to Grayson, his grantee. The court overruled both the objection to De Leon's deed, and that to the deed of Manso, and both deeds were read.

In the course of the trial, and coming to the defendants' case, the defendants offered to read a deposition of one H. Beaumont, taken *de bene esse*, under the thirtieth section of the Judiciary Act. This section provides that the witness "shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the de-

ponent in his presence." There was no certificate here by the magistrate that he reduced the testimony to writing himself, or that it was done by the witness in his presence.

Proceeding further, the plaintiff having on his side shown residence of their tenants on the lease from the spring of 1848 to the time of trial, the defendant sought to show by the deposition of certain persons, named respectively Moore, Schwatz, and Howeston, that tenants of Cook had been in possession of that same place from a date which countervailed the plaintiff's evidence. The depositions ran thus in the case of each witness respectively:

"Witness knows that Cook and his tenants have had continuous possession of said land since the fall of 1849 to the present time." "Since fall of 1849, Cook, by his tenants and those holding under him, has had continuous possession of said land; said possession he knows to have been continuous." "As the tenant of Cook, as witness understood, that witness knows that said Cook, by himself and his tenants, held possession continuously ever since May or June, 1850."

These statements were ruled out by the court, on the objection of plaintiff: 1st, that they were conclusions of law, and not matters of fact; 2d, that they were loose and indefinite, without the names of persons, and without dates or times, or any statement of the facts which in their mind constituted tenancy and possession. Facts stated by the witnesses, showing the names of the witnesses, the time when they came and when they went, were let in. Subsequent depositions of the same witnesses, taken on notice and cross-examination, were read.

The defendants, who asserted that their land was an island, and not capable of having been granted under De Leon, claimed under title from the State of Texas in favor of Cook, one of the defendants. This title was not disputed except as it was asserted to embrace lands claimed by the plaintiffs as within the earlier grant to Cano. The defendants' title as made out without the rejected depositions was as follows:

Statement of the case.

A certificate for 960 acres of land, issued to one Gwartney, December 15th, 1837. Conveyance of same by Gwartney to Cook, December 16th, 1837. A survey of 179½ acres of land north of Powderhorn Bayou, with 1100 varas front on the bay, by virtue of said certificate, made May 15th, 1850. Location of this certificate as follows:

"LOCATION No. 339, January 5th, 1847.

"*To the County Surveyor of Victoria County:*

"Will please survey 320 acres on bounty warrant No. 990, on Matagorda Bay, at the mouth of Powderhorn Bayou, on the northwest side; thence up the bay and back for quantity.

"W. M. COOK."

This was set up as a location of the 179½ acres of land to the date, and as sustaining the plea of limitation from January 5th, 1847.

Next a patent for said 179½ acres of land, issued May 16th, 1857.

The plaintiffs, on the other hand, to show that Cook had *abandoned* his location of the Gwartney certificate of January 5th, 1847, proved a location made by Cook, as follows:

"*Location, No.* 429, *Sept.* 12, 1849.—W. M. Cook locates land warrant, No. 5072, issued to J. A. Wells, for 320 acres of land, commencing at the east corner of a survey made for D. N. White, on the southwest side of Matagorda Bay; thence down the bay to Powderhorn Bayou; thence up the bayou and back, for quantity."

They proved, also, a survey of the same 179½ acres north of Powderhorn Bayou, made by the said Cook, by virtue of land certificate to Wells, May 15, 1850, recorded on the 29th same month; and that on the 13th January, 1851, by the direction and request of said W. M. Cook, the field notes and survey of this 179½ acres were altered and transferred to the land warrant 990, the Gwartney certificate.

As the reader will have perceived, one of the defendants' defences was, the plaintiff's grant did not embrace within

its legitimate boundaries the land which Cook had located on, and which the defendants were now claiming. To show the reverse of this and the true designation and character of the land granted, the plaintiffs relied on the diagram or plot attached to their grant, and forming part of their testimonio of title, as the evidence of the original survey. On a suit which had taken place about the land in the State courts, Beaumont, already mentioned, had been directed by the court to make a survey, according to the courses, distances, and landmarks of the original survey. Field notes were furnished him by the court. He did make the survey from the field notes so furnished, and returned the land as containing 48,665,450 square yards, or 8613¾ acres; much more than a league; but another person, a civil engineer, named Thelipapa, made the map. This he made from field notes furnished him by Beaumont. But these were different from those accompanying the order of survey. The last specified distances *and the corners of the league.* The former gave distances only. Made by the corners, more than a league was included, and the case of the plaintiffs was strengthened.

The law under which the original survey was made apparently required the course of the lines to be by the magnetic needle.* From the only testimony on the point, the survey of Beaumont was by the true meridian; and by comparing and platting the two maps, it was apparent that their meridians were different.

The defendants asked the court to give these instructions to the jury:

"1st. If Manso was an alien enemy at the time he executed the deed to Grayson, he conveyed no title through which plaintiff can recover.

"2d. If plaintiff's title was not on record in the county where the land lies, or in the general land office, at the time defendant located his land warrant, and completed his survey and

* Paschal's Digest, art. 727.

obtained his patent, he is in the position of an innocent purchaser, and entitled to recover.

"3d. If the plaintiff's title includes an island surrounded by tide water, it is bad as to the island.

"4th. If the jury, from the evidence, can fairly and justly construe both the plaintiff's and defendant's title so that both can stand, it is their duty to do so."

The court refused to give any one of these instructions, and gave none but this:

"The diagram or plot attached to the plaintiff's grant is evidence to show the designation and character of the land granted, and may be used by the jury for its shape and boundaries. It appears to have been surveyed by magnetic courses, and if the survey returned by Beaumont was not surveyed by the magnetic but the true course, the jury must allow for the difference, and Beamont's cannot be regarded as showing the original survey. The fourth call is from the end of the third line with the bend of the *Laguna Madre* of Matagorda to the beginning."

Verdict and judgment having gone for the plaintiffs, the defendants brought the case here; where it was submitted *by Mr. Merriman, for the plaintiff in error; and by Messrs. Adams and Ballinger, contra.*

Mr. Justice NELSON delivered the opinion of the court.

The plaintiffs derived their title in this case from Juan Cano, a colonist, in the empressario grant of Martin De Leon, and to whom the commissioner of that colony conveyed the league of land on the 11th of April, 1835.

Several objections are taken to this deduction of title, but it is not material to notice them particularly, as they were before the court in the case of *White et al.* v. *Burnley*,* already reported, in which these several objections were overruled. The only difference between that case and the present is, that the plaintiffs, Burnley and Jones, there claimed under a deed by the commissioner to a colonist by the name of

* 20 Howard, 235.

Benito Morales for a league of land lying on the Matagorda Bay, north and adjoining this grant to Cano. Both these colonists conveyed to Leonardo Manso, one on the 27th, the other on the 20th May, 1835, from whom the present plaintiffs derived title to both tracts. Porter, in the present suit, represents the interests of Jones in the former, and Cook, the principal defendant in this, was a defendant in that one. We find no question here, as it respects the deduction of title under the grant of the commissioner, but what was taken in the former case, fully considered and overruled. White, one of the defendants there, and who is a defendant here, set up title under a land warrant, which he had located within the boundaries of the grant to Morales, and, besides his objections to the deduction of the plaintiffs' title, relied on adverse possession of three years under the junior title. In the present case, Cook sets up a like defence under the location of a head-right and survey, which is within the boundaries of the grant to Cano.

Among other defences relied on in the present case, not in the former, is a plea in abatement of a suit, commenced by Burnley & Jones, against certain defendants, for the same cause of action, including the defendant Cook, in the District Court for the County of Calhoun. This plea was stricken from the record on the ground that it was put in after the defendants had pleaded to the merits, upon general principles, and came too late. And, further, that if it had been pleaded in season it would have constituted no bar to the suit in this court.* It also appears that the parties to the suit in the State court were not the same as in the present case.

The defendants, in the course of the trial, offered in evidence the deposition of H. Beaumont, taken under the 30th section of the Judiciary Act, which was objected to and excluded. There is no certificate by the magistrate that he reduced the testimony to writing himself, or that it was done

* See the case of White *v.* Whitman, 1 Curtis, 494; Piquignot *v.* Pennsylvania Railroad Company, 16 Howard, 104, and Wadleigh *v.* Veazie, 3 Sumner, 165.

by the witness in his presence, which omission is fatal to the deposition.*

The following portions of the depositions of Moore, Schwartz, and Howeston were excluded, on objections taken by the court. The testimony had reference to the possession of the *locus in quo.*

"Witness knows that said Cook and his tenants had continued possession of said land since the fall of the year 1849, or early part of the winter of 1849–50; say December, 1849, and down to the present time."

This is in the deposition of Moore; the portions of the testimony of the other two are substantially the same. The depositions had been taken *de bene esse*, without notice, in December, 1852. In January following the depositions of these same witnesses were taken on notice to the plaintiffs, and these were given in evidence by the defendants.

On looking at the testimony in the first depositions, it will be seen that the witnesses had testified to the fact of the possession of Cook, and of his tenants, naming them; and of the time the tenants held the possession; and when they left the premises; also, the fact of the tenancy under the agreement with Cook; and, of the improvements made by the tenants. Whether or not these facts constituted a continuous possession by Cook and his tenants from the time they entered into possession, within the meaning of the statute of limitations, can scarcely be regarded as a simple question of fact, especially in connection with the previous testimony of the witnesses on the subject of their actual possession. We are inclined to think the question was rather one for the jury under proper instructions from the court. All the facts as it respects the possession had already been testified to by the witnesses from the commencement to its termination. Whether they constitute a continuous possession would seem to be a mixed question of law and fact.

We come now to the charge of the court to the jury. The defendants put in four prayers for instructions.

* Elliott *v.* Piersol, 1 Peters, 335–6.

Opinion of the court.

1. "If L. Manso was an alien enemy at the time he executed the deed to Grayson, he conveyed no title through which the plaintiffs could recover."

This question was before the court in the case of *White et al.* v. *Burnley*, already referred to, very fully considered, and overruled. We need only to refer to that case.

2. "If the plaintiffs' title was not on record in the county where the land lies, or in the general land office, at the time the defendant located his land warrant, and completed his survey, and obtained his patent, he is in the position of an innocent purchaser, and entitled to recover."

The location of Cook under his land warrant of the premises in question, was made on the 12th September, 1849, and the survey thereon the 15th May, 1850. The first location was under a land warrant issued to Gwartney, certificate No. 990, and made 5th January, 1847. But this was abandoned, and a new one made at the time above mentioned, under a certificate to J. A. Wells, No. 5072. It appears from the testimony of E. Linn, who has been the legal surveyor of the district in which the premises are situate, from 1838 to 1840, and from 1847 to the time when his deposition was taken, that as early as 1838 this survey of the plat of eight leagues of L. Manso, Cano, and Morales, granted by De Leon, the commissioner, was laid down on the public map of the district, and which was deposited in the general land office as a matter of record. This, according to the decisions in the courts of Texas, deprives the junior locator of the character of an innocent purchaser. So does actual notice of the prior grant, which is, also, proved in the present case.*

3. "If the plaintiffs' title includes an island surrounded by water, it is bad as to the island."

There is no testimony in the case tending to prove the fact.

4. "If the jury, from the evidence, can fairly and justly construe both the plaintiffs' and defendants' title, so that each can stand, it is their duty to do so."

* Gilbeau v. Mays, 15 Texas, 410.

Opinion of the court.

There is no evidence in the case warranting such an instruction. Besides, it was the duty of the court to construe the paper titles of the parties.

The court gave but one instruction to the jury. The point of the objection to it is, that the court permitted the jury to depart from the survey of the league of land by Beaumont, who had been appointed by an order of the court to make it according to the courses, distances, and landmarks in the original survey by the government at the time the grant was made. The survey on the ground was made by Beaumont in pursuance of this order, but a civil engineer by the name of Thelipapa, made the map from the field notes. He was examined as a witness, and stated that he made the map from field notes furnished him by Beaumont. But, on comparing these field notes with those accompanying the order of survey, they were found to be different. He states that he made the map from courses and distances without any call for corners. In this respect the field notes of Beaumont differed from the original field notes, as they specified, in addition to distances, the corners of the league, in the survey by the government. There was, also, some evidence that the original survey was made by magnetic courses, and the one by Beaumont by the true course, which might account for the difference between the two surveys. The court, as will be seen, suggested this to the jury, but left the question to them to make an allowance for the difference. We perceive no objection to this instruction.

Upon the subject of this survey, it is quite apparent on the evidence, that the whole of the controversy between the parties consisted in a difference of opinion as to what line constituted a boundary upon the bay of Matagorda. The defendants insisting that there is a distinction to be made between the lagunas, some of them small, others of considerable magnitude, which are formed by tidal currents extending into the land from the bay, and, sometimes connecting with each other along the greater part of this coast, and the waters of the bay itself, while the plaintiffs insist that these lagunas belong to the bay and are parts of it, and that

a line bounded on the lagunas is the same as bounded on the bay. It seems in this case quite plain that the grant to Cano was bounded or intended to be bounded on the bay, as the first line given in the description of the tract commences on the bay and terminates at the place of beginning, following down the bends of the Laguna Madre, which designates the bay or great lake of Matagorda.

There were other exceptions taken in the case to the rulings of the court in the progress of the trial, such as motions to postpone the trial, and to change the venue, which it is not material to notice further than to say, that they are not available on a writ of error.

After the best consideration we have been able to give to the case, we think there is no error in the judgment below, and it must be

AFFIRMED.

SAME CASE.

1. An application to an inferior court to supply a lost record, being matter addressed to its discretion, is not a subject for writ of error.
2. If after a lost record of a case where judgment below has been affirmed, is supplied in the inferior court, final process issue in accordance with the mandate sent to such court on the affirmance, the action of the court in granting such process will not be reviewed here.

THE judgment which is above reported as having been affirmed, was so affirmed at the December Term, 1867. A mandate accordingly issued to the court below, reciting the judgment of this court, and directing that "such execution and proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding." This mandate was presented to the Circuit Court for the Eastern District of Texas, and ordered to be recorded; and Porter, who was now the surviving plaintiff, with the executors of his deceased co-plaintiff Burnley, applied to the court for writs of possession. But as the records of the court below had

been destroyed by fire during the late war, affidavit was made of that fact, and a carefully certified copy of the transcript in this court was presented, with a motion to have it received in lieu of the original. The plaintiffs also presented a sworn copy of the original petition, and asked to have it established as the petition in the cause. The defendant objected to the allowance of this motion, and assigned several grounds of objection of a technical character. But the Circuit Court ordered that the motion be sustained, and that a writ of possession issue. The defendants then gave notice that they would prosecute "a writ of error therefrom;" *i. e.* from the order, and the court fixed the amount of the bond at $7000, and "allowed thirty days for the filing" of the same. This order is entered December 18, 1869.

No bond having been filed or copy of writ of error lodged in the clerk's office up to January 1, 1870, the plaintiffs directed the issue of a writ of possession, which was issued; whereupon the defendant, Cook, applied by petition to the district judge, in chambers, at Austin, July 23, 1870, for a writ of supersedeas; and upon his petition an order was made for such writ, enjoining the marshal from executing the writ of possession, a copy of which order was served on the attorneys of plaintiffs. The allegation in Cook's petition, upon which this supersedeas was granted, was that he had sued out a writ of error and executed a bond, which was approved "in due and usual form in such cases," so that the order of the district judge must be understood as affirming *this* position.

The writ of error, and a copy of the bond and citation, were filed or "lodged" with the clerk of the Circuit Court on January 7, 1870, or *twenty days after* the judgment was rendered, but appeared to have been allowed and approved by the district judge on the 28th of December, 1869.

Mr. W. G. Hale, for himself, and Mr. W. B. Ballinger, now moved:

I. To dismiss the writ of error in said cause for the following causes, apparent in said record:

1st. The said writ of error is not prosecuted from any final judgment in this cause.

2d. That it is brought to reverse an order enforcing a mandate of this court, and not to reverse any judgment, order, or proceeding of the Circuit Court, from which a writ of error can lawfully be prosecuted to this court.

II. In case said writ of error be not dismissed, then that the court set aside and discharge the supersedeas to the writ of possession issued from said Circuit Court, or direct said Circuit Court so to do.

Mr. Thomas Wilson, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Final process is never issued by this court in the exercise of its appellate jurisdiction, except in cases where a State has once refused to execute the mandate of the court. Instead of that the mandate is transmitted to the subordinate court, and where the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate court to carry it into execution, and not to look elsewhere to change its meaning.*

Two causes are assigned for the motion to dismiss the present writ, which is a second writ of error in the case sued out by the same party: (1.) Because the writ of error is not prosecuted from any final judgment in the cause. (2.) Because the writ is sued out to reverse an order of the Circuit Court carrying into effect the mandate of this court.

Where the subordinate court commits any substantial error in executing the mandate of the Supreme Court, it is well-settled law that a second writ of error or appeal, as the case may be, will lie to correct the error, and to cause the mandate to be executed according to its tenor and effect.†

Ejectment was brought on the 13th of June, 1859, by the present defendants, or one of them and the testator of the

* Skillern *v.* May, 6 Cranch, 267; Ex parte Story, 12 Peters, 339; West *v.* Brashear, 14 Peters, 51; Curtis's Commentaries, § 405.

† McMicken *v.* Perin, 20 Howard, 135; Roberts *v.* Cooper, Ib. 481

other two, in the District Court of the United States for that district, to recover the possession of certain lands described in the petition filed in that court on that day. Process was issued, and the same having been served, the defendants appeared and made defence, and the parties went to trial. Under the rulings of the court the verdict and judgment were for the plaintiffs, and the defendants sued out a writ of error and removed the cause into this court.

Prior to the institution of that suit Texas was divided into two judicial districts, called the Eastern and Western, and the acts of Congress creating those districts provided to the effect that the district judge, whether sitting in the one or the other, might exercise Circuit Court powers.*

Subsequent to the removal of the cause into this court, Texas was included in the sixth circuit, and all acts which vested in the District Courts of the United States for the District of Texas the power and jurisdiction of Circuit Courts was repealed, and the third section of the act provided that all actions, suits, prosecutions, causes, pleas, process, and other proceedings relative to any cause, civil or criminal, . . . shall be and are declared to be respectively transferred, returnable, and continued to the several Circuit Courts constituted by that act.†

When reached in order, the cause as removed here by the first writ of error was heard, and this court affirmed the judgment rendered by the District Court before the acts of Congress giving that court Circuit Court powers were repealed. Judgment was entered in that court on the 30th of June, 1859, before the State was included in the sixth circuit, but the act including the State in the sixth circuit passed before the judgment was affirmed in this court. Consequently the mandate of this court was transmitted to the Circuit Court of that district, as required by the third section of the act.

Reference to the present record will show that the mandate as transmitted was duly received and recorded, and of

* 9 Stat. at Large, 1; 11 Id. 164.

† 12 Stat. at Large, 576.

course the judgment was duly affirmed, but objection is taken by the defendants in the judgment to the subsequent action of the court.

Suggestion was made by the plaintiffs in the suit that the original petition was lost, and they moved for leave to file a copy of the same, and for a writ of possession to carry the judgment as affirmed into execution.

Objection was made by the defendants to the motion, and the parties having been heard, the court took the matter under advisement, but finally passed an order that the copy of the original petition filed by the plaintiffs be adjudged to be the petition therein, and that the writ of possession, as prayed for, do issue. Such was the decision of the court, and the same was subsequently entered as a decree, and the defendants sued out a writ of error, and removed the cause into this court to reverse that decree. Sued out, as the writ of error was, to reverse that decree, the present defendants have filed a motion to dismiss it for the reasons assigned, and the court is of the opinion that the motion must be granted.

Nothing can be more certain, in legal decision, than the proposition that an application to supply a lost writ, declaration, or other pleading, if accompanied by proof of loss, is in general addressed to the discretion of the court, and it is well-settled law, that decisions which rest in the discretion of a court of original jurisdiction, cannot be re-examined in an appellate court upon a writ of error.*

Secondary evidence of a lost record, as well as of any other instrument, is admissible after proof of the loss; but in this case the plaintiffs filed a copy from the record of the case transmitted to this court, and the Circuit Court was quite right in allowing the loss of the petition to be supplied.†

Certainly it was not error to grant a writ of possession,

* Liter *v.* Green, 2 Wheaton, 306; Silsby *v.* Foote, 14 Howard, 218; Morsell *v.* Hall, 13 Id. 212; United States *v.* Buford, 3 Peters, 12; Jenkins *v.* Banning, 23 Howard, 455; Mandeville *v.* Wilson, 5 Cranch, 15; Spencer *v.* Lapsley, 20 Howard, 264.

† 1 Greenleaf on Evidence, 12th ed. § 509.

as that was but executing the express directions of the mandate, and surely it will not be argued that it was error to order to be done what this court had commanded should be done by its mandate.

Suppose all the foregoing conclusions are correct, still it is contended that the writ of error cannot be dismissed because it is a writ of error sued out under the twenty-second section of the Judiciary Act, which, it is said, brings up the whole record.

Undoubtedly, it is true that the first writ of error was sued out under that section, and that such a writ does bring up the whole record, and it is well settled that it is no ground to dismiss the writ of error because there is no bill of exceptions, agreed statement of facts, or material demurrer in the record presenting any question of law for the decision of the appellate court, as the absence of every such question is good cause for affirming the judgment, but it is not a good ground for dismissing the writ of error.*

Grant that, still the second writ of error, though issued under the twenty-second section of the Judiciary Act, does not bring up the whole record for re-examination. On the contrary, it is equally well settled that the second writ of error brings up nothing for revision except the proceedings subsequent to the mandate; and it follows that if those proceedings are merely such as the mandate commanded, and were necessary to the execution of the mandate, the writ of error will be dismissed, as any other rule would enable the losing party to delay the execution of the mandate indefinitely, which cannot be admitted.

MOTION TO DISMISS GRANTED.

* Taylor *v.* Morton, 2 Black, 484; Minor et al. *v.* Tillotson, 1 Howard, 287; Suydam *v.* Williamson, 20 Id. 441.

Statement of the case in the opinion.

WHITELEY *v.* KIRBY.

The inventions of Nelson Platt and of Alfred Churchill, patented, the former June 12, 1849, the latter March 3d, 1841 (harvesters), contained nothing which antedated the peculiar device secured by patent to Byron Dinsmore, February 10, 1852, for harvesting and mowing machines, assigned July 2, 1859, to Kirby and Osborn, and surrendered and reissued 28th January, 1862.

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

Kirby and Osborn filed a bill in the court below against Whiteley and others, to enjoin them from infringing their patent, originally issued to Byron Dinsmore, February 10, 1852, assigned to them the complainants, Kirby and Osborn, July 2, 1859, and surrendered and reissued 28th January, 1862. The court granted the injunction, and the defendants appealed.

Mr. S. Fisher, for the appellants; Mr. David Wright, contra.

Mr. Justice NELSON delivered the opinion of the court.

The patent is for improvements in harvesting and mowing machines, and consists chiefly in this, namely: the construction and combination of two frames, the one for supporting the driving-wheel, and the other for supporting the cutting apparatus, and hinging the same together in such a manner that the driving-wheel and cutting apparatus may each follow the inequalities of the ground independently of each other, and to be bolted rigidly together for supporting the cutting apparatus at any desired height. After giving a description of the machine sufficiently exact and precise as to enable any one skilled in the art to construct it, the claim is as follows:

"The hanging of the driving-wheel in a supplemental frame, or its equivalent, which is hinged at one end to the main frame, whilst its opposite end may be adjusted and secured at various heights, or be left free, as desired, whereby the cutting apparatus may be held at any given height for reaping, or be left free to

accommodate itself to the undulations of the ground, for mowing, as substantially described."

The surrender of this patent was made by the assignees on account of a defect in the claim, the patentee having failed to embrace within it the hanging of the driving-wheel in the supplemental frame, and its connections with the main frame to which the cutting apparatus is attached, and by means of which both the driving-wheel and cutting apparatus were made to follow the inequalities of the ground independently of each other. These devices were fully described in the specification, drawings, and model, and were embodied in the construction of the first machines. The patent, we have seen, was granted February 10, 1852. The first machine was built and successfully tried in the harvest of 1850. Twenty-one were made and sold the next year (1851), and fifty or sixty the year following, all entirely successful.

The defendants set up in their answer, and gave in evidence two patents for harvesters, which they claimed antedated this invention of Dinsmore.

The first, Nelson Platt's, of La Salle County, Illinois, June 12, 1849; the second, Alfred Churchill's, Kane County, same State, March 3, 1841. There is no proof in the record in respect to these patents. Whether any machine was ever constructed under either of them, or went into practical use if constructed, or whether each were but an imperfect and abandoned experiment, are matters apparently regarded by the counsel who introduced them as of no great importance. Nothing appears to be known in respect to them, except that they were found among the records of the patent office, and have relation to the subject of grain harvesters. Whatever may have been their merit, however, as harvesters, they can have no material bearing that we can perceive upon this invention of the complainants, for, as it respects the peculiar device for which the present patent was granted, it is not to be found in either of them; neither in the specification or claims.

A rejected specification and drawing were also given in

evidence of E. P. Covett, of Philadelphia, on the part of the defendants, on the point of novelty; but this was an application made to the patent office as late as 1852, two years after the invention of Dinsmore.

This closes all the evidence in the case on the question of novelty, and which requires no further comment.

The only remaining question is as to the infringement. The defendants' answer itself goes far towards making out an infringement, stripped of the coloring generally given to a case stated in the pleadings. It is admitted, the defendants' harvester is constructed with a main frame which carries the working parts of the machine—that is, the cutting apparatus—and to this main frame is attached a secondary (supplemental) frame, which carries the driving-wheel. The secondary frame, it is said, is not left free to play up and down, but is prolonged beyond the driving-wheel to a standard in the form of an arc, that rises from the rear of the main frame. This standard is provided at various heights with holes, which secure said secondary frame, and with it, the axle of the driving-wheel, at certain fixed distances above the main frame. Defendants say that their driving-wheel is not hung upon a crank shaft, and that their main and secondary frames are hinged in the opposite direction from that in which they are attached in the machine patented to Dinsmore. We have a model of the defendants' machine before us, and the above is a pretty fair description of it; and it will be seen to embrace every substantial element found in the construction and arrangement of the Dinsmore machine. There are the two frames, the main and secondary, or supplemental, the one supporting the cutting apparatus, the other the driving-wheel, hinging the two frames together in such a way that the driving-wheel and cutting apparatus may each follow the inequalities of the ground independently of each other, and may also be bolted rigidly together for supporting the cutting apparatus at any fixed height. Every advantage in reaping or mowing uneven or stony ground by the new and peculiar device of Dinsmore in the construction and arrangement of his machine, is found in that of the

defendants. The form in some parts is changed, their two frames are hinged at different ends, different names are given to the same things, and different mechanical arrangements in the gearing are used to produce corresponding results, and, as is claimed, better results, although we perceive no evidence of this in the record.

An expert, Mr. Young, an experienced machinist, engaged in building this class of machines, who had a model of the defendants before him, was inquired of if he found in its construction two powers—the one for supporting the driving-wheel, and the other for supporting the cutting apparatus? He answered that he did. He was inquired of if he found the two frames hinged together in such a manner that the driving-wheel and cutting apparatus may each follow the irregularities of the ground independently; and also, if they were bolted rigidly together for supporting the cutting apparatus at any desired height? He answered that he did. He was asked if he found the driving-wheel represented in the model as hung in a supplementary frame? He answered that he did. Also, if he found the supplementary frame hinged at one end to the main frame? He answered that he did, and that its opposite end could be adjusted at various heights, or left free, as desired. Do you find these several parts so constructed and arranged that the cutting apparatus may be held at any desired height for reaping, or be left free to accommodate itself to the undulations of the ground, for mowing? He answered he did.

Another witness, Mr. Dunning, supports in all respects the evidence above given; and there is no substantial contradiction of this account of the construction and arrangement of the defendants' machine.

There is a good deal of conflicting evidence on a point that is not at all controlling in the case, namely: whether the defendants' machine would work well in mowing without adjusting the wheel frame to the standard firmly at a given height. There are respectable witnesses on both sides of this question.

DECREE AFFIRMED.

Memorandum.

LEGAL TENDER CASES.

IN these cases (*Knox* v. *Lee* and *Parker* v. *Davis*), two questions were some time since directed to be argued, namely: 1st. Is the act of Congress known as the Legal Tender Act constitutional as to contracts made before its passage? 2d. Is it valid as applicable to transactions since its passage?

The questions were accordingly argued by *Mr. Akerman, Attorney-General, in the affirmative, and by Mr. Clarkson N. Potter on the other side;* and, having been considered by THE COURT, both were adjudged in the affirmative, and judgments entered accordingly.

The CHIEF JUSTICE, with Associate Justices NELSON, CLIFFORD, and FIELD, dissented from the majority of the court, upon both propositions and the result, holding that the act of Congress, so far as applicable to contracts made before its passage, was repugnant to the Constitution and void; and also, that it was repugnant to the Constitution and void, so far as applicable to contracts made since its passage.

No opinion of the court nor any reasons for dissent were now given. It was stated, however, that they would be read hereafter, before the close of the term. The case, along with a few others crowded for want of space from this volume, will be reported in a subsequent one.

APPENDIX.

It is mentioned in the report of *Edmondson* v. *Bloomshire*, *supra*, p. 383, that several interesting points were raised and argued, on which, however, no opinion was given, the case having been determined in the same way to which those points were directed, though determined largely on a question of fact. It has been suggested to the reporter that some note of the points raised and authorities on them might be valuable for future reference, and on this account the present note is made. To understand them, it is necessary to state the case more fully than it is stated in the body of the book. The points arose chiefly on a motion to dismiss the appeal.

The material facts were these:

In 1854 John Edmondson, with one Littleton Waddell and wife, filed their bill in chancery, in the Circuit Court for Ohio, against Bloomshire et al., praying for a decree requiring the respondents to release their respective titles to certain lands. The complainants, Edmondson and Mrs. Waddell, asserted a full equitable title as tenants in common, while the defendants held the legal title and were in adverse possession.

In July, 1859, the bill was dismissed. On the 26th May, 1860, the Circuit Court allowed an appeal, and ordered a bond in $1000. No bond was ever given. In July, 1865, the heirs of Mrs. Waddell transferred all their interest in the controversy by deed to Edmund Edmondson, a co-plaintiff. On the 14th November, 1865, a petition was filed in the Circuit Court, alleging that in June, 1862, John Edmondson (the original complainant of that name), died intestate, leaving four persons named, his only heirs at law. These were under no disability. That in June, 1864, Mrs. Waddell died intestate, leaving her only heirs at law, four persons named, one a married woman. This petition, filed by these two sets of heirs and the original petitioner, Littleton Waddell, averred that no appeal bond was given under the order of 26th May, 1860, allowing an appeal, and prayed that they might become parties to the appeal, and to perfect the same by now entering into a bond for the appeal. No process was asked or issued. On the same 14th November, 1865, the Circuit Court admitted these heirs as parties complainant in place of their ancestors, and ordered that they have leave to perfect the appeal allowed 26th May, 1860, by giving bond in $1000, as therein provided. On 22d November, 1865, bond was given. In February, 1869, this appeal was dismissed by this court for want of jurisdiction. On the 13th April following the counsel of the complainants produced, in the Circuit Court, a mandate from this court showing the dismissal and filed another petition, similar to the preceding one, on behalf

of the two sets of heirs for allowance of an appeal; setting out the heirship and alleging that the Supreme Court dismissed the appeal so taken "for want of jurisdiction, on the ground that the said order so made on the said 14th November, 1865, did not amount to an allowance of an appeal." The petition also averred that said Elizabeth Waddell was a *feme covert* at the date of the original decree, and to her death. It was also shown that Littleton Waddell died intestate, in March, 1869, and that John Edmondson died in June, 1862, "leaving to survive him four *children*," who were the petitioners.

On the same 13th April, 1869, the defendants filed a motion in the Circuit Court to dismiss this petition, because—

1. Five years had elapsed prior to filing petition.

2. The court having allowed one appeal exhausted the power to allow an appeal.

3. The heirs of Elizabeth Waddell had no interest in the subject-matter, they having transferred all interest to Edmund Edmondson, a co-plaintiff.

On the 14th of April, 1869, the Circuit Court found "that the matter in controversy exceeded in value $2000," and "allowed" an appeal and "directed that an appeal bond in $1000 be given, to be approved by the clerk of this court."

The citation, 14th April, 1869, recited that "Elizabeth Edmondson, James Waddell, and others," obtained allowance of an appeal from decree which "Adam Bloomshire and *others*" recovered against "John Edmondson and Littleton Waddell and wife, the ancestors of the now plaintiffs and petitioners."

The bond was given June 16th, 1869, approved by the clerk of the Circuit Court, *not* by the judge. The record was filed in this court June 21st, 1869.

The defendants now moved to dismiss the appeal.

Mr. William Lawrence, of Ohio, in support of the motion, propounded the following propositions for the appellees:

1. After final decree in chancery against the complainants in the Circuit Court, the heirs of a deceased complainant can only be made parties by bill of revivor, and without being so made parties cannot obtain the allowance of an appeal to the Supreme Court. (Judiciary Act, §§ 17, 22, 31; act of March 3d, 1803, § 2; Rules of Practice, 15, 57, 58; Curtis *v.* Hawn, 14 Ohio, 186; 3 Daniels's Ch. Pr. 1604; Giffard *v.* Hort, 1 Schoales and Lefroy, 411; Story Eq. Pl., §§ 364, 366, 369; Mitford's Eq. Pl., by Jeremy, 69; Tidd's Practice, 1120; 2 Saunders, 101, n.)

2. The citation on appeal of a chancery case must describe all the appellants. (Owings et al. *v.* Kincannon, 7 Peters, 399; Deneale et al. *v.* Archer, 8 Id. 526; Smyth *v.* Strader, 12 Howard, 327; Heirs of Wilson *v.* Life and Fire Ins. Co., 12 Peters, 140; Bayard *v.* Lombard, 9 Howard, 530.)

3. Under the twenty-second section of the Judiciary Act of 1789, the disability of coverture saving a right of appeal from the Circuit to the Supreme Court is a personal privilege which does not descend to heirs. (Angell on Limitations, § 23; the English and American Statutes of Limitation.)

4. Under the twenty-second section of the Judiciary Act, a disability

saving a right of appeal to one party plaintiff does not save a right of appeal to a co-plaintiff under no disability. (Angell on Limitations, § 484; Lessee of Bronson *v.* Adams, 10 Ohio, 137; Moore *v.* Armstrong, Ib. 11; Marsteller *v.* McClean, 7 Cranch, 158.)

5. In such case in a joint proceeding if one party is barred of a right of appeal, the party under disability is also barred. (Marsteller *v.* McClean, 7 Cranch, 158; Owings et al. *v.* Kincannon, 7 Peters, 399.)

6. Where one of two complainants in chancery whose bill is dismissed on hearing, after final decree, sells his interest in the subject-matter of the suit, he is not a proper party as petitioner for an appeal. The purchaser must make himself a party by supplemental bill and then appeal himself. (Reid *v.* Vanderheyden, 5 Cowen, 719; Mills *v.* Hoag, 7 Paige, 18; Hone *v.* Vanschaick, Ib. 221; Idley *v.* Bowen, 11 Wendell, 238; Steele *v.* White, 2 Paige, 478; Cuyler *v.* Moreland, 6 Paige, 273; 3 Daniels's Ch. Pr. 1604.)

7. After final decree in chancery against a party, his right of appeal is a personal privilege, and on grounds of public policy is not assignable.

8. Under the Judiciary Act an appeal bond in chancery must be approved by a judge. The Supreme Court will not remand an appeal for the amendment of the bond to save an appeal, where appellants have without excuse long delayed an appeal, especially on a stale equity. (Boyce *v.* Grundy, 6 Peters, 777; Catlett *v.* Brodie, 9 Wheaton, 553; Villabolos *v.* The United States, 6 Howard, 90.)

9. Whether on appeal in chancery to the Supreme Court the record below should not be filed in the Supreme Court within five years from decree, or disability removed—*Quære.* (Brooks *v.* Norris, 11 Howard, 204.)

10. On appeals in chancery to the Supreme Court it must appear by the record or evidence *dehors* that the amount "in dispute exceeds the sum or value of $2000, exclusive of costs."

INDEX.

ACTION. See *Public Law*, 1–3.

Where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from such nonfeasance or malfeasance. A mistake as to what his duty is and honest intentions will not excuse him. *Amy* v. *The Supervisors*, 136.

ADMINISTRATOR. See *Public Policy*.

ADMIRALTY. See *Conflict of Jurisdiction*, 2–4; *Lookouts; Practice*, 13, 14; *Public Law*, 1, 2.

1. Its jurisdiction declared. Has jurisdiction of a contract of marine insurance. *Insurance Company* v. *Dunham*, 1.
2. If a vessel at anchor in a gale could avoid a collision threatened by another vessel and does not adopt the means for doing so, she is a participant in the wrong, and must divide the loss with the other vessel. *The Sapphire*, 164.
3. The respective duties of steamer and sailing vessel approaching, defined. *The Fannie*, 238.

AGENCY. See *Notice*, 3, 4; *United States*, 1, 2.

APPEALS.

The court expresses its dissatisfaction with parties who impose upon it a necessity to examine appeals involving no question of law whatever; and being satisfied after examination with its correctness affirmed the decree below, without stating at large the reasons for which it did so. *Mann* v. *Rock Island Bank*, 651.

BANKRUPT ACT. See *Fraud*, 2; *Jurisdiction*, 3.

Semble, that a debt incurred by the members of a partnership individually, even in a matter where the firm is to profit, will not, in case of bankruptcy of the firm, let the person to whom the debt was incurred come for a dividend upon the assets of the firm as distinguished from the assets of the individual partners. *Forsyth* v. *Woods*, 484.

BILL OF EXCHANGE. See *Negotiable Paper*.

BURDEN OF PROOF. See *Common Carrier*, 2; *Practice*, 5.

CALIFORNIA LAND CLAIMS.

1. Nothing more is contemplated by proceedings under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in California, than the separation of lands owned by individuals from the public domain. *Meader et al.* v. *Norton*, 442.

CALIFORNIA LAND CLAIMS (*continued*).

2. What words, under the Mexican law in force in California in 1846, constituted a deed as distinguished from a license. *Steinbach* v. *Stewart*, 566.

3. A Mexican deed vague in description, received in evidence, being accompanied with proof of livery of seizin and continuing possession. *Ib.*

CAPTURED AND ABANDONED PROPERTY. See *Public Law*, 8.

CASES AFFIRMED.

Bronson *v.* Rodes (7 Wallace, 229), in Dewing *v.* Sears, 379.

Butler *v.* Horwitz (Ib. 258), in same case.

De Lovio *v.* Boit (2 Gallison, 398), in Insurance Company *v.* Dunham, 1.

Farragut, The (10 Id.), in the Fannie, 239.

Hanger *v.* Abbott (6 Wallace, 532), and the Protector (9 Id. 687), in United States *v.* Wiley, 508.

Riggs *v.* Johnson County (6 Id. 265), in Amy *v.* The Supervisors, 136.

White *v.* Burnley (20 Howard, 235), in Cook *v.* Burnley, 659.

CHATTEL MORTGAGE. See *Fraud*, 2.

CHEROKEE INDIANS. See *Internal Revenue*, 1.

CITIZENSHIP. See *Jurisdiction*, 10, 11; *Practice*, 4.

COLLISION. See *Admiralty*, 2, 3.

COMMERCIAL LAW. See *Shipping*.

COMMON CARRIER. See *Evidence*, 4.

1. The terms "dangers of lake navigation" include the peril which arises from shallowness of the waters at the entrance of the lake harbors. *Transportation Company* v. *Downer*, 129.

2. Where the carrier has given evidence from which the jury may infer that the injury occurred from a cause excepted in the bill of lading, the burden is cast on the plaintiff to show negligence. *Ib.*

COMPROMISES. See *Equity*, 1.

COMPTROLLER OF THE CURRENCY.

Cannot subject the United States to judicial jurisdiction. *Case* v. *Terrell*, 199.

CONFISCATION ACTS. See *Constitutional Law*, 4, 5; *Practice*, 13–15; *Public Law*, 4, 5.

1. Of August 6th, 1861, and July 17th, 1862, are constitutional. Their character described, and mode of making seizure of stocks under. *Miller* v. *United States*, 268.

2. The owner of property, for the forfeiture of which a libel is filed under the latter act of the above mentioned, is entitled to appear and to contest the charges upon which the forfeiture is claimed, although he was at the time of filing the libel a resident within the Confederate lines, and a rebel; and he can sue out a writ of error from this court to review any final decree of the court below condemning his property. *Ib.*; *McVeigh* v. *United States*, 259.

CONFLICT OF JURISDICTION.

I. FEDERAL AND STATE COURTS.

1. The State and National courts being independent of each other, neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. *Amy* v. *The Supervisors*, 136.
2. A suit for mariners' wages *in personam* is maintainable at common law. *Leon* v. *Galceran*, 185.
3. It is no objection to the jurisdiction of a State court in such a suit that the process of sequestration or attachment has been used to bring the vessel on which the services were rendered under the dominion of the court, for the purpose of subjecting it to such judgment as might be rendered in the cause. *Ib.*
4. And a bond given to relieve the vessel so sequestered or attached is properly sued on in a State court. *Ib.*

II. FEDERAL AND STATE GOVERNMENTS. See *Constitutional Law*, 2

CONFUSION OF GOODS.

Where distilled spirits forfeited to the United States are mixed with other distilled spirits belonging to the same person (ignorant of the forfeiture) they are not lost to the government by such mixture, either on the principle of confusion of goods, or transmutation of species, even though subsequently run through leaches for the purpose of rectification. The government will be entitled to its proportion of the result. *The Distilled Spirits*, 356.

CONSTITUTIONAL LAW. See *Confiscation Acts; Jurisdiction*, 2; *Virginia; West Virginia.*

1. The consent of Congress required by the Constitution to validate agreements between the States, need not be by an express assent to every proposition of the agreement. It may be inferred from legislation. *Virginia* v. *West Virginia*, 39.
2. Congress cannot impose a tax upon the salary of a judicial officer of a State. *The Collector* v. *Day*, 113.
3. It may supersede by statute a prior treaty. *The Cherokee Tobacco*, 616.
4. It can determine what property of public enemies shall be confiscated. *United States* v. *Miller*, 269.
5. It is not deprived of the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and sea, when the necessity for their exercise is called out by domestic insurrection and internal civil war instead of by foreign war. *Tyler* v. *Defrees*, 331.

CONTRACT. See *Corporation*, 1.

CORPORATION. See *Taxation.*

1. May be bound by a written contract, though a private seal of one of its officers was used instead of the corporate seal, and though no record may be found authorizing the officer to make the contract, if other evidence proves that he had such authority, or that the company ratified his act afterwards. *Eureka Company* v. *Bailey Company*, 488.

CORPORATION (*continued*).

2. What requisite to make citizenship of, for the purposes of jurisdiction under the Judiciary Act. *Insurance Company* v. *Francis*, 210.
3. A railroad corporation of one State cannot set up as against *bonâ fide* holders of its bonds, executed in due form, that a mortgage securing them was executed in another State, or by virtue of resolutions passed at a meeting held in such other State. *Galveston Railroad* v. *Cowdrey*, 459.

COURT OF CLAIMS. See *Public Law*, 8; *Sovereignty*.

CREDITOR AND DEBTOR. See *Fraud*, 2.

DECREE.

A decree of a superior court affirming "so far as it affirms" a certain "grant," described in a decree below, is an affirmance of such decree below with a proviso, if that decree have itself been an affirmance with a proviso of the grant in question. *Steinback* v. *Stewart*, 566.

DEED. See *California; Evidence*, 5, 6.

EQUITY. See *Laches; Notice; Patent*, 1; *Pleading; Practice*, 8–12.

1. Is disposed to uphold settlements intelligently made for the sake of peace. *May* v. *Le Claire*, 217; *Eureka Co.* v. *Bailey Co.* 488.
2. Will follow against a trustee abusing confidence, proceeds of trust property converted by him into money, and mould remedies so as to give the injured *cestui que trust* complete relief. *May* v. *Le Claire*, 217.
3. And decline to remit parties, on breach of contract, to law for damages, though the contract be no longer capable of fulfilment, unless the remedy at law be as effectual as equity can make it. *Ib.*
4. Can relieve where one man has procured the patent which belonged to another at the time the patent was issued. *Meader* v. *Norton*, 442.
5. Affects a client profiting by his counsel's inequitable doings with notice of what he inequitably did. *May* v. *Le Claire*, 217, and see *The Distilled Spirits*, 356.
6. A complaint which is in form and substance such a complaint as is made in "a creditor's bill," is a case of equitable jurisdiction, and one requiring equitable relief as distinguished from legal. *Dunphy* v. *Kleinsmith et al.*, 610.
7. In a Territory of the United States where the systems of common law and chancery are found as separate systems, equity can alone give relief on such a bill. *Ib.*
8. Will not retain the collection of a tax on the sole ground that a tax is illegal. *Dows* v. *City of Chicago*, 108.

EVIDENCE. See *Negotiable Paper; Patents*, 3, 5.

1. On a question of the exact ancient course of a river in a wild region of our country, maps made by early explorers being but hearsay evidence, so far as they relate to facts within the memory of witnesses—*ex. gr.* since A.D. 1800—are not to control the regularly given testimony of such persons. *Missouri* v. *Kentucky*, 395.

EVIDENCE (*continued*).

2. On a suit on a policy against loss of a stock of groceries in process of retail sale, by fire, it is competent, in the absence of trustworthy books and of specific evidence by persons other than the plaintiffs themselves, to show by witnesses in the town where the fire occurred, engaged in the same business with the plaintiffs, and whose annual sales were as large, that grocery merchants in that city for the six years prior to the fire had not carried, or had on hand at any one time, more than one-fifth of their annual aggregate sales, and that this was the case on the day the fire occurred. *Insurance Company* v. *Weide*, 439.
3. But the witness can testify only to his personal experience on the subject. He cannot be asked what "the course of trade" was in regard to this particular business. *Ib.*
4. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. *Transportation Co.* v. *Downer*, 129.
5. Statements of a grantor of land inadmissible to invalidate his previous deed of it. *Steinback* v. *Stewart*, 567.
6. A deed with a vague description received in evidence being accompanied by evidence of identification and occupancy of the land from its date. *Ib.*

"FALSE, FORGED, AND COUNTERFEIT."

The terms, in an indictment, in which a note is described as a "false, forged, and counterfeit note of the United States," issued under authority of a statute referred to, imply that the note is not genuine, but only purports to be so. *United States* v. *Howell*, 432.

"FINAL JUDGMENT."

What does not constitute a? *Rankin* v. *The State*, 380.

FINDING. See *Practice*, 5.

FLORIDA. See *Treaties of the United States.*

FORECLOSURE. See *Practice*, 8.

FRAUD.

1. An arrangement between an insolvent railroad company and a city by which a subscription of doubtful validity made by the city to the road was cancelled, held under special circumstances not to be a fraud on creditors of the railroad. *New Albany* v. *Burke*, 96.
2. A mortgage of personal property without accompanying possession void as against creditors and the provisions of the Bankrupt Act *Bank of Leavenworth* v. *Hunt, Assignee*, 391.

INDIANS. See *Internal Revenue.*

INDICTMENT. See *Treasury Notes.*

An indictment pursuing the language of the 6th section of the act of February 25, 1862, to punish the counterfeiting of Treasury notes, which pursues the language of the act, and describes the note passed as "a false, forged, and counterfeit note of the United States," issued under the authority of that statute, &c., is good. *United States* v. *Howell*, 432.

INSURANCE. See *Evidence.*

INTERNAL REVENUE. See *Confusion of Goods.*

1. The 107th section of the Internal Revenue Act of July 20, 1868, applies to and is in force in the Indian Territory embraced within the Western District of Arkansas, and occupied by the Cherokee nation of Indians. *The Cherokee Tobacco*, 616.
2. The acceptance by the collector of a false and fraudulent bond given for the removal of distilled spirits from a bonded warehouse, will not prevent a forfeiture of such spirits under the 45th section of the Internal Revenue Act of July 13th, 1866, if the removal have been effected by means of a false and fraudulent bond. *The Distilled Spirits*, 356.
3. The 48th section of the Internal Revenue Act of June 30th, 1864, as amended by the act of 1866, is applicable to distilled spirits. *Ib.*

JUDGMENT.

Presumption in favor of regularity in. See *Omnia rite acta.*

JURISDICTION.

I. Of the Supreme Court of the United States.

(*a*) It has jurisdiction—

1. Under the Judiciary Act of 1802, of a certificate of division in opinion between the associate justice of the Supreme Court and the Circuit judge, sitting under the Judiciary Act of 1869.
2. Of controversies between States of the Union concerning their boundaries. *Virginia* v. *West Virginia*, 39.

2*a*. In cases from the Supreme Court of Louisiana, under the code of that State, when the petition in that court for review set out that a Federal question was raised and decided against, and when that court decided the case in the way in which the lower court decided it. *Stewart* v. *Kahn*, 493.

(*b*) It has not jurisdiction—

3. Of a decree of the Circuit Court exercising the supervisory jurisdiction conferred upon it by the 2d section of the Bankrupt Act of 2d March, 1867. *Morgan* v. *Thornhill*, 65.
4. Nor of one as "a final decree" where the court below has reversed a judgment of one inferior to itself in such a way as that it must go back for trial on its merits. *Rankin* v. *The State*, 380.
5. Nor for a case brought directly here from the District Court of the District of Columbia, without review by the Supreme Court of the District. *Garnett* v. *United States*, 256.
6. Nor of one brought here as under the 25th section of the Judiciary

JURISDICTION (*continued*).

Act, where the record shows that the court below have perhaps decided the case on grounds not involving a Federal question. *Insurance Company* v. *The Treasurer*, 204.

7. Nor under that section where a Federal question was first raised but on argument in the highest court of the State on review of the decision of an inferior court, in which it was not raised in the pleadings or by the evidence, and where the fact of such a question having been raised appears only by the certificate of the presiding judge. *Parmelee* v. *Lawrence*, 36.
8. Nor of the action of an inferior court upon motion to change the venue, postpone a trial, or supply by copy a lost record. *Cook* v. *Burnley*, 660, 672.
9. Nor will it entertain a writ to review the action of a court below, proceeding in accordance with a mandate from this court. *Ib.*

II. OF THE CIRCUIT COURTS OF THE UNITED STATES.

10. They have NOT jurisdiction in controversies between citizens of different States, where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, if there are several co-plaintiffs, unless each plaintiff be competent to sue; executors and trustees suing for others' benefit forming no exception to this rule. *Coal Company* v. *Blatchford*, 172.
11. Nor in a suit by a citizen of one State against a corporation, the declaration averring only that the corporation was created by act of legislature of another State (named), is located in that State, and doing business there under its laws. *Insurance Company* v. *Francis*, 210.

LACHES.

1. What amounts to in equity; the matter considered in a special case where it was held that they existed. *New Albany* v. *Burke*, 96.
2. Cannot prevail as a defence where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered. *Meader* v. *Norton*, 443.

LEGAL TENDER.

1. A contract to pay a yearly rent of "four ounces, two pennyweights and twelve grains of pure gold in coined money," equivalent at the time the contract was made to $80, and subsequently to $87.25, is not discharged by a tender of notes of the United States known as "Legal Tenders." *Dewing* v. *Sears*, 379.
2. "The Legal Tender Act" valid. *Legal Tender Cases*, 682.

LIMITATION OF ACTIONS.

Act of June 11th, 1864, "in relation to the limitation of actions in certain cases," construed and held constitutional. *Stewart* v. *Kahn*, 493.

LOOKOUTS.

Absence of, not important, when their presence would not have been. *The Fannie*, 238.

LOUISIANA. See *Practice*, 6; *Rebellion*, 2; *Treaties of the United States*.
1. The Act of March 3, 1865, authorizing submissions of fact to the court applies to. *Generes* v. *Campbell*, 193.
2. Congress has adopted for common law cases in the Federal courts the modes of procedure prevailing in the State courts; and where these are violated in the Federal courts, proceedings will be set aside. The acts of May 26, 1824, and March 2, 1867, § 7, herein considered. *Moncure* v. *Zuntz*, 416.

MISSOURI. See *Treaties of the United States*.
Wolf Island, in the Mississippi, not a part of. *Missouri* v. *Kentucky*, 395.

MORTGAGE. See *Corporation*, 3; *Fraud*, 2; *Practice*, 8.
1. Although part of a railroad may be entirely built by money raised on a junior mortgage, yet that fact does not give such junior mortgage priority over prior mortgages, even on that portion of the road; provided it was a part of the chartered route, and the company had power to mortgage, and did mortgage the whole road. *Galveston Railroad* v. *Cowdrey*, 459.
2. A railroad mortgage, as against the company and its privies, although given before the road is built, attaches itself thereto as fast as it is built, and to all property covered by its terms as fast as it comes into existence as property of the company. *Ib.*

MUNICIPAL BONDS. See *Practice*, 5

NATIONAL BANKS. See *United States*, 1, 2.
1. Can make no valid loan or discount on the security of their own stock, unless necessary to prevent loss on a debt previously contracted in good faith. *Bank* v. *Lanier*, 369.
2. The placing by one bank of its funds on permanent deposit with another bank, is a loan within the spirit of this enactment. *Ib.*
3. Loans by, to their stockholders, do not give a lien to the bank on the stock of such stockholders. *Ib.*
4. How far their certificates of stock, with power of attorney to transfer attached, have a *quasi* negotiable character. *Ib.*

NATURALIZATION LAWS.
The act of July 14th, 1870, to amend the naturalization laws, repealed the 13th section of the act of Congress of 1813 for the regulation of seamen, &c. *United States* v. *Tynen*, 88.

NAVIGABLE WATERS OF THE UNITED STATES.
1. What rivers are such. *The Montello*, 411.
2. The Enrolment and Licensing Acts apply only to them. *Ib.*

NEGOTIABLE PAPER. See *National Banks*, 4; *Notice*, 1; *Practice*, 5.
In a suit on a negotiable security when the defendant has shown strong circumstances of fraud in the origin of the instrument, this casts upon the holder the necessity of showing that he gave value for it before maturity. *Smith* v. *Sac County*, 139.

NOTICE.

1. One who purchases railroad bonds in open market, supposing them to be valid and having no notice to the contrary, is a holder *bonâ fide*. *Galveston Railroad* v. *Cowdrey*, 459.
2. A purchaser by deed of quit-claim simply, is not regarded as a *bonâ fide* purchaser without notice. *May* v. *Le Claire*, 217.
3. The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence. *The Distilled Spirits*, 356.
4. A client profiting by his counsel's inequitable doings, will be affected with his counsel's knowledge. *May* v. *Le Claire*, 217.

OMNIA RITE ACTA.

1. Where a court having jurisdiction of the case and of the parties enters a judgment, there is a presumption that all the facts necessary to warrant the judgment have been found, if they are sufficiently averred in the pleadings. *Miller* v. *United States*, 268.
2. In a collateral proceeding, to set aside a sale made under a judgment of another court, it must be shown that such court had no jurisdiction of the case. It is not enough to show mere errors and irregularity. The doctrine applied to a sale under the Attachment Laws of Tennessee against a rebel absent in the rebel service. *Ludlow* v. *Ramsay*, 581.

PARTNERSHIP. See *Practice*, 11, 12.

A party coming in any way into the right of a partner, comes into nothing more than an interest in the partnership, which cannot be tangible, made available, or be delivered but under an account between the partnership and the partner. *Bank* v. *Carrollton Railroad*, 624.

PATENTS.

I. General Principles relating to.

1. Agreements between rival patentees, made after consideration and for the sake of peace, will be upheld unless in clear cases. *Eureka Company* v. *Bailey Company*, 488.
2. Effect on question of priority; of grant of letters by the commissioner of; effect in showing that oaths were taken, of recitals in letters patent; effect of act of commissioner in accepting a surrender, and granting a reissue; these matters considered. *Seymour* v. *Osborne*, 516.
3. Practice in equity is to require respondent to give notice in his answer of the names and residences of the persons who he intends to show had prior knowledge, &c. *Ib.*
4. When an invention does not embrace an entire machine, the part embraced or excluded should be pointed out. *Ib.*
5. Parol testimony as to the scope of an original invention inadmissible, on an application for a reissue as the basis of interpolation of new matter. In what way the identity of invention is to be settled. *Ib.*

PATENTS (*continued*).

6. Fraud in prosecuting application before commissioner for original or reissued or extended patents cannot be set up on a suit against infringer by him to abrogate them. Can be impeached only by a direct proceeding to set aside. *Ib.* *Eureka Company* v. *Bailey Company*, 488.
7. Interpolations in a reissued patent of new features or ingredients or devices not allowed. *Ib.*
8. A claim which might otherwise be held to be bad as covering a function or result, when containing the words "substantially as described," must be construed in connection with the specification, and be limited thereby; and when so construed it may be held to be valid. *Seymour* v. *Osborne*, 516.
9. Changes in the construction and operation of an old machine, so as to adapt it to a new and valuable use which the old machine had not, are patentable. Of what they may consist. *Ib.*
10. Utility, in the sense of the patent law, what meaning? *Ib.*
11. What sort of experiments confer a right to a patent. *Ib.*
12. Desertion of an alleged prior invention, consisting of a machine never patented, how proved. *Ib.*
13. Under the act of Congress allowing reissues in divisions, it may require the use of several reissues to constitute a complete machine, and on a proceeding for infringement these may be introduced in one bill. *Ib.*
14. What a description in a prior publication must contain and exhibit, in order to defeat a patent. This stated. *Ib.*
15. The extent to which either the inventor of a device or of an entire machine, or of a mere combination, can invoke the aid of the doctrine of equivalents, how far the same. *Ib.*

II. Validity of Particular Patents.

16. Those of W. H. Seymour, and of Palmer & Williams, considered. *Seymour* v. *Osborne*, 516.
17. Those of Nelson Platt, Alfred Churchill, and Byron Dinsmore. *Whiteley* v. *Kirby*, 678.

PLEADING.

A bill for a settlement of partnership accounts which, without charging fraudulent confederacy, shows that it is filed not against all the original partners, but against one of them (yet remaining in the administration of the firm concerns), and persons who have succeeded to the rights (not to the obligations), of one or more of the others, presents a misjoinder of the defendants, apparent upon the face of the bill, and it must be dismissed. *Bank* v. *Carrollton Railroad*, 624.

POSSESSION

Must accompany a chattel mortgage. *Bank of Leavenworth* v. *Hunt*, 391.

POSTMASTER-GENERAL

Is the sole judge whether the exigencies provided for by the act of March 3d, 1863, have arisen, as also to determine the manner and extent of the allowance to be made in case they have. *United States* v. *Wright*, 648.

POST OFFICE. See *Postmaster-General.*

PRACTICE. See *Final Judgment; Jurisdiction*, 2*a*; *Public Law*, 2.

I. In the Supreme Court. See *infra.*

1. No difference exists between appeals and writs of error as to the manner in which the names of the parties should be set forth. *The Protector*, 82.
2. Bills of exceptions need not be sealed. It is sufficient that they be signed by the judge. *Generes* v. *Campbell*, 193.
3. When the bill of exceptions does not purport to set forth all the evidence on any of the subjects to which the exception relates, and the judgment states that it was rendered for "reasons orally assigned," and these are not found in the record, the judgment must be affirmed. *Ib.*
4. When the citizenship of the parties is averred in the bill of complaint, and it thus appears that some of the plaintiffs are disqualified by their citizenship from maintaining the suit, the defect may be taken advantage of by demurrer, or without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only when the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. *Coal Company* v. *Blatchford*, 172.

II. In Circuit and District Courts. See *supra*, *Practice*, 2, 4.

(*a*) *In cases generally.*

5. In a suit on negotiable paper, submitted under the act of March 3d, 1865, to the court, without the intervention of a jury, when the defendant shows strong circumstances of fraud in the origin of the instrument (in which case there rests by law upon the holder a necessity to show that he gave value for the instrument), a finding which finds the facts constituting such fraud, and does not find that the plaintiff gave value for the paper, requires that the judgment be given for the defendant. *Smith* v. *Sac County*, 139.
6. The act is general in its terms; and Louisiana is accordingly embraced by it. *Generes* v. *Campbell*, 193.
7. Congress has adopted for common law suits in the Federal courts the modes of procedure prevalent in the State courts, and where these are disregarded in the Federal courts proceedings will be set aside. *Moncure* v. *Zuntz*, 416.

(*b*) *In Equity.*

8. Where the trustees of a railroad mortgage or deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders, secured by the same mortgage; or, if there be several successive mortgages, the trustees of which are dead, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all the bondholders under each mortgage. *Galveston Railroad* v. *Cowdrey*, 459.
9. If a case presented by a creditor's bill is tried by a jury, and a decree is entered on the verdict as a mere conclusion of law upon the facts

PRACTICE (*continued*).

found, and not as the result of the chancellor's own judgment, though of his judgment aided by the finding, it is error. *Dunphy* v. *Kleinsmith*, 610.

10. A decree on a creditor's bill, which makes the defendant who has co-operated with the debtor responsible for damages which the creditor has suffered in consequence of the conveyance sought to be avoided, is erroneous. On such a proceeding he is liable but to account. *Ib.*

11. A bill by an assignee of one partner for a settlement of the partnership accounts will not lie unless all the partners are made parties defendant. *Bank* v. *Carrollton Railroad*, 624.

12. Although in general a bill in chancery will not be dismissed for want of proper parties, the rule does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. *Ib.*

(*c*) *In Admiralty.*

13. Stocks and credits are attachable in admiralty and revenue cases by means of the simple service of a notice, without the aid of any statute. *Miller* v. *United States*, 268.

14. In admiralty and revenue cases when a default has been duly entered to a monition founded on an information averring all the facts necessary to a condemnation, it has substantially the effect of a default to a summons in a court of common law. It establishes the fact pleaded, and justifies a decree of condemnation. *Ib.*

(*d*) *In special cases.*

15. When under the act of July 17th, 1862, property intended for confiscation has been seized by the marshal, and the seizure is brought before the court by the filing of a libel for the forfeiture of the property, and is recognized and adopted by it, the property is subject to the control of the court in the hands of its officer; and it has jurisdiction of the case so far as a seizure of the *res* is essential to give it. *Tyler* v. *Defrees*, 331.

PRESUMPTION. See *Evidence*, 4; *Omnia rite acta.*

PROMISSORY NOTE. See *Negotiable Paper.*

PUBLIC LAW.

1. A foreign sovereign can bring a civil suit in the courts of the United States. *The Sapphire*, 164.

2. A claim arising by virtue of being such sovereign (such as an injury to a public ship of war) is not defeated, nor does suit therefore abate, by a change in the person of the sovereign. Such change, if necessary, may be suggested on the record. *Ib.*

3. British subjects, if otherwise entitled, may recover by process in our Court of Claims the proceeds of captured and abandoned property. *United States* v. *O'Keefe*, 178.

4. In the war of the rebellion the United States having had belligerent as well as sovereign rights, had a right to confiscate the property of public enemies wherever found, and also a right to punish offences against their sovereignty. *Miller* v. *United States*, 269.

PUBLIC LAW (*continued*).

5. The right of confiscation exists in case of a civil war as fully as it does when the war is foreign, and rebels in arms against the lawful gov ernment or persons inhabiting the territory exclusively within the control of the rebel belligerent, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory. *Ib.*

PUBLIC OFFICER. See *Action; Rebellion*, 1.

PUBLIC POLICY.

A loss sustained by a surety in the administration bond, who has entered into the suretyship under a representation from a firm of which the administrator was a member, that they intended to take into the possession of the partnership all the assets of the intestate, to make the administration a matter of partnership business, and to share as partners the gains and losses resulting from the administration, so that in signing the bond he would become the surety of the firm and not of the individual partner, cannot be recovered by the surety from the firm. *Forsyth* v. *Woods*, 484.

QUIT-CLAIM.

A purchaser by deed of, simply, not regarded as a *bonâ fide* purchaser without notice. *May* v. *Le Claire*, 217.

RAILROAD BONDS. See *Corporation*, 3; *Mortgage; Notice*, 1.

The rights of different classes of holders as regards each other considered in the case of an insolvent railroad corporation. *Galveston Railroad* v. *Cowdrey*, 460.

REBELLION.

1. Suspended the running of statutes of limitation during its continuance, in regard to the claims of the government against its own citizens resident in the rebellious States. Nor did the act of June 11th, 1864, change this. *United States* v. *Wiley*, 508.
2. As also as against persons in the loyal States, the running of the prescription given by articles 3505 and 3506 of the Louisiana Code, prescribing bills and notes in five years from their maturity, and providing that this prescription run against minors, interdicted persons, and persons residing out of the State. *Levy* v. *Stewart*, 244.
3. The doctrine of *Dean* v. *Nelson* (10 Wallace, 158), that judicial proceedings on a mortgage carried on within the Union lines, against a person driven, by way of retaliation for outrages committed by others, outside of those lines and prohibited from returning within them, does not apply to a person who went and remained voluntarily in rebellion. Such a person cannot complain of legal proceedings regularly prosecuted against him as an absentee. *Ludlow* v. *Ramsey*, 581.

RECEIVER OF NATIONAL BANKS.

Cannot subject the United States to judicial jurisdiction. *Case* v. *Terrell*, 199.

SHIPS AND SHIPPING.

1. What constitutes an affreightment sounding in contract as distin guished from an ownership for the voyage. *Reed* v. *United States*, 591
2. What "a breaking up of a voyage." *Ib.*

SOVEREIGNTY.

No judgment for the payment of money can be rendered against the United States in any court other than the Court of Claims without a special act of Congress conferring jurisdiction. *Case* v. *Terrell*, 199.

STATUTES, IMPLIED REPEAL OF.

1. When impliedly repealed by a subsequent statute. *United States* v. *Tynen*, 88.
2. When *not* so impliedly repealed. *Henderson's Tobacco*, 652; *The Distilled Spirits*, 356.

STATUTES OF LIMITATION. See *Rebellion*, 1, 2.

Cannot prevail as defences where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered. *Meader* v. *Norton*, 443.

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, or construed.

September 24, 1789. See *Jurisdiction.*
March 3, 1813. See *Statutes, Implied Repeal of*, 1.
May 26, 1824. See *Louisiana*, 2.
March 3, 1851. See *California Land Claims*, 1.
June 22, 1860. See *Treaties of the United States.*
August 6, 1861. See *Confiscation Acts; Practice*, 13–15; *Public Law*, 4, 5.
February 25, 1862. See *Indictment.*
July 17, 1862. See *Confiscation Acts; Practice*, 13–15; *Public Law*, 4, 5.
March 3, 1863. See *Postmaster-General.*
June 3, 1864. See *National Banks.*
June 11, 1864. See *Limitation of Actions; Rebellion.*
June 30, 1864. See *Constitutional Law*, 2; *Internal Revenue.*
March 3, 1865. See *Constitutional Law*, 2.
March 10, 1866. See *Constitutional Law*, 1.
July 13, 1866. See *Constitutional Law*, 2; *Internal Revenue*, 2.
March 2, 1867. See *Jurisdiction*, 3; *Louisiana*, 2; *Statutes, Implied Repeal of; Constitutional Law*, 2.
July 20, 1868. See *Statutes, Implied Repeal of*, 2.
April 10, 1869. See *Jurisdiction*, 1.
July 14, 1870. See *Statutes, Implied Repeal of*, 1.

TAX.

Collection of will not be restrained in equity only because illegal. Grounds for *equitable* aid must be shown. *Dows* v. *City of Chicago*, 108.

TAXATION.

Under a law taxing all property "within" a city, ferry-boats, the property of a corporation incorporated by a State other than that where

TAXATION (*continued*).
the city is situated, are not taxable; the boats using the city wharves only as a point of contact and as one of the termini of the ferry, and being laid up at night, and when withdrawn from ferry service, upon the opposite shore, the shore of the incorporating State. *St. Louis* v *The Ferry Company*, 423.

TENDER. See *Legal Tender*.

TENNESSEE.
Proceedings under its attachment law sustained against attack collaterally though the requisitions of its code had not been literally complied with. *Ludlow* v. *Ramsey*, 581.

TERMS.
Meaning of particular. See "*False, Forged, and Counterfeit;*" "*Within a City.*"

TEXAS.
1. Laws relating to rights of railroad corporations to mortgage their roads considered, and the priorities of senior and junior incumbrancers in case of the corporation's insolvency. *Galveston Railroad Company* v. *Cowdrey*, 459.
2. Title of Juan Cano, under the empressario grant of De Leon, good. *Cook* v. *Burnley*, 659.
3. When a junior locator of a warrant is deprived of right by the laws of, to claim as an innocent purchaser. *Ib.*

TRANSFER OF PROPERTY.
Held to have been effected to a third party, advancing funds on it, in a special case against an attaching creditor and vendor, though the implied condition on which the purchasing debtor bought it—that of paying cash—wholly failed. *Halliday* v. *Hamilton*, 560.

TREASURY NOTES. See *Indictment*.
The 6th section of the act of February 25, 1862, punishing the counterfeiting of, is sensible and valid. *United States* v. *Howell*, 432.

TREATIES OF THE UNITED STATES.
The history of these with France and Spain relative to Louisiana and the Floridas given, and the decisions of the Supreme Court upon the rights of claimants under them, held to be qualified by the act of June 22, 1860, "for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri." *United States* v. *Lynde*, 632.

UNITED STATES. See *Sovereignty*.
1. A receiver of a National bank, whose operations have been suspended by the Comptroller of the Currency for causes specified in the National Currency Act, in no sense represents the government, and cannot subject it to the jurisdiction of the courts. *Case* v. *Terrell*, 199.
2. Nor can the Comptroller of the Currency, though he be sued himself and submit to it, subject the government to the jurisdiction of the

UNITED STATES (*continued*).
ordinary courts to determine the conflicting claims of the United States and other creditors in the funds of such a bank. *Ib.*
3. The history of her treaties with Spain and France, relative to Louisiana, and the Floridas given; and the right of claimants as fixed by decisions of the Supreme Court upon them, held to be qualified by the act of June 22, 1860. *United States* v. *Lynde*, 632.

VENDOR'S LIEN. See *Transfer of Property.*

VIRGINIA. See *West Virginia.*
The statutes of, relative to the creation of West Virginia, and the subject of her admission into the Union considered. *Virginia* v. *West Virginia*, 39.

WEST VIRGINIA.
The ordinance of the convention under which it was organized, and the act of May 13th, 1862, of that commonwealth, construed in reference to the counties of *Jefferson*, *Berkeley*, and others. *Virginia* v. *West Virginia*, 39.

"WITHIN A CITY."
Meaning of these terms as respects taxable property. *St. Louis* v. *The Ferry Company*, 423.

WOLF ISLAND,
In the Mississippi, is part of the State of Kentucky. *Missouri* v. *Kentucky*, 395.

WORDS.
Meaning of particular. See ***"False, Forged, and Counterfeit;" "Within a City."***